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WASHINGTON STATE
SUPREME COURT

with appendices

NO. 93812-1

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-I)

CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

CITY'S ANSWER OPPOSING PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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A. IDENTITY OF RESPONDENT

Respondent, City of Kirkland, asks this Court to deny Petitioner Hope A. Stevens' motion to modify the commissioner's ruling because this case does not satisfy the requirements of RAP 13.4. Moreover, the Court of Appeals decision to deny discretionary review was correct.

B. DECISION BELOW

Stevens seeks review of the October 4, 2016, Court of Appeals decision by the Honorable Justices Michael S. Spearman, Stephen J. Dwyer, and Ronald E. Cox, denying the motion to modify Court Commissioner Masako Kanazawa's ruling.

The Court Commissioner, agreeing with the superior court, found no evidence of governmental misconduct or arbitrary action in the record. The Court Commissioner determined that the trial court had "conflated" the City's obligations with the witnesses' actions, which does not the meet standard for dismissal under CrRLJ 8.3(b).

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it denied Petitioner's motion for discretionary review in applying RAP 2.3(d) so as to create an issue of public interest meriting appeal, that review by the Supreme Court is warranted?

2. Did the Court of Appeals "reject" the proper "abuse of discretion" standard of review to conflict with established precedent or so far depart from the usual and accepted course of judicial proceedings as to call for discretionary review by this Court?

D. STATEMENT OF THE CASE

The City of Kirkland charged Hope A. Stevens with two counts of Assault in the Fourth Degree, Domestic Violence for conduct toward her half-sister, Teresa Obert, and her nephew, C.O. – Ms. Obert's son - on June 21, 2014. See Appendix A.

Ms. Obert and C.O. retained independent legal counsel, Mary Gaston. See Appendix B at ¶ 7. At the request of Stevens' attorney, Mr. Maybrown, Ms. Gaston offered two separate opportunities to interview the witnesses in October. Id and Appendix A. He declined to conduct those interviews. See Appendix C. Over the City's objection, the trial court ordered the witnesses to sit for depositions. See Appendix D.

Mr. Maybrown scheduled the depositions of Ms. Obert and C.O. for November 25, 2014 and mailed notices of depositions to the witness's attorney, Mary Gaston. See Appendix E. The prosecutors cleared their schedules in order to attend. See Appendix F at ¶ 8. On the morning of the scheduled depositions, Ms. Gaston informed the parties that her clients would not be present for the depositions because (1) C.O. was hospitalized on that date, and (2) Ms. Gaston read CrRLJ 4.6 to require the witnesses to be under subpoena. See Appendix G at 13:13-17. The prosecutors immediately provided alternative dates. Id. at 13:21-22.

Stevens then moved to dismiss under CrRLJ 8.3(b) "because the City's witnesses have refused to be interviewed and/or deposed." See Appendix H. Counsel based his motion on the witness's behavior, stating "the witnesses have made it virtually impossible for counsel to prepare...," attributing much of this difficulty to Mary Gaston, the witness's independent counsel. See Appendix B at ¶¶ 7, 14, 18 – 20.

The City arranged for the witnesses to be available for depositions on December 19, 2014. See Appendix F at ¶¶11-15. The City subpoenaed the witnesses to appear for the deposition. See Appendix I. Both witnesses sat for depositions on December 19, 2014, each lasting for approximately ninety minutes. See Appendix G at 26:25- 27:1. Both witnesses answered counsel's questions, except for what medications C.O. may have been using at the time of the alleged assault and about a recent hospital stay. Id. at 27:2-6; 27:8-10; 28:1-2. Private counsel objected based on HIPAA privilege. Id. at 27:6-7; 27:12; 28:2-4.

Stevens renewed her request for dismissal under CrRLJ 8.3(b) and CrRLJ 4.7, citing her belief that the depositions were inadequate. See Appendix J at ¶ 36. Counsel claimed the witnesses "hijacked" the proceedings and used "obstructionist" tactics when they failed to answer questions. See Appendix G at 8:22; Appendix J at ¶¶ 2:6-4:4. He stated that the information was "material to the defense for several reasons" but did

not elaborate on those reasons. See Appendix J at ¶ 11. Additionally, counsel claimed that the City had failed to provide interview notes from the City's October 22, 2014 interview of the two witnesses. Id. at ¶ 24-28.

On December 29, 2014, the City filed an amended witness list, adding four fact witnesses that included contact information and a summary of the expected testimony. See Appendix K.

The trial court heard oral arguments on December 30, 2014. See Appendix G. The trial court ordered the City to produce all notes and recordings from the City's interview of the witnesses by end of business the day. Id. at 29:19-22. The trial court further ordered the two material witnesses to appear for additional depositions on January 2, 2015 to answer questions regarding C.O.'s medical history and medications used, finding this line of questioning to be "relevant." Id. at 29:23-25, 30:8-13.

The City subpoenaed C.O. and Ms. Obert to appear for a second deposition, as ordered. See Appendix F at ¶ 19. The City arranged for a Kirkland Police officer to personally serve the witnesses, but the officer was unsuccessful. Id. at ¶¶ 19, 21. Ms. Offutt spoke with Ms. Obert by phone to inform her of the trial court's ruling, and Ms. Obert responded that she did not know if they were available. Id. at ¶ 22. The second deposition did not take place. See Appendix L at ¶ 8.

On January 6, 2015, Mr. Maybrown conceded that, but for the witnesses' absence at a second deposition on January 2, 2015, "[w]e would be prepared for trial in mid-January, if all of this hadn't been created by the **misconduct of these witnesses...**" See Appendix M, 8:6-10 (emphasis added). The trial court ruled that defense has a right to interview witnesses prior to trial, noting that the "defense does not have to wait to hear to questions for the first time while the jury is sitting there." Id. at 26:12-15. The trial court stated that "the witnesses have chosen not to respond to the second deposition. That's up to the witnesses." Id. at 26:23-24. The trial court ordered a third deposition of C.O. and Ms. Obert to occur on January 8, once more instructing that the witnesses reveal "whether or not the [witness] was under the influence of medicines and narcotics and alcohol" and to answer "questions concerning what the [witness] was seeing the doctor for." Id. at 28:6-8.

Once again, the City prepared subpoenas for the witnesses to appear for the January 8, 2015 depositions. See Appendix N. The City again arranged for a Kirkland Police officer to personally serve the witnesses with the subpoenas, but again were unsuccessful. See Appendix O at ¶ 7. Both prosecutors made repeated attempts to call the witnesses, unsuccessfully. Id. at ¶10. Ms. Offutt provided notice to the witness's attorney, Ms.

Gaston, via telephone on January 6, 2015. The witnesses failed to appear for the third ordered deposition. See Appendix P at 12:18-20.

On January 13, 2015, the trial court heard Steven's third motion to dismiss. See Appendix P. The court dismissed the case pursuant to 8.3(b) and 4.7. Id. at 15:25-16:1. In its oral ruling, the trial court noted the "pattern of the City's witnesses' failure to cooperate with defense interviews...." Id. at 10:13-14. The trial court specifically noted that, at the "one and only interview" with defense counsel, the witnesses declined to answer questions regarding C.O.'s medication use and mental status at the time of the alleged assault, claiming medical privilege and lack of relevance. Id. at 10:20-11:3. The Court also found the witnesses failed to sit for the second deposition to answer questions the trial court deemed relevant, without analysis of whether the medical information was material to the defense. Id. at 11:9-10. The trial court also considered the witnesses' failure to appear for the third-ordered deposition on January 8, 2015 and the logistical strain the repeated depositions had on defense counsel to hire a stenographer and rearrange his schedule. Id. at 12:9-13; 12:18-20.

Additionally, the trial court found that the City endorsed four additional witnesses "less than two weeks before trial readiness," finding it significant that the City disclosed the witnesses six months after filing the charges. Id. at 12:22-13:1. Of those four witnesses, the two named medical

professionals declined to speak with Mr. Maybrown due to doctor-patient privilege. Id. at 13:11-13. Jeff Obert failed to appear for a scheduled interview on January 8, 2015. Id. at 14:2-3. Cori Parks did speak to the defendant's investigator, but declined to be interviewed over the phone. Id. at 14:12-15. The trial court found that the defendant would "clearly be impermissibly prejudiced" due to defense counsel's inability to interview these four witnesses. Id. at pg. 15:4-8.

Ultimately, the trial court dismissed the case finding that Ms. Steven's right to a fair trial had been materially affected because she was forced to choose between proceeding to trial and hear testimony from the additional witnesses for the first time at trial, or forfeit her right to a speedy trial and ask for another continuance "in hopes that witnesses may cooperate." Id. at 15:9-24. The City sought review of the dismissal via RALJ appeal and argued that the trial court abused its discretion when it dismissed this case under CrRLJ 4.7 and CrRLJ 8.3. See Appendix Q.

The superior court remanded the case to the Kirkland Municipal Court. See Appendix R. The superior court found the trial court had abused its discretion because it did not follow the two-prong standard of CrRLJ 8.3 that requires a showing of governmental misconduct or arbitrary action **and** prejudice to the rights of the accused which materially affected her rights to a fair trial. See Appendix S at pg. 15:20-22. The superior court found that, while there was "significant evidence" of

prejudice to the defendant, there was no governmental misconduct or arbitrary action. See Appendix S at pg. 16:9-12. Without first finding both requirements, the trial court could not have reached the extraordinary, or "nuclear," remedy of dismissal. See Appendix S at pg. 14:1-5.

Petitioner sought discretionary review on November 4, 2015, at the Court of Appeals for the superior court decision that the trial court had abused its discretion for dismissing under CrRLJ 8.3 and 4.7. See Appendix T. The filed a response on January 22, 2016. See Appendix U. Petitioner replied on January 29, 2016. See Appendix V. All parties appeared for oral arguments regarding the motion for discretionary review on May 27, 2016. On June 7, 2016, Commissioner Masako Kanazawa, denied Petitioner's motion for discretionary review, stating that:

> Stevens fails to demonstrate that the superior court's decision is in conflict with any Washington precedent, that her appeal involves an issue of public interest that should be determined by this Court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

See Appendix W at pg. 13. Stevens filed a motion to modify the commissioner's ruling. August 5, 2016. See Appendix X. Petitioner's motion to modify was denied on October 4, 2016. See Appendix Y.

E. ARGUMENT: REVIEW SHOULD BE DENIED

Under RAP 13.4(b) discretionary review may only be accepted in the following circumstances:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the decision involves an issue of public interest which should be determined by the Supreme Court.

RAP 13.4(b).

The Court of Appeals denied review because Stevens failed to show her appeal involved a public interest or that the Court of Appeals decision was in conflict with a decision of the Supreme Court. Stevens seeks review under RAP 13.4(b), but again fails to demonstrate that the Court of Appeals erred in its decision or show a public interest was implicated. Therefore, review should be denied because Stevens's case does not meet the criteria under RAP 13.4(b) for discretionary review.

1. THE COURT OF APPEALS DID NOT ERR WHEN IT DENIED DISCRETIONARY REVIEW OF THE SUPERIOR COURT DECISION.

The Court of Appeals, after a thorough review of the Superior Court record, denied discretionary review due to Stevens failure to demonstrate that (1) the superior court ruling was in conflict with any Washington

precedent, (2) that an issue of public interest was implicated, or (3) that the superior court so far departed from the accepted and usual course of judicial proceedings. See Appendix W. Therefore, the Court of Appeals did not err in denying discretionary review and this Court should likewise deny her motion for discretionary review.

Washington court rules are clear and unambiguous, a superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction. RALJ 9.1(b). If there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Id. at 644 (quoting State v. Halstein, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). While the court has an obligation to reasonably infer facts from the trial court's judgment, it would be difficult to determine what should be inferred if the record is not clear. State v. Weber, 159 Wn. App. 779, 786, 247 P.3d 782 (2011). It is a long-recognized logical fallacy to draw an affirmative conclusion from a negative premise. Id. In other words, a court on review cannot infer a finding where no facts support such

a finding. Id. If nothing in the record would support an inference, the reviewing court cannot infer facts that have no substantial evidentiary support. Id. Where there are no written finding of facts and conclusions of law from the lower court, a reviewing court should not remand solely to complete the formality of adding written findings and conclusions where the reasons for the trial court's ruling was evident from the court's oral ruling. State v. Wilson, 149 Wn.2d 1,9, 65 P.3d 657 (2003)(quoting State v. Sonneland, 80 Wn.2d 343, 350, 494 P.2d 469 (1972)).

Here, the superior court did not misapply or disregard the dictates of RALJ 9.1(b). It did not "reject" the trial court's oral statements from which Steven's urged the superior court to infer governmental misconduct or arbitrary action. Rather, the superior court was quite clear that there was nothing in the trial court record from which to infer governmental misconduct. See Appendix S at 12:1-4. The only evidence the superior court could point to was a "presumed" prejudice to the defense. Id. at 17:14-18. The superior court assured Stevens if there was something in the record that would allow the court to "infer" the trial court found governmental misconduct then it would certainly look at that part of the record. Id. at 16:5-12. But it did not exist. Id. at 16:9. The superior court was very clear that the trial court did not properly apply the well-established two-prong rule for dismissal under CrRLJ 8.3, and that it could

not infer the trial court found governmental misconduct from the record presented. Id. at 16:5-12. Therefore, the dismissal under CrRLJ 8.3 was an abuse of discretion by the trial court and the case was remanded back to the trial court.

The Court of Appeals decision to deny discretionary review was based on a similar analysis. The Court determined that the superior court's oral ruling "viewed in its entirety, appears to apply the correct standard" that showed "[d]iscretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." Appendix W at pg. 9 (quoting State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997)). The Court of Appeals commented on the superior court's conclusion that "the trial court improperly conflated the city's obligations with the witnesses' conduct" but found no governmental misconduct to support the dismissal under CrRLJ 8.3. Stevens fails to show that the Court of Appeals erred in denying discretionary review, therefore this Court should deny Stevens's motion for discretionary review.

2. THIS CASE DOES NOT INVOLVE A PUBLIC INTEREST UNDER RAP 13.4(b)(4) WHICH WOULD ALLOW FOR DISCRETIONARY REVIEW.

A "public interest" under RAP 13.4(b)(4) relates to something that has a wide-reaching effect and "involves an issue of substantial public

interest that should be determined by the Supreme Court." State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). For example: whether the Court of Appeals defined ex parte communication incorrectly, Id.; a challenge whether the custodial parent must repay child support pursuant to an invalid escalation clause, In re Marriage of Ortiz, 108 Wn.2d 643, 740 P.2d 864 (1987); or whether a flower shop owner can refuse providing flowers arrangements for a same sex wedding based on religious beliefs, Ingersoll & Freed v Arlene's Flowers & Stutzman, 91615-2. These cases have a far-reaching effect state wide, not just on the individual parties involved in the specific case, and therefore were within the "public interest" classification for Supreme Court review.

Here, Stevens has once again provided no case law to support her position or even an argument about how this case presents a "public interest" under the RAP 13.4(b)(4) to allow this Court to accept the case for discretionary review. A public interest is generated out of the effects that issue will have on the public state wide. State v. Walter, 66 Wn. App. 862, 865, 833 P.2d 440 (1992). It is not because there are "no published opinions on RALJ 9.1(b)(2)" or that in "absence of a published decision other superior court judges will make the same mistake" as Stevens argues. Petitioners Motion for Discretionary Review to the Supreme Court of Washington, Nov. 1, 2016, Pg. 15. If that were the case, our judicial

process would grind to a halt because every rule that had no published decisions could be turned into a public interest. This was not the intent of that rule. The City asks this Court to reject Stevens's argument as she does not meet her burden to show the Court of Appeals erred nor does it satisfy the requirements under RAP 13.4(b)(4). Therefore, her motion for discretionary review should be denied.

3. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT.

Stevens has failed to show that the Court of Appeals decision is in conflict with any decision of the Washington State Supreme Court. Stevens argues

> The Commissioner did not directly address the conflict between the Superior Court's oral statement and the case law. Instead she seems to reason that since the case law also says that a dismissal can only be ordered in cases of "egregious" conduct, that the Superior Court's use of the "gross mismanagement" standard is excusable.

Petitioners Motion for Discretionary Review to the Supreme Court of Washington, Nov. 1, 2016, Pg. 17. Citing to State v. Dailey, 93 Wn.2d 454, 457 (1980), State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997), State v. Brooks, 149 Wn.App. 373, 203 P.3d 397 (2009), and State v. Blackwell, 120 Wn.2d 822, 831 (1993), Stevens alleges that the superior

court applied the wrong standard of review for governmental misconduct. Id. at 17-18. Stevens further argues "it is undisputed that the prosecutors mismanaged the discovery process in this case and that Petitioner was prejudiced on account of that mismanagement...Consequently, the superior court's explicit use of a standard which this Court had condemned calls for appellate review and correction by this Court." Id. at 18. Stevens argument is flawed in both scope and focus.

Stevens faults the superior court judge for using the "gross mismanagement" standard when, according to Stevens, the court should have applied simple mismanagement. Id. To be able to apply either standard, there must first be a finding of governmental mismanagement. The Superior Court's decision was rooted in the notion that the trial court's decision was untenable. See Appendix S at 15:20-22. As noted by the Court of Appeals, "the superior court concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal." Appendix W at pg. 10. Where there is no showing of governmental misconduct or arbitrary action, the trial court's dismissal of the case will be reversed. Blackwell, 120 Wn.2d at 832, 845 P.2d 1017 (citing State v. Underwood, 33 Wn. App. 833, 837, 658 P.2d 50 (1983)).

The superior court articulated that an abuse of discretion occurs when the trial court's ruling is "made for untenable grounds or for untenable reasons." Appendix S at pg. 15:16-22. In applying that standard here, the superior court determined that the trial court abused its discretion when it dismissed this prosecution. See Appendix R. The superior court found that the trial court dismissed the prosecution on the "untenable" basis of governmental misconduct and/or arbitrary action without ever finding governmental misconduct or arbitrary action, contrary to the dictates of CrRLJ 8.3 case law. See Appendix S at 15:20-22. "There clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Now, there is by the witnesses. But … you're conflating the witnesses with the prosecuting entity." Id. at 12:1-4.

The superior court further clarified that, not only did the trial court fail to make such an express finding of governmental misconduct, but the record was devoid of facts from which he could reasonably infer such a finding:

> I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something…but there, **it isn't there**…But [dismissal] requires both elements

> (arbitrary action or governmental misconduct and prejudice affecting defendant's right to a fair trial). It can't just be one.

Appendix S at pg. 16:5-12 (emphasis added).

In reading the superior court's ruling in its entirety, it is clear that the superior court determined that the trial court had abused its discretion by dismissing the case when "there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency" – explicit or implicit. Appendix S at pg. 12:1-4. Thus, it was not the trial court's failure to say or write the words "prosecutorial misconduct", but the lack of evidence supporting such a finding that the superior court deemed an abuse of the trial court's discretion.

The Court of Appeals concurred with this analysis. See Appendix W at pg. 13. Addressing this exact issue, the Court of Appeals specifically noted that "Stevens fails to demonstrate that the superior court decision is in conflict with any Washington precedent." Id. at pg. 13. Commissioner Kanagawa noted that "the superior court concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal." Id. at pg. 10. After a thorough review of the briefing and the record, the Court of Appeals articulated that

> [S]tevens argues that the evidence supports a finding of the City's mismanagement, that the

> City's failure to timely provide discovery constitutes mismanagement, and that the superior court's decision is in conflict with Brooks and Michielli. But her motion for discretionary review did not cite Brooks or Michielli or argue that these cases present a conflict for review under RAP 2.3(d)(1). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration" (citing to Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

Id. at pgs. 10-11.

The Commissioner then made an in-depth analysis of both Brooks and Michielli and found both cases easily distinguishable from the case before this Court. Id. at pg. 11. Specifically, "[i]n view of the record, neither Brooks nor Michielli appear analogous to the facts of this case." Id. at pg. 12. She completes the argument by stating

> Stevens argues that "gross mismanagement" is not required and that "simple mismanagement" is sufficient. Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient."[1] But Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court should resort only in truly egregious cases of mismanagement or misconduct."[2]

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[1] State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).
[2] Wilson, 149 Wn.2d at 9.

Id. at pgs. 12-13. Based on this analysis the Court of Appeals specifically found that

> the superior courts oral ruling, viewed in its entirety, appears to apply the correct standard. The court concluded that the dismissal was based on untenable grounds - dismissal without a supportable finding of the City's arbitrary action or misconduct warranting dismissal. Specifically, the court concluded that the trial court improperly conflated the City's obligations with the witnesses' conduct. Stevens' contrary argument does not satisfy any of the criteria for review under RAP 2.3(d).

Id. at pgs. 9-10.

Similarly, Stevens argument to this Court does not satisfy any of the criteria for review under RAP 13.4(b). The Court of Appeals directly addressed the case law cited by Stevens, finding that it was distinguishable and does not apply to this case. Id. at pg. 12. Stevens does not challenge this ruling, rather only offers the same argument submitted to the Court of Appeals and the superior court. Having shown no new case law or evidence that the Court of Appeals decision conflicted with Washington State Supreme Court precedent, Stevens's motion for discretionary review must be denied.

F. CONCLUSION

This case does not present an appropriate issue warranting discretionary review pursuant to RAP 13.4(b). For the foregoing reasons, the City asks this Court to deny the petitioner's motion for discretionary review.

DATED this 2nd day of December, 2016.

Respectfully Submitted,

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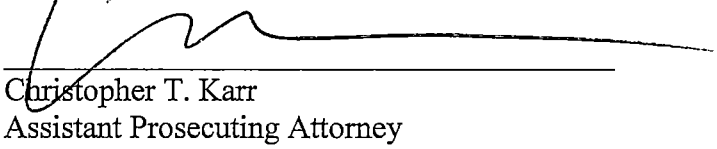

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APPENDIX A

FILED
JUN 30 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant,	NO. 38384 COMPLAINT 2 COUNTS (Assault in the Fourth Degree-Domestic Violence/Assault in the Fourth Degree-Domestic Violence) Gross Misdemeanor

COUNT I

The Prosecuting Attorney for the City of Kirkland, in the name and by the authority of the City of Kirkland, does accuse the defendant of the crime of Assault in the Fourth Degree (domestic violence), committed as follows:

That the defendant in the City of Kirkland, Washington, on or about 06/21/2014, did intentionally assault, Teresa L. Obert (DOB: 12/10/1971), a family or household member as defined in RCW 10.99.020.

Contrary to KMC, adopting by reference RCW 9A.36.041, and against the peace and dignity of the City of Kirkland.

COUNT II

And the Prosecuting Attorney, does further accuse the defendant of the crime of Assault in the Fourth Degree, Domestic Violence, a crime of the same or similar character as based on the same conduct as based on a series of acts connected together with Count I, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

MOBERLY & ROBERTS, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

That the defendant in the City of Kirkland, Washington, on or about 06/21/2014, did intentionally assault, C.J.D.O. (DOB: 05/28/1997), a family or household member as defined in RCW 10.99.020.

Contrary to KMC, adopting by reference RCW 9A.36.041, and against the peace and dignity of the City of Kirkland.

AND COMES NOW PLAINTIFF, CITY OF KIRKLAND, AND HEREBY DEMANDS A JURY TRIAL IN THE ABOVE-ENTITLED CAUSE. SUCH DEMAND IS MADE PURSUANT TO CrRLJ 6.1.1(B).

Moberly & Roberts, PLLC

DATED: 6/23/2014

By: _____
Assistant Prosecuting Attorney, WSBA # 42466

The above-signed Prosecuting Attorney certifies, under penalty of perjury of the laws of the State of Washington, that there are reasonable grounds to believe, and the attorney does believe, that the defendant committed the offense contrary to law.

MOBERLY & ROBERTS, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

APPENDIX B

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DEC 10 2014
KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case.

2. On or about June 23, 2014, the prosecuting attorney for the City of Kirkland filed a complaint charging Ms. Stevens with two counts of assault. Count I alleges that Ms. Stevens assaulted an individual identified as Teresa L. Obert on June 21, 2014. Count II alleges that Ms. Stevens assaulted an individual identified as C.J.D.O. on June 21, 2014. Ms. Stevens has entered a plea of not guilty to each of the charges, and she adamantly denies both charges. Moreover, Ms. Stevens claims that she used lawful force in defending herself after she was attacked by C.J.D.O. on June 21, 2014.

3. As reflected in the police reports, this incident stemmed from an argument and then a physical altercation involving C.J.D.O. and Ms. Stevens. For some unknown reason,

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police reports do not include a description of C.J.D.O. In fact, C.J.D.O. is much larger than Ms. Stevens – approximately 6'9" in height and 280 pounds in weight. On June 21, C.J.D.O. took offense to a comment that was made by Ms. Stevens. C.J.D.O. became enraged and he attacked Ms. Stevens. As his anger grew, C.J.D.O. grabbed a broom stick handle and repeatedly hit Ms. Stevens over the head with the stick. C.J.D.O. used such great force during these blows that he broke the stick in half.

4. Ms. Stevens has consistently – and persistently – denied any claim that she assaulted the City's complaining witnesses. In fact, when first speaking with police investigators, Ms. Stevens denied the claims of assault and told the officers that she was the "victim" and that "[C.J.D.O.] hit me with a stick." Ms. Stevens told the officers that C.J.D.O. is a "scary person and that she was protecting herself." She also explained that C.J.D.O.'s mother, Teresa Obert, always protects her son. When the police officers advised Ms. Stevens that she was under arrest, Ms. Stevens repeatedly asked for an explanation and told the officers that she was the victim. Later, when being transferred to the police station, Ms. Stevens again asked why she was being arrested and denied the claim of assault.

5. Should this case proceed to trial, the defense is confident that we will demonstrate it was C.J.D.O., and not Ms. Stevens, who was the true aggressor during this incident. The defense will also present testimony to demonstrate that Ms. Stevens was seriously injured on account of his attack. The defense will present testimony to show that Ms. Stevens suffered a concussion on account of C.J.D.O.'s unlawful conduct.

6. The defense has attempted to investigate this case over the last several months. To that end, defense counsel has interviewed each police officer who was present at the Obert home following the incident of June 21, 2014. These officers have each confirmed that there is

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no independent evidence, other than the self-serving claims of C.J.D.O., that Ms. Stevens was somehow the first aggressor during the incident.[1]

7. The complaining witnesses in this case, Teresa Obert and C.J.D.O., have retained an attorney to represent them in these matters. That attorney, Mary Gaston, is employed by the Perkins Coie law firm in Seattle.

8. Over the last several months, I have made countless attempts to schedule defense interviews and/or depositions with Teresa Obert and C.J.D.O. The defense has been thwarted in these efforts and no interview and/or deposition has been completed as of today's date.

9. This obstruction was focused solely on defense counsel. I was advised that the complaining witnesses agreed to meet with the assigned prosecuting attorneys to discuss the case and that such a meeting was to be held on October 22, 2014. Before that meeting, one of the prosecuting attorneys wrote and advised me that I would not be permitted to attend any meeting between these witnesses and the prosecutor. *See Appendix A.* The City has yet to produce any discovery materials relating to that meeting.

10. This Court initially scheduled a readiness hearing in this case for November 12, 2014 and a motion hearing for November 4, 2014. Unfortunately, these hearings needed to be continued because Teresa Obert and C.J.D.O. had refused to cooperate with defense counsel. Accordingly, the defense filed a motion for leave to conduct depositions pursuant to CrRLJ 4.6.

---

[1] The police reports indicate that Teresa Obert has claimed that she was not present during the start of this altercation, so she would not be able to shed much light on this crucial issue.

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11. The parties appeared before this Court on November 4, 2014. After hearing argument, the Court granted the defendant's motion and ordered that the defense was authorized to depose the two complaining witnesses. *See Appendix B* (Order of November 4, 2014). Counsel for the complaining witnesses was present when the Court issued this ruling, so there can be no doubt that the complaining witnesses had fair notice of the Court's decision.

12. Over the last month, I have expended considerable efforts in an attempt to arrange the depositions of Teresa Obert and C.J.D.O. Yet, as discussed further below, these depositions have not been completed and it now appears that the "witnesses" will not comply with any Orders of this Court.

13. CrRLJ 4.6(b) sets forth the procedure for arranging depositions in a criminal case. The rule provides that the party scheduling the deposition must prepare a "written notice" and that such notice must state "the time and place for taking the depositions." *Id.*

14. On November 5, 2014, I wrote to Ms. Gaston and asked if she would accept notices on behalf of her clients. Ms. Gaston responded that she would agree to accept such notices. *See Appendix C.* Ms. Gaston asked for me to arrange a date for these depositions with the assigned prosecutors.

15. On November 13, 2014, I wrote to all counsel and explained that I was hoping to schedule depositions for the afternoon on November 25. *See Appendix D.* In that correspondence, I advised the parties that it was imperative that we complete the depositions sometime during the week of November 24. Having heard no objections, I served all parties with written notice for these depositions on the following day. *See Appendix E.* These same notices were filed with the Court.

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16. But no deposition went forward on November 25 as scheduled. Rather, on November 14, 2014, one of the assigned prosecutors contacted me by email and asked if I would reschedule the depositions for a later date. In particular, the prosecutor asked if I would agree to set the deposition for the afternoon of December 2. As a matter of professional courtesy, I agreed to reschedule the depositions for December 2.

17. On November 17, 2014, my assistant emailed a copy of the amended notices to counsel for all the parties. *See Appendix F.* These notices were surely received by Ms. Gaston. In fact, later that same date, Ms. Gaston responded to my assistant and confirmed her receipt and explained that she did not need to receive hard copies. *See id.*

18. But, once again, no deposition went forward on December 2. On the morning of December 2, Ms. Gaston emailed a "notice of unavailability" in which she explained that her clients had never received subpoenas for any deposition. *See Appendix G.* I immediately responded to Ms. Gaston and explained that I was shocked by her claims. Along with that email message, I sent Ms. Gaston a copy of all emails relating to the deposition – including her confirmation of receipt of the notices.

19. Later that same date, Ms. Gaston's assistant wrote to me and explained that Ms. Gaston was not in the office. She then claimed, for the very first time, that her clients did not intend to appear for depositions based upon her contention that the notices she received were somehow defective. Apparently, citing CR 45 (rather than the appropriate criminal rules), Ms. Gaston decided to make an 11th hour claim that her clients would not appear unless they were given subpoenas.

20. Ms. Gaston's claim is untenable – and simply another example of gamesmanship. Accordingly, I promptly wrote to the prosecuting attorneys and explained:

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> As you know, this is a criminal case and the criminal rules of procedure apply. CrRLJ 4.6 does not require service of a subpoena. To the contrary, the rule requires a "notice," and nothing more:
>
> > (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable **written notice** of the time and place for taking the deposition. The **notice** shall state the name and address of each person to be examined. On motion of a party upon whom the **notice** is served, the court for cause shown may extend or shorten the time and may change the place of taking.
>
> *Id.* Moreover, the thought that Ms. Gaston would accept service of these notices on November 17 and then "lay in the weeds" for two weeks so that she could offer up this sort of bogus objection is remarkable.
>
> Once again, I am forced to file a motion with the court.

See Appendix H.

21. One of the prosecutors wrote back and, quite remarkably, she suggested that Ms. Gaston's claim might have some merit. She also asked Ms. Gaston to consider another possible date for these depositions. To this point, Ms. Gaston has failed to respond to that message.

22. Defense counsel cannot fairly or effectively prepare this case for trial without completing the depositions of Teresa Obert and C.J.D.O. in a time and manner that would allow for follow-up investigation. *See, e.g., State v. Ray,* 113 Wn.2d 531, 548 (1991) ("Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest."); *State v. Jury,* 13 Wn.App. 256, 264 (1978) (Sixth Amendment violated where defense counsel failed to interview the State's witnesses). These

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interviews are critical to the defense and must be completed before the defense can complete its investigation and file pre-trial motions.

23. This Court has previously authorized defense counsel to depose Teresa Obert and C.J.D.O. regarding these matters. Yet, after more than a month of efforts, both of these witnesses have refused to appear for a deposition. This intransigence and obstructionism is unfathomable – particularly so given that these witnesses have voluntarily met with the prosecuting attorneys at a time that the prosecuting attorneys refused to allow defense counsel to be present.[2]

24. Under CrR 4.7(g), this Court is authorized to manage the discovery procedures in any case. These rules are designed to ensure that each side – not just the prosecuting attorney – is provided a fair opportunity to investigate a case.

25. In cases involving violations of the discovery rules, CrRLJ 4.7(g)(7)(i) provides that the Court may enter such "order as it deems just under the circumstances." CrRLJ 4.7(g)(7)(ii) specifically provides: "The Court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure." *Id.*

26. The defense has been seriously prejudiced by the actions of the City's witnesses in this case. Although defense counsel has repeatedly advised the prosecutors and counsel for these witnesses that "time was of the essence" and that we needed to complete these depositions as soon as possible, the witnesses have chosen to thumb their nose at these

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requests. In fact, it now appears that these witnesses will never cooperate or appear for depositions. Because of these actions, the witnesses have made it virtually impossible for counsel to prepare for pre-scheduled hearings and trial.

27. This Court is also authorized to dismiss this action pursuant to CrRLJ 8.3, where the defense is prejudiced due to "arbitrary action" relating to the proceedings. In one significant case, *State v. Michielli*, 132 Wn.2d 587 (1997), the Washington Supreme Court explained that a defendant suffers significant prejudice if she is forced to request a continuance (and to waive her speedy trial rights) due to the improper action of another participant in the litigation. That principle applies with great force given the circumstances of this case.

28. As the Court knows, Ms. Stevens is a professional athlete. The defense has made great efforts to proceed with this case in an expeditious fashion to ensure that Ms. Stevens' professional obligations were not compromised. Unfortunately, due to the intransigency of the City's complaining witnesses, the trial in this case was continued to January 2015. Now, in light of the continued intransigence of the City's complaining witnesses, the defense has been deprived of an opportunity to prepare the case for the January hearings. This Court should not force the defense to continue these matters a second time. Rather, consistent with CRLJ 4.7 and 8.3, this case should be dismissed. Such a dismissal is consistent with the interests of justice.

29. At a minimum, and in the alternative, this Court should conclude that Teresa Obert and C.J.D.O. will not be permitted to testify at any trial of these matters.

---

[2] To this point, the prosecuting attorneys have failed to provide any discovery information regarding these interviews in violation of CrRLJ 4.7(a)(1)(i) which requires production of "the

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 9th day of December, 2014.

ALLEN, HANSEN & MAYBROWN, P.S.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / ~~email~~ / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElyea and Lacey Offutt

Dated: 12/10/2014

substance of any oral statements" of the witnesses.

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APPENDIX A

FILED
DEC 1 0 2014
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Todd Maybrown

From: Tammy McElyea <tmcelyea@moberlyandroberts.com>
Sent: Wednesday, October 22, 2014 2:01 PM
To: Todd Maybrown
Cc: Lacey Offutt
Subject: Re: Hope Stevens Discovery

Hello;

It is our understanding that Ms. Gaston has provided you with two different opportunities to interview both Teresa and [redacted]. One on Friday October 17th and then this coming Friday October 24th. Based on that information we would be objecting to a motion for depositions. Under 4.6 (a) a deposition is only appropriate where "upon showing that a prospective witness...refuses to discuss the case with either lawyer..." That clearly is not the case in this situation. If you are not planning to attend the scheduled 11:00 interview on Friday then I suppose you have that option to contact the court. But understand we will argue to the court that you have been given two different occasions to interview the victims and have chosen not to take advantage of those opportunities. We know that having a third attorney involved is difficult but that is the hand we have been dealt in this situation. We have little to no control over that obstacle. So please let us know if you plan on attending on Friday.

In addition, you will not be involved in our meeting with our witnesses. Our meeting is designed for trial prep and as you are very aware that is considered "work product" and is not subject to the discovery rules. I will assure you that if any exculpatory evidence that was not previously disclosed comes to light, we will provide you that information in writing.

Thank you.

Tammy

On Wed, Oct 22, 2014 at 12:59 PM, Todd Maybrown <Todd@ahmlawyers.com> wrote:

Please see attached. We will send a package with the interview transcripts via hard mail.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

One Union Square

600 University Street, Suite 3020

Seattle, Washington 98101-4105

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APPENDIX B

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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 [PROPOSED] ORDER RE DEFENDANT'S MOTION FOR DEPOSITIONS

This matter came before the above-entitled Court upon Defendant's Motion for Depositions. The Court having reviewed the pleadings filed herein and heard oral argument, does hereby ORDER that Defendant's Motion for Depositions is Granted
The defense may schedule depositions with witnesses TO & CO at counsel's discretion.

DONE in open court this 4 day of November, 2014.

Municipal Court Judge
Michael J. Lambo

Presented by:

Todd Maybrown, WSBA #18557
Attorney for Defendant

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Seattle, Washington 98101
(206) 447-9681

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APPENDIX C

Paula Smeltzer

From:	Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com>
Sent:	Thursday, November 06, 2014 12:52 PM
To:	Todd Maybrown
Cc:	Paula Smeltzer
Subject:	Re: Depositions

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Yes. I assume you will coordinate with us on the date. Thanks. M.

Mary P. Gaston

On Nov 5, 2014, at 1:21 PM, Todd Maybrown <Todd@ahmlawyers.com> wrote:

Mary:

Will you accept service of deposition notices for your clients? Please let me know.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com[ahmlawyers.com]

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APPENDIX D

Todd Maybrown

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From:	Todd Maybrown
Sent:	Thursday, November 13, 2014 9:14 AM
To:	'Tammy McElyea'; Lacey Offutt Gaston, Mary P. (Perkins Coie)
Cc:	Paula Smeltzer
Subject:	Depositions of CO and TO

Counsel:

I am planning to schedule the court-ordered depositions as follows:

Witness:	CO
Location:	Law Office of Allen, Hansen & Maybrown, PS
Date:	November 25, 2014
Time:	1:00 PM

Witness:	TO
Location:	Law Office of Allen, Hansen & Maybrown, PS
Date:	November 25, 2014
Time:	2:30 PM

I may be able to adjust the date – as I am also available on November 24 and 26 – but the depositions will need to be completed during the week of November 24. Unless I hear back by close of business today, I will send notices to all counsel. Ms. Gaston has previously agreed to accept service of the notices on behalf of the witnesses.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
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APPENDIX E

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Todd Maybrown

From:	Sarah Conger
Sent:	Friday, November 14, 2014 10:47 AM
To:	mgaston@perkinscoie.com
Cc:	tmcelyea@moberlyandroberts.com; loffutt@moberlyandroberts.com; Todd Maybrown; Paula Smeltzer
Subject:	City of Kirkland v. Hope Stevens, No. 38384
Attachments:	NOTICE OF DEPOSITION (Teresa Obert).pdf; NOTICE OF DEPOSITION (C[redacted] O[redacted]).pdf

Ms. Gaston:

Attached please find copies of the Notices of Deposition for Teresa Obert and C[redacted] O[redacted]. A hard copy is being delivered to your office today via legal messenger.

Thank you for your attention to this matter.

Take care,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, WA 98101
Phone: 206-447-9681
Fax: 206-447-0839

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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown by Cooper Blanchard #9890
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: [redacted]
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of [redacted] will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown by Cooper Ellenbecker
Todd Maybrown, WSBA #18557 #48690
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

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APPENDIX F

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MUNICIPAL COURT

Todd Maybrown

From: Sarah Conger
Sent: Monday, November 17, 2014 1:17 PM
To: mgaston@perkinscoie.com
Cc: loffutt@moberlyandroberts.com; tmcelyea@moberlyandroberts.com; Todd Maybrown; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384
Attachments: Notice of Deposition (Teresa Obert - 12.2).pdf

Ms. Gaston:

Attached please find a new Notice of Deposition for Teresa Obert which contains the new deposition date. Please let me know if you require a hard copy delivered to your office.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Monday, November 17, 2014 9:22 AM
To: Todd Maybrown
Cc: 'loffutt@moberlyandroberts.com'; 'tmcelyea@moberlyandroberts.com'; 'mgaston@perkinscoie.com'; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384

Counsel:

This morning I spoke with Jeff from Kirkland Municipal Court. He needed something to replace the notice that contained C.O.'s full name. Attached is a copy of the new Notice of Deposition (which also contains the new date) that will be replacing the one that was sent to the Court on Friday. The notice containing C.O.'s full name will be destroyed, having never been entered into the file.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Friday, November 14, 2014 2:25 PM
To: Todd Maybrown

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MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: C.O.
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of C.O. will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Cooper Offenbacher #40690
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Copy on file
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

FILED
DEC 10 2014
KIRKLAND
MUNICIPAL COURT

Sarah Conger

From: Gaston, Mary P., (Perkins Coie) <MGaston@perkinscoie.com>
Sent: Monday, November 17, 2014 1:19 PM
To: Sarah Conger
Subject: Re: City of Kirkland v. Hope Stevens, No. 38384

No hard copy is necessary. Thank you.

On Nov 17, 2014, at 1:16 PM, Sarah Conger <Sarah@ahmlawyers.com> wrote:

Ms. Gaston:

Attached please find a new Notice of Deposition for Teresa Obert which contains the new deposition date. Please let me know if you require a hard copy delivered to your office.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Monday, November 17, 2014 9:22 AM
To: Todd Maybrown
Cc: 'loffutt@moberlyandroberts.com'; 'tmcelyea@moberlyandroberts.com'; 'mgaston@perkinscoie.com'; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384

Counsel:

This morning I spoke with Jeff from Kirkland Municipal Court. He needed something to replace the notice that contained C.O.'s full name. Attached is a copy of the new Notice of Deposition (which also contains the new date) that will be replacing the one that was sent to the Court on Friday. The notice containing C.O.'s full name will be destroyed, having never been entered into the file.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

FILED
DEC 10 2014
KIRKLAND
MUNICIPAL COURT

APPENDIX G

FILED
DEC 1 0 2014
KIRKLAND
MUNICIPAL COURT

Todd Maybrown

From: Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com>
Sent: Tuesday, December 02, 2014 5:55 AM
To: Todd Maybrown
Cc: Lacey Offutt; Tammy McElyea
Subject: Notice of Unavailability

Dear Todd,

I have confirmed with my clients and my office that the Oberts still have not been subpoenaed for depositions. Please be advised, I will be out of the country and unavailable from Dec 10-16. I will have at best only sporadic email during that time. Therefore, please let this serve as my notice of unavailability during that period and my notice that I will be unable to accept service of subpoenas on behalf of my clients during that time. Accordingly, if you wish to serve subpoenas on the Oberts for depositions during that period please use one of the normal means of service under Rule 45 so that the Oberts are assured of timely notice.

Thank you,

Mary

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

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KIRKLAND
MUNICIPAL COURT

APPENDIX H

FILED
1 9 2014
KIRKLAND
MUNICIPAL COURT

Todd Maybrown

From: Todd Maybrown
Sent: Tuesday, December 02, 2014 11:59 AM
To: Tammy McElyea; Lacey Offutt
Cc: Sarah Conger; Paula Smeltzer
Subject: FW: Mary Gaston email

Importance: High

Tammy and Lacey:

As you know, this is a criminal case and the criminal rules of procedure apply. CrRLJ 4.6 does not require service of a subpoena. To the contrary, the rule requires a "notice," and nothing more:

> (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

Id. Moreover, the thought that Ms. Gaston would accept service of these notices on November 17 and then "lay in the weeds" for two weeks so that she could offer up this sort of bogus objection is remarkable.

Once again, I am forced to file a motion with the court.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com

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APPENDIX C

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NOV - 3 2014

KIRKLAND MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 SUPPLMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION FOR DEPOSITIONS

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case.

2. On October 23, 2014, I filed a Motion for Depositions of the complaining witnesses, Teresa Obert and C.J.D.O. Since filing that motion, I have continued my attempts to schedule a defense pre-trial interview with Teresa Obert and C.J.D.O. Unfortunately, the parties have been unable to agree upon any procedure that would allow the defense to properly document these interviews.

3. As noted in the defense Motion for Depositions, the complaining witnesses are represented by attorney Mary Gaston. On October 21, 2014, Ms. Gaston sent me the following e-mail message:

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600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

ORIGINAL

> Todd, I agreed only, at your request, to allow you to speak informally with my clients. If you wish to depose my clients, the rules of procedure provide the proper mechanism for doing so.

4. I immediately responded to Ms. Gaston's message and requested clarification of her position. Also, I wrote to the prosecutors who are assigned to the case and asked for them to assist in my efforts to the scheduling of interviews. Because I received no response to my request, I filed a Motion for Depositions as suggested by Ms. Gaston

5. Soon after I filed the motion, Ms. Gaston wrote to me and set forth her clients' position regarding these interviews. *See* Appendix A. In particular, Ms. Gaston stated that the defense would not be permitted to use a court reporter or any other "extraneous people" to document the interviews. Rather, she explained that only defense counsel (me) could be present during the interviews. *See id.*

6. Again I promptly responded and explained that the interviews must be documented. In particular, I noted:

> I would plan to use a court reporter, which will ensure that the interviews proceed as professionally and efficiently as possible. I have not faced an objection to this procedure in many, many years, but I can send you a stack of court rulings (from years past) in which judges have approved this procedure. To my knowledge, no judge in Washington has ever accepted the position you are advancing at this time.

Id.

7. Thereafter, I sent Ms. Gaston several documents which demonstrate that the use of a court reporter is reasonable and appropriate in this sort of proceeding. *See* Appendix B.

8. On October 30, 2010, Ms. Gaston responded and explained that her clients would object to the use of a court reporter – or any other means of documentation – during these

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600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

interviews. In essence, Ms. Gaston has taken the position that these witnesses will not agree to an interview if any third-party is present to document the interviews.

9. I have been practicing criminal law for approximately 25 years. In all of that time, I have never before been required to conduct a pretrial interview that could not be documented by a third party. In fact, such a procedure could lead to my disqualification as counsel for Ms. Stevens in these proceedings. *See* RPC 3.7; *State v. Schmid*, 124 Wn.App. 662 (2004) (prosecutor was disqualified after speaking with a witness and obtains information that may be materials to the defense of the case); *State v. Sanchez*, 171 Wn.App. 518 (2012) (defense counsel risks disqualification where he conducts a pretrial interview where no third party is present to document the interview).

10. The defense is entitled to reasonable pretrial interviews, and such interviews must be documented by a third party. As explained in the *Sanchez* case:

> To avoid lawyer-witness problems, it is typical and advisable for lawyers to conduct witness interviews in this manner, so that a third person can be called as an impeachment witness if the interviewee testifies inconsistently at trial.

Sanchez, 171 Wn.App. at 546 (*citing* ABA Standards for Criminal Justice).

11. Defense counsel cannot fairly or effectively prepare this case for trial without completing interviews or depositions of Teresa Obert and C.J.D.O. These interviews are critical to the defense and must be completed before the defense can complete its investigation and file pre-trial motions.

12. Pursuant to CrRLJ 3.6, this Court should authorize defense counsel to depose Teresa Obert and C.J.D.O. regarding these matters.

13. In the alternative, the Court should conclude that the defense is permitted to have a third-party document the interviews. As noted by numerous judges (*see* Appendix B)

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– including judges who are currently sitting on the appellate bench – use of a court reporter is the most efficient and professional mechanism to document these types of interviews.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 31rd day of October, 2014.

ALLEN, HANSEN & MAYBROWN, P.S.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / email / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElyea, Moberly & Roberts
Dated: 10/31/2014

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX A

Paula Smeltzer

From:	Todd Maybrown
Sent:	Friday, October 31, 2014 12:30 PM
To:	Paula Smeltzer
Subject:	FW: Interviews
Importance:	High

From: Todd Maybrown
Sent: Friday, October 24, 2014 7:57 AM
To: Gaston, Mary P. (Perkins Coie); Cooper Offenbecher
Cc: Starr, June (Perkins Coie); 'Tammy McElyea (tmcelyea@moberlyandroberts.com)'
Subject: Re: Interviews
Importance: High

Mary:

Thank you for your clarifying message.

We have never suggested that the interviews would be recorded, so that is a non-issue. Rather, each interview must be documented. I would plan to use a court reporter, which will ensure that the interviews proceed as professionally and efficiently as possible. I have not faced an objection to this procedure in many, many years, but I can send you a stack of court rulings (from years past) in which judges have approved this procedure.
To my knowledge, no judge in Washington has ever accepted the position you are advancing at this time.

As you probably know, I have filed a motion for deposition. I believe that motion will be heard on November 4. I would agree to withdraw the motion so long as there is no further dispute regarding these interviews.
I would need an express confirmation from you that: (1) I will be permitted to conduct an independent interview of each witness; (2) each interview will last approximately 90 minutes; (3) each interview will be documented by a court reporter; and (4) you may be present at each interview, so long as you do not interfere with the interview process.

If not, we will ask the Court to order a deposition for each witness.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

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On 10/23/14, 6:01 PM, "Gaston, Mary P. (Perkins Coie)"
<MGaston@perkinscoie.com> wrote:

>Todd,
>
>I apologize if I was not clear. Your email below is correct. While
>you are welcome to take notes of the interviews, you are not authorized
>to record the interview, for example by tape recorder or digital recorder.
>Teresa and Christian do not consent to that, which consent is required by
>law. RCW 9.73.030. Nor may you bring a court reporter to the
>interview. It is difficult enough for Teresa and Christian to discuss
>Hope's attack on them that night with anyone. They are not going do so
>with extraneous people in the room and that includes a court reporter.
>So that there is no confusion regarding the scope of the interview,
>Teresa and Christian will discuss the events of that night and events
>related to that night.
>
>Mary
>
>
>----Original Message----
>From: Todd Maybrown [mailto:Todd@ahmlawyers.com]
>Sent: Tuesday, October 21, 2014 5:52 PM
>To: Gaston, Mary P. (Perkins Coie)
>Cc: Starr, June (Perkins Coie)
>Subject: Re: Interviews
>
>Mary:
>
>I don't understand what you mean by "informally," Do you mean I will
>not permitted to document the interviews? To be clear, I use a court
>reporter in all interviews in criminal cases to document/transcribe the
>questions and answers, but the witness is not sworn. Are you objecting
>to that type of interview?
>
>Todd
>
>
>Sent from my iPad
>

>> On Oct 21, 2014, at 5:45 PM, Gaston, Mary P. (Perkins Coie)
>><MGaston@perkinscoie.com> wrote:
>>
>> Todd, I agreed only, at your request, to allow you to speak
>>informally with my clients. If you wish to depose my clients, the
>>rules of procedure provide the proper mechanism for doing so.
>>
>> Mary P. Gaston
>>
>>> On Oct 20, 2014, at 12:26 PM, Todd Maybrown <Todd@ahmlawyers.com>
>>>wrote:
>>>
>>> Mary:
>>>
>>> I will need to interview each of them independently (without the
>>>other being present). I expect each interview to last approximately
>>>90 minutes. I would plan to use a court reporter to document the
>>>interviews. I can be available this Friday and I would plan to sit
>>>in on the interviews conducted by the prosecutor. Then I will
>>>commence my interviews of the witnesses once the prosecutor's
>>>interviews have been completed.
>>>
>>> Please let me know how the prosecutor intends to document the
>>>earlier interviews.
>>>
>>> Todd
>>>
>>> Todd Maybrown
>>> Allen, Hansen & Maybrown, P.S.
>>> One Union Square
>>> 600 University Street, Suite 3020
>>> Seattle, Washington 98101-4105
>>> (206) 447-9681 - Phone
>>> (206) 447-0839 - Fax
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>>>copies of the message by mail to the sender at the address noted above.
>>>
>>> -----Original Message-----
>>> From: Gaston, Mary P. (Perkins Coie)
>>> [mailto:MGaston@perkinscoie.com]
>>> Sent: Monday, October 20, 2014 12:16 PM
>>> To: Todd Maybrown

>>> Cc: Starr, June (Perkins Coie)
>>> Subject: Interviews
>>>
>>> Todd,
>>>
>>> Of course we will make Teresa and Christian available. Given the
>>>emotional difficulty of going through the events of that night, they
>>>will be available at my Bellevue office this Friday at 11:00. Tammy
>>>will be interviewing them as well, and you are free to ask any
>>>appropriate follow-up.
>>>
>>> Please confirm your availability at your earliest convenience. Let
>>>me know if you need address.
>>>
>>> Thanks,
>>>
>>> Mary
>>>
>>>
>>>
>>> _____
>>>
>>> NOTICE: This communication may contain privileged or other
>>>confidential information. If you have received it in error, please
>>>advise the sender by reply email and immediately delete the message
>>>and any attachments without copying or disclosing the contents. Thank you.
>>
>> _____
>>
>> NOTICE: This communication may contain privileged or other
>>confidential information. If you have received it in error, please
>>advise the sender by reply email and immediately delete the message
>>and any attachments without copying or disclosing the contents. Thank you.
>
>_____
>
>NOTICE: This communication may contain privileged or other confidential
>information. If you have received it in error, please advise the sender
>by reply email and immediately delete the message and any attachments
>without copying or disclosing the contents. Thank you.

APPENDIX D

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NOV 04 2014

KIRKLAND MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 [PROPOSED] ORDER RE DEFENDANT'S MOTION FOR DEPOSITIONS

This matter came before the above-entitled Court upon Defendant's Motion for Depositions. The Court having reviewed the pleadings filed herein and heard oral argument, does hereby ORDER that Defendant's Motion for Depositions is Granted. The defense may schedule depositions with witnesses TV & CO at counsel's discretion.

DONE in open court this 4 day of November, 2014.

Municipal Court Judge
Michael J. Lambo

Presented by:

Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX E

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NOV 14 2014

KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

FILED
NOV 17 2014
KIRKLAND
MUNICIPAL COURT

1/6
1 pm
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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: C.O.
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of C.O. will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Copy [illegible]
Todd Maybrown, WSBA #18557
Attorney for Defendant
#40690

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX F

FILED

JAN - 6 2015

KIRKLAND MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, vs. STEVENS, HOPE A., Defendant.	)	NO. 38384 DECLARATION OF LACEY OFFUTT IN SUPPORT OF CITY'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO DISMISS

I, Lacey Offutt, a duly qualified, appointed and acting Prosecuting Attorney for City of Kirkland and acting on behalf of Plaintiff, declare the following:

1. On November 4, 2014, this court ordered the depositions of the City's Witnesses in the above-cited case, Teresa Obert and C.O., to take place at defense counsel's discretion.

2. Tammy McElyea is another Prosecuting Attorney for the City of Kirkland and is co-counsel in the above-cited case.

3. Mary Gaston is the attorney for the witnesses Teresa Obert and C.O.

4. On November 13, 2014, at 9:14 am, defense counsel, Todd Maybrown, sent an email titled "Depositions of CO and TO" to myself, Tammy McElyea, and Mary Gaston, which indicated that the depositions would take place on November 25, 2014. C.J.D.O's deposition was to take place at 1:00 pm, and Teresa Obert's at 2:30 pm. Mr. Maybrown stated that the date was flexible, but the depositions must take place during the week of November 24. He gave no explanation for this. He stated that unless he heard back from the parties by end of business on November 13, he would mail notices of deposition to all

Moberly & Roberts, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

counsel, noting that Ms. Gaston had previously agreed to accept service of notices on behalf of the witnesses. *See City's Exhibit 1 page 1.*

5. Prior to scheduling depositions for November 25, 2014, Mr. Maybrown made no attempt to coordinate with the City for scheduling purposes.

6. On November 14, 2014, I emailed Mr. Maybrown in response to his November 13, 2014 email. I informed him that neither Ms. McElyea or I were available on November 25, 2014 for depositions, as we were both scheduled to be in court on that date. I suggested three alternative dates on which both City prosecutors could be present: 12/2/14, 12/5/14, and 12/12/14. *City's Exhibit 1 page 2.*

7. In response, Mr. Maybrown agreed to reset the date of the depositions to December 2, 2014. *City's Exhibit 1 page 3.*

8. Ms. McElyea and I cleared our schedules on December 2, 2014, in order to be present at the deposition.

9. On December 2, 2014, Ms. Gaston emailed all counsel that C.O. was in the hospital, and since the witnesses had never been served with subpoenas, the witnesses would not be present at the depositions scheduled that afternoon. Ms. Gaston based her legal argument on her reading of CrRLJ 4.6. *City's Exhibit 2 page 1; City's Exhibit 3 page 1.*

10. Mr. Maybrown sent Ms. McElyea and myself an email later on December 2, 2014 suggesting he would no longer communicate with her regarding these matters. Up until this time, Mr. Maybrown communicated nearly exclusively with Ms. Gaston regarding scheduling. He suggested alternative dates for the deposition to be scheduled. *City's Exhibit 2 pages 1-2.*

11. Ms. McElyea immediately sent an email to Mr. Maybrown an email, copying me, indicating that, though she was currently in court, she would consult her calendar upon return to her office. *City's Exhibit 2, page 2.*

12. Later on December 2, 2014, Ms. McElyea sent an email to Mr. Maybrown, copying me, agreeing with proposed alternative dates for the deposition: December 12, and December 15. *City's Exhibit 3 page 3, 4.*

13. Ms. McElyea sent a second email, copying me, detailing the legal misunderstanding between Ms. Gaston and Mr. Maybrown in which she reiterated that either December 12 or December 15 would be available to conduct depositions. *City's Exhibit 3 page 4.*

14. On December 11, 2014, Ms. McElyea confirmed with all counsel that the witnesses, Teresa Obert and C.O., were available on December 19, 2014, for depositions, when Ms. Gaston was again in the country. *City's Exhibit 4.*

15. On December 12, 2014, the City sent subpoenas to Teresa Obert and C.O. ordering them to appear for depositions on December 19, 2014 at 1:00 and 2:30 respectively.

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12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

16. The depositions of Teresa Obert and C.O. did occur on December 19, 2014. C.O.'s deposition took approximately ninety minutes, followed by Teresa Obert's deposition, which lasted approximately ninety minutes.

17. Ms. Gaston was present at each deposition acting as counsel for the witnesses. She made some objections based on relevancy and privilege with regard to Mr. Maybrown's questions about C.O.'s medical history.

18. Mr. Maybrown submitted a Supplemental Declaration in support of his motion to dismiss on December 24, 2014 detailing what he characterized as the witness's obstructionist tactics and arbitrary conduct. This characterization is inaccurate.

19. The hearing on December 30, 2014 began at approximately 1:00 pm. I returned to my office at approximately 2:30 pm and promptly began compiling my notes to turn over to the defendant (which were to be turned over by 4:30 on December 30, 2014, per the court's order). After faxing my personal notes to defense counsel, I prepared subpoenas for Teresa Obert and C.O. to appear for the ordered deposition on January 2, 2015. By this time, mail by U.S. postal service had already gone out. Out of concern that a mailed subpoena would not be delivered to the witnesses prior to January 2, 2015 (Thursday, January 1, 2015 was a holiday and there would be no mail service), I arranged for a Kirkland Police Officer to personally serve the subpoenas on the witnesses.

20. On information and belief, Ms. Gaston, attorney for the witnesses, was out of the country. At the time of the hearing on December 30, 2014, I did not know when Ms. Gaston would return to the country.

21. On information and belief, no person answered the door when the officer attempted to serve the subpoenas on Teresa Obert and C.O., and the subpoenas were never served.

22. I spoke with Teresa Obert at roughly 4:30 pm on December 30, 2014 following the hearing. At that time, I informed her of the deposition's date and time, and she told me "I don't know if we can make that."

23. On January 5, 2015, the City received the Second Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss. In his declaration, Mr. Maybrown claims to have found "a considerable amount of impeachment evidence" from my notes taken during the City's witness interview of C.O. held on October 24, 2014. He cites the note "Tell she had been drinking? No, tired and had been crying" as evidence that the witnesses have changed their testimony about Hope Stevens' alcohol consumption prior to the incident on the evening of June 21, 2014. In actuality, the note, taken on yellow legal paper, reads as follows:

> "tell she'd been drinking? No, tired and "
>
> [next line]"Had been crying"

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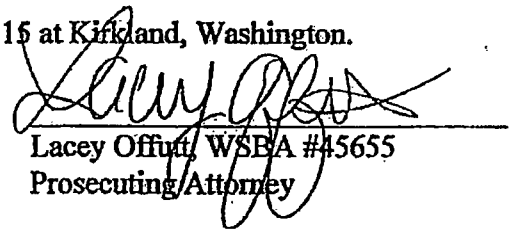
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

These shorthand notes were taken by me to assist in my understanding of the case. They were not written to be understood by a third party, nor are they a verbatim report of the questions asked and answers given. In actuality, the question asked was "Did she [Hope] tell you she's been drinking?" C.O.'s answer was not in response to whether Ms. Stevens had been drinking, but rather if Ms. Stevens had told C.O. about her alcohol consumption (Mr. Maybrown omitted the note from Teresa Obert's 10/24/14 interview in which reads: "could tell she'd [Hope] been drinking – just tell"). Furthermore, the line "had been crying" was C.O.'s recollection of Ms. Steven's appearance and not, as counsel implied, part of the previous statement. Defense counsel's inaccurate interpretation of this one note - and his unsupported inferences therefrom – is a precise example of why the prosecutor's notes are privileged work product and should not have been made discoverable.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 5th day of January, 2015 at Kirkland, Washington.



Lacey Offutt, WSBA #45655
Prosecuting Attorney

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12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

City's Exhibit 1

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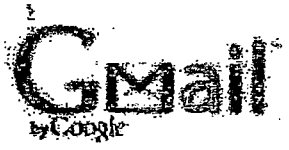

Lacey Offutt <loffutt@moberlyandroberts.com>

Depositions of CO and TO

4 messages

Todd Maybrown <Todd@ahmlawyers.com> Thu, Nov 13, 2014 at 9:14 AM
To: Tammy McElyea <tmcelyea@moberlyandroberts.com>, Lacey Offutt <loffutt@moberlyandroberts.com>, "Gaston, Mary P. (Perkins Coie)" <MGaston@perkinscoie.com>
Cc: Paula Smeltzer <Paula@ahmlawyers.com>

Counsel:

I am planning to schedule the court-ordered depositions as follows:

Witness:	CO
Location:	Law Office of Allen, Hansen & Maybrown, PS
Date:	November 25, 2014
Time:	1:00 PM

Witness:	TO
Location:	Law Office of Allen, Hansen & Maybrown, PS
Date:	November 25, 2014
Time:	2:30 PM

I may be able to adjust the date – as I am also available on November 24 and 26 – but the depositions will need to be completed during the week of November 24. Unless I hear back by close of business today, I will send notices to all counsel. Ms. Gaston has previously agreed to accept service of the notices on behalf of the witnesses.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

One Union Square

600 University Street, Suite 3020

Seattle, Washington 98101-4105

(206) 447-9681 - Phone

(206) 447-0839 - Fax

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Lacey Offutt <loffutt@moberlyandroberts.com> Fri, Nov 14, 2014 at 2:05 PM
To: Todd Maybrown <Todd@ahmlawyers.com>
Cc: Tammy McElyea <tmcelyea@moberlyandroberts.com>, "Gaston, Mary P. (Perkins Coie)" <MGaston@perkinscoie.com>

Good afternoon, Todd:

Tammy and I are not be available for depositions on Tuesday, November 25th. We both are scheduled to be in court that afternoon, which we are not able to rearrange. Furthermore, we are both scheduled to be in court on Wednesday, November 26, so that date is also out. After reviewing Judge Lambo's order, I see that he only stated that the deposition would take place "at your discretion." I see no reason the depositions must take place during the week of November 24th, and as an alternative I suggest the following dates: 12/2 (afternoon), 12/5 (afternoon), or 12/12 (afternoon). These are dates that neither Tammy or I are in court - I have not checked with Mary's schedule, or with her clients.

In addition, I believe we were all under the impression that the depositions would take place at Perkins Coie's Bellevue office. Though this requires a little extra travel time for you, it's familiar to the witnesses and much more convenient for Tammy and I, who will undoubtedly be traveling to the depositions directly from court.

Best,

Lacey Offutt
[Quoted text hidden]
--
Lacey N. Offutt
Assistant Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Ave NE #101
Kirkland, Washington 98034
City of Kirkland
Office: 425-284-2362
Fax: 425-284-1205

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Todd Maybrown <Todd@ahmlawyers.com> Fri, Nov 14, 2014 at 3:04 PM
To: Lacey Offutt <loffutt@moberlyandroberts.com>
Cc: Tammy McElyea <tmcelyea@moberlyandroberts.com>, Paula Smeltzer <Paula@ahmlawyers.com>

Lacey:

Judge Lambo ruled that the depositions would be conducted at my discretion. I intend for the depositions to go forward at my office. Any prior agreements or proposals are immaterial, since I received no cooperation and was forced to go to Court and seek an Order for depositions.

I wrote yesterday morning and heard no response or objection to the proposed date. As a matter of professional courtesy, I am willing to reset the dates if neither you nor Tammy are available on November 25 or 26. Are you available on November 24? If not, I am willing to move the date to December 2 assuming I have nothing else on my calendar. (I am not in my office, so I will not be able to confirm the December 2 date until Monday).

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
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600 University Street, Suite 3020
Seattle, Washington 98101-4105
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(206) 447-0839 – Fax

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From: Lacey Offutt <loffutt@moberlyandroberts.com>
Date: Friday, November 14, 2014 at 2:05 PM
To: Todd Maybrown <Todd@ahmlawyers.com>
Cc: Tammy McElyea <tmcelyea@moberlyandroberts.com>, Mary Gaston <MGaston@perkinscoie.com>
Subject: Re: Depositions of CO and TO
[Quoted text hidden]

Lacey Offutt <loffutt@moberlyandroberts.com> Fri, Nov 14, 2014 at 3:47 PM

To: Todd Maybrown <Todd@ahmlawyers.com>
Cc: Tammy McElyea <tmcelyea@moberlyandroberts.com>, Paula Smeltzer <Paula@ahmlawyers.com>, Mary Gaston <mgaston@perkinscoie.com>

Todd:

Tammy and I are available on November 24th after about 12:30, but I have no knowledge of Mary's availability on that date. I apologize for the late response, but as you are no doubt aware, coordinating between this many people with opposite schedules sometimes takes more than a few hours. I appreciate your professional courtesy and I believe that now Tammy and I have coordinated several workable dates to get these depositions completed.

Best,

Lacey

[Quoted text hidden]

City's Exhibit 2

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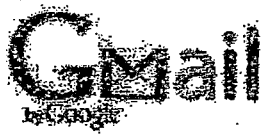
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205



Gmail by Google

Lacey Offutt <loffutt@moberlyandroberts.com>

Notice of Unavailability

5 messages

Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com> Tue, Dec 2, 2014 at 5:55 AM
To: "Todd Maybrown <Todd@ahmlawyers. com>" <Todd@ahmlawyers.com>
Cc: Lacey Offutt <loffutt@moberlyandroberts.com>, Tammy McElyea <tmcelyea@moberlyandroberts.com>

Dear Todd,

I have confirmed with my clients and my office that the Oberts still have not been subpoenaed for depositions. Please be advised, I will be out of the country and unavailable from Dec 10-16. I will have at best only sporadic email during that time. Therefore, please let this serve as my notice of unavailability during that period and my notice that I will be unable to accept service of subpoenas on behalf of my clients during that time. Accordingly, if you wish to serve subpoenas on the Oberts for depositions during that period please use one of the normal means of service under Rule 45 so that the Oberts are assured of timely notice.

Thank you,

Mary

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Todd Maybrown <Todd@ahmlawyers.com> Tue, Dec 2, 2014 at 7:44 AM
To: "Gaston, Mary P. (Perkins Coie)" <MGaston@perkinscoie.com>
Cc: Lacey Offutt <loffutt@moberlyandroberts.com>, Tammy McElyea <tmcelyea@moberlyandroberts.com>, Sarah Conger <Sarah@ahmlawyers.com>, Paula Smeltzer <Paula@ahmlawyers.com>

Mary:

I am shocked by this turn of events, as all parties were intending to proceed with depositions today. Are you claiming that you never received any of the numerous emails and notices that were sent to you?

Please let me know immediately if your clients are refusing to appear for today's depositions as I have scheduled a court reporter for today's depositions.

Todd

Sent from my iPad
[Quoted text hidden]

Todd Maybrown <Todd@ahmlawyers.com> Tue, Dec 2, 2014 at 8:03 AM
To: Paula Smeltzer <Paula@ahmlawyers.com>, Sarah Conger <Sarah@ahmlawyers.com>
Cc: Lacey Offutt <loffutt@moberlyandroberts.com>, Tammy McElyea <tmcelyea@moberlyandroberts.com>

Given Ms. Gaston's latest stunt, I will no longer communicate with her regarding these matters. Although I will likely need to present this latest ploy before the court, I think we should agree upon another date for depositions. I am available on the afternoon of December 12 and December 15 all day. Please promptly

confirm that one of you (or both) can be available on those dates.

Todd

Sent from my iPad

> On Dec 2, 2014, at 5:55 AM, Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com> wrote:
>
[Quoted text hidden]

Tammy McElyea <tmcelyea@moberlyandroberts.com> Tue, Dec 2, 2014 at 8:34 AM
To: Todd Maybrown <Todd@ahmlawyers.com>
Cc: Paula Smeltzer <Paula@ahmlawyers.com>, Sarah Conger <Sarah@ahmlawyers.com>, Lacey Offutt <loffutt@moberlyandroberts.com>

I am currently in court and will be all morning. I will check my calendar when I return to the office.
[Quoted text hidden]

Tammy McElyea
Assistant Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Ave NE #101
Kirkland, Washington 98034
City of Kirkland & Woodinville
Office: 425-284-2362
Fax: 425-284-1205

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Todd Maybrown <Todd@ahmlawyers.com> Tue, Dec 2, 2014 at 9:19 AM
To: Tammy McElyea <tmcelyea@moberlyandroberts.com>
Cc: Paula Smeltzer <Paula@ahmlawyers.com>, Sarah Conger <Sarah@ahmlawyers.com>, Lacey Offutt <loffutt@moberlyandroberts.com>, Cooper Offenbecher <Cooper@ahmlawyers.com>

Tammy:

To my mind, this morning's email from Ms. Gaston was just a charade. Please see the attached correspondence in which Ms. Gaston acknowledged receipt of the deposition notices on November 17, 2014. At this point, I must assume that the witnesses will appear for their depositions as required.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

One Union Square

600 University Street, Suite 3020

Seattle, Washington 98101-4105

(206) 447-9681 - Phone

(206) 447-0839 - Fax

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From: Tammy McElyea [mailto:tmcelyea@moberlyandroberts.com]
Sent: Tuesday, December 02, 2014 8:34 AM
To: Todd Maybrown
Cc: Paula Smeltzer; Sarah Conger; Lacey Offutt
Subject: Re: Notice of Unavailability

[Quoted text hidden]

20141202085731.pdf
89K

City's Exhibit 3

Moberly & Roberts, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
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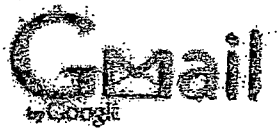

Gmail by Google

Lacey Offutt <loffutt@moberlyandroberts.com>

Mary Gaston email

5 messages

Starr, June (Perkins Coie) <JStarr@perkinscoie.com> Tue, Dec 2, 2014 at 11:23 AM
To: "Todd@ahmlawyers.com" <Todd@ahmlawyers.com>
Cc: "Gaston, Mary P. (Perkins Coie)" <MGaston@perkinscoie.com>, "loffutt@moberlyandroberts.com" <loffutt@moberlyandroberts.com>, "tmcelyea@moberlyandroberts.com" <tmcelyea@moberlyandroberts.com>

Todd:

Mary is out of the office and asked that I forward the following to you:

Todd, I do not understand your confusion. No one has refused to do anything. To the contrary as of COB yesterday, we have not received subpoenas for the Oberts despite my agreeing as a professional courtesy to accept service of subpoenas on their behalf.

The only thing we received was a copy of a notice in the criminal action. Obviously, notices are for parties, not witnesses. The Oberts are not parties to the criminal action involving your client. They are merely fact witnesses. Only parties to an action can be compelled to appear when noticed without the requirement of a subpoena. The law is clear on this.

In fact, when you sent out a "notice" of deposition, I reiterated to you that I would except service of the SUBPOENAS on behalf of my client. This is not a difference without a distinction as once my clients are under the Court's jurisdiction vis a vis a subpoena, the rules provide them protections and redress.

I remain willing to accept service of subpoenas on behalf of the Oberts subject to my unavailability on the dates mentioned.

Finally, you seem to believe that everyone was planning on a deposition today. Such is not the case, which I thought I had made clear when I requested the subpoenas. To the contrary, had you subpoenaed my clients for depositions today I would have advised you (or the Court if necessary) that the witnesses were not available for medical reasons given that C is in the hospital where he has been for the last eleven days and his discharge date is unknown at this time, and his mother stays with him during the day.

Mary

June Starr | Perkins Coie LLP

LEGAL SECRETARY

1201 Third Avenue Suite 4900

Seattle, WA 98101-3099

D. +1.206.359.3426

F. +1.206.359.4426

E. JStarr@perkinscoie.com

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Todd Maybrown <Todd@ahmlawyers.com> Tue, Dec 2, 2014 at 11:59 AM
To: Tammy McElyea <tmcelyea@moberlyandroberts.com>, Lacey Offutt <loffutt@moberlyandroberts.com>
Cc: Sarah Conger <Sarah@ahmlawyers.com>, Paula Smeltzer <Paula@ahmlawyers.com>

Tammy and Lacey:

As you know, this is a criminal case and the criminal rules of procedure apply. CrRLJ 4.6 does not require service of a subpoena. To the contrary, the rule requires a "notice," and nothing more:

> (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable **written notice** of the time and place for taking the deposition. The **notice** shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

Id. Moreover, the thought that Ms. Gaston would accept service of these notices on November 17 and then "lay in the weeds" for two weeks so that she could offer up this sort of bogus objection is remarkable.

Once again, I am forced to file a motion with the court.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

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From: Starr, June (Perkins Coie) [mailto:JStarr@perkinscoie.com]
Sent: Tuesday, December 02, 2014 11:24 AM
To: Todd Maybrown
Cc: Gaston, Mary P. (Perkins Coie); loffutt@moberlyandroberts.com; tmcelyea@moberlyandroberts.com
Subject: Mary Gaston email
Importance: High

[Quoted text hidden]

Tammy McElyea <tmcelyea@moberlyandroberts.com> Tue, Dec 2, 2014 at 12:00 PM
To: "Starr, June (Perkins Coie)" <JStarr@perkinscoie.com>
Cc: "Todd@ahmlawyers.com" <Todd@ahmlawyers.com>, "Gaston, Mary P. (Perkins Coie)" <MGaston@perkinscoie.com>, "loffutt@moberlyandroberts.com" <loffutt@moberlyandroberts.com>

Hello;

Given the last email sent Ms. Offutt and I will not be coming to your office today. We had cleared our schedules for this time frame. We are available on December 12 in the afternoon and would be available on December 15 anytime after 10:30 am. Ms. Offutt may have a short calendar in Mercer Island early that morning but should be open after 10:30.

Based on the court's order for depositions to be taken, Mary can you please verify with the Oberts which day, December 12 or December 15, works best for them so we can move forward with this process. Thank you so much for your cooperation.

Tammy
[Quoted text hidden]

Tammy McElyea
Assistant Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Ave NE #101
Kirkland, Washington 98034
City of Kirkland & Woodinville
Office: 425-284-2362
Fax: 425-284-1205

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Tammy McElyea <tmcelyea@moberlyandroberts.com> Tue, Dec 2, 2014 at 12:10 PM
To: Todd Maybrown <Todd@ahmlawyers.com>
Cc: Lacey Offutt <loffutt@moberlyandroberts.com>, Sarah Conger <Sarah@ahmlawyers.com>, Paula Smeltzer <Paula@ahmlawyers.com>

Hello;

We are attempting to make this work. Can we wait until we hear if one of those dates are available before dragging the court into this? I understand you want to get this done and so do we. The reading of 4.6 isn't that clear because it does reference "parties" not "witnesses." In reality the only "parties" to this case are the defendant and the City. CR 45 does reference a distinction with "witnesses" v. "parties." And in that rule it does state the "witnesses" should be sent a subpoena to appear at a deposition. I see where both readings of those rules could be interpreted in the manner in which both you and Mary have cited. The witnesses are not refusing to be interviewed. So let's all get on the same page and make either December 12 or 15 work.

Tammy
[Quoted text hidden]
--
Tammy McElyea
Assistant Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Ave NE #101
Kirkland, Washington 98034
City of Kirkland & Woodinville
Office: 425-284-2362
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Todd Maybrown <Todd@ahmlawyers.com> Tue, Dec 2, 2014 at 12:42 PM
To: Tammy McElyea <tmcelyea@moberlyandroberts.com>
Cc: Lacey Offutt <loffutt@moberlyandroberts.com>, Sarah Conger <Sarah@ahmlawyers.com>, Paula Smeltzer <Paula@ahmlawyers.com>, Cooper Offenbecher <Cooper@ahmlawyers.com>

Tammy:

To me, it is obvious that the Court is going to reject this strained interpretation of the rules. Ms. Gaston is a civil practitioner so she seems to want to focus upon the notice requirements in CR 45. There is no comparable requirement in the criminal rules.

Moreover, this sort of hyper-technical objection will not fly given the history of this case. Everyone has been on notice for weeks that these depositions were scheduled to go forward on December 2. Ms. Gaston never made any objection prior to 8:00 AM this morning. I don't see how any attorney can raise this sort of 11th hour objection – after accepting notices (without objection), after reviewing numerous emails regarding our agreement to schedule the December 2 date (without objection), and after sitting silent for two weeks while we were forced to incur the costs associated with these depositions.

I have spent months attempting to arrange interviews/depositions of these witnesses. I don't see any way to get on "the same page" with Ms. Gaston and these witnesses.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

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From: Tammy McElyea [mailto:tmcelyea@moberlyandroberts.com]

Sent: Tuesday, December 02, 2014 [illegible]:11 PM
To: Todd Maybrown
Cc: Lacey Offutt; Sarah Conger; Paula Smeltzer
Subject: Re: FW: Mary Gaston email

[Quoted text hidden]

City's Exhibit 4

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(425) 284-2362, FAX (425) 284-1205

Gmail by Google

Lacey Offutt <loffutt@moberlyandroberts.com>

(no subject)

Tammy McElyea <tmcelyea@moberlyandroberts.com> Thu, Dec 11, 2014 at 9:08 AM
To: Todd Maybrown <Todd@ahmlawyers.com>, Lacey Offutt <loffutt@moberlyandroberts.com>, Mary Gaston <MGaston@perkinscoie.com>

Good morning Mr. Maybrown;

The court contacted me this morning and informed me that you have filed a motion to dismiss. Have you sent us a copy? If so we have not received it as of this email.

Ms. Gaston contacted us late yesterday and informed us the Oberts will be available for an interview on Friday December 19th. She will be back in the country at that time. Please provide us with a time and my office will send subpoenas to them to appear for the depositions.

Thank you for your time and cooperation.

Tammy McElyea
Assistant Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Ave NE #101
Kirkland, Washington 98034
City of Kirkland & Woodinville
Office: 425-284-2362
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APPENDIX G

1
2
3 KIRKLAND MUNICIPAL COURT
4
5 CITY OF KIRKLAND,)
6 Plaintiff,) No. 38384
7 vs.)
8 HOPE A. STEVENS,)
9 Defendant.)
10
11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 DECEMBER 30, 2014
15
16 APPEARANCES:
17
18 For the City: TAMMY McELYEA
19 LACEY N. OFFUTT
Attorney at Law
20 For the Defendant: TODD MAYBROWN
21 Attorney at Law
22 Before: THE HONORABLE MICHAEL J. LAMBO
23
24 Prepared by: Linda A. Owen
425-466-8543
25

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Court Issues Remedial Orders	29

1 PROCEEDINGS

2 --o0o--

3

4 THE COURT: All right. Counsel, did we want to take
5 Ms. Stevens first, or did you have some other matters you'd
6 like to take out of order?
7 MS. OFFUTT: Yes, your Honor, we are prepared with the
8 Stevens case. For the record, Lacey Offutt on behalf of
9 the City. This is cause number 38384.
10 THE COURT: All right. Counsel, good afternoon.
11 MR. MAYBROWN: Good afternoon, your Honor.
12 THE COURT: All right. Well, I've read all of the
13 briefing. This is your motion, Mr. Maybrown, so I'll let
14 you go ahead and start.
15 MR. MAYBROWN: Thank you, your Honor. We filed two
16 declarations that I prepared, both under oath, and an
17 initial declaration and then a supplemental declaration.
18 The City has responded, but they haven't filed any
19 declarations or anything that disputes the facts that we've
20 claimed, so I'm going to assume for purposes of the motion
21 that the City agrees with all the facts that are stated in
22 our motion. They're all true, but I think that that's the
23 fairway to proceed, since they haven't rebutted or
24 suggested that any of the facts are anything but accurate.
25 I do think I need to give a little background, because

1 this has been quite a moving target for us. We were -- the
2 incident was from June 2014. We've been trying to prepare
3 the case for trial since then. We wanted to go to trial in
4 November. We talked about it at the initial hearing.
5 Unfortunately, that became impossible because the City's
6 witnesses refused to cooperate, would not participate in
7 interviews. We came to court, we had a hearing, I think on
8 November 4th. The court granted our order -- or motion for
9 depositions.
10 Promptly, within a day or two, I said we need to get
11 these depositions scheduled. They need to go in -- I think
12 I said no later than November 20th, because we need to
13 prepare the case after these interviews so we can do some
14 follow-up investigation and go to trial.
15 I told the court at the time of the last hearing that we
16 were reluctantly agreeing to continue the case because we
17 needed to but that we were very firm that we needed the
18 case to be resolved in January. That was our hope and that
19 was our goal.
20 What happened after we submitted our information? What
21 did we discover was that depositions didn't go as
22 scheduled, December 2nd. We all thought there were going
23 to be depositions. The witnesses at the last minute make
24 what I consider to be a very bogus objection and don't show
25 up. We file a motion to dismiss after that. The witnesses

1 contact us through the prosecutors and say, oh, now we'll
2 appear but we can't do it until December 19th, right before
3 the holiday.
4 At that point the court had already scheduled a motion,
5 but I thought I needed to at least go forward and see
6 what's going to happen. We went forward with the
7 depositions, and to my dismay, it was, from the outset, a
8 terrible experience. I mean right from the beginning, the
9 witnesses are refusing to answer my questions when they're
10 very relevant to the case. Their attorney is saying that
11 my questions are outside the scope, as if the attorney gets
12 to decide what the scope of the proper deposition is. I
13 move forward for a few minutes, and I finally said this is
14 just not tenable. This is not a fair way to prepare a
15 case.
16 I actually tried to call the court, since we were both
17 together. The prosecutors were both present. I learned
18 that the judge was not available. You were not in the
19 building. So I came back on the record and reluctantly
20 said that I would proceed under protest because we couldn't
21 reach the court to help us move the case forward.
22 I got no assistance from the City at all. They never
23 tried to advance the ball, never tried to speak with the
24 lawyer or the witnesses and ask them to answer questions.
25 And the thing that's so hard about this is that these

1 witnesses met with the police not once, but twice, and
2 answered all their questions. These witnesses met with the
3 prosecutors and answered all their questions. The
4 prosecutor said I'm not allowed to be present when they
5 were meeting with the witnesses, even though I had asked
6 for an opportunity. I asked that it be recorded. I've
7 received no discovery, nothing, about those interviews.
8 When the depositions continued, I learned some things
9 about the incident. I learned that their testimony
10 completely changed from what they had told the police, that
11 they claimed the police reports were false. I never had
12 any idea or expectation that would happen, and then it went
13 on and on from there with them refusing to provide any of
14 the background information I needed but answering specific
15 questions about the day of the incident.
16 The problems we face now is these delays have all been
17 caused by the City's witnesses and we're backed up against
18 a trial date again. The questions that I needed answers to
19 they flatly refused to answer. A few examples, I hear from
20 the witnesses, including C.O., that he was on medication at
21 the time of the deposition and the time of the incident.
22 Will he tell me what it was? No. I ask him about his
23 change of story. He says he has memory difficulties
24 because he had a traumatic brain injury. He claims it was
25 caused during the incident. Will he tell me anything about

1 it? No. I find out that he was recently in a 14-day
2 hospitalization. He says it was because of the incident.
3 I ask them to explain. They refuse. They won't provide
4 any of that information.
5 And there seems to be an incredible double standard. I
6 have no indication that they refused to answer any of the
7 questions that the City had put to them, or the police, but
8 whenever I'm asking questions that are clearly relevant to
9 the information in the case, they won't answer.
10 I also find out that they destroyed important evidence
11 that would have been apparent to everybody from the
12 beginning that we needed, and how that happened, when that
13 happened, why that happened, we have no way of knowing, and
14 we don't know that it happened before or after they met
15 with the prosecutors, because the prosecutors have flatly
16 refused to give me any discovery. I pointed out in my
17 motion that under the Criminal Rules 4.7(1)(i)(a), these
18 are statements of witnesses, they need to be produced. We
19 should have gotten them before the depositions. And, in
20 fact, we now know that they're clearly also Brady
21 information because if the witnesses were changing their
22 stories when they met with the prosecutors, I needed to
23 know that. If they decided to change their stories only
24 now, we needed to know that either way. It should have
25 been produced and I should have gotten it before the

1 depositions.

2 The only objection I've heard is from the prosecutors.
3 They say it's work product. In my pleading you see that
4 there's a case, State v. Garcia, that says notes of a
5 prosecutor are not work product if they're the statements
6 of a witness. They have to be turned over. If the City
7 chose not to record those interviews for strategic reasons
8 or otherwise, that doesn't matter. Their notes are still
9 discoverable. We get the summary of the statements under
10 the rule.

11 And also, the thing that's -- that strikes me is you
12 would think in a situation like this, the prosecutors would
13 want to help. They would try to facilitate getting the
14 information available to the defense so we can properly
15 move forward, but I've gotten no assistance at all.

16 Now, the legal standards for the court, I actually think
17 this is a 4.7 issue more than it's an 8.3(b) issue, and
18 there clearly have been discovery violations, and I agree
19 that dismissal is an extraordinary remedy, but this is an
20 extraordinary type of case and situation. I've never faced
21 anything like this before. The only fair remedy when the
22 witnesses have so highjacked the proceedings I think is --
23 would be for a dismissal. When they've destroyed and
24 hidden evidence, the only fair remedy would be dismissal.
25 And when the City's prosecutors won't give you statements

1 of these key witnesses, even though we're just a few weeks
2 before trial, and they wouldn't give them to me before the
3 depositions, the only remedy would be dismissal.
4 Now, there is a case also about suppressing the
5 testimony, State v. Hutchinson, and that's a very
6 interesting case. It was a claim of diminished capacity,
7 and the defendant refused to answer questions about the
8 incident when the prosecutors asked him to because under
9 the rules, the defendant has to submit to an examination
10 and answer questions if there's that type of defense. The
11 trial court said if the witness is refusing to answer those
12 questions, the defense can't put on the expert. The expert
13 witness can't testify, because it would be unfair. This is
14 exactly the same circumstance. These witnesses won't
15 answer my questions, so they shouldn't be allowed to come
16 to court and testify when they won't answer appropriate
17 questions.
18 The Hutchinson court, Supreme Court decision, affirmed
19 the court and said that that's a reasonable remedy. It's
20 up to the trial court to fashion an appropriate remedy, but
21 the question is, is there another possible remedy? I
22 suppose the court could order a second deposition and try
23 to force them to answer questions again. But given the
24 timing, given the way they've behaved, I don't know why we
25 would put us on that merry-go-round some more, given what

1 we've been through. The court should also consider the
2 impact of the witnesses, and these are important witnesses,
3 but also the impact on the defense is extraordinary. The
4 prejudice to the non-violating party, that's us, the
5 prejudice is extreme, given how much time they've delayed,
6 given the way they've behaved, given what they've put us
7 through. And another question is whether it was bad faith,
8 and clearly in this instance it's got to be bad faith.
9 I can't see how any further order of this court would
10 remedy the situation and give Ms. Stevens an opportunity
11 for a fair trial. I just don't see how it can under these
12 circumstances, given their refusal to appear, the court
13 orders them to appear, they refuse to appear again, we're
14 forced to file a motion. Once the motion is filed then
15 they come to the depositions reluctantly.
16 I mean I can't tell you -- one of these witnesses was
17 screaming at me at the top of her lungs during this
18 deposition, to the point where we had to cancel and I had
19 to say that we're not going to be able to go forward unless
20 you can behave yourself, and this was going on and on and
21 on through the whole process.
22 We should not be forced to have to go through this
23 again, and certainly Ms. Stevens shouldn't be forced to
24 have to waive her speedy trial rights and ask for another
25 continuance under these circumstances. I know this is a

1 very significant case, it's an important case for
2 everybody, but both sides deserve a right to a fair trial.
3 Both sides deserve an opportunity to prepare.
4 The City has cited the Brady cases, which is
5 interesting. Those are cases post verdict, and in a Brady
6 situation you ask yourself, was the testimony -- was the
7 evidence that was withheld material, meaning would it have
8 made a difference to the verdict, but that's not what you
9 decide pretrial. Pretrial discovery, if the side is
10 entitled to it, it has to be turned over. It's not for the
11 court or the prosecutors to decide what's important and
12 what's not. That's exactly what the Garcia court said.
13 They can't pick and choose and decide what they want to
14 have us have -- have us see. And, frankly, to avoid a
15 Brady problem, that's why you have these discovery rules
16 and these disclosure standards.
17 So we think that this is an appropriate case for that
18 extraordinary remedy of dismissal, but at the least, we ask
19 the court to rule that these witnesses cannot testify at
20 this case, given what they've put us through, and given how
21 it's now going to be impossible for us to do anything more
22 in the next week or two weeks to get prepared for hearings
23 we have on January 6th and then at trial, which is soon
24 thereafter.
25 And I would be open to any other ideas that the court

1 had or any other remedy. I know that the prosecutor said,
2 well, the court should review the entire transcripts. I've
3 been calling the court reporter and asking when they'll be
4 completed, but obviously the witnesses' delay, delay,
5 delay, delay, and pushed her right up to the holiday, and
6 we haven't seen them yet. I've asked that they be
7 expedited, and if the court wants to see them, we'd ask to
8 provide them ex parte so the court could review them. But
9 since the City has not disputed one fact that we've
10 claimed, I don't think it's even necessary under the
11 circumstances.
12 Unless the court has any questions, I will just be
13 willing to provide any other information that the court
14 would need to make a proper ruling.
15 THE COURT: All right, thank you, Mr. Maybrown.
16 Ms. Offutt?
17 MS. OFFUTT: Thank you, your Honor. As Mr. Maybrown
18 stated, we're here based on his motion that was filed on
19 December 11, 2014. In that motion he asked for dismissal
20 by the court under 4.7 and CrRLJ 8.3. 8.3 dictates that
21 the court dismiss the case in the interest of justice. So
22 that's what the City is operating under the assumption,
23 that that's the motion that we're here on today.
24 It's the City's position, first and foremost, that that
25 motion, as we sit here today, is moot because the

1 depositions did, in fact, take place on December 19th. And
2 despite the characterizations by defense counsel, it's the
3 City's position that the witnesses were cooperative with
4 regard to answering questions on the night in question, and
5 I'll get to those other concerns that counsel cited in a
6 moment.
7 But first, a motion to dismiss under CrRLJ 8.3 requires
8 the defendant to show two things. First, arbitrary action
9 or governmental misconduct on the part of, in this case,
10 the City, the prosecutorial authority. As Mr. Maybrown
11 stated, depositions were scheduled for December 2nd, 2014.
12 On the morning of December 2nd, all parties involved -- and
13 Mr. Maybrown did state this. All parties involved found
14 out that the witnesses' independent counsel, Mary Gaston,
15 was canceling those depositions based on her interpretation
16 of certain statutes, as well as the fact that the witness,
17 C.O., was in the hospital at the time.
18 Ms. McElyea and I had cleared our schedules for that
19 afternoon in order to partake in those depositions, and as
20 soon as we found out that those depositions were not going
21 to take place that afternoon, we immediately supplied
22 counsel with two alternative dates, December 12th and
23 December 15th, during which we would be available and we
24 would attempt to get the witnesses there to conduct the
25 depositions. Those dates did not work for the independent

1 counsel, Ms. Mary Gaston, and so Mr. Maybrown then filed
2 the current motion before the court on December 11th.
3 That same day Ms. McElyea confirmed with the witnesses
4 that they would be available on December 19th for
5 depositions. C.O. was then out of the hospital and
6 everybody would be present and accounted for.
7 And I have the e-mails, your Honor, if you would like to
8 take a look at those, that show Ms. McElyea's diligence in
9 coordinating these depositions and the City's willingness
10 to work with all parties involved.
11 In order to avoid any confusion, based on Ms. Gaston's
12 misinterpretation or different interpretation of the
13 statutes, the City did send subpoenas for the witnesses to
14 appear in court. We sent those on December 12th, they were
15 filed with the court, they were sent to both witnesses, and
16 then the depositions were held on December 19th. So as far
17 as that first prong that the defendant must show, arbitrary
18 action or governmental misconduct, the City doesn't believe
19 that they've been able to meet that burden. The rule does
20 not provide for dismissal based on actions of witnesses or
21 of independent counsel. It is based on the prosecutorial
22 misconduct, and that was not the case here.
23 The second prong then, your Honor, that the defendant
24 must show is that the right to fair trial was prejudiced.
25 In this case there can be no prejudice found. Counsel

1 cited the Micheli case, in which the court found prejudice
2 when the State filed four brand new charges only three
3 business days before trial, when in that case the State had
4 no new investigation or additional facts to support a new
5 charge. In that case it was only three days before trial.
6 In this case the deposition occurred more than a month
7 before the trial is scheduled. We're not scheduled to
8 commence until January 20th. The depositions happened on
9 December 19th. Under the facts of the Micheli case and the
10 facts here, counsel has had ample time before trial to
11 continue to investigate and to prepare for trial.
12 Therefore, just based on the dismissal that's before the
13 court here today, your Honor, under 4.7 and 8.3, this
14 extraordinary remedy is not one that's appropriate here,
15 because the defendant has not met those burdens.
16 Counsel in his December 23rd declaration appeared to add
17 numerous issues for the court to address. It is the City's
18 position first and foremost that doing so by declaration
19 was not only inappropriate but did not provide the City
20 ample time to respond to his concerns, given the fact that
21 was only five days ago. We received it seven days ago, I
22 apologize.
23 However, I will address those as Mr. Maybrown has also
24 done. First he cites the witnesses' obstructionist tactics
25 in not answering questions regarding C.O.'s medical

1 history. Second, he adds the issue of the witnesses'
2 strategy of intimidation and he cites malicious statements,
3 attempts to intimidate, and says that Teresa Obert in
4 particular used the proceedings as a forum to damage
5 Ms. Stevens' reputation. I'm going to address each one of
6 these in turn, your Honor.
7 The other additional statement that Mr. Maybrown
8 included in his declaration was the witnesses'
9 newly-contrived claims, statements that the depositions
10 differed from statements to the police when the witnesses
11 spoke with the police in June.
12 And, finally, Mr. Maybrown also included the issue that
13 witnesses destroyed items of evidence.
14 All of those issues overall the City objects to, your
15 Honor. First of all, they were not properly briefed. They
16 were brought to the court's attention under a declaration
17 that was attached to a motion to dismiss under 8.3 and 4.7.
18 They were not brought to the court's attention under a
19 Knapstad motion or a 3.6. Those are both noted according
20 to the pretrial order for the 6th of January, not for
21 today's consideration.
22 However, each of those also relies on Mr. Maybrown's own
23 perceptions, recollections, and representations of the
24 events of the depositions. He himself is stating to the
25 court how he remembers those depositions occurring. He has

1 provided no transcript of the deposition, and therefore
2 everything that he is stating under his declaration is
3 hearsay. He's telling the court what the witnesses said
4 when there is no transcript of what they said under penalty
5 of perjury. The deposition does provide that those --
6 those statements that they are making are made under
7 penalty of perjury, but we haven't seen those, and your
8 Honor hasn't had a chance to review those. By doing so,
9 Mr. Maybrown is then making himself a witness and
10 attempting to improperly testify as to the facts of the
11 case, because those deposition transcripts have not been
12 provided. He is only filtering what the court hears today
13 through his own memory.
14 He's asking the court, by introducing these additional
15 issues, to make a determinations of evidence based on the
16 facts that he's, in the City's opinion, improperly
17 presented to the court. Those facts that he's presented to
18 the court are the proper province of the jury. They are
19 not for the court to address and decide here today. As
20 I've already stated, if he wants to bring those motions,
21 the proper forum is a 3.6 motion or a Knapstad motion,
22 neither of which are here today. And for the record, your
23 Honor, the City does disagree with Mr. Maybrown's
24 characterization of all of the facts in his declaration and
25 this court should not assume that the City is in agreement

1 with those facts.

2 Turning to each of those issues in turn, your Honor,
3 regarding the obstructionist tactics, as Mr. Maybrown so
4 states, the majority of those concerns in his declaration
5 were because of the victims', the alleged victims' refusal
6 to answer questions regarding C.O.'s medical history and
7 his medical care. The victim is represented by an
8 independent attorney. The victim's right statute, RCW
9 7.69.030, subsection 10, allows that victims are permitted
10 to have a support person present of their choosing. They
11 have chosen to have independent counsel. Independent
12 counsel was there at the deposition and chose to make
13 objections and instruct her individual witnesses not to
14 answer certain questions. Those questions were with regard
15 to C.O.'s medical history. The City has no ability or
16 authority to disclose evidence that it is not in control of
17 or not in possession of. 4.7 only covers material in
18 prosecutor's possession and control. We don't have a
19 medical release signed here today for C.O. We don't have
20 access to those medical records, and if Mr. Maybrown wants
21 those medical records, he needs to properly go through
22 Ms. Gaston, the victims' attorney.

23 In addition, I believe that it came out eventually, your
24 Honor, though it was maybe improperly stated during the
25 deposition, that this was actually an objection based on

1 the doctor-patient privilege, and had we had copies of the
2 transcript, I think that that would have been shown.
3 With regard to the witnesses', quote, strategy of
4 intimidation, Mr. Maybrown alleges that these were
5 malicious statements, attempts to intimidate, use of
6 proceedings as a forum to damage Ms. Stevens' reputation.
7 The City wholeheartedly agrees with this characterization,
8 both of us having been there and been present for those
9 depositions. Again, this is Maybrown -- Mr. Maybrown's
10 perception, as there is no full transcript.
11 Finally, Mr. Maybrown is a very experienced trial
12 attorney. It can come as no surprise that victims of an
13 assault such as this would be emotional and react
14 accordingly when questioned by somebody who they view as
15 opposing them. That can come as no surprise. And, in
16 fact, the City would characterize that as exactly what
17 happened.
18 Furthermore, your Honor, Mr. Maybrown indicates that he
19 is seeking information, and by noting the witnesses'
20 strategy of intimidation as he so puts it, he's got his
21 impeachment evidence. That is what the purpose of these
22 meetings and depositions are, is for him to examine how the
23 witnesses react, what their credibility looks like, how
24 they might testify on the stand, and he's now received that
25 information, because the depositions lasted for an hour and

1 a half of each of the individual people, and he had more
2 than ample opportunity to delve into the facts of the case
3 that night and get his impeachment evidence.
4 Third, your Honor, Mr. Maybrown cites the witnesses'
5 newly-contrived claims. Once again, it can come as no
6 surprise to an experienced trial attorney that on occasion,
7 and probably often, witnesses' statements when they're
8 given to the police officers the night of an event,
9 particularly one that was so fraught with emotion between
10 family members, as here, would add or misremember things
11 that then they clarify later, and, again, that is the
12 purpose for the deposition. Once again, Mr. Maybrown has
13 uncovered that information. He has ample opportunity to
14 explore that, as evidenced by the fact that he did, in
15 fact, get to ask the witnesses about their inconsistent
16 statements. He's got his impeachment evidence, if that's
17 what he was seeking.
18 And, finally, your Honor, the fact that the witness has
19 destroyed items of evidence, also this comes under
20 impeachment evidence. It goes to the credibility of
21 witnesses at trial, and all of these claims that
22 Mr. Maybrown is stating are in support of a motion to
23 dismiss are, in fact, more properly heard before a jury, so
24 that the jury can weigh the credibility of the witnesses
25 and hear all of the evidence presented to them.

1 Finally, your Honor, Mr. Maybrown addresses the
2 prosecutor withholding evidence, or the prosecutors in this
3 case withholding evidence. Once again, I'll note the
4 City's position is that this was not properly briefed for
5 this hearing, based on the motion to dismiss under 8.3.
6 However, Mr. Maybrown has requested the prosecutors to give
7 him all of our notes from the interviews that we conducted
8 with the Oberts. He also notes that he was not permitted
9 to be there. And, again, as an experienced trial attorney,
10 it can come as no surprise that the City would conduct
11 independent interviews of their witnesses in order to
12 prepare for trial and to understand all of those additional
13 details.
14 I believe your Honor has said before in the past that
15 trial preparation is much like a snowball, and that's
16 exactly what's happened here, your Honor.
17 Regarding the Brady violation, a Brady violation must
18 have three things. First, the evidence at issue is
19 favorable to the accused, either because it is exculpatory
20 or because it is impeaching. As I've already stated, your
21 Honor, Mr. Maybrown conducted a successful deposition of
22 the witnesses with regard to any and all facts that
23 happened that night and has the ability to then delve into
24 those issues and conduct further investigation into those
25 statements that they made.

1 Number two for a Brady violation, evidence must have
2 been suppressed by the State, either willfully or
3 inadvertently, and this is the one that absolutely has not
4 happened, because he's had a chance to depose these
5 witnesses. The State hasn't suppressed these statements,
6 even if it's -- arguably, if there are any, because
7 Mr. Maybrown has had a chance to depose the witnesses.
8 And, finally, prejudice must have ensued. Again, we're
9 talking about a deposition that happened more than a month
10 prior to trial. A month of trial preparation, based on the
11 depositions and the information that the witnesses provided
12 at the deposition is more than enough for Mr. Maybrown to
13 prepare for trial. A Brady violation does not arise if the
14 defendant, using reasonable diligence, could have obtained
15 the information herself in this case. That's exactly what
16 happened here. Mr. Maybrown conducted the deposition using
17 reasonable diligence. He obtained the information that
18 he's seeking. The prosecutor is not required to hand over
19 her entire file or point out proof of lines of questioning
20 that would assist the defense theory. We only have to
21 provide access to the witnesses, which has been done, per
22 the court's order, as we sit here today.
23 Under State v. Mullen, if a prosecutor provides a
24 pretrial opportunity to examine the City's witnesses, all
25 Brady obligations have been satisfied with respect to the

1 contents of a witness's testimony. I can't say it enough.
2 It's already happened. The deposition took place on the
3 19th.
4 In this case, your Honor, the City has satisfied its
5 obligation. Our notes are our work product. They contain
6 trial strategy and preparation materials, and the defendant
7 is not entitled to them. If the defendant would like to
8 challenge that, there are ways of doing that, but today is
9 not the forum to do so because he has not properly briefed
10 it. In short, your Honor, the City's position is that the
11 defendant has not met the burden for dismissal under CrRLJ
12 8.3, subsection (b), and the additional allegations that
13 he's included in his declaration should not be considered
14 today by your Honor.
15 THE COURT: Okay, thank you, Counsel.
16 Anything further, Mr. Maybrown?
17 MR. MAYBROWN: Very briefly. Your Honor, obviously time
18 has been of the essence for a long time here, and I
19 provided information to the court as quickly as I could,
20 because we've been trying to move the case. I don't hear
21 the City disputing any of the facts in my declaration, and
22 we would be happy to provide the full transcripts, because
23 they're actually worse than my characterization in my
24 declaration, and I welcome the court to look at that, but I
25 don't think it's necessary.

1 I should say, about 8.3(b), the provision is
2 mismanagement by the prosecutors or arbitrary action. It
3 doesn't say arbitrary action by the prosecutors, and I
4 think that what we have here is arbitrary action. We have
5 destruction of evidence, we have refusal to participate in
6 interviews, we have all of the type of arbitrary,
7 unreasonable action that you could ever imagine in a case
8 of this sort.
9 And lastly, I don't even hear and understand why they're
10 refusing to turn over summaries of the witnesses'
11 statements. Criminal Rule 4.7 says that they're required
12 to provide all oral statements of their witness -- of these
13 witnesses. And State v. Garcia says, and I'm quoting:
14 Notes taken by prosecutors are not work product. So,
15 frankly, I don't understand why we have to go through this.
16 I've made it clear in my motion, initially, that I was
17 seeking this information in advance of even filing a
18 supplemental declaration.
19 So it seems to me the court has all of the information
20 necessary. Some remedy is absolutely necessary because of
21 these discovery violations. If the court has some
22 alternatives, I'm open to discussing all possibilities. I
23 came back from a vacation to be here today because this is
24 so important to us to move forward. But given the way
25 these witnesses have behaved, I think the court can easily

1 decide that the only fair remedy would be to suppress their
2 testimony and ultimately I think the case should be
3 dismissed.
4 THE COURT: Okay, thank you, Counsel.
5 All right. Well, I've read the memorandum and briefing
6 of both counsel, and as both counsel recall, I heard the
7 motions earlier, back on November 4th, when defense moved
8 for depositions because of the reputed repeated refusal of
9 the material witnesses to sit for a reported interview.
10 This court granted that motion on November 4th.
11 Gleaning from the memorandum that I've reviewed, and
12 hearing the oral testimony here today, shortly thereafter
13 the defense contacted all parties, and November 25th, 2014
14 was scheduled for the depositions. Defense counsel
15 properly issued written notices of the depositions
16 confirming the date and time. Those were provided to all
17 counsel involved in this case, both the prosecuting
18 authority and apparently the witnesses' private --
19 privately-retained counsel.
20 On November 14, 2014, one of the prosecuting attorneys
21 called and asked defense counsel to reschedule the
22 deposition for the afternoon of December 2nd. Now, in the
23 briefing I didn't see any reason for this requested delay.
24 I'm now hearing in oral argument that it was because the
25 witness was in the hospital. As a professional courtesy,

1 defense counsel agreed and rescheduled the deposition. The
2 defense e-mailed amended notices to all parties. According
3 to the briefing and attachments, private counsel for the
4 government witnesses acknowledged receipt of the e-mail and
5 stated she did not need to receive hard copies.
6 Still, on December 2nd, defense counsel received an
7 e-mail notice of unavailability from the private attorney.
8 Included were additional comments that her clients had
9 never received subpoenas for any deposition. Later,
10 according to the briefing, the attorney's assistant wrote
11 to defense counsel that the attorney was not in the office
12 and that the witnesses did not intend to appear at the
13 deposition.
14 Subsequent to this delay, according to the briefing
15 filed, the prosecutor told defense counsel she asked the
16 witnesses' private attorney to consider another date. As
17 of December 9th, neither the prosecutor nor private
18 attorney for the government witnesses responded.
19 Understandably, defense counsel filed a motion to dismiss,
20 based on the material witnesses' continued refusal to sit
21 for a court-ordered deposition. On December 11th, 2014,
22 after the court scheduled this hearing to address defense
23 counsel's motion to dismiss, the prosecutors called defense
24 counsel indicating that the witnesses would now agree to a
25 deposition on December 19th, 2014. That deposition took

1 place.

2 During the deposition, amongst other things, defense
3 counsel asked the first witness if he was using any
4 medication. The witness stated, according to the briefing,
5 that he was. Defense counsel asked him what the medication
6 was. Private counsel interrupted and instructed the
7 witness not to answer. Apparently, according to briefing,
8 the prosecuting attorney remained silent. Defense counsel
9 asked the witness if he was using the medication at the
10 time of the alleged assault. The witness stated he was.
11 Defense counsel asked him what the medication was. Again,
12 private counsel instructed the witness not to answer.
13 Again, according to the briefing, the prosecuting attorney
14 remained silent.

15 These are relevant inquiries of a material witness.
16 Just as it is relevant to know whether a witness is under
17 the influence of intoxicants at the time he or she is
18 testifying in court or at a deposition or at the time he or
19 she is witnessing an event, so is it relevant to know if a
20 witness is under the influence of medication that may or
21 may not contain narcotics, hallucinogens, depressants,
22 sleep aids, et cetera.

23 According to the briefing, the witness also advised
24 defense counsel that he was unable to attend the December
25 2nd deposition because he was in the hospital. Defense

1 counsel asked if the witness was in the hospital related to
2 his claims in this case. The witness stated yes. Private
3 counsel then instructed the witness to not answer any
4 questions regarding his stay at the hospital. Apparently,
5 according to briefing, the prosecuting attorney remained
6 silent as to this line of questioning as well.
7 This, likewise, was a relevant inquiry. If the material
8 witness went to the hospital as a result of the alleged
9 assault or altercation, the doctor's assessment and other
10 physical and mental conditions having to do with this
11 hospital stay are relevant and discoverable.
12 In addition, according to briefing, one of the material
13 witnesses is now saying she was present during the
14 altercation. This is noteworthy and important for purposes
15 of discovery because, according to briefing, this same
16 witness stated to the police and signed a written statement
17 confirming she was not present during the altercation.
18 Further, one of the witnesses is now stating that the
19 defendant slammed his head against a cement wall five to
20 ten times during this event. According to briefing, this
21 witness made no such statement to the police during their
22 investigation.
23 The defendant is now moving to dismiss the charges in
24 this case in the furtherance of justice and due to a
25 violation of her right to effective assistance of counsel

1 and fair due process. The City is resisting the motion,
2 arguing that the deposition occurred as ordered. Further,
3 that this court should not make a ruling concerning the
4 alleged obstructionist efforts of government witnesses
5 until this court has reviewed the transcripts of the
6 deposition. Still, defense counsel mentions in his
7 briefing that he presents some summaries of the deposition
8 for the court as an officer of the court. The prosecuting
9 authority has not denied the validity or substantive
10 language of the defense summaries presented to this court
11 in her briefing. This court will nonetheless delay ruling
12 on defense motions until transcripts are available.
13 In the meantime, however, this court will issue the
14 following remedial orders: The substantial change in
15 observations, medical conditions and/or injuries and the
16 material witnesses' versions of the events herein has now
17 changed the recent private witness interviews between the
18 prosecuting attorney and the two material witnesses from
19 work product to discovery. Consequently, it is an order of
20 this court that all prosecutor notes and recordings, if
21 any, concerning those interviews be turned over to defense
22 counsel by today at 4:30 p.m.
23 Further, a second deposition is hereby ordered to take
24 place this Friday, January 2nd, at 8:30 a.m., here at
25 Kirkland Municipal Court in the Totem Lake Room. My

1 clerical staff will direct all parties to that location.
2 The prosecutors are to be present and assist with the
3 interview.
4 Evidence is often discoverable but may not always be
5 admissible at trial. This is a criminal case involving the
6 defendant's constitutional rights to fair due process,
7 confrontation of witnesses, and effective assistance of
8 counsel. At the deposition this Friday, so long as the
9 inquiries are relevant, the interview should be unfettered.
10 This will include inquiries concerning the witnesses' use
11 of alcohol, drugs or prescribed medicines at the time of
12 the incident, mental health issues, hospital stays that
13 occurred as a result of this criminal case, et cetera. If
14 there are questions and answers appearing in the transcript
15 of this second deposition that the prosecutor feels is
16 inadmissible during trial, they should be highlighted and
17 addressed to the court at the motion hearing currently
18 scheduled for January 6th at 1 p.m.
19 That concludes my ruling.
20 MS. OFFUTT: Thank you, your Honor.
21 MR. MAYBROWN: Thank you, your Honor. I'll step back
22 and try to prepare an order consistent with the court's
23 ruling.
24 (PROCEEDINGS ADJOURNED.)
25 --o0o--

1 **CERTIFICATE**

2

3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

5

6

7

8 I hereby declare under penalty of perjury that the foregoing transcript of proceedings was prepared by me or under my direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my ability;

10

11 That the transcript is, to the best of my ability, a full, true and correct record of the proceedings, including the testimony of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the proceedings;

13

14 That I am neither attorney for, nor a relative or employee of any of the parties to the action; further, that I am not a relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16

17 Dated this 10th day of June, 2015.

18

19 Linda A. Owen

20 Linda A. Owen

21

22

23

24

25

APPENDIX H

FILED
DEC 1 0 2014
KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

COMES NOW the defendant, Hope Stevens, through her attorney Todd Maybrown, and moves pursuant to CrRLJ 4.7 and CrRLJ 8.3 to dismiss this action or for alternative relief because the City's witnesses have refused to be interviewed and/or deposed as evidenced by the Declaration of Todd Maybrown and attachments thereto.

DATED this 9th day of December, 2014.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / ~~email~~ / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElgea and Laney Offatt
Dated: 12/10/2014

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX I

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that on 12-12-14 I sent this document via United States mail, first class, postage prepaid, to the address of the witness indicated below.

Signed by _____, in Kirkland, WA on 12-12-14.

FILED
DEC 15 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: Teresa Obert

In the name of the City of Kirkland, State of Washington, you are required to appear on **December 19, 2014, at 2:30 p.m.**, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 12th day of December, 2014.

Moberly & Roberts, PLLC

By: _____
Assistant Prosecuting Attorney, WSBA # 42446

MOBERLY & ROBERTS, PLLC
13040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that on 12-12-14 I sent this document via United States mail, first class, postage prepaid, to the address of the witness indicated below.

Signed by _____, in Kirkland, WA on 12-12-14

FILED
DEC 15 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: C.O.

In the name of the City of Kirkland, State of Washington, you are required to appear on **December 19, 2014, at 1:00 p.m.**, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 12th day of December, 2014.

Moberly & Roberts, PLLC

By: _____
Assistant Prosecuting Attorney, WSBA # 12406

MOBERLY & ROBERTS, PLLC
12040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

APPENDIX J

FILED
DEC 24 2014
KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 SUPPLEMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case. This declaration is submitted to supplement the Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated. December 9, 2014.

2. On December 11, 2014, after the Court scheduled a hearing on Defendant's Motion to Dismiss, the City's prosecutors notified me that the city's key witnesses, Teresa Obert and C.J.D.O., would agree to appear for depositions on December 19, 2014.

3. These depositions went forward as scheduled. However, as discussed further below, these depositions have not improved the situation in any respect. To the contrary, it is now even more apparent that the defendant is entitled to relief from this Court.

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4. I do not yet have transcripts of these recent depositions, but I have asked the court reporter to expedite the production of these transcripts. Given the current trial schedule, and acting as an officer of this Court, I will do my best to summarize what transpired during these interviews.

Obstructionist Tactics During the Depositions

5. The depositions commenced at approximately 1:10 p.m. on December 19. The first deponent was C.J.D.O. Following introductions and some generalized discussion, I asked C.J.D.O. if he was presently using any medication. C.J.D.O. answered "yes," but his counsel advised him not to tell me what medication he was using. I asked C.J.D.O. if he was using that same medication on the date of the June 21, 2014 incident. Again the witness answered "yes," but his counsel advised him not to tell me what medication he was using.

6. Thereafter, I asked C.J.D.O. why he did not attend the deposition that was scheduled for December 2, 2014. The witness told me he was "in the hospital" at the time. I asked C.J.D.O. if this hospital stay was related to his claims in this case, and he answered "yes." But, once again, C.J.D.O.'s counsel advised him not to answer any questions regarding his stay in this hospital.

7. From the outset, C.J.D.O.'s counsel argued that I was not permitted to ask questions that, in her view, were "outside the scope" of this Court's Order granting the defense Motion for Depositions. I advised the attorney that she was not a party to these proceedings and that the Court did not set any limits on the "scope" of the depositions. I also advised the attorney that it was improper for her to attempt to make relevancy objections or to obstruct the deposition process.

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8. Finally, after about twenty minutes, I went off the record and telephoned the Kirkland Municipal Court in the hope that the Court could be conferenced in to resolve the dispute regarding the witnesses' objections and unwillingness to answer relevant questions. Unfortunately, I was advised that Judge Lambo was not available at that time.

9. Accordingly, I was faced with a dilemma. I could terminate the depositions and attempt to present these issues to the Court at the hearing scheduled for December 30, 2014. Or I could proceed with the depositions even though it was clear that the witnesses (and their attorney) would make it impossible to obtain critical information relating to the claims in the case. I chose to proceed with the depositions under protest.

10. During the remainder of the depositions, the witnesses' attorney and the witnesses refused to answer numerous questions that could assist the defense in preparing the case for trial. For example, the witnesses refused to answer questions regarding: (a) C.J.D.O.'s mental health history, including his recent mental health problems; (b) C.J.D.O.'s history of behavioral problems; (c) C.J.D.O.'s recent 14-day stay at a local hospital; (d) C.J.D.O.'s supposed head injuries; and (e) C.J.D.O.'s statements (and texts) regarding the incident of June 14, 2014.

11. All of this information is material to the defense for several reasons. First, C.J.D.O. and his mother are now claiming that C.J.D.O.'s emotional problems are somehow the result of the incident on June 21, 2014. In fact, during the deposition, C.J.D.O. has claimed that he suffered a "traumatic brain injury" and currently has severe memory difficulties – and that these difficulties were somehow caused by the incident on June 21, 2014. Notwithstanding these claims, C.J.D.O. and his mother refused to answer questions relating to the basis for these current contentions and claims.

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12. The City attorneys made no comments during the entire deposition process. Thus, they offered no assistance and sat silent while the witnesses repeatedly blocked my efforts to obtain information that was obviously relevant to the claims in this case.

The Witnesses' Strategy of Intimidation

13. Although the City's witnesses refused to answer questions that were clearly relevant to the claims in this case, these same witnesses frequently interjected irrelevant and unsubstantiated allegations regarding Ms. Stevens. Most all of these scurrilous allegations related to events that occurred long before the alleged incident, and they would never be admissible at any criminal trial. Thus, I will not deign to repeat them here.

14. Suffice it to say, as the depositions progressed, it became clear that these witnesses arrived at the depositions with an agenda. The witnesses refused to answer any questions that could be used as impeachment at a trial. At the same time, Ms. Obert repeatedly made malicious claims about Ms. Stevens.

15. It is my firm opinion that Ms. Obert made a calculated decision to interject this information during the deposition as a form of intimidation. I believe that Ms. Obert presented this testimony in an attempt to frighten Ms. Stevens from proceeding to trial. In essence, Ms. Obert hoped to send a clear message that she would use these proceedings as a forum to damage Ms. Stevens' reputation.

The Witnesses' Newly-Contrived Claims

16. The City's key witnesses, Ms. Obert and C.J.D.O., provided written statements to the police shortly after the incident. Both witnesses carefully reviewed their respective

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statements and made substantive changes to ensure their accuracy. Then, after completing their review, each witness signed their statement under penalty of perjury.[1]

17. For the last five months, the defense assumed that the City would proceed on the bases of these allegations. As it now turns out, defense counsel was misinformed, for both of these witnesses are now claiming that their statements to the police were inaccurate and incomplete.

18. It is unclear whether the City prosecutors were operating under this same misimpression. Although these prosecutors have interviewed the witnesses on at least one occasion, they have steadfastly refused to provide any discovery regarding the interviews.

19. To my surprise, both C.J.D.O. and Ms. Obert are now providing radically different statements regarding the alleged incident. I will not document each change in this pleading – as such a process would take numerous pages. Instead, I will summarize a few of the most significant changes for the Court's consideration.

20. First, it is noteworthy that C.J.D.O. and Ms. Obert have changed their statements so that they now closely mirror each other.[2] For example, on June 21, 2014, Ms. Obert told the police that she was in the bathroom and did not know what happened when the altercation between C.J.D.O. and Ms. Stevens commenced. But, Ms. Obert is now claiming that she was present when the altercation commenced.

21. Second, both C.J.D.O. and his mother are now claiming that C.J.D.O. suffered a "traumatic brain injury" during the incident on June 21, 2014. This is a fantastical claim, but

---

[1] Ms. Obert provided a follow-up statement to Kirkland police officers on June 22, 2014.

[2] In fact, during the depositions these witnesses repeatedly answered "we" when asked about their own actions during the evening in question.

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both C.J.D.O. and his mother now contend that Ms. Stevens slammed C.J.D.O.'s head against the concrete 5-10 times at the time of the incident. Neither witness made any similar claim when they spoke to police officers on June 21, 2014. Nor did C.J.D.O. make such a claim when he was seen by a doctor soon after the incident. Notwithstanding this contention, both C.J.D.O. and his mother have refused to provide any details regarding this supposed "new" diagnosis.

22. Third, both C.J.D.O. and his mother are now claiming that Ms. Stevens pushed Ms. Obert down a flight of stairs during the incident. Neither witness made any similar claim when they spoke to police officers on June 21, 2014.

23. It is the defense position that these witnesses have collaborated and concocted these new claims in an effort to respond to the defense claims in this litigation. But, as discussed further below, the prosecution has blocked the defendant's attempts to obtain information pertinent to these matters.

The Prosecutors Continue to Withhold Crucial Evidence

24. As previously noted, Ms. Obert and C.J.D.O. agreed to a voluntary meeting with the prosecutors on October 22, 2014. On December 19, each witness testified that these meetings lasted between 90-120 minutes and that at least one prosecutor was taking notes during these interviews. Yet, notwithstanding the clear dictates of CrRLJ 4.7(a)(1)(i), the prosecutors have refused to provide discovery regarding any statements of these witnesses. This failing has severely prejudiced the defendant's effort to prepare for trial

25. Apparently, the prosecutors would like to claim that these witness statements are protected by work product. This is not the case. See *State v. Garcia*, 45 Wn.App. 132, 147 (1986).

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26. Moreover, in light of the witnesses' newly-minted testimony, it is now clear that these statements are discoverable pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The United States Supreme Court has made clear that the prosecutors are required to produce all evidence that could be used for impeachment purposes. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972).

27. The prosecution should have produced these statements well in advance of the depositions. Nevertheless, once again, I have formally requested production of these statements. *See Appendix A*. There is now no doubt that these statements are discoverable pursuant to *Brady*. On the one hand, the defense is entitled to know if the witnesses have only recently changed their testimony regarding the June 21 events. On the other hand, the defense is entitled to know if the witnesses had already provided revised statements when they met with the prosecutors on October 22, 2014 – and how they attempted to justify these inconsistent statements in light of their written statements following the incident.

28. It is clear that the City has failed to comply with the dictates of CrRLJ. 4.7 and due process principles.

The City's Witnesses Have Destroyed Key Items of Evidence

29. The defense is claiming that C.J.D.O. grabbed a broomstick handle and repeatedly hit Ms. Stevens over the head with the stick. Curiously, although Ms. Stevens told Kirkland Police officers that she was the "victim" and that C.J.D.O. had hit her with a stick, the police investigators never took custody of this item of evidence following the incident. In fact, the police never even took a photograph of this evidence.

30. On December 19, 2014, C.J.D.O. testified that the stick he had used in this altercation has recently been destroyed. Apparently, Ms. Obert and C.J.D.O. decided to burn

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the stick before it could be presented as evidence in this case. Now that the stick has been destroyed, C.J.D.O. is attempting to downplay the violent nature of his attack by claiming that it was not a very big stick.

31. In addition, the police reports indicate that C.J.D.O. may have used a gun at some point during the incident. The police investigators also claim that, soon after the incident, they asked C.J.D.O. to show them the gun he had used, but C.J.D.O. claimed he couldn't find it.

32. On December 19, 2014, C.J.D.O. testified that the gun has now been destroyed. Apparently, Ms. Oberi and C.J.D.O. decided to hide or destroy the gun before it could be presented as evidence in this case.

33. Once again, these witnesses have taken affirmative steps to thwart Ms. Steven's attempts to present a defense in this case.

Conclusions

34. The prosecutors and the City's key witnesses have made it virtually impossible for the defense to prepare for trial. On December 19, 2014, less than 30 days before trial is scheduled to commence, the City's witnesses finally agreed to appear for court-ordered depositions. Yet, even during the deposition process, these witnesses have refused to provide information that is surely relevant to the defense in this case.

35. While much of this misconduct was caused by the actions of the City's key witnesses, the City's prosecutors have only exacerbated matters by refusing to disclose necessary discovery information. Moreover, because of the lax nature of the City's investigation, it is now clear that the City's witnesses were permitted to destroy critical items of evidence.

36. Given all of these factors, the defense has been deprived of any fair opportunity to defend this case at trial. It is clear that the defense is entitled to additional discovery –

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including a deposition process in which the City's key witnesses answer all pertinent questions, discovery regarding C.J.D.O.'s recent medical claims, disclosure of all witness statements, etc. Yet, given the delays that have been caused by the City and the City's witnesses, there is no reasonable possibility that this information can be available for the scheduled trial date.

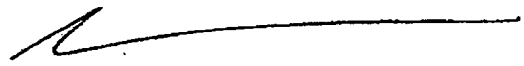
37. This Court should not force the defense to continue these matters a second time. Rather, consistent with CrRLJ 4.7 and 8.3, this case should be dismissed. Such a dismissal is consistent with the interests of justice.

38. At a minimum, and in the alternative, this Court should conclude that Teresa Obert and C.J.D.O. will not be permitted to testify at any trial of these matters.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 23rd day of November, 2014.

ALLEN, HANSEN & MAYBROWN, P.S.



Todd Maybrown, WSBA #18557
Attorney for Defendant

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APPENDIX K

12/30
1 pm
(3)

FILED
DEC 29 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff,	)	NO. 38384
vs.	)	
STEVENS, HOPE A. Defendant.	)	CITY'S ADDENDUM TO WITNESS LIST

In addition to the witnesses identified in the pre-trial order, the City intends to call the following individuals and a summary of their intended testimony:

1. Dr. Jing Jin: Immediate Clinic Rose Hill 13131 NE 85th St. Kirkland, WA. 425-702-8002. Will testify to her interactions, observations, and medical diagnosis of Teresa Obert and C.O. on June 21, 2014.
2. Lindsay Taylor, PA-C: Immediate Clinic Rose Hill. (See contact information above) Will testify to her interactions, and observations of Teresa Obert and C.O. on June 21, 2014.
3. Jeff Obert: Will testify to his observations on the morning of June 21, 2014 and to the type of equipment he uses for work. He will testify to the type of broomstick that C.O. grabbed that morning.
4. Cori Parks: Will testify to her observations of Ms. Stevens, Teresa Obert, and C.O. demeanors prior to the assaults.

Moberly & Roberts, PLLC
12040 98th Ave. NE Suite 101
Kirkland, Washington 98034
Tel: (425) 284-2362
Fax: (425) 284-1205

DATED this 29th day of December, 2014.

Respectfully submitted,

Moberly & Roberts, PLLC

By _____
Tamara L. McElyea, WSBA #42466
Assistant Prosecuting Attorney

_____
Lacey Offutt, WSBA #45655
Assistant Prosecuting Attorney

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APPENDIX L

FILED

JAN 06 2015

KIRKLAND
MUNICIPAL COURT

Hon. Michael Lambo
Jan. 6, 2015
1:00 p.m.

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 SECOND SUPPLEMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case. This declaration is submitted to further supplement the Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 9, 2014, and the Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 23, 2014. This declaration is also submitted in support of the Defendant's Renewed Motion to Dismiss dated December 31, 2014.

2. On December 30, 2014, the parties appeared before this Court for hearing on Defendant's Motion to Dismiss. After hearing argument, the Court deferred its ruling on Defendant's Motion.

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3. Nevertheless, in light of the very significant difficulties that the defense has faced over the last several months, the Court ordered certain "remedial" relief. First, the Court directed the City prosecutors to disclose all notes and recordings from the interviews with the City's key witnesses, Teresa Obert and C.O. Second, the Court ordered these witnesses to appear for a second deposition at the Kirkland Justice Center on January 2, 2015.

The City's Notes Include Compelling Impeachment Evidence

4. On December 30, 2014, the City prosecutors disclosed approximately 20 pages of handwritten notes as directed by the Court. These notes included several pages of notes that purported to document the City prosecutors' interviews of Ms. Obert and C.O. on October 24, 2014.

5. These notes include a considerable amount of impeachment evidence that only further undermines the claims of the City's key witnesses in this action. By way of example, the witnesses are contending that Ms. Stevens was intoxicated at the time of the June 21 incident and that she had been drinking (and was presumably intoxicated) before she entered the Obert home. This contention is false and it is belied by the notes of the City prosecutors on October 24, 2014. A note from the interview of C.O. includes the following information: "Tell she had been drinking? No, tired and had been crying."

6. I have identified many other notes that include similar inconsistencies and I planned to question the City's witnesses regarding these matters during the January 2 depositions. I feel strongly that the defense should have received all notes from the interviews of October 24, 2014 soon after the interviews were completed. Such information was clearly discoverable under CrRLJ 4.7. Moreover, and perhaps more importantly, disclosure of this information was compelled by the Due Process Clause of the United States Constitution.

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The City's Witnesses Did Not Appear at the Court-Ordered Depositions

7. Following the December 30 hearing, I made considerable efforts to prepare for the January 2 depositions. First, I arranged for a court reporter to appear at the second depositions. Second, I changed travel plans that otherwised required me to be present in Spokane on January 2. Third, I reviewed all available discovery information and prepared questions for the second depositions.

8. On January 2, 2015, I appeared at the Kirkland Justice Center at approximately 8:25 a.m. to conduct these second depositions. The City's prosecutors and a court reporter were also present. Neither Teresa Obert nor C.O. appeared for their second depositions.

9. It is my firm belief that Teresa Obert and C.O. had notice of this Court's order of December 30, 2014 and the directive for each of them to appear for a second deposition on January 2, 2015. I understand that the City's prosecutors provided several forms of notice to these witnesses following the December 30 hearing. Moreover, this Court's December 30 "remedial" ruling was widely publicized in the national and local news media. Based on the witnesses' previous statements to the prosecutors and their answers during the first depositions, it is clear that the City's witnesses have been very closely following all news coverage regarding this case.[1] Thus, it is the defense position that the City's key witnesses simply refused to abide by this Court's order of December 30 and that they willfully failed to appear for their second depositions.

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[1] In fact, during the deposition of December 19, 2014, Ms. Obert testified that she was planning to sue certain news media outlets based on their reporting of the case.

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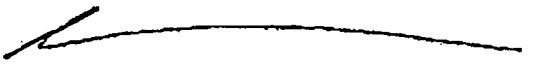
10. Given all of these factors, the defense has been deprived of any fair opportunity to defend this case at trial. The case against Hope Stevens should be dismissed with prejudice.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 5th day of January, 2015.

ALLEN, HANSEN & MAYBROWN, P.S.



Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by ~~mail~~ / email / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McClyea and Lacey Offutt

Dated: 1/5/2015

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APPENDIX M

1
2
3 KIRKLAND MUNICIPAL COURT
4
5 CITY OF KIRKLAND,)
6 Plaintiff,) No. 38384
7 vs.)
8 HOPE A. STEVENS,)
9 Defendant.)
10
11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 JANUARY 6, 2015
15
16 APPEARANCES:
17
18 For the City: TAMMY McELYEA
19 LACEY N. OFFUTT
Attorney at Law
20 For the Defendant: TODD MAYBROWN
Attorney at Law
21
22 Before: THE HONORABLE MICHAEL J. LAMBO
23
Prepared by: Linda A. Owen
24 425-466-8543
25

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1 PROCEEDINGS

2 --o0o--

3

4 THE COURT: All right, this is the 1 o'clock motions
5 calendar. We have a number of items on the calendar. Why
6 don't we start off with the Stevens matter, Kirkland versus
7 Hope Stevens, cause 38384.
8 MR. MAYBROWN: Good afternoon, your Honor.
9 THE COURT: Good afternoon, Counsel.
10 MR. MAYBROWN: Your Honor, I won't rehash all that's
11 been before the court. I'm sure the court recalls, because
12 we were here just a few days ago for a hearing on our
13 motion to dismiss.
14 THE COURT: Yes.
15 MR. MAYBROWN: And at the time the court deferred ruling
16 and provided what I think was termed remedial relief, and
17 my reading was that the court was hoping that the City
18 could get this case back in shape, that we could move
19 forward, and give the defense the proper information so we
20 would obtain due process and go forward with the trial as
21 scheduled. The best laid plans sometimes do not work out.
22 The court scheduled depositions here at the Justice Center
23 for January 2nd, 2015. The court also ordered the City to
24 turn over their notes.
25 I should note for the court that yesterday I obtained

1 transcripts from the first depositions. I have them with
2 me here today. I've not had sufficient time to redact all
3 of the names and information that would need to be redacted
4 to file them, because of the schedule, but if the court
5 wishes to see them, I could provide them to the court, and
6 we should discuss a mechanism. But, frankly, I think that
7 given what happened after the court's ruling, I don't
8 believe the court needs to review them now, although I'll
9 leave that to your Honor.
10 The depositions were scheduled for January 2nd, 2015.
11 We did everything necessary to make that happen. I
12 obtained a court reporter, I canceled other appearances
13 that I had in Spokane for that day, and I did all the
14 review and prepared all the questions that I would need to
15 do at that time.
16 I understand that the City personally notified the
17 witnesses that they needed to be here and the court had
18 directed them to be here. In paragraph 22 of Mr. Offutt's
19 declaration, she confirms that they had actual notice of
20 the court's ruling. She spoke with Teresa Obert and told
21 her what the court had ruled, and what Ms. Obert said, and
22 I'm not paraphrasing here: I don't know if we can make
23 that, as if it was an invitation and they could come if
24 they chose to, and they chose not to.
25 I had no idea that there was ever any hesitation. I

1 came here with the understanding that we would have
2 depositions. We sat there for more than half an hour.
3 They just did not show up. And it was a willful violation
4 of this court's order. There's nothing more that you can
5 say about it. There's no excuse. There's no
6 justification. And we had no notice, and since then we've
7 heard nothing more.
8 I should point out, and I know it's not -- it's not
9 perfectly analogous, but Ms. Stevens sits here, she's made,
10 of course, all court appearances and she's supposed to be
11 with the U.S. National Soccer Team training in California
12 today, but she made arrangements, she got permissions to be
13 here for this proceeding, as that was what was a priority
14 and was necessary, and she's done that and she will
15 continue do that. But obviously this is a difficult
16 situation for the defense, and that's why we've been trying
17 to move the case as quickly and as expeditiously as we
18 could.
19 I also want to talk about the notes that we received,
20 because that creates a further problem. I've told the
21 court that we should have seen them before the depositions.
22 It's now absolutely clear that these notes include
23 impeachment information and important contradictory
24 information that we had never seen before the depositions.
25 And I should point out that before these interviews took

1 place, I specifically asked the prosecutors how they
2 planned to document these interviews. I was told I could
3 not be present, but I assumed that they would document
4 them. Now what we find out is they chose not to document
5 them. That was a conscious choice not to properly document
6 them through a recording or some other means. We got the
7 notes. We believe the notes have important impeachment
8 information. Of course, I need to talk to the witnesses,
9 but they're refusing to answer questions.
10 And I think Ms. Offutt tried to suggest that the note
11 might mean something different than the plain words of one
12 of the notes that I pointed out to the court. That doesn't
13 make any sense, but of course that's a concern that they've
14 created, and it's impossible for us to follow up on,
15 because the witnesses did not appear as the court ordered.
16 In addition to these problems, I think I filed as soon
17 as possible after I got back to my office, a renewed
18 motion, because we got four additional witnesses after we
19 were in court for the hearing, and two of the witnesses are
20 lay witnesses, one of them who was uncooperative with the
21 police and we've never seen any statement of. The other
22 one is a new name that we just discovered or heard about
23 recently.
24 The second set of witnesses are two medical experts. We
25 don't have CVs. We don't have background information. We

1 don't have anything more about them. And at the last
2 proceeding, the prosecutors notified the court that they
3 don't have medical releases. So even if I wanted to
4 interview these witnesses before trial, without releases,
5 how could I? And that goes right to the heart of the
6 problem here. The City would like to use medical
7 information. It's conceded, basically, that medical
8 information is relevant to the proceedings. The witnesses
9 said that medical information is relevant, but they've
10 flatly refused to answer appropriate questions about --
11 that are relevant to the case, and in the end will
12 contradict all of the claims that they would like to make
13 at trial.
14 So it seems to me that they want it both ways. They
15 want the court to move forward with the proceeding, but
16 only if it's on their terms. They don't want to answer
17 questions that they think might hurt them at trial or might
18 undermine their testimony. I understand that the City
19 doesn't have absolute control over these witnesses, but
20 given the court's ruling and given the fact that these
21 witnesses basically thumb their nose at the court's ruling,
22 and we did all that we could possibly do to come to these
23 depositions, you would think that we would have another
24 date, we would have an explanation, we would have some
25 suggestion of how to go forward. We have none of that.

1 So it seems to me that the court at this point really
2 has no choice. The witnesses have made it very clear that
3 they will not follow orders of this court, that they could
4 assist the defense in preparing the case for trial, and
5 without that information, we can't fairly defend the case.
6 We would be prepared for trial in mid-January, if all of
7 this hadn't been created by the misconduct of these
8 witnesses, and I suppose the witnesses could have claimed
9 that they -- their lawyer wasn't available, but from what I
10 understand, Ms. Gaston was back in town on January 2nd.
11 She -- I was told she came back on January 1st. She works
12 at Perkins Coie. It's I think the largest law firm in the
13 City of Seattle. They have more lawyers, paralegals and
14 assistants than any other law firm I've ever been in in
15 Seattle. And to this point, it's January 6th, we have no
16 justification except for willfulness that they didn't
17 appear.
18 Your Honor, unless the court has more questions, I just
19 don't see how we could fairly get this case ready for
20 trial, no matter how hard we've tried, because of the
21 misconduct of the witnesses and the mismanagement of the
22 City.
23 THE COURT: Okay, thank you, Mr. Maybrown.
24 Ms. McElyea or Ms. Offutt, I don't know who's going to
25 make their presentation, but --

1 MS. MCELYEA: Combination of both, your Honor.
2 THE COURT: Go ahead, I'll hear from you.
3 MS. MCELYEA: Ms. Offutt first. Did you want to
4 address --
5 MS. OFFUTT: (Inaudible).
6 MS. MCELYEA: Okay. Well, your Honor, I'll -- Tammy
7 McElyea, one of the prosecutors for the City. I'll start
8 off by -- we were not -- we're going on the premise of a
9 supplemental motion that Mr. Maybrown provided to us on
10 January 2nd. We were never served with the actual brief
11 that he filed with the court. We're under the assumption
12 it's the same one that we got on January 2nd, so we'll
13 start off with that.
14 In regards to the additional witnesses, the four
15 individuals that we had asked, that we had placed on that
16 list, one of them had been -- was already in the police
17 report. Mr. Obert was already listed in the police report,
18 so it should be no surprise to the defense that the City
19 might call the individual. Up to the point of the
20 depositions, we had not placed him on the list. Some
21 information that came out from those depositions in regards
22 to the actual broomstick was part of his work tools and the
23 fact that we no longer have that information, it made sense
24 to the City that if somebody could explain what exactly the
25 dimensions or the length or the status of that particular

1 piece of evidence, it would be the individual who uses them
2 on a daily basis. So that was the reasoning that the City
3 added Mr. Obert to the witness list at that time. And as I
4 said, that came from the information that was gleaned out
5 of the depositions from December 19th.
6 In regards to Corey Park, that was also a name that had
7 come out in regards that she was there during the incident
8 prior to the actual alleged assaults that had occurred.
9 She could testify to the demeanor of the defendant as well
10 as the demeanor of other individuals. Once -- after the
11 depositions it appeared that that person could provide the
12 trier of fact with some additional information that wasn't
13 provided elsewhere, more independent individual who wasn't
14 a party to what occurred after the fact but certainly could
15 glean some light on the situation at hand.
16 In regards to the two medical individuals -- and when
17 this case first came about, there was a medical release
18 that was signed by both of the witnesses in this case.
19 They saw a doctor on -- later on -- this happened in the
20 early morning hours. They saw the individuals later on
21 that day. At some point in the process, those medical
22 releases were rescinded, so we no longer had the ability to
23 obtain those. We did get a copy of those at the end of
24 November from the witnesses' attorney with the idea that
25 they could be used in our trial, provided a copy of those

1 to defense. Within those medical reports, both of these
2 individuals were listed on there, contact information was
3 on there, both a phone number as well as an address, and
4 the -- the individuals -- obviously there was enough time,
5 and the City provided a copy of those medical reports on
6 December 3rd. So, again, it should be no surprise to
7 defense that the City may be calling them.
8 THE COURT: So let me ask you --
9 MS. MCELYEA: Okay.
10 THE COURT: -- to make sure I'm following you correctly.
11 So at the end of November, the rescinded medical releases
12 were reinstated, and then --
13 MS. MCELYEA: For that particular day, yes, your Honor.
14 THE COURT: And so it was at that time that you endorsed
15 the doctors as government witnesses?
16 MS. MCELYEA: Yes, your Honor.
17 THE COURT: And you provided that information to defense
18 counsel at that time?
19 MS. MCELYEA: Correct, on -- I believe we sent -- there
20 was a deposition that was supposed to be scheduled. I was
21 going to take a copy for Mr. Maybrown on -- I think at the
22 end of November. That didn't occur, so then in the next
23 couple of days I was able -- after the holiday I was able
24 to send him a copy of that. I believe it was December 3rd.
25 THE COURT: So prior to the December 19th deposition, it

1 was your intent to call the doctor to testify in your case
2 in chief?
3 MS. MCELYEA: Yes.
4 THE COURT: All right. Go ahead, continue.
5 MS. MCELYEA: Thank you, your Honor. In regards to --
6 in regards to timing wise, the rules under the discovery
7 rules, under 4.7 for prosecutors, there isn't a specific
8 time frame to give defense the witness list. Even though
9 in that same -- in that same rule there for the defense
10 there's a specific rule that says before 14 days prior to
11 the trial they should provide the City or the State with
12 any witnesses that they're going to have, addresses,
13 testimony, that type of thing. So the City was going on
14 that time frame. We sent this well before 14 days prior to
15 this trial, and so if there was some type of issue in
16 regards to that, the rules were clear. The case law that
17 Mr. Maybrown cited in his -- in his brief, in his
18 supplemental brief, focused on cases where the prosecution
19 either gave additional witnesses the day before the trial,
20 the day of the trial, mid trial.
21 That is certainly not the situation that we have here.
22 We've given this list of individuals well before the
23 14-days expectation. Mr. Maybrown also provided us with a
24 expert doctor testimony on December 15th. So everybody's
25 been throwing now witnesses out there. We believe that

1 based on the fact that this was given well before, and the
2 limited testimony of at least the two civilian witnesses
3 should not be a burden in this case.
4 In regards to there was -- in regards to the medical
5 releases, there seems to be some confusion about that. We
6 do not have any medical release for the information that
7 Mr. Maybrown was wanting the second deposition for. We
8 have no medical release for those. We have no medical
9 reports from that particular thing.
10 The medical reports that we provided to defense counsel
11 were from the June 21st, when this incident first occurred.
12 That was the original medical release that ultimately was
13 rescinded by the witnesses, and then ultimately they took
14 that back and did provide us with those medical reports,
15 which we did provide to the defense counsel.
16 So the idea that that that's like a blanket medical
17 release is incorrect. The medical release was specifically
18 for that immediate care clinic, which is the reports that
19 we provided.
20 MS. MCELYEA: Do you want to do your part?
21 MS. OFFUTT: Sure.
22 Your Honor, I'd like to take just a moment to clarify
23 the timeline that seems to have been a matter of some
24 confusion when we were last here.
25 Mr. Maybrown indicated that he had contacted Ms. McElyea

1 and myself via e-mail about an original date of November, I
2 believe it was 24th or 25th, and it was sometime later that
3 I responded that we would not be available. Well,
4 Ms. McElyea and I at that time were in court, or were
5 scheduled to be in court on the date that Mr. Maybrown had
6 originally set those depositions for, and therefore
7 obviously were not available to be there. That was the
8 reason that Mr. Maybrown agreed to change the date of the
9 deposition to December 2nd. And I will clarify that I did
10 make it quite clear to Mr. Maybrown that the reason that
11 the City did not respond immediately as to the timing was
12 because we were trying to coordinate between five people
13 with both Ms. McElyea and myself being in and out of court.
14 We were trying to coordinate not only amongst ourselves but
15 two witnesses and their private attorney, Ms. Mary Gaston.
16 We've already hashed out the December 2nd date, your
17 Honor. And I will note for the record, however, that prior
18 to the December 2nd date, Mr. Maybrown primarily contacted
19 Ms. Gaston in order to coordinate dates. It wasn't until
20 after the December 2nd date where Ms. Gaston indicated that
21 she and her clients would not be available for the December
22 2nd deposition, that Mr. Maybrown began really contacting
23 the City primarily to coordinate schedules and such, which
24 made our job understandably a little more difficult.
25 There was also some discussion of the prosecutors'

1 silence during the December 19th depositions. I'll note
2 that in the City's response brief filed just this morning,
3 there are discovery rules that prevent the City and the
4 City's attorneys from interfering with an investigation,
5 and, in fact, there was at least one instance where
6 Mr. Maybrown instructed us not to speak at a previous
7 interview with one of the officers.
8 The witnesses have their own attorney, and their
9 attorney was there for the purpose of making sure that the
10 witnesses' legal rights were protected, and that's exactly
11 what she did. She objected when she felt that it was
12 necessary, and it wasn't the province of the prosecutor to
13 interfere with those rights as she was instructing her own
14 clients.
15 I'd like to address the prosecutor's notes that
16 Mr. Maybrown indicated were actually given on -- they were
17 faxed to his office approximately an hour before the
18 court's deadline of 4:30 on the 30th. It's the City's
19 position that -- still that these are work product.
20 However, they have been deemed to be discovery --
21 THE COURT: Let's move -- let's move past that. I've
22 ruled on that, Counsel.
23 MS. OFFUTT: Thank you, your Honor. I would like to --
24 Mr. Maybrown addressed some of the notes that I myself took
25 on October 24th. What he's done is he's cherry-picked one

1 line and then misinterpreted it. It's the City's position
2 that this is precisely why these were work product. I
3 understand your Honor has already ruled on it. I would
4 simply like to point out, though, that it's naturally going
5 to cause some confusion when these notes were intended for,
6 truthfully, my eyes only as a memory jot, and that the
7 facts of the case and any impeachable material that
8 Mr. Maybrown thinks he has uncovered in those notes is the
9 proper province of the jury.
10 Finally, your Honor, I will simply note that the
11 witnesses have been cooperative with Ms. McElyea and I,
12 They've been cooperative with the police investigation, and
13 what Mr. Maybrown claims is obstruction tactics by the
14 witnesses is no more than them simply making sure that
15 their own legal rights have not been undermined, and they
16 shouldn't be penalized for doing so.
17 MS. MCELYEA: Your Honor, the final piece that we would
18 like to address is part of the reason or part -- one of the
19 points that case law is clear about in regards to the
20 defense asking the court to dismiss this case under 8.3,
21 that there needs to be prejudice shown for a fair trial.
22 Mr. Maybrown has been given the opportunity to interview
23 the witnesses, maybe not to his satisfaction or in his eyes
24 to glean enough information of what he wanted, but that's
25 not what the law requires of the City. The law requires

1 that the City produce the witnesses, allow them to be
2 interviewed, which is exactly what the City has done at
3 this point. This isn't -- anything beyond that is outside
4 of the City's control.
5 As far as the second deposition goes, this was based on
6 the defense's speculation that there was more evidence that
7 hasn't been revealed or maybe something that hasn't been,
8 you know, revealed by forcing them to talk about privileged
9 information. During the initial depositions on the 19th,
10 both private counsel and the witnesses themselves objected
11 to the questions in regards to talking about the privilege,
12 doctor privilege -- doctor-patient privileged information,
13 and they didn't want to talk about those particular
14 records.
15 Mr. Maybrown has now told us that the transcripts are
16 available. Up to this point they have not been available
17 to either the court or the City, and in order for the court
18 to get a full picture of the questions that were asked in
19 regards to those issues and what the answers were, there
20 isn't a -- there isn't a full record here, and so the
21 defense is asking the court to make a ruling on a very
22 limited and basically the -- both counsel's limited
23 recollection of events, which is an extraordinary ruling.
24 Case law is very clear that to dismiss a case under 8.3,
25 it's an extraordinary ruling and should be used very

1 narrowly.
2 Under State v. Mines, which is a Division I case, the
3 court found that defense counsel have an obligation to
4 ferret out all the relevant evidence, material and
5 favorable, to a defendant, but that may not be performed --
6 that duty may not be performed by breaching a
7 physician-patient privilege, and that's exactly what he's
8 asking the court to force these witnesses to do.
9 And in closing, basically this case doesn't contain
10 complicated facts. This isn't a murder trial. This isn't
11 a theft conspiracy trial where there's a whole lot of
12 twists and turns. The facts are very straightforward. The
13 facts of that night is what we're here to discuss or to
14 determine, not what may or may not happen several months
15 after the fact, and really it comes down to this is a --
16 these are facts that go before the trier of fact to
17 determine the credibility of these witnesses and the facts,
18 find what's credible and find what's not. Everything else
19 is just muddying the waters at this point in this process.
20 Defense counsel makes several references in his brief
21 that the City is not prepared for trial and that there was
22 an issue in there in regards to there's no just cause for
23 continuance. Not in the last two months has the City ever
24 suggested or asked the court for a continuance or suggested
25 to defense counsel that we are not ready for court -- for

1 trial. We are ready for trial, and at this point we are
2 asking that the -- that the court not dismiss this matter.
3 THE COURT: Okay, anything further?
4 MR. MAYBROWN: Your Honor, I think absence is somehow a
5 greater proof than argument. They have made no mention
6 that anything that's happened since these witnesses refused
7 to follow this court's order on January 2nd, seems clear
8 from their silence that these witnesses have decided that
9 they're not going to abide by this court's rulings, and at
10 this point the court has every reason to make a finding
11 that they've willfully and intentionally refused to abide
12 by the court's rulings.
13 This fields like a motion for reconsideration, although
14 the City has not filed a motion for reconsideration, and it
15 wouldn't be proper because the court made what I considered
16 to be an appropriate ruling, a remedial ruling, given the
17 circumstances we faced.
18 You can see how unfair this matter is by just focusing
19 on one particular issue, and that's the medical issue.
20 This is the first I've learned that the way they got the
21 medical records is that counsel for these witnesses
22 selectively chose to give them some medical records, even
23 though there was no medical release. As the court probably
24 would understand, if I tried to contact those doctors and
25 interview them without a release, they would tell me to

1 take a hike. They would not talk to me, and I cannot
2 interview them now even, but the City has told you that
3 back in November they knew that they were going to call
4 these witnesses and that they had endorsed them, when they
5 didn't endorse them until December 30th.
6 But even today I could not question them about these
7 matters, and it's especially unfair because during the
8 depositions I asked very appropriate questions, what
9 medications were you on on January 21st? Are you on
10 medications now? Have you -- what was this
11 hospitalization? Did it have to do with this incident?
12 Yes. Did -- I could go on and on, but I don't want to
13 repeat myself. But they want to -- they want to have it
14 both ways. They want to present what limited medical
15 information they think might help them, even though it's
16 not true and perhaps would be unfair to do that, but they
17 want us to have no opportunity to examine or follow through
18 and get additional information, and that can't be what's
19 expected by the rules.
20 THE COURT: Were you aware of the medical professionals
21 that were going to be called as government witnesses?
22 MR. MAYBROWN: I wasn't. I thought that I got that
23 information as impeachment, because I didn't know how they
24 got it. I was going to ask about it, but I didn't know how
25 the City even obtained it. I got in the mail I think an

1 additional disclosure which had, I think, three or four
2 pages of medical records, and I assumed -- I assumed that
3 the attorney had provided it, but I never saw a release, I
4 didn't know how, and I was planning to ask questions of the
5 witnesses about the medical issues, but I was told over and
6 over again irrelevant, none of your business, you shouldn't
7 be asking those questions, whenever I asked about medical
8 information.
9 THE COURT: Plaintiff's counsel indicates that they
10 advised you at the end of November they were calling this
11 Dr. Jing Jen and endorsing her as a government witness.
12 Were you provided that information at the end of November?
13 MR. MAYBROWN: I was not. I should say in fairness, I
14 did get the records, and the records were typed out. And I
15 can show them to the court, they're very -- there are just
16 a few records. But I never got the names of the witnesses,
17 and I suppose I could have looked through those records and
18 tried to see who the medical providers were, but I didn't
19 have any context to it, except for they just came to me in
20 the mail.
21 And in contrast, when we were last in the court for a
22 pretrial, I listed our medical witness, Dr. Herring, who's
23 an expert on -- a national expert regarding concussions,
24 and since then I've provided his CV, I've provided medical
25 reports, and I provided additional information, and that's

1 what they received subsequent to us endorsing him as we --
2 as we did at the pretrial hearing. We haven't listed or
3 identified anybody new.
4 But think about what's -- what we have to do here. They
5 expect us to do these depositions, although the witnesses
6 won't respond and they won't appear. We would -- how are
7 we going to get the records that we need? How are we going
8 to interview these other witnesses who have just now been
9 named to us? And the reason I said way back when that we
10 needed to have these depositions in November was because I
11 knew that they -- that they, meaning the witnesses, were
12 going to be difficult and they were going to ultimately try
13 to jam us to make it impossible for us to prepare for
14 impeachment for trial, and that's exactly what happened,
15 totally outside of our control.
16 When the City's prosecutors told me they couldn't be
17 available on a certain day, I said as a courtesy I'll
18 change it, but time is of the essence. I've been saying
19 that over and over and over again. And the issue about
20 just cause is that we think it would be totally unfair to
21 require us to ask for a continuance so we can chase down
22 all this additional information. I mean what's the court
23 to do? Arrest these folks and force them to come to
24 depositions? That's -- that's not what we're seeking. If
25 they refuse to come when they're notified of a court order,

1 what more can the court do?
2 So it seems to me at this point that we have been so
3 badly prejudiced because we can't respond to the
4 information -- I provided declarations to show some of the
5 impeachment. And Ms. Offutt says that the note is somehow
6 ambiguous. It says: Tell she had been drinking, question
7 mark? No. Tired and had been crying. What's to
8 misinterpret? The witness told her no when she asked if
9 he -- he could tell whether she had been drinking. And
10 that's exactly the information we needed to know, because
11 that's been our position all along, that Ms. Solo --
12 Ms. Stevens wasn't intoxicated, she was concussed when she
13 was hit over the head with a stick.
14 So it seems to me that at this point we've done
15 everything humanly possible, moved heaven and earth to get
16 this case prepared for trial, and we've been defeated at
17 every turn.
18 THE COURT: All right, anything further?
19 MS. OFFUTT: Your Honor, Mr. Maybrown has mentioned that
20 we've made no mention of the witnesses refusing to
21 cooperate because they haven't refused to cooperate. We
22 attempted to serve them personally with subpoenas to appear
23 on Friday, but we were given hours to do so, just over two
24 days, I believe it was. And they were notified that it was
25 going to happen, but they were not able to at that time

1 consult with their attorney. We had no idea at that time
2 if their attorney would be able to be present, and we
3 hadn't heard from them after that. So once we -- and it is
4 our understanding that at that time they had not been
5 served with subpoenas. So it's not that they were refusing
6 to cooperate, it's that they were not served with the
7 proper paperwork because their schedules weren't revolving
8 around this case.
9 Did you have anything else?
10 THE COURT: Does that conclude your comments?
11 MS. OFFUTT: Yes, your Honor.
12 MS. MCELYEA: Yes, your Honor.
13 THE COURT: All right. Well, at the risk of sounding
14 like a broken record, the court already decided that some
15 of the inquiries that defense counsel made during the first
16 deposition were relevant and the witnesses refused to
17 answer. Those inquiries included was the defendant taking
18 any medication at the time of the alleged event and the
19 recounting of that event to police investigators and was
20 the witness taking that medication during the testimony at
21 the deposition. Those are relevant inquiries, as I
22 mentioned, and, again, I've already stated this at the
23 earlier ruling.
24 But whether or not a witness is under the influence of
25 alcohol, narcotics, hallucinogens, sleep aids, antianxiety

1 drugs, anything like that, during the time that witness
2 witnesses an event and during the time that that witness
3 recounts what they observed to police investigators is
4 entirely relevant in an assault trial or any type of
5 criminal trial. So I ruled that the witnesses should have
6 answered those questions for defense counsel at the time,
7 and it was improper to order the witness not to answer
8 those questions. That was the reason for the dep -- the
9 second deposition, and it was a quick -- the court set a
10 fairly quick deposition because time is of the essence in
11 this case.
12 Trial is scheduled. People keep mentioning January
13 20th, but the readiness is a week away. At the readiness
14 hearing, both parties will announce to the court whether or
15 not they're ready to proceed to trial. So essentially both
16 parties have one more week to be prepared to go to trial.
17 If not, it's the readiness hearing when the parties should
18 announce to the court that they're not ready and what their
19 difficulties are, why they're not ready. Once the court
20 hears the reasons why one side or the other is not ready,
21 then the court is to issue remedies for that. That could
22 be a continuance or that could be an order requiring a
23 deposition, that can be a material witness warrant. So
24 it's not the 20th, it's the 14th, and that's about one week
25 away.

1 The court is certainly not going to send officers out to
2 arrest witnesses. The witnesses are not a party to this
3 action. Ms. Stevens is a party to this action, and the
4 City of Kirkland is a party to this action. However, the
5 witnesses are material witnesses.
6 Both parties have argued and I believe testified or
7 written in their briefs that the police have acknowledged
8 there are no other witnesses to this case. No police
9 officer that I'm aware of witnessed this case. It's the
10 two witnesses that the defense seeks to interview, so they
11 are material witnesses.
12 Case law is clear, the defense counsel has a right to
13 interview witnesses prior to trial. Defense does not have
14 to wait to hear answers to questions for the first time
15 while the jury is sitting there. The defense has a right
16 to examine witnesses and be prepared for trial. By not
17 answering questions concerning whether or not the defendant
18 was under the influence of medicines and narcotics and
19 alcohol by not answering questions concerning what the
20 defendant was seeing the doctor for, when the City is
21 endorsing a doctor as a government witness was improper.
22 Again, the impetus for the second deposition.
23 Now, the witnesses have chose not to respond to the
24 second deposition. That's up to the witnesses. And I have
25 also indicated that I wanted to review the transcripts of

1 the first deposition before I make a final ruling on the
2 motion to dismiss, and I'm going to do that, and I
3 understand you have that deposition transcribed for the
4 court, Mr. Maybrown. I'll take that opportunity to review
5 that.
6 In the meantime, I'm going to require that the
7 witnesses sit for a deposition once again so that
8 Mr. Maybrown can finish the interview of these people.
9 So Ms. McElyea or Ms. Offutt, tell me between now and
10 Friday what is the best day for your witnesses to appear
11 here at Kirkland Municipal Court so that they can finish
12 the interview with Mr. Maybrown?
13 MS. OFFUTT: Your Honor, I believe that both Ms. McElyea
14 and I are out of court on Friday. Thursday or Friday would
15 be amenable dates.
16 THE COURT: Thursday or Friday what?
17 MS. OFFUTT: Would be amenable dates.
18 THE COURT: Okay. Mr. Maybrown?
19 MR. MAYBROWN: Your Honor, I'm in Yakima for court on
20 Friday. I am available -- I can be available on Thursday,
21 but I would certainly prefer not to be jerked around, and
22 I'd like to get some notice about whether they're truly
23 going to appear, because they haven't given any indication
24 that they would. But I will clear any calendar necessary
25 if I truly hear they're going to appear. I don't want to

1 have to pay for another court reporter if they're not going
2 to show up, but I'll do it if it's necessary. I would --
3 as an officer of the court, I will provide the depositions,
4 but they're going to clearly show everything that I've
5 already testified to in my declaration and more.
6 THE COURT: I'll review them in camera. So let's have
7 the deposition then on Thursday, January 8th at 8:30 at the
8 Kirkland Municipal Court.
9 Is there any reason -- let me ask plaintiff's counsel,
10 any reason why the witnesses cannot appear for that?
11 MS. OFFUTT: Not that I'm aware of, your Honor.
12 THE COURT: Okay. So Mr. Maybrown, there you go. I
13 know you are paying for the court reporter every time to
14 come out for this.
15 MR. MAYBROWN: Can I ask whether they've inquired
16 whether they would be willing to appear?
17 MS. OFFUTT: I don't know what their schedule is, if
18 that's their question.
19 MR. MAYBROWN: It's not scheduling. I don't think that
20 that's the issue at all. I don't think that they had
21 something else on the schedule. Have they said that they
22 would appear to the court's order, is I guess my question?
23 MS. OFFUTT: They have been very agreeable to the
24 court's orders so far. I have no reason to understand that
25 they would not follow the court's order at this point.

1 THE COURT: Okay. So let's have the deposition then
2 take place here, as I mentioned, Thursday, January 8th,
3 8:30. And then I'm going to have all parties reconvene
4 here again next Tuesday, January 13th at 1 p.m. That's the
5 day before the readiness. I will have had an opportunity
6 to review transcripts at that time and will have heard the
7 status of the second deposition by that time hopefully.
8 MS. MCELYEA: Your Honor, do you want an order to appear
9 made out for the 13th?
10 THE COURT: For the next motions hearing, yes.
11 MS. MCELYEA: Okay.
12 THE COURT: And then we'll need an order, a new order
13 for Thursday, January 8th at 8:30 as well for the
14 deposition for the two City witnesses.
15 MR. MAYBROWN: Your Honor, I spoke with Ms. Stevens, and
16 she would like to join the team for training, as is her
17 responsibilities. Would she be permitted to appear via
18 phone at the next proceedings, given these circumstances
19 and how things have changed outside of our control?
20 THE COURT: Sorry, are you speaking of the 13th and the
21 14th, so you know --
22 MR. MAYBROWN: Well, I'm thinking of the 13th and the
23 14th at this point, although I mean obviously if she needs
24 to be here, we'll consult with the team. But I'm so
25 suspicious about these witnesses showing up, and on top of

1 that, of course, the court hasn't even said anything about
2 these four new witnesses that I -- that I've just been
3 notified of.
4 MS. MCELYEA: And, your Honor, do you want a blank order
5 in regards to the witnesses (Inaudible)?
6 THE COURT: Yes.
7 MS. MCELYEA: I need to go out. We don't have any blank
8 orders in the --
9 THE COURT: Mr. Maybrown, it would be the court's intent
10 to address the endorsing of additional witnesses at next
11 Tuesday's motion hearing.
12 MR. MAYBROWN: Okay. Thank you, your Honor, and --
13 THE COURT: I guess I would also indicate that you
14 should, if it's your intent to interview them prior to
15 trial, you should make every effort to do that this week as
16 well so that I can hear about any difficulties you might
17 have next Tuesday.
18 MR. MAYBROWN: Okay.
19 (END OF RECORDING.)
20 --o0o--
21
22
23
24
25

1 **CERTIFICATE**

2

3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

5

6

7 I hereby declare under penalty of perjury that the foregoing
8 transcript of proceedings was prepared by me or under my
direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my
ability;
10
That the transcript is, to the best of my ability, a full, true
11 and correct record of the proceedings, including the testimony
of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the
proceedings;
13
That I am neither attorney for, nor a relative or employee of
14 any of the parties to the action; further, that I am not a
relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16
Dated this 10th day of June, 2015.
17

18

19 Linda A. Owen

20 Linda A. Owen

21

22

23

24

25

APPENDIX N

DECLARATION OF MAILING

I declare under penalty of perjury under the laws of the State of Washington that on 1-6-2015 I personally served this subpoena to the person mentioned below.

Signed by_____, in Kirkland, WA on 1-6-2015.

FILED
JAN - 7 2015
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: Teresa Oberts

In the name of the City of Kirkland, State of Washington, you are required to appear on **January 8, 2015, at 8:30 a.m.**, at the Kirkland Justice Center, 11750 NE 118th Street, Kirkland, WA, for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 6th day of January, 2015.

Moberly & Roberts, PLLC

By: [signature]
Assistant Prosecuting Attorney, WSBA # 45625

MOBERLY & ROBERTS, PLLC
12040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205 (f)

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that on 1-6-2015 I personally served this subpoena to the person mentioned below.

Signed by _____ in Kirkland, WA on 1-6-2015.

FILED
JAN - 7 2015
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: C.O.

In the name of the City of Kirkland, State of Washington, you are required to appear on **January 8, 2015, at 8:30 a.m.**, at the Kirkland Justice Center, 11750 NE 118th Street, Kirkland, WA, for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 6th day of January, 2015.

Moberly & Roberts, PLLC

By: _____
Assistant Prosecuting Attorney, WSBA # 45655

MOBERLY & ROBERTS, PLLC
12040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

APPENDIX O

FILED
JAN 12 2015
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, vs. STEVENS, HOPE A., Defendant.	)	NO. 38384 DECLARATION OF TAMARA MCELYEA IN SUPPORT OF CITY'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO DISMISS

I, Tamara L. McElyea, a duly qualified, appointed and acting Prosecuting Attorney for City of Kirkland and acting on behalf of Plaintiff, declare the following:

1. On November 4, 2014, this court ordered the depositions of the City's Witnesses in the above-cited case, Teresa Obert and C.O., to take place at defense counsel's discretion.

2. Lacey Offutt is another Prosecuting Attorney for the City of Kirkland and is co-counsel in the above-cited case.

3. Mary Gaston is the attorney for the witnesses Teresa Obert and C.O.

4. The court ordered depositions of Teresa Obert and C.O. occurred on December 19, 2014. C.O.'s deposition took approximately ninety minutes, followed by Teresa Obert's deposition, which lasted approximately ninety minutes.

5. Ms. Gaston was present at each deposition acting as counsel for the witnesses. She made some objections based on relevancy and privilege with regard to Mr. Maybrown's questions about C.O.'s medical history.

Moberly & Roberts, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

6. Mr. Maybrown submitted a third Supplemental Declaration in support of his motion to dismiss on January 8, 2015 detaining the City's witnesses' failure to appear for a second deposition on January 8, 2015.

7. The hearing on January 6, 2015 began at approximately 1:00 pm. After that hearing I instructed Ms. Offutt to attempt contact with the witnesses and prepare subpoenas for Teresa Obert and C.O. to appear for the ordered deposition on January 8, 2015. By this time, mail by U.S. postal service had already gone out. Out of concern that a mailed subpoena would not be delivered to the witnesses prior to January 8, 2015, Ms. Offutt arranged for a Kirkland Police Officer to personally serve the subpoenas on the witnesses.

8. On information and belief, Jeff Obert answered the door when the officer attempted to serve the subpoenas on Teresa Obert and C.O..

9. On information and belief, Mr. Obert told Officer Daniel McGrath that both Teresa Obert and C.O. were out of the state. The subpoenas were not personally served.

10. Ms. Offutt and I attempted several times to make direct contact with Teresa Obert that were unsuccessful.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 12th day of January, 2015 at Kirkland, Washington.

Tamara L. McElyea, WSBA #42466
Prosecuting Attorney

Moberly & Roberts, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

APPENDIX P

1
2
3 KIRKLAND MUNICIPAL COURT
4
5 CITY OF KIRKLAND,)
6 Plaintiff,) No. 38384
7 vs.)
8 HOPE A. STEVENS,)
9 Defendant.)
10
11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 JANUARY 13, 2015
15
16 APPEARANCES:
17
18 For the City: TAMMY McELYEA
Attorney at Law
19
20 For the Defendant: TODD MAYBROWN
Attorney at Law
21
22 Before: THE HONORABLE MICHAEL J. LAMBO
23 Prepared by: Linda A. Owen
425-466-8543
24
25

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1 PROCEEDINGS

2 --o0o--

3

4 THE COURT: All right, let's take the Stevens matter

5 first.

6 MS. MCELYEA: Thank you, your Honor, Tammy McElyea for

7 the City. It's the Hope Stevens matter, 38384.

8 THE COURT: All right, I did have a chance to review the

9 last briefing from both counsel. Let me -- since we're

10 still proceeding with the motion to dismiss, Mr. Maybrown,

11 and that's your motion, I'll hear from you first, and then

12 I'll let the City respond, if they like.

13 MR. MAYBROWN: Thank you, your Honor, and I'm going to

14 try not to repeat the arguments that have been made. I'm

15 sure that the court recalls. I do want to just highlight a

16 couple of things that have happened since the last court

17 hearing.

18 Obviously the court gave the City one additional chance

19 to try to produce the necessary witnesses. The court also

20 deferred ruling on the motion to dismiss based on the late

21 disclosed witnesses, the four witnesses that we hadn't had

22 notice of before the end of the year, and I've tried to

23 handle both.

24 Of course, we came for a deposition, as had been ordered

25 on January 8th. The witnesses did not appear. We had no

1 prior explanation, notice, anything. What we've heard
2 since then, I think the court saw, that someone in the
3 household told a police officer that the witnesses were out
4 of state. I don't believe it for a minute. And, frankly,
5 I did a little bit of follow-up, because I know that
6 Ms. Obert has a business in Bellevue and that I sent an
7 investigator, it's open to the public, to see what was
8 going on there, and it's open, from all appearances it's
9 remained open over the last weeks, and Ms. Obert was there
10 this morning. And I have a declaration from the
11 investigator who saw her there at 8:30.
12 So if the City really intended to locate these people,
13 it's very easy, if they truly wanted to, or if the
14 witnesses were telling the truth, we wouldn't see them
15 working when supposedly they're claiming they're not
16 available or they're not in state. I just don't think it's
17 believable. I think at this point the court has given
18 every opportunity for the City to produce these two
19 material, critical witnesses to answer questions, and
20 they're just not going to appear and they're going to lie
21 and they're going to deceive the court, and I think that
22 that's outrageous conduct.
23 Secondly, the court asked me to follow up and find the
24 four witnesses, or at least see if I could interview them.
25 The two medical witnesses, not a surprise to me, have no

1 release, they're unwilling to speak with me at all, and, in
2 fact, I got an e-mail from their lawyer, which I attached,
3 just so the court could see, and the witne -- and she told
4 me that they haven't even been subpoenaed as far as she's
5 heard from the witnesses. So to her knowledge they were
6 not going to participate at all in the case, and they
7 certainly wouldn't talk to me.
8 Jeff Obert, who is a family member of the complaining
9 witnesses here, we found out from the City, was actually at
10 home. I asked to interview him on the 8th, after I
11 completed the interviews with -- or the depositions with
12 the other witnesses. He didn't show up either. And the
13 last witness, who is Ms. Parks, we had an investigator try
14 to contact her. She's in the state of Florida. She's
15 basically said she's not decided if she's even going to
16 come to Washington to this trial and she's not agreed to an
17 interview unless she decides she's going to come.
18 So I've struck out on all counts. I mean we've been
19 placed in an untenable situation. There are six witnesses,
20 four of whom who have just recently been revealed to us who
21 won't cooperate in any way and can't be interviewed. We've
22 got the two material witnesses, and I know the court has
23 had a chance to look at the deposition transcripts, and I
24 think they bear out everything that I reported to the court
25 and maybe a lot more as well. But clearly Ms. Stevens has

1 been advising the City and the court that we wanted to go
2 forward with this trial as scheduled. We were forced to
3 continue it once because the witnesses wouldn't cooperate,
4 and the court had to schedule depositions. They didn't
5 cooperate with -- at the depositions. They finally came
6 but refused to answer numerous material questions. This
7 court has ordered them to come to depositions since then
8 twice to try to remedy the situation. They've refused.
9 I don't think that we should be forced to go to trial
10 unprepared or to request a continuance, and that's exactly
11 what the cases say makes out an 8.3 type of violation. At
12 this point we'd ask the court to dismiss the case with
13 prejudice. I don't see how we could have a fair trial, no
14 matter how hard we tried, given the position that we've
15 been placed in, and numerous witnesses who are unwilling to
16 cooperate and shouldn't be allowed to testify at a trial.
17 THE COURT: Thank you, Counsel.
18 City care to respond?
19 MS. MCELYEA: Thank you, your Honor. In regards to
20 Mr. Maybrown's original motion to dismiss, was completely
21 based on the fact that the two primary material witnesses
22 had not shown up for the deposition. Those depositions
23 have occurred. The court was given a copy of those
24 depositions at the last hearing last week, and when you
25 look at the amount of material that was provided in that --

1 in those two transcripts, one 81 pages long, the other one
2 84 pages long, numerous -- there were very, very few
3 questions that they refused to answer. The questions
4 regarding the specific incident, they had no problem
5 answering.
6 The questions that they refused to answer were based on
7 medical privilege, doctor-patient privilege, and that was
8 invoked, and as you saw going through the transcripts, you
9 saw where those were the specific things.
10 So the amount of information that was provided within
11 those -- that original December 19th deposition covered,
12 quite frankly, the majority of the information regarding or
13 the facts regarding this case. So the fact that counsel
14 says that they refused to answer so many questions is
15 rather inaccurate when you look at the amount of
16 information that was provided in those depositions.
17 So just based on his original motion to dismiss, it's a
18 moot point at this point, because those depositions did
19 occur. Again, the City goes back to case law that says,
20 yes, he's entitled to an interview of the City's witnesses.
21 He's not entitled to a perfect or successful one. And,
22 again, like I said, the information -- there was ample
23 opportunity to talk about the facts of this case, and that
24 was shown in the depositions, of the transcripts that was
25 provided.

1 As far as then the material witnesses not appearing for
2 the second deposition, we did the same thing that we did to
3 the prior, we attempted to serve them with subpoenas to
4 appear at that point. There were numerous contacts that
5 the police attempted to make in that short amount of time.
6 Officer McGrath was told by Mr. Obert at that point that
7 they were out of town. The City has no other way -- we
8 attempted to make contact with them. The voicemails --
9 excuse me, the voicemails that we got through to, basically
10 the box was full. We could not leave a message.
11 So the fact that Mr. Maybrown says she has a business,
12 it was open. Businesses are open whether the owners of
13 those businesses are there or not. To say that she was
14 there, he has no information providing that.
15 But the bottom line is, is that in this particular case,
16 again, his original motion to dismiss was based on that
17 depositions didn't happen. They didn't happen. Everything
18 else after that, there has not been an additional motion
19 noted at this point. It's just declarations of
20 supplementals from the original motion to dismiss. City
21 believes that the defense has had ample opportunity to
22 interview the two primary witnesses at this point and that
23 we would ask the court not to dismiss at this time and
24 continue this on the trial track.
25 As far as the additional four witnesses, we complied

1 with 4.7 by saying that these are witnesses that the City
2 may potentially call. There are oftentimes witnesses on a
3 list that we may or may not call. There are some officers
4 that are currently on the list. After talking with them
5 and going through defense interviews with them, that
6 they're not, they'll just be cumulative witnesses at this
7 point. So the City has complied with the 4.7 by
8 allowing -- or notifying the defense of who those witnesses
9 would be. So at this point we are asking that the court
10 not dismiss this case and allow it to proceed to trial.
11 THE COURT: All right, thank you, Counsel.
12 Anything further?
13 MR. MAYBROWN: Just so it's clear for the record, this
14 business is a solo operation. There's nobody else that
15 works there, and she was present today. If there was any
16 desire to make them available, as the court has ordered,
17 they could have just as easily made attempts to contact
18 them by going to where she's employed. They chose not to
19 because to be frank, I think that it's clear that they're
20 not going to answer appropriate questions. They'll answer
21 what they want to answer, but they won't provide me any
22 information that would be appropriate impeachment
23 information. That's just the way it is, and that's not
24 fair. That's not the way a proceeding should be. We've
25 got their notes, and there's no indication in those notes

1 that they refused to answer any of the prosecutor's
2 questions, and they discussed mental health in those notes.
3 So it's just been not -- a one-way street here, and that's
4 not the way the process should be.
5 THE COURT: All right, thank you, Counsel.
6 All right, well, as I mentioned when I first came out on
7 the bench, I've read all of the recent declaration and
8 memorandum, as I have since the very beginning of this
9 case, and this court makes the following comments, after
10 having had the opportunity to review as well both
11 transcripts generated as a result of the depositions in
12 this case.
13 The pattern of the City's witnesses' failure to
14 cooperate with defense interviews is well documented.
15 We've been here for hearings several times. In short, the
16 City's witnesses only agreed to speak initially to the
17 defense after the court ordered a deposition, several
18 months after the City filed charges against the defendant.
19 After the court ordered the deposition, the interview was
20 delayed several times but eventually took place. Of note,
21 during the one and only interview with defense counsel, the
22 witnesses declined to answer questions concerning the
23 witnesses' medical prescriptions he was taking and
24 apparently under the influence of at the time of the
25 alleged assault as well as medical and mental status at the

1 time of the alleged assault and at the time of the first
2 interview. The witnesses claimed lack of relevance and
3 privilege, and that's clearly indicated in the depositions.
4 Defense immediately moved to dismiss and the court
5 scheduled a hearing on the matter. The court ultimately
6 reserved ruling on the motion, however, and issued remedial
7 orders requiring the City's witnesses to sit for a
8 follow-up deposition in order to answer the relevant
9 questions. The witnesses declined to appear for this
10 court-ordered second interview. It was reported to this
11 court that police officers were not able to locate the
12 witnesses in order to apprise them of the new deposition
13 date. Still, one of the witnesses talked to the prosecutor
14 by phone, according to the prosecutor's own declaration,
15 and when told about the court-ordered interview, the
16 witness simply stated: I don't think I can make that.
17 The defense again moved to dismiss, and the court held
18 another hearing. Concerning the witnesses' failure to
19 attend the court-ordered interview, the City responded by
20 saying the court did not give the parties enough time, and
21 a holiday occurred in the interim making scheduling a
22 challenge.
23 With the trial readiness now only one week away, the
24 court ordered another interview. The court asked the
25 prosecutors what day during the remainder of the week would

1 be a good day for the attorneys and the witnesses to meet
2 with defense counsel for the follow-up interview.
3 Plaintiff's counsel advised the court Thursday was the best
4 day and indicated there was no reason why the attorneys and
5 witnesses could not be available at that time. The defense
6 continued to object and moved to dismiss, stating the
7 defendant would have little time to prepare for trial, even
8 if the witnesses appeared for a successful interview.
9 In addition, defense counsel made the court aware they
10 were having to schedule a stenographer for every attempted
11 interview and that defense counsel had other court
12 appearances throughout the state that were creating
13 substantial conflicts.
14 In light of the fact that trial was fast approaching,
15 the court ordered the interview anyway and ordered that it
16 occur on Thursday, January 8th, 2015, over the defense
17 objection.
18 It is now reported to this court that the witnesses
19 again failed to appear for a second time for the
20 court-ordered interviews. According to the declaration by
21 the prosecutors, both witnesses have left the state.
22 In addition, on December 30, 2014, more than six months
23 after the government filed charges against the defendant,
24 and less than two weeks before trial readiness, the City
25 filed an additional witness list endorsing four additional

1 witnesses. The witness list included two medical health
2 professionals, a doctor and a physician's assistant. Both
3 apparently took part in examining the alleged
4 victim/witness after the assault.
5 The defense again moved to dismiss charges, citing
6 mismanagement on the part of the prosecutors by waiting
7 over six months to endorse expert witnesses only days
8 before trial. Again, the court chose to reserve ruling and
9 urged defense counsel to attempt to interview the
10 newly-endorsed witnesses with the time left before trial.
11 Today, according to declarations filed by the defense,
12 the two medical professionals have declined to discuss
13 their involvement in this case citing privilege. It's
14 interesting to note that the government has endorsed two
15 doctor witnesses, albeit late, to testify as to the
16 condition of the alleged victim following the altercation.
17 Still, both medical witnesses are refusing to discuss the
18 case with the defense. Consequently, the defendant will
19 hear this crucial testimony for the first time during trial
20 in front of the jury. The testimony, and that of others --
21 this testimony, and that of others, will be a complete
22 surprise to the defendant.
23 According to defense counsel, the third witness endorsed
24 by the City on December 30th, 2014 is Jeffrey Obert.
25 Working with the prosecuting attorney, the defense arranged

1 to interview Mr. Obert on January 8th, immediately
2 following the depositions. Mr. Obert declined to appear
3 for the interview.
4 Interesting to note, according to the declarations filed
5 by the City prosecutors, it was Mr. Obert that answered the
6 door or otherwise talked to police officers prior to the
7 January 8th deposition and advised the police officers that
8 the other witnesses had left the state. Consequently, it's
9 clear to this court that Mr. Obert was at home and
10 available for the interview but declined.
11 The fourth witness added to the government's list on
12 December 30, 2014 is a Corey Parks. According to the
13 declaration filed by the defense, this witness lives in
14 Florida and has also declined to be interviewed over the
15 phone. According to the declaration, Ms. Parks states she
16 has not received a subpoena to appear in court. Apparently
17 Ms. Parks stated to investigators that she will let the
18 defense know if she decides to come to Washington.
19 Consequently, there are four witnesses that have all
20 refused to talk to defense counsel. These witnesses were
21 added to the government's witness list less than two weeks
22 before trial readiness and more than six months after
23 charges were filed. Now trial readiness is tomorrow. All
24 witnesses have refused to speak to defense counsel. There
25 are two witnesses who are avoiding interviews with defense

1 counsel and twice declined a court-ordered deposition.
2 Because the defendant's speedy trial right expires February
3 2nd, 2015, this matter must proceed to trial this month and
4 begin on January 20. Defense counsel has not had a
5 sufficient opportunity to adequately prepare a material
6 part of the defense and the defendant will clearly be
7 impermissibly prejudiced if the trial were to proceed this
8 month.
9 A dismissal of a criminal prosecution is an
10 extraordinary remedy, as both counsel bring up many times,
11 available only if the accused rights have been prejudiced
12 to the degree that the accused right to a fair trial has
13 been materially affected. Here the defendant's right to a
14 fair trial has been materially affected, in that the
15 defendant is now at the point where she is compelled to
16 choose between two distinct rights, either proceed as
17 scheduled and hear testimony from many witnesses for the
18 first time during trial, thereby violating her effective
19 assistance of counsel, right to confront witnesses, and
20 right to fair due process, or give up her right to speedy
21 trial and ask for yet another extension in hopes the
22 witnesses may cooperate. The government simply cannot
23 force a defendant, a criminal defendant, to choose between
24 these rights.
25 Defense motion to dismiss pursuant to Criminal Rule 4.7

1 and 8.3 is granted. All charges are dismissed.
2 MS. MCELYEA: Your Honor, there is a no-contact order in
3 effect for two different people under the same cause
4 number, but so -- but on this particular it doesn't specify
5 the two, so I don't know if we need two separate ones
6 that --
7 THE COURT: We probably should have two separate ones --
8 MS. MCELYEA: Okay.
9 THE COURT: -- that indicate the names of each on the
10 order.
11 MS. MCELYEA: All right, thank you.
12 And, your Honor, in light of your ruling, when -- when
13 could we anticipate it in writing?
14 THE COURT: That's up to counsel. If you want to
15 present an order to me.
16 MS. MCELYEA: Okay.
17 MR. MAYBROWN: Okay, your Honor --
18 THE COURT: Be happy to review it and sign it.
19 MR. MAYBROWN: Your Honor, I have an order which
20 reflects what the court has considered and incorporates the
21 court's oral ruling. If that would be sufficient with the
22 court, that would be sufficient with the defense. If the
23 court wants us to prepare findings, we would prepare
24 findings and conclusions. I'm satisfied either way, but
25 I'll defer to the court. And perhaps the prosecutor would

1 have --

2 THE COURT: Does the prosecutor wish to be heard?

3 MS. MCELYEA: No, your Honor.

4 THE COURT: Then I'll sign your order, Counsel.

5 MR. MAYBROWN: Okay.

6 THE COURT: If you have one ready.

7 MR. MAYBROWN: Would this be -- dismissal be with

8 prejudice, your Honor?

9 THE COURT: It will be with prejudice.

10 (INAUDIBLE COMMENTS.)

11 THE COURT: Perfect, perfect. Thank you.

12 MS. MCELYEA: And, your Honor, in regards to the

13 depositions that Mr. Maybrown provided to the court, the

14 City at this point, because they were not redacted, would

15 ask that those be sealed as part of the record.

16 MR. MAYBROWN: Your Honor, we would concur and think

17 it's most appropriate. If it turns out that there is a

18 need for an appeal, then we might return to the court and

19 ask to submit a redacted version, but at this point we'd be

20 satisfied with the record that's been made and we don't

21 think there's a need to file it. We think that the

22 Bone-Club factors would allow for a sealing under these

23 unusual circumstances, but would, of course, defer to the

24 court.

25 THE COURT: Let me reserve ruling on that, Mr. Maybrown

1 and Ms. McElyea. I want to reserve the criteria for that.
2 I think you are probably correct. However, the appellate
3 case law trending thus far is for open courts and open
4 files, and courts are to be slow to seal or close the
5 courtrooms to the public, so let me review the criteria,
6 and I'll just have my staff let you know one way or the
7 other. If I decide not to seal them, then I'll schedule a
8 hearing and let you both address the court concerning that.
9 MS. MCELYEA: Thank you, your Honor.
10 MR. MAYBROWN: Thank you very much, your Honor.
11 THE COURT: All right, I've signed the order.
12 MR. MAYBROWN: Thank you.
13 (PROCEEDINGS ADJOURNED.)
14 --o0o--
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1 **CERTIFICATE**

2

3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

5

6

7 I hereby declare under penalty of perjury that the foregoing
8 transcript of proceedings was prepared by me or under my
direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my
ability;
10
That the transcript is, to the best of my ability, a full, true
11 and correct record of the proceedings, including the testimony
of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the
proceedings;
13
That I am neither attorney for, nor a relative or employee of
14 any of the parties to the action; further, that I am not a
relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16
Dated this 10th day of June, 2015.
17

18

19 Linda A. Owen

20 Linda A. Owen

21

22

23

24

25

APPENDIX Q

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, vs. STEVENS, HOPE A., Defendant.	)	NO. 38384 NOTICE OF APPEAL TO SUPERIOR COURT AND CERTIFICATION OF FILING STATUS.

Appellant, The City of Kirkland, the named plaintiff above seeks review by the Superior Court of the Kirkland Municipal Court Decision in criminal cause number 38384, two counts of Assault in the Fourth Degree (Domestic Violence), entered on January 13, 2015.

Specific errors of law claimed are:

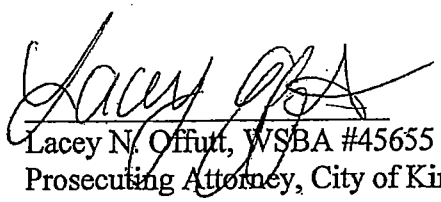
1. The Court abused its discretion by ordering the case's dismissal under CrRLJ 8.3(b);
2. The Court abused its discretion by ordering the case's dismissal under CrRLJ 4.7.

Appellant reserves the right to raise additional errors upon review of the record.

Moberly & Roberts, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, Washington 98034
(425) 284-2362, FAX (425) 284-1205

Presented this 9th day of February, 2015 at Kirkland, Washington.

Tamara L. McElyea, WSBA #42466
Prosecuting Attorney, City of Kirkland
Appellant
12040 98th Avenue NE, Ste 101
Kirkland, WA 98034



Lacey N. Offutt, WSBA #45655
Prosecuting Attorney, City of Kirkland
Appellant
12040 98th Avenue NE, Ste 101
Kirkland, WA 98034

Hope A. Stevens, Respondent
6415 NE 138th Place
Kirkland, WA 98034

Todd Maybrown, Attorney for Respondent
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Ste 3020
Seattle, WA 98101

KIRKLAND MUNICIPAL COURT

KING COUNTY, STATE OF WASHINGTON

CITY OF Kirkland)
Plaintiff)
)
Vs.)
)
Stevens, Hope Defendant,)
)

No. 38384

NOTICE OF APPEAL TO SUPERIOR COURT AND CERTIFICATION OF FILING STATUS.

Appellant The City of Kirkland, the named (plaintiff) (defendant) above seeks review by the Superior Court of the Kirkland Municipal Court decision in cause number 38384 entered on the date of January 13, 2015.

Specific errors of law claimed are:

① The Court abused its discretion by ordering the case dismissal under CrRLJ 8.3(b);

② The Court abused its discretion by ordering the case's dismissal under CrRLJ 4.7;

③ Appellant reserves the right to raise additional errors upon review of the record.

Within 14 days the appellant will file and serve on all other parties a designation of the part of the record that needs to be transmitted to the Superior Court. Appellant shall pay for the cost of preparing the record to the Clerk of the Kirkland Municipal Court within 10 days of notification by the Clerk that the record is ready unless payment has been waived by the Municipal Court (RALJ 6.2(a)).

Appellant shall transcribe the electronic recording of proceedings in accordance with RALJ 6.3A, and shall file the transcript of the record with the Superior Court Clerk in accordance with RALJ 4.1(a).

Copies of this notice must be served on all other parties.

CITY OF KIRKLAND WASHINGTON

CERTIFICATE OF STATUS

This is designated:

- A criminal appeal for which no filing fee is required. (RCW 10.10.060)
- A civil, infraction, parking, or contempt appeal for which a filing fee must be paid before the Notice of Appeal will be accepted for filing. (RALJ 2.4(b))
- A civil, infraction, or parking appeal for which an In Forma Pauperis petition has been granted and filing fee is waived. (RCW 36.18.022)
- A de novo small claims appeal for which a filing fee must be paid before the Notice of Appeal will be accepted for filing. (RALJ 1.1)

Dated this 9th day of February, 2015.

Kirkland Municipal Clerk of the Court

==========

Presented this 9th day of February, 2015.

Tamara L. McElyea/Lacey Offutt
Appellant's Lawyer

[signature]
Appellant's Signature

42466 / 45655
Lawyer's Name/Bar # (type/print)

City of Kirkland
Appellant's Name (type/print)

12040 98th Ave NE Ste 101
Address

12040 98th Ave NE Ste 101
Address

Kirkland WA 98034
City State Zip

Kirkland WA 98034
City State Zip

Hope A. Stevens, Todd Maybrown
Respondent's Name and Counsel, if known (type/print)

600 University Street, Ste 3020
Address

Seattle WA 98101
City State Zip

APPENDIX R

FILED
KING COUNTY, WASHINGTON
OCT 2 - 2015
SUPERIOR COURT CLERK
BY Jon Schroeder
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

~~STATE OF WASHINGTON~~
City of Kirkland
Plaintiff

vs.

Stevens, Hope A
Defendant

NO. 15-1-01772-8 SEA

ORDER ON CRIMINAL MOTION

The above entitled court having heard a motion to remand this case back to the trial court for an abuse of discretion under 8.3 and 4.7.

IT IS HEREBY ORDERED that this case be remanded back to the trial court for a trial. Court finds there was an abuse of discretion

DATED: Oct. 2, 2015.

Douglass A. North
Judge Douglass A. North

Deputy Prosecuting Attorney/WSBA# 42466 Tamara L. McElyea

copy received

Attorney for Defendant/WSB #

APPENDIX S

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff/Appellant, v. HOPE STEVENS, Defendant/Respondent.	NO. 15-1-01772-8 SEA

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 2nd day of October, 2015, King County Cause No. 15-1-01772-8 SEA came on for a Motion Hearing before the Honorable Judge Douglass North, sitting at the King County Courthouse, City of Seattle, State of Washington; and the parties being represented as follows:

TAMMY MCELYEA, City of Kirkland Prosecuting Attorney's Office, 123 Fifth Ave., Kirkland, WA 98033 for Plaintiff; and

TODD MAYBROWN, Allen, Hansen, Maybrown & Offenbecher, P.S., 600 University St., Suite 3020, Seattle, WA 98101, for Defendant.

Beth Carlson, Court Reporter
20480 Pond View Lane
Poulsbo, Washington 98370
(360) 697-3979

MOTION CALENDAR IN PROGRESS

WHEREUPON, the following proceedings were had and done to-wit:

MR. MAYBROWN: Good morning, Your Honor.

MS. McELYEA: Good morning, Your Honor.

COURT: So we're here on City of Kirkland versus Stevens. Preliminarily I'll grant the defense motion to strike the, uh, amicus brief filed in this case. There's no provision for amicus briefs in the Rules of Appeal from courts of limited jurisdiction. And that's for the simple reason that the courts, uh, the decisions of the Superior Court are not published so there's no precedential value to them, and therefore no reason why anyone would want to file an amicus brief in Superior Court.

The only reason why anyone is here this morning other than me, the clerk and the lawyers is because of the notoriety of Ms. Stevens. But defendant's notoriety doesn't ma-- give a case precedential value. So that said, we're ready to get started with the merits. And so Ms. McElyea, if you'd like to go ahead?

MS. McELYEA: Thank you, Your Honor. Good morning. Tammy McElyea for the City of Kirkland. In this particular-- and do you mind if I stay seated, or...?

COURT: That's fine. Whichever you prefer. You're welcome to come up to the bar or stay, be seated there at the table.

MS. McELYEA: Okay. Perfect. Thank you so much. The question that the City is asking this Court to answer is: How did the trial court get to this extraordinary remedy of dismissing these matters under 8.3 and 4.7 without even considering any less drastic

1 remedies, or allowing just this case to go to trial? We are asking
2 this Court today to find that the trial court abused its
3 discretion in the foll-- in the following manners.
4 We look at Court Rule 4.7. There is a provision in that rule
5 that states that the Court may at any dismiss an action if the
6 Court determines that the failure to comply with an applicable
7 discovery rule, or an order issued by the Court that is the result
8 of a willful violation or a, or of gross negligence. And that that
9 action prejudiced the ju-- prejudiced the defendant by such
10 failure.
11 This rule is extremely detailed as to what the obligations of
12 the prosecutor is. It goes through, um, every single step that the
13 prosecution has to meet. There are two specific subsections of
14 that rule that talk about investigations and how no party shall
15 interfere with the other party's ability to investigate or impede
16 their investigation.
17 There is also a second subsection on the ongoing duty to
18 disclose where a party discovers additional material and it's
19 their duty to continue throughout that process, including the
20 trial process, to make sure that that information is provided to
21 the other side. They even put in a provision: If discovered during
22 trial the Court shall be notified.
23 So the idea that this rule, there's an ongoing duty to
24 disclose things. There is no bright line, okay, on this particular
25 date everybody needs to stop giving everything. That's just not
26 how trial practice works. And in this particular case, the defense
27 claimed that filing a witness list twenty-two days prior to the

1 week of trial was a violation of 4.7.

2 Nowhere in the plain language of the rule or in any of the
3 case law that's currently active is that the case, or would they
4 find this as a violation.

5 The case law is very specific to what they found as
6 unreasonable to the prosecutor. Providing discovery day of trial;
7 failing to subpoena a victim for trial; failing to disclose names
8 and addresses of witnesses unless one day-- oh, until one day
9 before trial; not being prepared for trial the day of trial;
10 failing to disclose exculpatory evidence until the middle of
11 trial. These are what the Court, the Washington courts have
12 consistently found as unreasonable.

13 Giving a witness list twenty-two days prior to trial week did
14 not fall under that extreme case. The defense argues, he even
15 argued during the trial court proceedings that he made attempts to
16 contact these four individuals that were on our witness list, to
17 no avail because they refused to talk to him.

18 And case law also shows us that witnesses, there isn't a duty
19 for them to talk to the defense. It's the duty of the prosecutor
20 not to interfere with those interactions, or prevent, or all the
21 case law that we found in regards to this type of situation. The
22 prosecutors would say, don't show up to these hearings, or these
23 interviews, unless I'm there, or the prosecutor is there. Or that
24 they've told them don't talk to them or your plea bargain will go
25 away. That simply isn't the case here. And as long as the City
26 does not interfere or engage in impeding on the defendant's
27 process then no misconduct and no violation of 4.7 can be found.

1 If we go-- the only thing that the Court, there are two
2 things that the Court ordered the City to do. One was to produce
3 our interview witness, our witness interview notes. We did that
4 very promptly. It was done by the end of business day on the day
5 the Court ordered that. The other part was that they, he ordered
6 depositions. We did, we went above and beyond doing our due
7 diligence in order to make that happen. Make the, um, them
8 available as best that we could at that point. But again it comes
9 back to, this is around what the witnesses did.
10 And it's like, even though the trial court found the
11 defendant had been prejudiced, the trial court did not find that
12 it was the City's action that violated any discovery rule or
13 order, and the trial court didn't find that the City acted
14 willfully or in gross negligent, in a grossly negligent manner.
15 Therefore the…
16 COURT: Yeah. It appeared to me that where things got confused
17 here was that because we had this series of hearings. That the
18 December 30th hearing was off. It clearly stated to the Court that
19 the two things that the case law indicates you have to have in
20 order to have a dismissal is a proof by the defense of arbitrary
21 action or governmental misconduct and, secondly, prejudice
22 affecting the, uh, the right of the defendant to a fair trial.
23 And that I think was discussed at the December 30th hearing.
24 But then the Court, rather than deciding the motion at that point
25 puts it over to January 6th and then to January 13th. And at those
26 hearings all we do is revisit the issue of prejudice affecting the
27 defendant, and there's no more discussion of whether there's any

1 actual, uh, arbitrary action or governmental misconduct.

2 MS. McELYEA: And that's correct, Your Honor. And from that,
3 from the case law if, if the trial court could not find that then
4 basically the prejudice is moot, because you have to have both.
5 And in the case law that we found it ba-- it truly states that if
6 the Court cannot find that there was arbitrary action then the
7 only, the only way that the, the next Court can rule is to remand
8 it back to the trial court.

9 And that's exactly what we're asking here. Because we don't
10 believe that the trial court made any findings whatsoever that the
11 City's, it was the City's behavior. That basically what the trial
12 court did was conflate the City's obligations and their actions
13 with what the vic-- or what the witnesses did or didn't do. For
14 example, answering questions about their medical information.
15 Their physician-patient privilege. Those subsequent depositions
16 were specific to that. It had nothing to do with what the City
17 did.

18 And, in order for this to be dismissed in this matter the
19 trial court has to find that it was the City's behavior that
20 impeded either the defense getting things done, or forcing, and
21 basically strong-arming the victims and the witnesses in these
22 cases to say exactly what the defense wanted them to say.

23 In, and, it's like in *State v. Clark*, the statement of yes,
24 the defense has a right to interview them. They don't have a right
25 to a successful interview. You just can't keep expecting the
26 witnesses to come back time and time and time again. Case law
27 doesn't allow it. The rules don't allow it. They don't allow for

1 this multiple thing. And you have to be able to find that the City
2 did something wrong. And the trial court just simply didn't rule
3 in that way. His rule was specifically and focused on what the
4 victims did. What they did. What they wouldn't answer. What they
5 wouldn't show up for specific things. There was no indication that
6 the City did anything to impede that process.
7 COURT: Okay. So Mr. Maybrown?
8 MR. MAYBROWN: Thank you, Your Honor. This was an
9 extraordinary set of circumstances and many things were happening
10 side by side as the case moved towards trial. By the eve of trial
11 you had six witnesses. Every fact witness in the case was refusing
12 to comply with the discovery process. You have the two witnesses
13 that were thumbing their nose at the Court and refusing to comply
14 with Court orders, and the Court did find they were willful
15 violations.
16 Secondly, you have the City endorsing right before the
17 holiday, six months after the case was filed, less than two weeks
18 before the readiness, four new lay witnesses. All of that is
19 happening side by side. This deprived the defense of any fair
20 opportunity to prepare the case for trial, and the Court so found.
21 What I want to respond to is…
22 COURT: Well, I guess I'm, I'm not sure the Court so found.
23 The Court certainly said that the defense was presented with
24 enormous difficulties by this case. But obviously one of the
25 problems we have here is there weren't actual written findings and
26 conclusions entered. There are oral statements by the judge in
27 making his decision. And certainly he substantially agrees with

1 you Mr. Maybrown that there were enormous difficulties presented
2 to the defense. I'm not sure that he actually made a finding that
3 it, that it prevented the defense from, from going forward.
4 MR. MAYBROWN: Well, first of all, under the RALJ rules,
5 because the courts of limited jurisdiction are somewhat less
6 formal than these provisions, there's a very specific rule, 9.1B
7 that says the Court must accept all findings, both explicitly made
8 and implicit in the Court's findings.
9 Here what the Court very clearly found is that endorsing
10 these witnesses six months after the trial had been set, less than
11 two weeks before readiness without any explanation or
12 justification was mismanagement.
13 If the Court-- let's, let me, um, get to the hearing, because
14 I asked whether the Court wanted to enter written findings or
15 conclusions and the Court said, you hear from the prosecutors, and
16 I can cite to the page. It's page 16 and 17 of that. And, and the
17 prosecutor did not want to be heard on this so the prosecutor did
18 not seek the entry of findings.
19 Now if the Court would say I, it would benefit this Court to
20 have more explicit findings we could go get more explicit
21 findings. But it's clear from this record what the Court was
22 saying, and the Court was saying two things. One, there's been
23 these very clear discovery violations where I've entered two
24 orders and under 4.7 these witnesses are willfully failing to
25 abide by these orders. And that's sufficient. The sec...
26 COURT: Well, but now wait a second. That's not sufficient.
27 That's willful behavior by the witnesses, but it's not by the, the

1 prosecuting agency.

2 MR. MAYBROWN: You have to look at 4.7, the second section
3 which is different than the Superior Court rule. It does not say
4 in that section anywhere that the willful violation of the order
5 must be by the prosecutor. It doesn't say that.

6 COURT: I agree. It doesn't say that. But both you and I know
7 it means that. Because it could not possibly mean anything else.
8 It would be making a fool of the law for it to mean anything else.
9 If you look at the history of the rule here, the, uh, local rule,
10 or the, the rule for limited courts is patterned after the
11 Superior Court.

12 And in the Superior Court rule both of those provisions are
13 in, it's, it's, we're talking about subsection 7 and there's a
14 little i's, one, two, three, etc. And in the Superior Court rule
15 there's only a i and a ii. The ii in the Superior Court rule deals
16 with lawyers and the iii in the, um, in the local court rule is
17 the same.

18 What they've done in the local court rule, which was done
19 after the Superior Court rule is break out the first one that has
20 the more general discussion of discovery violations and possible
21 remedies. And they separated the, the, out in the second part,
22 those situations which rise to a level of considering dismissal.

23 Because in the Superior Court rule, unfortunately, it doesn't
24 give you what the case law tells you, which is that you have to
25 have the two elements of governmental misconduct or arbitrary
26 action and prejudice affecting the defendant's rights. And that,
27 the case law on that had developed by that time so I think they

1 felt it was necessary to break that out so you substated that
2 separately.
3 You're right. It doesn't say in a second, that the,
4 specifically say that it has to be the, the government that does
5 it. But it would just, well it just would destroy any action at
6 all if that were not true. All you'd have to do in any case is
7 defendant has, says at the time that, that the crime was
8 committed. I was at my buddy Al's. Al gives a statement to the
9 police saying, yeah he was there. Then the, they, you know, people
10 try to go interview him. He refuses to be interviewed. The Court
11 issues a subpoena or a material witness warrant. Al takes off and
12 disappears.
13 Defense moves to dismiss. We've got willful action. Clearly
14 Al is willfully refusing. That materially prejudices the defense.
15 If what Al said was true it would be an alibi. We'd be dismissing
16 cases right and left. But not on the basis of any government
17 action, but just because somebody else related to the case was
18 doing.
19 MR. MAYBROWN: Well, Your Honor, I think the problem-- we're
20 getting the two mixed. I think the Court certainly was authorized
21 to strike these witnesses given their refusal to cooperate. And...
22 COURT: Right. And I agree with you that that's, that's a
23 potential thing. But that's not, of course, what he did.
24 MR. MAYBROWN: Well, but there's a reason why he didn't do
25 that, and it's in the record. He said, the cost-- and this is at
26 page 26 of the hearing on Jan, January 6. Both parties have argued
27 and I believe testified that the police have acknowledged, there's

1 no other witnesses to this case. So it would have been, it would
2 have been the same essentially. If you're asking that it would
3 have been cleaner to say, oh I'm going to strike the witnesses.
4 And then, do you have a case? No, we don't have a case. We could
5 have that conversation but it had already been conceded that that
6 was the point.
7 So I think that, we could go back and the Court could make
8 more explicit and you could have beautiful detailed findings,
9 which would get us to exactly the same place. And even if this
10 Court was going to say the judge should have struck the witnesses
11 initially, there was no other alternative remedy that was
12 possible. They never suggested an alternative remedy at any time
13 during the hearings.
14 The Court moved along and gave chance after chance after
15 chance to rectify the situation. By the time they got to the day
16 before the readiness there was no proposal, give them one more
17 chance. We can help arrange the interviews with these four
18 witnesses who have been identified.
19 Once the Court strikes the six witnesses there's no case. It
20 was conceded. So it seems to me that if the Court's concern is
21 that there's not explicit findings saying, I find gross
22 mismanagement, or, I find gross negligence on the part of the
23 prosecutors, we'll go back and we'll just get that. I have no
24 doubt that the Court will enter such findings and clarify it's...
25 COURT: Well, but there wouldn't be any basis for entering
26 those findings. I mean, and that would...
27 MR. MAYBROWN: That's, that is untrue.

COURT: There, there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Now there is by the witnesses. But, but, but you're conflating the witnesses with the prosecuting entity.

MR. MAYBROWN: Then what, what is the defense to do when the State, six months after the trial, the case is filed, just two weeks before trial readiness announces four witnesses. Two of them are expert witnesses. There's no justification. We can't prepare for them. What is the Court to do? Say, well, that's tough luck. You've got to just hear what they have to say the first time on the stand?

COURT: No.

MR. MAYBROWN: They gave us no time to get, they gave us…

COURT: No. There, there are other remedies Mr. …

MR. MAYBROWN: Well, the other remedy would have been to get a deposition, but there was not sufficient time to get depositions under the rules because they announced them so late in the day. And the judge said, try to interview them and then we'll, um, we'll reach that issue. But it seems to…

COURT: Well, well the next step for the judge would have been to simply say, if you can't interview them by X date then they're going to be stricken. Because-- now those witnesses are not essential to the City's case. The City could go forward without those witnesses. It might not like to do it that way, but those witnesses are not essential to the case.

MR. MAYBROWN: So, well, so what the Court seems to be saying is, the Court could have struck the two witnesses who failed to

1 comply with the orders based on 4.7, and the other four witnesses
2 based on their, um, being endorsed so late in the game. That would
3 have led to the same exact result.
4 COURT: Well, but I don't think, I think you're hurdling a
5 couple of steps Mr. Maybrown in terms of striking the, the two
6 witnesses, the alleged victim witnesses. Because what happened
7 was, of course, that you initially moved for dismissal on the
8 ground that they refused to be interviewed by you, and I
9 understand why you would do that.
10 And, but, of course, by the time we got the hearing on it
11 there actually had been a deposition. There had been an assertion
12 at the hearing of a refusal to answer certain questions on the
13 grounds of medical privilege. Now, ultimately the trial judge
14 determined that that medical privilege could not be asserted under
15 those circumstances, or at least not blanketly asserted.
16 One might have been able to, to say that they didn't have a
17 right to, to, I mean to, they didn't have to reveal all their
18 medical information but they certainly should have been willing to
19 answer any questions about medications that would relate to their
20 ability to perceive events or to be able to relate them
21 accurately, and so on, at trial.
22 But, the thing is, is that assertion is by the witnesses'
23 counsel. Now the witnesses' counsel it appears made that, that
24 claim of privilege in good faith. The judge ruled against her on
25 that, but, I think at that point then you need to go back and,
26 and, uh, and find out whether that you can get the answers or not.
27 Now, I realize that, that you were up against time pressures. But

1 I don't think that just because it's gotten that close it just
2 automatically means that we go to the nuclear option and, and
3 dismiss the case. Dismissal of the case requires willful or
4 arbitrary action on the part of the government, not on the basis
5 of the witnesses.
6 MR. MAYBROWN: Well, Your Honor, given the Court's, um, I
7 think the Court's lack of, um, appreciation or understanding of
8 exactly what was happening in the trial court, what I would ask
9 the Court to do is to remand us back to the trial court for entry
10 of findings and conclusions to protect this appeal. We offered
11 that opportunity. The prosecutor said it wasn't necessary. They
12 chose to appeal. The judge said he would, um, he'd ask the
13 prosecutors if they thought it was necessary.
14 I think that we would be in a much better position. The Court
15 could say, if Your Honor would appreciate it, that, I'm going to
16 strike the witnesses based on their willful violations. And then
17 we will see, I think, very clearly that we will ultimately be in
18 the same place. But, the real question, of course, is whether it
19 was an abuse of discretion for the judge to rule the way he did.
20 Having been told by the State-- or, the City, excuse me, that
21 they're the only witnesses and we won't have a case if they won't
22 testify. I understand why the trial judge said, I'm, we're going
23 to dismiss the case because there's no way that a case can proceed
24 given all that's happened.
25 And I think the judge will make a very explicit finding of
26 gross negligence in terms of them identifying the witnesses at the
27 time they did, for very specific reasons. But I think it's very

1 unfair to put the burden on us to try to show you why the hoops
2 were, um, set out the way they were. And more so…
3 COURT: Well but, now wait a second Mr. Maybrown. The burden
4 is on the defense when it makes a motion to dismiss under the rule
5 that requires the defense. It's an extraordinary remedy. I mean
6 obviously ordinarily in a criminal case there isn't, aren't any
7 burdens on the defense. But when the, but when the defense comes
8 forward and affirmatively says, you gotta get rid of this case
9 Court, because one, the government is engaged in arbitrary or, or,
10 is engaged in misconduct or arbitrary action; and, two, it
11 prejudicially affects the defense then, yes, the defense has the
12 burden on that.
13 MR. MAYBROWN: Well, I understand. But here we're, the
14 question is whether any reasonable judge in Washington, faced with
15 these circumstances, could have reached the decision it reached?
16 COURT: No, that's not the proper… I realize that there are
17 cases that articulate the standard that way but that, that's a
18 fundamental misstatement of what, what the, abusive discretion
19 means. It's a decision made for untenable grounds or for untenable
20 reasons. And the untenable grounds here is that there is no
21 finding by the trial court of a governmental misconduct or
22 arbitrary action.
23 MR. MAYBROWN: Then I think that the Court should allow us to
24 return to have findings entered, because I think that this Court's
25 not having a fair full record. I do think that in fairness to the
26 trial court and to the proceeding as a whole, rather than the
27 Court say, well, I don't see the findings here, or they're not

1 clear enough. Given that there's a very clear RALJ rule that says
2 this Court should infer. But for the sake of the record and for
3 the sake of this Court and its proceeding, I think the Court
4 should just remand us and let us enter findings.
5 COURT: Well, I'm certainly happy to infer Mr. Maybrown, if
6 you can point me to something in the record that, that would allow
7 me to infer that the Court actually found governmental misconduct
8 or arbitrary action on the basis of something, of, you know, but
9 there, it isn't there. What's there is an enormous litany of, of
10 concern about prejudice to the defense. And I grant you that
11 there, there is significant evidence of that. But it requires both
12 elements. It can't just be the one.
13 MR. MAYBROWN: Well, well I understand. But the Court did say
14 over and over again that the identification of these witnesses,
15 six months after the case had been filed, without justification,
16 two weeks before trial, and it was a holiday as the Court might be
17 aware.
18 COURT: Right. Right.
19 MR. MAYBROWN: Uh, and you, that, you confer he was saying
20 gross mismanagement. But if this Court wants to have the specific
21 finding of arbitrary action I think that we should go back and
22 make it more explicit. I don't think the Court should send it--
23 we're going to, we're going to get in a situation where I think
24 the Court is not, not making an inference because it doesn't have
25 a full enough record. But I, I do think that that would be the
26 appropriate way to handle this case.
27 I've been involved in appeals before, for example, in

1 suppression issues where the Court of Appeals says we need more
2 clear findings so we can rule upon it. I, I don't think that that
3 would be unwise in this case, if you want a more complete record.
4 But I think it would be unfair to say this is untenable without
5 giving the trial court a chance to be more explicit in why he was
6 making those findings, and we can do that.
7 And in fact, I, I contemplated that at the time but the
8 prosecutor said they didn't think it was necessary, or at least
9 they didn't ask for that opportunity. It maybe lined the weeds a
10 little bit. But whatever the intention was, I think that that
11 would be the more appropriate course. Because either way we have
12 to have the trial court have a chance to explicate.
13 COURT: Okay. Well, I don't think that's going to get us
14 anywhere Mr. Maybrown. The problem is that this thing went off the
15 rails when we had this series of hearings and we lost sight of
16 what the original basis that the motion was. Because we kept
17 coming back with new hearings and the only thing that was
18 discussed was the prejudice for the defense.
19 Now, you may very well be able to accomplish the same result
20 for your client upon remand. Because if what I think the trial
21 judge is well within his rights to do is to say that okay, trial
22 is on this date. If the defense does not have by this date ahead
23 of trial the medical releases that are necessary to talk to the
24 professional witnesses, the opportunity to interview people, then
25 we're going to have a hearing on this date and which would be
26 shortly thereafter, that deadline. And if, in fact, you don't have
27 those then the Court goes through the process of determining okay,

1 this is material that's essential to the defense. It's unfair to
2 go forward. There isn't any lesser sanction that would, would
3 allow it, and exclude the witnesses.
4 Now, excluding the witnesses it may, it's different because
5 it's not finding misconduct on the part of the government, it's
6 finding these witnesses are prohibiting it. And it may accomplish
7 the same thing, but there is a significant procedural difference
8 between the one and the other.
9 MR. MAYBROWN: Well, well I have to say, the Court doesn't
10 have the full story. We filed actually after the original motion
11 to dismiss a document of renewed motion to dismiss, which was
12 actually what was ruled upon. Not the initial motion. So, I
13 actually think that, uh, we should have an opportunity to enter
14 findings and conclusions rather than start from ground zero.
15 Because basically what this Court has done is started the clock
16 all over again and gives the City another, uh, forces a
17 continuance is basically what, what's going to happen here.
18 So, rather than the former, I think that the latter is the
19 more fair remedy, given the situation when we offered the
20 opportunity to provide findings, rather than the Court saying,
21 well, I'll just give them-- let's start again and see what happens
22 now that they've, um, we've been through the process for months
23 and months and months.
24 So, um, I don't understand why the Court would put us in that
25 situation, where we have to start from ground zero, as if they
26 could re-file the case as if nothing happened.
27 COURT: Okay. Well, I appreciate your position Mr. Maybrown,

1 but I disagree with you. I think that it's fundamentally important
2 that the trial court keep in mind the basis of the motion that
3 it's ruling upon, and that it has to find the elements of that, of
4 what the defense has asserted as a basis for dismissal in order to
5 be able to dismiss.
6 And so I think that, that yes, that you need to go back to
7 the trial court and go through the process again. Now, obviously
8 you're pretty well along in the, in the process and I think you're
9 in a position to be able to ask the trial court to set some
10 deadlines for, by which you have to have stuff, or else we ought
11 to be looking at excluding witnesses. But I think we gotta go
12 through it properly rather than, you know, deciding after the
13 fact, well, it would accomplish the same thing so we'll just go
14 back and let the trial court enter some, some orders on that.
15 MR. MAYBROWN: Well, I actually think that the Court is
16 reading the record as narrowly as possible and not finding, uh,
17 not giving any credence to the motions that were filed. Because
18 there was a renewed motion specifically articulating what the
19 standard was. The judge cited the rule. He articulated the
20 standard. He noted that it was an extraordinary remedy and this
21 was an extraordinary situation.
22 So I, I can't disagree more strongly with the, this Court.
23 And it really is fundamentally unfair to put us into this
24 situation once again when we never had a fair chance to go to
25 trial the first time.
26 COURT: Okay. Well, I appreciate your position. So if you have
27 an order for me Ms. McElyea I'll sign it.

MS. McELYEA: Your Honor, unfortunately we don't have a copy of it. It's not with us. Do you want, is it all right (inaudible).

COURT: Okay. Yeah, if you want to, uh, prepare an order then.

MS. McELYEA: That would be fine. Okay.

COURT: Okay. So thank you counsel.

MOTION CALENDAR CONTINUES

CERTIFICATE OF COURT CLERK AND

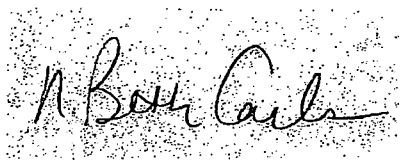
ELECTRONIC COURT REPORTER

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, Beth Carlson, Official Electronic Court Reporter of the Superior Court of the State of Washington in and for King County, do hereby certify as follows:

That the foregoing Verbatim Report Of Proceedings, numbered from page 1 through 21, is a true and correct transcript of a Motion Hearing held October 2, 2015, heard in the matter of City of Kirkland, Plaintiff v. Hope Stevens, Defendant, King County Cause No. 15-1-01772-8 SEA, before Honorable Judge Douglass North sitting at the King County Courthouse, City of Seattle, State of Washington, on the date hereinbefore mentioned.

DATED at Poulsbo, Washington on this 11th day of October, 2015.



Court Reporter

CERTIFICATE

APPENDIX T

No. 74300-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass North

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Pursuant to RAP 2.3(d), Petitioner Hope Stevens asks this court to grant review of the decision designated below in Part II of this motion.

II. DECISION BELOW

Petitioner seeks review of the Superior Court's decision of October 2, 2015 remanding the case to the Kirkland Municipal Court and finding an abuse of discretion by the lower court. (Appendix A).

III. ISSUES PRESENTED

1. Is it error for a Superior Court, sitting as an appellate court in a RALJ appeal, to reverse because the trial judge failed to enter written findings of fact and conclusions of law, when RALJ 9.1(b)(2) states that the appellate court "shall accept those factual determinations . . . that may be reasonably inferred from the judgment" of the court of limited jurisdiction?

2. Did the Superior Court so far depart from the normal course of proceedings as to call for review by this Court when it ignored both RALJ 9.1(b) and the well settled test for determining whether a trial court had abused its discretion?

IV. STATEMENT OF THE CASE

On June 23, 2014, the City charged Stevens with assaulting Teresa Obert and C.O. (Appendix B). Stevens maintains that C.O. (her 6'9", 280 pound, 17 year-old nephew), *attacked her* with a broomstick handle, and that she did not assault anyone. *Decl. Maybrown,* ¶¶2-4. (Appendix C).

A. November 4: Order Granting Defense Motion for Depositions.

The two alleged assault victims retained their own attorney, and

refused to cooperate in arranging to be interviewed by defense counsel Todd Maybrown. After Maybrown made several unsuccessful attempts to interview them, he filed a motion for an order permitting him to depose them. (Appendix D). On November 4th the Municipal Court *granted* that motion and issued an order stating that "the defense may schedule depositions with witnesses T.O. and C.O. at counsel's discretion." (Appendix E). Trial was postponed from November to January.

B. December 2: Witnesses' First Failure to Appear and Stevens' Subsequent Motion to Dismiss, or for Alternative Relief.

Maybrown noted the depositions of Obert and C.O. for November 25th. (Appendices F & G). At the prosecutors' request, Maybrown rescheduled their depositions for December 2nd. (Appendix C, ¶¶16-17). Copies of new notices of deposition for the new date were emailed to the attorney for Obert and C.O. and their attorney confirmed their receipt. (Appendix C, ¶17). But on the morning of December 2nd both Obert and C.O. failed to appear. (Appendix C, ¶18).[1]

On December 9th Stevens' counsel filed a motion to dismiss, or in the alternative, for an order precluding the witnesses from testifying at the upcoming January trial. (Appendix H). The motion was noted for

[1] Their attorney sent an e-mail stating that her clients were refusing to appear because they had not been served with subpoenas. Maybrown responded that CrRLJ 4.6 did not require a subpoena, merely a notice of deposition, and he protested the attorney's behavior of accepting the notices, and then disregarding them two weeks later on the ground that they were not accompanied by a subpoena. (Appendix C, ¶¶18-20).

December 30, 2014.

C. December 19: Prosecution Witnesses Appear for a Deposition But Refuse to Answer Key Questions.

Before the December 30th hearing could take place, on December 11th the City prosecutors contacted Maybrown and informed him that the two witnesses were now willing to appear and be deposed, but they could not do that until December 19th. (Appendix I, ¶2). Maybrown reset the deposition again, and this time, on December 19th the two witnesses did appear, but they refused to answer many questions. *Id.*, ¶¶ 3, 4 & 10.

For example, witness C.O. acknowledged that he was on medication both at the time of the deposition and at the time of the alleged assaults; but when asked to identify the medication his counsel told him to refuse to answer the question. *Id.*, ¶5. When asked why he failed to appear at the December 2nd deposition, C.O. said that he was in the hospital, and that this hospitalization was related to Stevens' alleged assault, but he refused to answer any questions about that hospitalization. *Id.*, ¶6. He also refused to answer any questions about his history of mental health problems, his supposed head injuries, and his prior statements and text messages regarding the charged incident. *Id.*,¶10. Similarly, Obert refused to answer questions about C.O.'s alleged "traumatic brain injury" that was allegedly inflicted by Stevens. *Id.*, ¶11.

Portions of their deposition testimony were radically different from

the statements they initially made to police. For example, Obert originally stated she was in a bathroom and did not witness the alleged assault on her son; but at the December 19th deposition she testified that she was present and did witness it. (Appendix I, ¶20. Similarly, both Obert and C.O. testified that Stevens pushed Obert down a flight of stairs, although neither had ever made that claim before. *Id.*, ¶22. They claimed that the police reports of their initial statements were false. RP I, 6.[2]

Since inconsistencies between statements can be powerful impeachment evidence, Maybrown made a discovery request for copies of the prosecutors' notes of their own witness interviews. *Id.*, ¶24-28. The City refused to produce these notes, claiming that they were protected by the work-product privilege, and the City persisted in this refusal even after defense counsel cited them to *State v. Garcia*, 45 Wn. App. 132, 724 P.2d 412 (1986). *Id.*, ¶25 and attached Letter of December 23, 2014. *Garcia* specifically *rejected* the argument that a prosecutor's notes of a witness interview were *per se* work product. *Id.* at 138.

Finally, in the course of the December 19th depositions, defense counsel learned that critical physical evidence had been destroyed. Although Stevens told Kirkland police officers that C.O. had hit her on the

[2] RP I refers to the Municipal Court hearing of December 30, 2014; RP II and RP III refer to the Municipal Court hearings of January 6 and January 15, 2015. RP IV is a transcription of the oral argument held before the Superior Court on October 2, 2015.

head with a stick, the officers never collected this piece of evidence and never even photographed it; at his deposition, witness C.O. disclosed that he had recently burned the stick. *Id.*, ¶¶29-30. On the date of the incident, believing that C.O. may also have handled a gun during the incident, police asked C.O. to show them his gun, but he claimed he couldn't find it. At the December 19th deposition, C.O. acknowledged that he had found the gun but he had destroyed it so it no longer existed. *Id.*, ¶31-32.

D. December 30: The Municipal Court defers ruling, orders a second deposition, gives the witnesses another chance, and orders the prosecutors to produce its interview notes.

In light of the witnesses' refusals to answer at their December 19 depositions, Stevens supplemented her motion to dismiss, noting that (1) the scheduled trial date was fast approaching; (2) one of the witnesses had destroyed evidence; (3) the City prosecutors were refusing to disclose documentary impeachment evidence; and (4) that the witnesses were refusing to answer highly relevant questions. On December 30th the Municipal Court considered Stevens' motion to dismiss. The City did not produce any evidence at this hearing and thus did not dispute anything stated in the declarations submitted by Stevens' counsel. RP I, 3.[3]

[3] Nevertheless, the City argued that the Court should not rely on attorney Maybrown's declaration as to what happened at the December 19th depositions, and faulted him for not supplying the Court with transcripts of them: "He has provided no transcript of the deposition, and therefore everything he is stating under his declaration is hearsay. ...
(Footnote continued next page)

The prosecutors acknowledged that they had refused to provide defense counsel with copies of their notes from the interviews that they had conducted with the witnesses stating: "Our notes are our work product. They contain trial strategy and preparation materials, and the defendant is not entitled to them." RP I, 23. The City did not respond to Stevens' citations to the *Garcia* case and to CrRLJ 4.7(a)(i); [4] nor did it discuss its obligations under the due process clause.[5] Nor did the State offer to submit its interview notes for in camera review so the Court could determine if there was any work product within it that should be redacted.[6] Finally, the City argued that while it had been difficult to arrange for defense counsel interviews of the witnesses, since they had ultimately been deposed on December 19th the delay in providing that discovery had not caused Stevens to suffer any prejudice. RP I, 19-20.[7] Without either

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there is no transcript of what they said . . . we haven't seen those, and your Honor hasn't had a chance to review those. ... [they] have not been provided." RP I, 16-17.

[4] *Garcia* holds, "Our courts, in interpreting CrR 4.7, have also refused to insulate materials from discovery simply because a statement was taken or notes compiled by an attorney." *Garcia* at 138, citing *State v. DeWilde*, 12 Wn. App. 255, 257, 529 P.2d 878 (1974) (witness White's statement "was taken by a deputy prosecuting attorney" but was not disclosed to the defendant. "We agree that the deputy prosecuting attorney erred."). See also RP I, 24 ("Criminal Rule 4.7 says that they're required to provide all oral statements of their witness – of these witnesses. And *State v. Garcia* says, and I'm quoting: Notes taken by prosecutors are not work product.")

[5] *See United States v. Bagley*, 473 U.S.667, 676-77 (1985).

[6] *See Garcia*, at 139.

[7] "[H]e's got his impeachment evidence. That is what the purpose of these meetings and depositions are . . . and he's now received that information, because the depositions lasted for an hour and a half of each of the individual people, and he had more than ample opportunity to delve into the facts ... and get his impeachment evidence."

admitting or denying that the witnesses had refused to answer several questions, the City argued that defense counsel had "conducted a successful deposition of the witnesses with regard to any and all facts of that happened that night . . . ." RP I, 21. Stating that the depositions had "already happened," and ignoring the witnesses' refusals to answer, the City argued that no additional depositions were necessary. RP I, 23. The City claimed that since the trial was scheduled for January 20th the defense had plenty of time to complete its trial preparation. RP I, 15.

Attorney Maybrown concluded by stating that he would happily provide the court with the transcripts of the depositions as soon as he received them,[8] but that given the short amount of time remaining before the trial date he believed that the Court should either dismiss the case, or at the very least exclude the testimony of the alleged victims. RP 23-25.

The trial court judge then made his ruling. He did *not* grant Stevens' motion for dismissal at that time. But the judge stated that defense counsel had acted properly and promptly[9] and he specifically recalled that he had already ruled ("back on November 4th") that the defense was entitled to take depositions because of the "repeated refusal of

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[8] See also RP I, 12: "I've asked that they be expedited, and if the court wants to see them, we'd ask to provide them ex parte so the court could review them."

[9] "Defense counsel properly issued written notices of the depositions confirming the date and time. Those were provided to all counsel involved in this case . . . ." RP I, 25.

the material witnesses to sit for a reported interview." RP I, 25. The Court further noted that when the prosecution asked if they could reschedule the depositions, as a professional courtesy defense counsel did as requested, and sent new notices to all counsel resetting the date to December 2nd. RP I, 25-26. Noting that the witnesses then failed to show up for the deposition on that day, the Court then faulted the prosecutor for not promptly responding to defense counsel's request to set still another date for the depositions. RP I, 26. He noted that it was not until the defense had filed a motion to dismiss that the prosecutors took any action:

> On December 11th, 2014, ***after*** the court scheduled this hearing to address defense counsel's motion to dismiss, ***the prosecutors called defense counsel*** indicating that the witnesses ***would now agree*** to a deposition on December 19th, 2014. That deposition took place.

RP I, 26-27 (emphasis added).

Furthermore, the Court specifically *rejected* the City's argument that the depositions had provided the defense with ample opportunity to prepare for trial, ruling that the City's witnesses had improperly refused to answer relevant questions as to whether C.O. was using his medication at the time of the assault, or at the time of the deposition,[10] and whether his

[10] "These are relevant inquiries ... . Just as it is relevant to know whether a witness is under the influence of intoxicants at the time he or she is testifying in court or at a deposition or at the time he or she is witnessing an event, so it is relevant to know if a witness is under the influence of medication ... ." RP I, 27.

recent hospitalization was related to the charged incident.[11]

Although he *rejected* the City's contention that the defense had been given a fair opportunity to prepare for trial, the Court ruled that it would not yet make any ruling on Stevens' motion for a dismissal. The Court deferred any ruling until it had reviewed the deposition transcripts,[12] but at the same time, the Court issued several "remedial orders."

- Noting there had been substantial changes in the witnesses' version of the events, the Court ordered "all prosecutor notes and recordings, if any, concerning those [prosecutor] interviews be turned over to defense counsel by today at 4:30 p.m." RP I, 29.

- Rejecting the City's argument that the December 19th depositions had been adequate to comply with the discovery rules and due process, the court ordered the City's witnesses to submit to "a second deposition . . . to take place this Friday, January 2nd, at 8:30 a.m., here at Kirkland Municipal Court . . . . The prosecutors are to be present and assist with the interview." RP I, 29-30.

- Finally, the Court made it clear that the City's witnesses were to answer all relevant questions.[13] RP I, 30.

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[11] "This, likewise, was a relevant inquiry. If the material witness went to the hospital as a result of the alleged assault ..., the doctor's assessment and other physical and mental conditions having to do with this hospital stay are relevant and discoverable." RP I, 28.

[12] "The City is resisting the motion, arguing ... that this court should not make a ruling concerning the alleged obstructionist efforts of government witnesses until this court has reviewed the transcripts of the deposition. Still defense counsel mentions in his briefing that he presents some summaries of the deposition for the court as an officer of the court. ***The prosecuting authority has not denied the validity or substantive language of the defense summaries presented to this court in her briefing. The court will nonetheless delay ruling on defense motions until transcripts are available.***" RP I, 29 (emphasis added).

[13] "At the deposition this Friday, so long as the inquiries are relevant, the interview should be unfettered. This will include inquiries concerning the witnesses' use of alcohol, drugs or prescribed medicines at the time of the incident, mental health issues, hospital stays that occurred as a result of this case, et cetera." RP I, 30. *See also Order on Def's Motion to Dismiss or For Alternative Relief,* dated 12/30/14 (Appendix J).

E. **December 30: The City Amends Its Witness List to Add Four New Witnesses, Including Two Expert Witnesses.**

On the same day as the hearing on Stevens' motion to dismiss, the City amended its witness list by adding four new witnesses, including two expert witnesses. (Appendix K). As the trial judge later noted, the City never offered any explanation as to why these witnesses were not identified until six months after charging. RP IV, 13.

F. **January 2: Renewed Defense Motion to Dismiss.**

On January 2, 2015, Stevens filed a renewed motion for dismissal of the case. (Appendix L). She argued that "the City's handling of this case as it has proceeded to trial constitutes gross mismanagement warranting the imposition of an extraordinary remedy." *Id.* at 1-2. In her motion she noted that:

- the City had no basis to claim that any of the four new witnesses were "only recently 'discovered'";
- the January 14th readiness hearing was now 12 days away;
- the defense could not possibly interview the four new witnesses before the time of trial; and
- the defense would be unable to find and identify potential defense rebuttal expert witnesses in the time remaining before trial.

Id. at 2. Stevens also noted that while the City prosecutors had complied with the Court's order to produce its interview notes, the notes showed that the prosecutors' witness interviews had been conducted on October 24th and yet they were not turned over until the afternoon of December

30th when the Court ordered them disclosed. (Appendix M, ¶¶ 4-6).

G. January 2: The City's Witnesses Fail to Appear for Deposition.

Also on January 2nd witnesses Obert and C.O. failed to appear for the second court-ordered deposition. RP II, 4 & Appendix M, ¶7-9. A prosecutor confirmed that she had notified Obert of the deposition date and that Obert had replied, "I don't know if we can make that." *Id.*, ¶22.

H. January 6: The Court gives the City's witnesses a third chance and orders they submit to deposition on January 8th.

On January 6th yet another hearing was held. The Court was informed that the City's alleged victim-witnesses failed to appear for deposition on January 2nd. RP II, 5. The Court noted that the readiness hearing was now only one week away, and that it was conceded by all parties that the two witnesses who had failed to appear were the only witnesses to the alleged assaults. RP II, 25-26. The Court said it wanted to read the transcripts of the depositions where the witnesses had refused to answer pertinent questions, and that it was going to give the witnesses yet another chance before it ruled on the motion to dismiss. RP II, 27. For the third time the Court again ordered the witnesses to appear for a deposition. RP II, 27-28. The Court ordered them to appear at the Municipal Court on January 8th for a deposition. RP II, 29. One of the prosecutors said she was unaware of any reason why the witnesses could not appear on that day, and said she had "no reason to understand that they

would not follow the court's order at this point." RP II, 28.

The Court also directed defense counsel to make every effort to interview the City's recently disclosed expert witnesses. RP II, 30.

I. January 8: The City's Witnesses Again Fail to Appear.

On January 8th the two alleged victim-witnesses again failed to appear at a court ordered deposition. RP III, 3 & Appendix N, ¶5.

J. January 13th: Municipal Court Grants Dismissal Motion.

At the readiness hearing on January 13th the Court was told that the City's witnesses had failed to appear on January 8th. RP III, 3. The Court was also informed that defense counsel had attempted without success to interview the City's recently disclosed new expert witnesses. An attorney representing the two medical experts had told defense counsel that the doctors could not and would not submit to an interview because (1) they had no patient release authorizing them to speak to defense counsel and also because (2) neither doctor had been subpoenaed for trial by the prosecution. (Appendix N, ¶8). As to the City's two new lay witnesses, one of them failed to appear at the time scheduled for his defense interview and the other told the defense investigator that she currently lives in Florida and had not yet decided whether she would agree to attend the scheduled trial. *Id.*, ¶10.

After listening to argument, the trial judge granted Stevens' motion

to dismiss. RP III, 15-16. In his oral ruling the trial judge specifically found fault with the City for disclosing four new witnesses two weeks before the readiness hearing, one of whom had left the State. RP III, 12-14. The court's complete oral ruling is attached as Appendix O. The Court entered a written order dismissing the charges with prejudice, and which specifically stated that "IN REACHING THIS DECISION the Court further incorporates its oral rulings of November 6, 2014, December 30, 2014, January 6, 2015 and January 13, 2015." (Appendix P).

K. Superior Court Vacates Municipal Court's Dismissal Order On Ground That Municipal Court Made No Finding of Fact That City Engaged in Willful or Grossly Negligent Conduct.

At the oral argument of the RALJ Appeal, the City argued that the trial court judge did not expressly find that the City willfully or negligently violated the discovery rules: "[W]e don't believe that the trial court made any findings whatsoever that . . . it was the City's behavior [that prejudiced the defendant]." RP IV, 5-6. The City agreed that its two victim-witnesses had acted improperly, but claimed that the Municipal Court never made any finding "that the City did something wrong" which prejudiced the defendant. RP IV, 7.

Stevens argued that the prosecution's delay in waiting to identify four new witnesses until less than two weeks before the readiness hearing was governmental misconduct that "deprived the defense of any fair

opportunity to prepare the case for trial, and the Court so found." RP IV, 7. The Superior Court judge did not agree, and faulted the Municipal Court for not entering any written findings of fact and conclusions of law:

> COURT: Well, I guess I'm, ***I'm not sure the Court so found.*** The Court certainly said that the defense was presented with enormous difficulties by this case. ***But obviously one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge*** in making his decision. And certainly he substantially agrees with you, Mr. Maybrown, that there were enormous difficulties presented to the defense. ***I'm not sure that he actually made a finding that it, that it prevented the defense from, from going forward.***

RP IV, 7-8 (emphasis added).

Stevens' counsel replied noting that the RALJ rules required the Superior Court to accept the "implicit" findings made by the trial court:

> MR. MAYBROWN: Well, first of all, under the RALJ rules, because the courts of limited jurisdiction are somewhat less formal than these provisions, ***there's a very specific rule, 9.1B that says the Court must accept all findings, both explicitly made and implicit in the Court's findings.***
>
> Here what the Court very clearly found is that endorsing these witnesses six months after the trial had been set, less than two weeks before readiness without any explanation or justification was mismanagement.

RP IV, 8 (emphasis added). Defense counsel also noted that the City had foregone the opportunity to have written findings entered. RP IV, 8.[14]

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[14] "[At the hearing] I asked whether the court wanted to enter written findings or conclusions ... [T]he prosecutor did not want to be heard on this so the prosecutor did not seek the entry of findings." The transcript of the January 13, 2015 hearing bears this out:

(Footnote continued next page)

Defense counsel reiterated that if the Superior Court thought "it would benefit this Court to have more explicit findings we could go get more explicit findings," but argued that that was unnecessary. RP IV, 8. The Superior Court suggested that there was an available alternative to dismissal: the striking of the two witnesses who had refused to answer all relevant questions at the court ordered deposition and refused to appear for the rescheduled deposition. RP IV, 10.[15] But defense counsel noted that the City had previously conceded that if these two witnesses were stricken then the City would have no way of proving the charges and the case would have to be dismissed. So striking the witnesses would necessarily lead to a dismissal anyway:

> MR. MAYBROWN: . . . Both parties have argued and I believe testified that the police have acknowledged, there's no other witness to this case. So it would have been, it would have been the same essentially. . . .
>
> So I think that, ***we could go back and the court could make more explicit and you could have these beautiful detailed findings, which would get us to exactly the same place.***

"MR. MAYBROWN: Your Honor, I have an order which reflects what the court has considered and incorporates the court's oral ruling. If that would be sufficient with the court, that would be sufficient with the defense. ***If the court wants us to prepare findings, we would prepare findings and conclusions.*** I'm satisfied either way, but I'll defer to the court. And perhaps the prosecutor would have –

THE COURT: ***Does the prosecutor wish to be heard?***

MS. McELYEA: ***No, Your Honor.***

THE COURT: ***Then I'll sign your order, Counsel.***" RP III, 16-17 (emphasis added).

[15] MR. MAYBROWN: . . . I think the Court certainly was authorized to strike these witnesses given their refusal to cooperate. And – COURT: Right. And I agree with you that, that's a potential thing. But that's not, of course, what he did." RP IV, 10.

RP IV, 10-11 (emphasis added).

The Superior Court replied that it was not yet clear that there was no other remedy, because if the trial judge had given the witnesses a *fourth* chance to be deposed and to answer all questions, maybe then the witnesses would then have answered fully; and if not *then* the trial judge could have dismissed the case. It is not clear that the Superior Court understood that there had been *three* hearings before the Municipal Court judge, for he spoke as if he thought there had been only one.[16]

Defense counsel argued that the issue before the Superior Court was whether the trial court judge had abused his discretion when he determined that it was no longer possible, in the time remaining, for the defense to have a fair opportunity to prepare for trial. Defense counsel stated the time-honored test for abuse of discretion and the Superior Court *disagreed* with his formulation of the test. The Superior Court concluded that the Municipal Court judge abused his discretion because he did not

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[16] "[W]hat happened was, of course, that you initially moved for dismissal on the ground that they refused to be interviewed by you, and I understand why you would do that. [¶] And, but, of course, by the time we got the hearing on it there actually had been a deposition. There had been an assertion at the hearing of a refusal to answer certain questions on the grounds of medical privilege. . . . [¶] . . . The judge ruled against [the witnesses] on that, but, I think at that point ***you need to go back and, and, uh, and find out whether that [sic] you can get the answers or not.*** Now, I realize that, that you were up against time pressures. But I don't think that just because it's gotten that close it just automatically means that we go to the nuclear option and, and dismiss the case. . . . ." RP IV, 13-14 (emphasis added).

(But the defense *had* gone back and *had* attempted to find out if the witnesses would answer all relevant questions and *twice* the witnesses had simply refused to appear.)

make an explicit finding of governmental misconduct:

> MR. MAYBROWN: . . . ***[T]he question is whether any reasonable judge in Washington, faced with these circumstances, could have reached the decision it [the Municipal Court] reached.***
>
> COURT: ***No, that's not the proper...*** I realize that there are cases that articulate the standard that way but that, ***that's a fundamental misstatement of what, what the, abusive [sic] discretion means.*** It's a decision made for untenable grounds or for untenable reasons. And ***the untenable grounds here is that there is no finding by the trial court*** of a governmental misconduct or arbitrary action.

RP IV, 15 (emphasis added). The Superior Court then entered this order:

> The above entitled court having heard a motion to remand this case back to the trial court for an abuse of discretion under 8.3 and 4.7.
>
> IT IS HEREBY ORDERED THAT this case be remanded back to the trial court for a trial. Court finds there was an abuse of discretion.

(Appendix A).

V. WHY REVIEW SHOULD BE ACCEPTED

A. THE SUPERIOR COURT ERRONEOUSLY REJECTED THE ESTABLISHED TEST FOR DECIDING IF THERE WAS AN ABUSE OF DISCRETION. (RAP 2.3(d)(1) & (d)(4)).

The test for deciding whether an abuse of discretion has occurred is well established: "An appellate court finds abuse of discretion only when no reasonable judge would have reached the same conclusion." *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). This test

has been around for a long time and is often cited.[17] Stevens' counsel said that this was the applicable standard. But the Superior Court said that it was *not* the proper the test, and that even though "there are cases that articulate the standard that way, but that, that's a fundamental misstatement of what" the term abuse of discretion means." RP IV, 15.

The Superior Court was wrong. That standard is not a misstatement of the proper appellate test for determining whether an abuse of discretion has occurred. The Superior Court's rejection of this test is contrary to dozens of Washington decisions and his refusal to apply this test was a radical departure from the usual course of proceedings which calls for discretionary review.

B. THE RALJ COURT VIOLATED THE RULE SPECIALLY CRAFTED FOR APPELLATE REVIEW OF MUNICIPAL COURT DECISIONS WHICH REQUIRES THE ACCEPTANCE OF ALL FINDINGS, INCLUDING ALL UNSPOKEN FINDINGS THAT CAN REASONABLY BE INFERRED FROM THE LOWER COURT'S DECISION. (RAP 2.3(d)(3) & (d)(4)).

The Superior Court was fixated on what it erroneously saw as a "problem": "[T]here weren't actual written findings and conclusions entered"; there were only "oral statements by the judge . . . ." RP IV, 7. Given the absence of any formal written findings of fact or conclusions of

[17] *See, e.g., State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001); *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1220 (1997); *State v. Perez*, 184 Wn. App. 321, 341-42, 337 P.3d 352 (2014).

law, the Superior Court said that the trial judge's decision to dismiss was "made for untenable grounds" because there was "no finding of a [sic] governmental misconduct or arbitrary action." RP IV, 15.

The "no tenable reason" test is merely a different articulation of the "no reasonable judge" test. But the RALJ judge's application of the test makes no sense. The failure to make a written or oral finding of fact does not mean that the trial court judge had no tenable reason. A reason need not be written or spoken to be a "tenable" reason. As RALJ 9.1(b)(2) expressly provides, it need only be something that can be "reasonably inferred" from the trial court's judgment.

RALJ 9.1(b)(2) accommodates the generally informal nature of judging that takes place in the municipal courts. The rule recognizes that it would be completely unworkable to require the judges of these courts to support all their decisions with written FF&CL. Instead of requiring such findings, RALJ 9.1(b)(2) *requires* appellate courts to accept all reasonably inferable findings that could support the judgment of the lower court.

There is only one published decision that makes even a passing reference to RALJ 9.1(b). *State v. Basson*, 105 Wn.2d 314, 714 P.2d 1188 (1986) states that because the Superior Court was sitting as an appellate court, RALJ 9.1(b) applied, and thus it was improper for the Superior Court to make its own evaluation of the evidence. But *Basson* only

addresses subsection (b)(1) which requires acceptance of all findings "supported by substantial evidence;" it does not address subsection (b)(2) which requires acceptance of all "reasonably inferred" findings.

Because there is no published opinion analyzing subsection (b)(2), this case presents a question of substantial public interest. In the absence of a published decision, other Superior Court judges are likely to make the same mistake and will fail to follow the mandate of RALJ 9.1(b)(2).

In the present case, the record is replete with facts that support the trial court judge's decision and from which a finding of governmental mismanagement of the case can reasonably be inferred.[18] The Superior Court's decision remanding this case for trial ignores all these oral statements, all these reasonable inferences, and the clear command of the applicable appellate rule.

VI. CONCLUSION

For the reasons stated above, Petitioner Stevens asks this Court to grant discretionary review of the Superior Court's decision.

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[18] For example, there was unrebutted evidence that the police failed to collect physical evidence that supported the self-defense defense; and the prosecutors delayed the deposition of their witnesses; failed to promptly reschedule them when the witnesses failed to appear; refused to provide discovery of their own interview notes; defended their refusal with a frivolous claim of work-product privilege; waited for six months to identify four new witnesses just two weeks before the readiness hearing; failed to subpoena their belatedly disclosed experts; and failed to provide their experts with medical releases thus making it impossible for defense counsel to interview them.

Respectfully submitted this 12th day of January, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz

ALLEN HANSEN MAYBROWN & OFFENBECHER, P.S.

By _____
Todd Maybrown

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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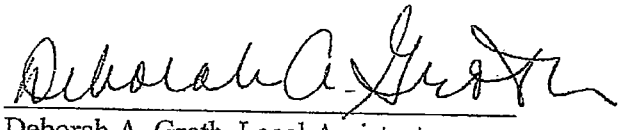
DATED this 12th day of January, 2016.



Deborah A. Groth, Legal Assistant

APPENDIX U

NO. 74300-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

CITY'S ANSWER OPPOSING PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

King County Superior Court RALJ Decision
No. 15-1-01772-8 SEA

Kirkland Municipal Court Cause
No. 38384

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APPENDICES

APPENDIX A: ..... Complaint (June 23, 2014).

APPENDIX B: ..... Decl. of Todd Maybrown in Support of Def.'s Mot. to Dismiss or for Alt. Relief (Dec. 10, 2014).

APPENDIX C: ..... Supplemental Decl. of Todd Maybrown in Supp. of Def.'s Mot. for Dep.'s (Nov. 3, 2014).

APPENDIX D: ..... Order re Def.'s Mot. for Dep.'s (Nov. 4, 2014).

APPENDIX E: ..... Teresa Obert Notice of Dep. (Nov. 14, 2014); C.O. Notice of Dep. (Nov. 17, 2014).

APPENDIX F: ..... Decl. of Lacey Offutt in Supp. of City's Resp. to Def.'s Renewed Mot. to Dismiss (Jan. 6, 2015).

APPENDIX G: ..... Hrg. Transcr. (Dec. 30, 2014).

APPENDIX H: ..... Def.'s Mot. to Dismiss or for Alternative Relief (Dec. 10, 2014).

APPENDIX I: ..... Teresa Obert Subpoena for Dep. (Dec. 15, 2014); C.O. Subp. for Dep. (Dec. 15, 2014).

APPENDIX J: ..... Supplemental Decl. of Todd Maybrown in Supp. of Def.'s Mot. to Dismiss (Dec. 24, 2014).

APPENDIX K: ..... City's Addendum to Witness List (Dec. 29, 2014).

APPENDIX L: ..... Second Supplemental Decl. of Todd Maybrown in Supp. of Def.'s Mot. to Dismiss (Jan. 5, 2015).

APPENDIX M: ..... Hrg. Transc. (Jan. 6, 2014).

APPENDIX N: ..... Teresa Obert Subpoena for Dep. (Jan. 7, 2015); C.O. Subpoena for Dep. (Jan. 7, 2015).

APPENDIX O: ..... Decl. of Tamara McElyea in Supp. of City's Resp. to Def.'s Mot. to Dismiss (Jan. 12, 2015).

APPENDIX P: ..... Hrg. Transc. (Jan. 13, 2015).

APPENDIX Q: ..... Notice of Appeal to Superior Court and Certification of Filing Status (Feb. 9, 2015).

APPENDIX R: ..... Order on Criminal Motion, City of Kirkland v. Stevens, 15-1-01772 SEA, Oct. 2, 2015.

APPENDIX S: ..... Verbatim Report of Proceedings ("RP"), City of Kirkland v. Stevens, 15-1-01772 SEA, Oct. 2, 2015.

APPENDIX T: ..... Mot. For Discretionary Review (Jan. 12, 2016).

A. IDENTITY OF RESPONDENT

Respondent, City of Kirkland, asks this Court to deny Petitioner Hope A. Stevens' motion for discretionary review because this case does not satisfy the requirements of RAP 2.3(d). Moreover, the Superior Court's decision to remand this case for trial was correct.

B. DECISION BELOW

Stevens seeks review of the October 2, 2015, RALJ decision of the King County Superior Court, the Honorable Judge Douglass A. North, finding an abuse of discretion by the trial court and remanding the case to the Kirkland Municipal Court. On RALJ appeal, the City argued that the trial court abused its discretion when it dismissed the case under CrRLJ 4.7 and CrRLJ 8.3(b).

The Superior Court agreed, finding that there was no evidence presented of governmental misconduct or arbitrary action in the record. The Superior Court determined that the trial court had "conflated" the City's obligations with the witnesses' actions, which does not the meet standard for dismisssl under CrRLJ 8.3(b)[1].

C. ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in applying RALJ 9.1(b) so as to create an issue of public interest meriting appeal, or so far depart from the accepted and usual course of judicial proceedings that review by the Court of Appeals is warranted?

2. Did the Superior Court "reject" the proper "abuse of discretion" standard of review so as to conflict with established precedent or

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[1] Verbatim Report of Proceedings at 12, City of Kirkland v. Stevens, 15-1-01772 SEA, Oct. 2, 2015 (hereinafter "RP").

so far depart from the usual and accepted course of judicial proceedings as to call for discretionary review by this Court?

D. STATEMENT OF THE CASE

The City of Kirkland charged Hope A. Stevens with two counts of Assault in the Fourth Degree, Domestic Violence for conduct toward her half-sister, Teresa Obert, and her nephew, C.O. – Ms. Obert's son - on June 21, 2014. (App. A).

Ms. Obert and C.O. retained independent legal counsel, Mary Gaston. (App. B, ¶ 7). At the request of Stevens' attorney, Mr. Maybrown, Ms. Gaston offered Mr. Maybrown two separate opportunities to interview the witnesses in October. Id. at App. A. He declined to conduct those interviews. (App. C, ¶¶ 6 and app. A). Over the City's objection, the trial court ordered the witnesses to sit for depositions. (App. D).

Mr. Maybrown scheduled the depositions of Ms. Obert and C.O. for December 2, 2014 and mailed notices of depositions to the witness's attorney, Mary Gaston. (App. E). The prosecutors cleared their schedules in order to attend. (App. F, ¶ 8). On the morning of the scheduled depositions, Ms. Gaston informed the parties that her clients would not be present for the depositions because (1) C.O. was hospitalized on that date, and (2) Ms. Gaston read CrRLJ 4.6 to require the witnesses to be under subpoena. (App.

G, 13:13-17). The prosecutors immediately provided alternative dates. Id. at 13:21-22.

The defendant moved to dismiss under CrRLJ 8.3(b) "because the City's witnesses have refused to be interviewed and/or deposed." (App. H). Counsel based his motion on the witness's behavior, stating "the witnesses have made it virtually impossible for counsel to prepare...," attributing much of this difficulty to Mary Gaston, the witness's independent counsel. (App. B, ¶¶ 7, 14, 18 – 20).

The City arranged for the witnesses to be available for depositions on December 19, 2014. (App. F, ¶¶11-15). The City subpoenaed the witnesses to appear for the deposition. (App. I). Both witnesses sat for depositions on December 19, 2014, each lasting for approximately ninety minutes. (App. G, 26:25- 27:1). Both witnesses answered counsel's questions, with the exception of what medications C.O. was using at the time of the alleged assault and about his recent hospital stay. Id. at 27:2-6; 27:8-10; 28:1-2. Private counsel objected based on doctor-patient privilege. Id. at 27:6-7; 27:12; 28:2-4.

Defendant renewed her request for dismissal under CrRLJ 8.3(b) and CrRLJ 4.7, citing her belief that the depositions were inadequate. (App. J, ¶ 36). Counsel claimed the witnesses "hijacked" the proceedings and used "obstructionist" tactics when they failed to answer questions. (App. G,

8:22). He stated that the information was "material to the defense for several reasons" but did not elaborate on how. (App. J, ¶ 11). Additionally, counsel claimed that the City had failed to provide interview notes from the City's October 22 interview of the two witnesses. Id. at ¶ 24-28.

On December 29, 2014, the City filed an amended witness list, adding four fact witnesses and including their contact information and a summary of their expected testimony. (App. K).

The trial court heard oral argument on December 30, 2014. (App. G). The trial court ordered the City to produce all notes and recordings from the City's interview of the witnesses by end of business that day. Id. at 29:16-22. The trial court further ordered the witnesses to appear for additional depositions on January 2, 2015 to answer questions regarding C.O.'s medical history and medications used, finding this line of questioning to be "relevant." Id. at 29:25, 30:8-13.

The City subpoenaed C.O. and Ms. Obert to appear for a second deposition, as ordered. (App. F, ¶ 19). The City arranged for a Kirkland Police officer to personally serve the witnesses, but the officer was unsuccessful. Id. at ¶ 19, 21. Ms. Offutt spoke with Ms. Obert by phone to inform her of the trial court's ruling, and Ms. Obert responded that she did not know if they were available. Id. at ¶ 22. The second deposition did not occur. (App. L, ¶ 8).

On January 6, 2015, Mr. Maybrown conceded that but for the witnesses' absence at a second deposition on January 2, 2015 "[w]e would be prepared for trial in mid-January, if all of this hadn't been created by the misconduct of these witnesses… ." (App. M, 8:8). The trial court ruled that defense has a right to interview witnesses prior to trial, noting that the "defense does not have to wait to hear to questions for the first time while the jury is sitting there." Id. at 26:12-15. The judge stated that "the witnesses have chosen not to respond to the second deposition. That's up to the witnesses." Id. at 26:23-24. The trial court ordered a third deposition of C.O. and Ms. Obert to occur on January 8, once more instructing that the witnesses reveal "whether or not the [witness] was under the influence of medicines and narcotics and alcohol" and to answer "questions concerning what the [witness] was seeing the doctor for." Id. at 28:6-8.

Once again, the City prepared subpoenas for the witnesses to appear for the January 8, 2015 depositions. (App. N). The City again arranged for a Kirkland Police officer to personally serve the witnesses with the subpoenas, but again were unsuccessful. (App. O, ¶ 7). Both prosecutors made repeated attempts to call the witnesses, unsuccessfully. Id. at ¶10. Ms. Offutt provided notice to the witness's attorney, Ms. Gaston, via telephone on January 6, 2015. The witnesses failed to appear for the third ordered deposition. (App. P, 12:18-20).

On January 13, 2015, the trial court heard defendant's third motion to dismiss. Id. The court dismissed the case pursuant to 8.3(b) and 4.7. Id. 15:25-16:8.3. In its oral ruling, the trial court noted the "pattern of the City's witnesses' failure to cooperate with defense interviews...." Id. at 10:13-14. The trial court specifically noted that, at the "one and only interview" with defense counsel, the witnesses declined to answer questions regarding C.O.'s medication use and mental status at the time of the alleged assault, claiming medical privilege and lack of relevance. Id. at 10:20- 11:3. The witnesses failed to sit for the second deposition to answer questions the court deemed relevant, without analysis of whether the medical information was material to the defense. Id. at 11:9-10. The court also considered the witnesses' failure to appear for the third-ordered deposition on January 8, 2015 and the logistical strain the repeated depositions had on defense counsel to hire a stenographer and rearrange his schedule. Id. at 12:18-21; 12:9-13.

The trial court found that the City endorsed four additional witnesses "less than two weeks before trial readiness," finding it significant that the City disclosed the witnesses six months after filing the charges. Id. at 12:22-13:1. Of those four witnesses, the two named medical professionals declined to speak with Mr. Maybrown due to doctor-patient privilege. Id. at 13:11-13. Jeff Obert failed to appear for a scheduled interview on January

8, 2015. Id. at 14:2-3, 14:8-10. Cori Parks actually did speak to the defendant's investigator, but declined to interview over the phone. Id. at 5:13-17, 14:13-15. The trial court found that the defendant would "clearly be impermissibly prejudiced" due to defense counsel's inability to interview these four witnesses. Id.

Ultimately, the trial court found that Ms. Steven's right to a fair trial had been materially affected because she was forced to choose between proceeding to trial and hear testimony from some witnesses for the first time during trial, or forfeit her right to a speedy trial and ask for another continuance "in hopes that witnesses may cooperate." Id. at 15:9-24. The City sought review of the dismissal via RALJ appeal and argued that the trial court abused its discretion when it dismissed this case under CrRLJ 4.7 and CrRLJ 8.3. (App. Q).

The Superior Court remanded the case to the Kirkland Municipal Court. (App. R). The Superior Court found the trial court had abused its discretion because it did not follow the two-prong standard of CrRLJ 8.3 that requires a showing of governmental misconduct or arbitrary action **and** prejudice to the rights of the accused which materially affected her rights to a fair trial. (App. S, 19). The Superior Court found that, while there was "significant evidence" of prejudice to the defendant, there was no governmental misconduct or arbitrary action. (App. S, 16). Without

first finding both requirements, the trial court should not have reached the extraordinary, or "nuclear," remedy of dismissal. (App. S, 14).

E. ARGUMENT: WHY REVIEW SHOULD BE DENIED

Under RAP 2.3(d), discretionary review may only be accepted in the following circumstances:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Stevens seeks review under RAP 2.3(d) (1), (3), and (4), but fails to demonstrate that the Superior Court erred or how a public interest is implicated. The Superior Court's decision showed no conflicts with precedent, there was no public interest issue, and there was no departure from the accepted and usual course of judicial proceedings. Therefore, review should be denied because Stevens's case does not meet the criteria of RAP 2.3 for discretionary review.

1. THE SUPERIOR COURT DID NOT ERR IN APPLYING RALJ 9.1(B) SO AS TO CREATE AN ISSUE OF PUBLIC INTEREST MERITING APPEAL, OR SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REVIEW BY THE COURT OF APPEALS IS WARRANTED.

The Superior Court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably inferred from the judgment of the court of limited jurisdiction. RALJ 9.1(b) If there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Id. at 644 (quoting State v. Halstein, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

While the court has an obligation to reasonably infer facts from the trial court's judgment, it would be difficult to determine what should be inferred if the record is not clear. State v. Weber, 159 Wn. App. 779, 786, 247 P.3d 782 (2011). It is a long-recognized logical fallacy to draw an affirmative conclusion from a negative premise. Id. In other words, a court on review cannot infer a finding where no facts support such a

finding. If nothing in the record would support an inference, the reviewing court must only infer facts that have substantial evidentiary support. Id.

Here, the trial court did not enter written findings of fact and conclusions of law before or after the City filed a RALJ appeal. On January 13, 2015, after the trial court dismissed the case, the parties had the following exchange that shows that Stevens offered, and then accepted, a written order that "incorporates" the trial court's oral ruling and found that to be sufficient:

> MS. MCELYEA: All right, thank you. And, your Honor, in light of your ruling, when -- when could we anticipate it in writing?
> THE COURT: That's up to counsel. If you want to present an order to me.
> MS. MCELYEA: Okay.
> MR. MAYBROWN: Okay, your Honor –
> THE COURT: Be happy to review it and sign it.
> MR. MAYBROWN: Your Honor, I have an order which reflects what the court has considered and incorporates the court's oral ruling. **If that would be sufficient with the court, that would be sufficient with the defense.** If the court wants us to prepare findings, we would prepare findings and conclusions. **I'm satisfied either way, but I'll defer to the court.** And perhaps the prosecutor would
> THE COURT: Does the prosecutor wish to be heard?
> MS. MCELYEA: No, your Honor.

(App. P, 16:11-17:3). Rather than draft findings of fact and conclusions of law, Stevens deferred to the trial court's decision to incorporate into a written order the court's oral ruling.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. See RAP 2.5(a); State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). Now, faced with the Superior Court's decision, Stevens asks this Court to grant discretionary review on the basis that the Superior Court could have inferred governmental misconduct or arbitrary action from the record, or alternatively remand back to the trial court for completion of written findings of facts and conclusions of law.

The Superior Court did not misapply or disregard the dictates of RALJ 9.1(b). It did not "reject[1]" the trial court's oral statements from which Steven's urged the Superior Court to infer governmental misconduct or arbitrary action. Rather, the Superior Court was quite clear that there was nothing in the trial court record from which to infer governmental misconduct. RP at 12:1-4 (App. S). The only evidence the Superior Court could point to in the exhaustive record of several hearings was the presumed prejudice to the defense. Id. at 17:14-18. The Superior Court agreed with Stevens that if there was something in the record that

[1] (App. T, 18:8).

would allow the Court to "infer" the trial court found governmental misconduct then it would certainly look at that part of the record. Id. at 16:5-12. But it does not exist. Id. at 16:9.

Stevens argues that the record is "replete with facts" that would have allowed the Superior Court to infer governmental misconduct. (App. T, 20). But on the other hand, Stevens also argues the case should be remanded for the trial court to complete written findings of facts and conclusions of law in order for Superior court to have a "full record" so the Court would have "beautiful detailed findings." (App. S, 11:7-8). The Superior Court ruled there simply were not facts supporting a finding of governmental misconduct; the record was completely absent of any mention that filing additional witness list, or defense's difficulties interviewing witnesses, rose to the level of "gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Id. at 12. The Superior Court found that both the trial court and Stevens conflated the City's obligation with the witnesses' behavior in finding a violation of CrRLJ 4.7. Id. The Superior court was very clear that the trial court was not using the well-established two-prong rule for dismissal under CrRLJ 8.3, and therefore it could not infer the trial court found governmental misconduct from the record presented. Id. at 16, 19.

Furthermore, remanding this case for entry of findings of fact and conclusions of law would not cure the issue. The practice of entering findings after the appellant has framed the issues on appeal lends to unfairness. State v. McGary, 37 Wn.App. 856, 861, 683 P.2d 1125 (1984). Where there are no written finding of facts and conclusions of law from the lower court, a reviewing court should not remand solely to complete the formality of adding written findings and conclusions where the reasons for the trial court's ruling were clearly evident from the court's oral ruling. State v. Wilson, 149 Wn.2d 1,9, 65 P.3d 657 (2003), quoting State v. Sonneland, 80 Wn.2d 343, 350, 494 P.2d 469 (1972).

The trial court should not now be allowed to fix its oversight by completing written findings after the issues have been illuminated and argued on appeal. To now argue the case be remanded to complete written findings of facts and conclusions of law reeks of unfairness. Both parties were given the option of completing the findings and both parties deferred to the trial court. Stevens' argument focuses on the "informal nature" of judging that takes place in municipal courts and how "completely unworkable" it would be to require municipal court judges to complete written findings on all cases. (App. T, 19). There is no discussion on how giving a road map to the trial court of what is needed to prove her argument is a fair use of the judicial process. Remanding the case for entry of

"beautiful and detailed findings" would be a misuse of court resources and invite revision of the trial court's true ruling and reasoning. (App. S, 19:1-5). Moreover, more detailed findings of the facts on which the trial court relied would not illuminate the trial court's ruling – it still ignored the established rule for dismissal in violation of CrRLJ 8.3(b) and case law.

The absence of published case law analyzing RALJ 9.1(b)(2) does not automatically create a "public interest" issue under RAP 2.3(d)(3). (App. T, 20). A "public interest" under RAP 2.3(d)(3) relates to something that has a wide-reaching effect. State v. Walter, 66 Wn. App. 862, 865, 833 P.2d 440 (1992). For example: whether the State has to prove a defendant actually supplied a fake identification to someone under 21, Id.; whether several statutes dealing with suspended licenses proscribe the same conduct, State v. Alfonso, 47 Wn. App. 121,122, 702 P.2d 1218 (1985); challenging the language of a traffic violation, State v. Prado, 145 Wn. App. 646, 186 P.3d 1186 (2008); court appointment of counsel for RALJ appeal, State v. Mills, 85 Wn. App. 285, 932 P. 2d 192 (1997); challenging the safely-off-the-roadway defense, State v. Hazard, 43 Wn. App. 335, 336, 716 P.2d 977 (1986); or appointment of an expert for a public defender case, City of Mount Vernon v. Cochran, 70 Wn.App. 517,521, 855 P.2d 1180 (1993). All of these cases had the potential to

affect numerous defendants in numerous cases, and were therefore within the "public interest."

Here, Stevens has again provided no case law to support this position or even argument about how this could be a "public interest" under the RAP. There is an extensive list of cases in Washington that refer to RALJ 9.1(b) as the RALJ rule that governs the standards by which a case is to be reviewed by the Superior Court. State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988). A public interest is generated out of the effects that issue will have on the public as a whole or an issue that has never been addressed in the court of Washington. Walter, 66 Wn. App. at 865. It is not the analysis of a rule that would create a public interest. If that were the case our judicial process would grind to a halt because every rule could be turned into a public interest. The City asks that this Court to reject Stevens's argument that the perceived absence of published case law on the analysis of RALJ 9.1(b)(2) presumptively creates a public interest and deny discretionary review on that basis.

2. THE SUPERIOR COURT APPLIED THE ABUSE OF DISCRETION STANDARD PROPERLY.

The Superior Court employed the proper standard of review and applied the abuse of discretion standard squarely within the accepted and usual course of judicial proceedings in harmony with existing precedent.

Therefore, no review by this Court is warranted under RAP 2.3(d)(1) or 2.3(d)(4).

Washington's courts have repeatedly articulated the proper standard of review when evaluating appeals based on alleged discovery violations and alleged prosecutorial misconduct. "The trial court's power to dismiss is discretionary and is reviewable only for manifest abuse of discretion... 'Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on **untenable grounds** or for **untenable reasons**.'" State v. Micheilli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). "A trial court's decision to dismiss under CrR 8.3(b) can be reversed only when a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on **untenable grounds.**" State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). "Abuse of discretion requires the trial court's decision [denying defendant's motion to dismiss under CrR 8.3(b)] to be manifestly unreasonable or based on **untenable grounds** or **untenable reasons**." State v. Athan, 160 Wn.2d 354, 375-76, 158 P.3d 27 (2007). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on **untenable grounds** or for **untenable reasons**, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its

ruling on an erroneous view of the law." State v. Slocum, 183 Wn. App. 438, 449, 333 P.3d 541 (2014) (reviewing a trial court's evidentiary rulings for an abuse of discretion).

Where there is no showing of governmental misconduct or arbitrary action, the trial Court's dismissal of the case will be reversed. Blackwell, 120 Wn.2d at 832, 845 P.2d 1017 (citing State v. Underwood, 33 Wn. App. 833, 837, 658 P.2d 50 (1983)).

Here, the Superior Court articulated that an abuse of discretion occurs when the trial court's ruling is "made for untenable grounds or for untenable reasons." (App. S, 15). In applying that standard here, Superior Court determined that the trial court abused its discretion when it dismissed this prosecution. Id. The Superior Court judge found that the trial court dismissed the prosecution on the "untenable" basis of governmental misconduct and/or arbitrary action without ever finding governmental misconduct or arbitrary action, contrary to the dictates of CrRLJ 8.3 case law[1]. Id. "There, there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Now, there is by the witnesses. But ... you're conflating the witnesses with the prosecuting entity." Id. at 12.

[1] [T]he untenable grounds here is that there is no finding by the trial court of a governmental misconduct or arbitrary action." (App. S, 15).

The Superior Court further clarified that, not only did the trial court fail to make such an express finding of governmental misconduct, but the record was devoid of facts from which he could reasonably infer such a finding:

> I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something...but there, **it isn't there**. What's there is an enormous litany of, of concern about prejudice to the defense. And I grant you that there, there is significant evidence of that. But [dismissal] requires both elements (arbitrary action or governmental misconduct and prejudice affecting defendant's right to a fair trial). It can't just be one.

(App S, 16).

The Petitioner asks this Court to adopt a labored reading of the Superior Court's ruling[1]. (App. T, 19). The Petitioner would have this Court understand that the Superior Court only found an abuse of discretion because the trial judge did not make a **specific written or oral** finding of prosecutorial misconduct, and that failure is what made the dismissal

[1] "But the RALJ judge's application of the test makes no sense. The failure to make a written or oral finding of fact does not mean that the trial court judge had no tenable reason. A reason need not be written or spoken to be a "tenable" reason... it only needs to be something that can be "reasonably inferred" from the trial court's judgment. (App. T, 19:4-10).

"untenable" in the Superior Court's eyes. (App. T, 19:4-10). This understanding is flawed. In reading the Superior Court's ruling in its entirety, it is clear that the Superior Court determined that the trial court had abused its discretion by dismissing the case when "there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency[1]" – explicit or implicit. Thus, it was not the trial court's failure to say or write the words "prosecutorial misconduct", but the lack of evidence supporting such a finding that the Superior Court deemed an abuse of the trial court's discretion.

The Superior Court in this case properly announced and applied the abuse of discretion standard as articulated in well-established case-law. Washington courts regularly apply this standard as stated by the Superior Court (i.e. that a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons). Because the Superior Court operated within the accepted and usual course of proceedings, and acted in accordance with well-established decisions by the Washington State Supreme Court, this case does not meet the requirements for discretionary review under RAP 2.3(d)(1) or 2.3(d)(4).

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[1] (App. S, 12).

G. CONCLUSION

This case does not present an appropriate issue warranting discretionary review pursuant to RAP 2.3(d). For the foregoing reasons, the City asks this Court to deny the petitioner's motion for discretionary review.

DATED this 22th day of January 2016.

Respectfully Submitted,

Tamara L. McElyea
City of Kirkland Assistant Prosecutor
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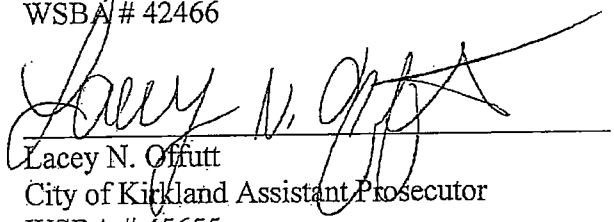

Lacey N. Offutt
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APPENDIX V

No. 74300-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass North

PETITIONER'S REPLY BRIEF

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B. The Superior Court judge stated that the basis for the Municipal Court's decision was unclear to him because there were no written findings of fact. 2

C. *None* of the *facts* that the Municipal Court relied upon *were disputed.* And the City further acknowledges that the Superior Court agreed with the Municipal Court that Stevens suffered significant prejudice. 3

D. The only disagreement between the Municipal Court and the Superior Court is whether the undisputed facts "rise to the level" of mismanagement or arbitrary government action. *State v. Brooks* holds that it is *not* an abuse of discretion to rule that failure to provide timely discovery to the defendant constitutes mismanagement. 6

E. Here, as in *Brooks*, the trial court applied the correct test set forth in *Michielli*. 7

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I. ARGUMENT IN REPLY

A. The Superior Court's decision violated RALJ 9.1 and did the exact opposite of what the rule requires. RALJ 9.1(g) requires the Superior Court to state the reasons for its ruling in writing. The Superior Court did not comply with this rule. Instead, the superior court faulted the municipal court for failing to state its findings in writing, even though RALJ 9.1 explicitly recognizes that municipal courts do *not* have to make their findings in writing.

Presenting an internally inconsistent argument, the City attempts to persuade this Court that the Superior Court committed no obvious errors and did not depart from the accepted and usual course of judicial proceedings. But the City's view of the applicable appellate rule is hopelessly muddled.

RALJ 9.1 speaks to the duties of both the trial court and the Superior Court sitting as an appellate court. RALJ 9.1(g) unambiguously states, "The decision of the superior court *shall* be in writing . . . ." and goes on to state, "The reasons for the decision *shall* be stated." (Italics added). The word "shall" dictates that the act described is mandatory. *See State ex rel Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980) (the word "shall" in JCrR 2.04(b), a rule for courts of limited jurisdiction, stated a command that created a mandatory duty).

Similarly, RALJ 9.1(b) states that the "superior court *shall* accept those factual determinations supported by substantial evidence," thereby creating another mandatory duty. This part of the rule extends that duty of

acceptance to *both* the factual determinations "which were expressly made by the court of limited jurisdiction" and to such other factual determinations "as may be reasonable inferred" from the judgment of the municipal court. Thus the rule states that the superior court must accept findings that are *not* explicitly made – either in writing or orally – so long as they are reasonably inferable from the municipal court's decision.

In the present case, the Superior Court ignored its duty to state the reasons for its own decision in writing, thereby violating RALJ 9.1(g). After ordering the case sent back to the municipal court for a trial the Superior Court's decision states only this: "Court finds there was an abuse of discretion." (Appendix A). Why was there an abuse of discretion? The Superior Court's written decision doesn't say. Thus, "[t]he *reasons* for the decision" are never stated.

But at the same time, the Superior Court faulted the Municipal Court for failing to enter written findings of fact, thereby ignoring RALJ 9.1(b). Although the rule specifically acknowledges that municipal court decisions need *not* be supported by any explicit findings, the Superior Court ignored this portion of the rule as well.

B. The Superior Court judge stated that the basis for the Municipal Court's decision was unclear to him because there were no written findings of fact.

As Petitioner Stevens noted in her opening brief, the reason that

allegedly supported the Superior Court's decision – which the Superior Court stated orally – was that the Municipal Court's failure to enter any written findings of fact made the Superior Court unsure of what the Municipal Court judge actually found. Thus, when Stevens' counsel said that the Municipal Court judge found that Stevens had been prejudiced by the failure to provide timely discovery, the Superior Court responded by stating: "I guess I'm, ***I'm not sure the Court so found.***" RP IV, 7 (emphasis added). The Superior Court zeroed in on the absence of written findings, stating: "But obviously, one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge in making his decision." *Id.*

Stevens' counsel then responded by pointing out that the appellate rule made it clear that no written and no oral findings were required, and that all that was necessary was a decision from which factual determinations could be "reasonably inferred" (RP I, 8).

C. *None* of the *facts* that the Municipal Court relied upon *were disputed.* And the City further acknowledges that the Superior Court agreed with the Municipal Court that Stevens suffered significant prejudice.

The City argues that the superior court judge then took a different tack, and shifted the basis for its ruling to *a lack of evidence in the record* to support the Municipal Court's decision that there was mismanagement or arbitrary conduct by the prosecution. *City's Answer*, at 12. Confusing

facts with legal conclusions, the City claims that "[t]he Superior Court ruled there simply were not facts supporting a finding of governmental misconduct [because] the record was completely absent of any mention that [the actions of the trial prosecutors] rose to the level of 'gross[[1]] mismanagement or arbitrary action, or willful violations by the prosecuting agency." *Id.*

But the *facts* regarding the City's actions *were undisputed.* The City did ***not*** dispute ***any*** of the following facts, all of which were relied upon by the Municipal Court:

1. In response to Stevens' request the City prosecutors refused to produce their own notes from their interviews with the key witnesses.

2. The prosecutors asserted that they didn't have to produce those notes because they constituted work product. RP I, 23.

3. When the defense informed the prosecutors that *State v. Garcia,* 45 Wn. App. 132, 724 P.2d 412 (1986) had rejected that exact same argument nearly 30 years ago the prosecutors *still* refused to produce their interview notes. (Attachment A, pp. 2-3, to Appendix I)

4. When the same witnesses failed to appear for their scheduled defense attorney interviews the prosecutors failed to promptly reschedule them. RP I, 25.

5. After bringing charges against Stevens the prosecutors waited

[1] The State inflates the requirement of mismanagement by asserting that a defendant must show *gross* mismanagement. No case so holds. In fact, the Supreme Court has explicitly rejected such a high standard As noted in *State v. Dailey,* 93 Wn.2d 454, 457, 610 P.2d 357 (1980), "we have made it clear that "governmental misconduct" need not be of an evil or dishonest nature, ***simple mismanagement is sufficient.***"

for six months, until they were within two weeks of the readiness hearing, and then disclosed the existence of four new witnesses, two of whom were expert medical witnesses. (Appendix K).

6. The prosecutors failed to provide these expert witnesses with releases, thus insuring that their experts would not agree to be interviewed by defense counsel. (Appendix L, p. 3).

7. The prosecution took no action to insure that physical evidence, including the stick that was used to threaten defendant Stevens, was preserved. (Appendix I, ¶¶29-30.)

8. At the same time, one of the four additional witnesses the City disclosed at the last minute was described as a witness who would "testify to the type of broomstick" that the City allowed the alleged victim to destroy. (Appendix K, Witness #3).

The standard of review for a finding of fact is whether the record contains substantial evidence to support it. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Since these facts were *undisputed* there clearly was substantial evidence to support them. Moreover, in answer to Stevens' motion for discretionary review, the City admits that many of these facts were expressly found by the Municipal Court: "***The trial court found*** that the City endorsed four additional witnesses 'less than two weeks before trial readiness,' finding it significant that the City disclosed the witnesses six months after filing the charges." *City's Answer,* at 6. Moreover, based upon these undisputed facts, the Superior Court expressly agreed with the Municipal Court's determination that these actions caused Stevens to suffer prejudice. *Id.* at 7.

D. The only disagreement between the Municipal Court and the Superior Court is whether the undisputed facts "rise to the level" of mismanagement or arbitrary government action. *State v. Brooks* holds that it is *not* an abuse of discretion to rule that failure to provide timely discovery to the defendant constitutes mismanagement.

Ignoring the applicable standard of "simple mismanagement," the City argues, that the Superior Court RALJ judge properly concluded that the sum total of these undisputed facts does not "rise to the level of gross mismanagement." *City's Answer,* at 12. *See Dailey, supra,* at 457; *State v. Oppelt,* 172 Wn.2d 285, 297, 257 P.3d 653 (2011). The Municipal Court concluded that it did. The Superior Court stated orally that it did not think it was. But the Superior Court's oral comment is in direct conflict with *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009).

In Stevens' case, as in *Brooks*, the prosecution failed to timely provide discovery. Here, as in *Brooks*, the prosecution's failure to timely provide discovery was undisputed. In *Brooks* the prosecution took two months to transcribe a key witness statement. *Id.* at 382. It also noted the delay in producing the report of the lead detective in the case:

> The State failed to deliver Deputy Smith's report and he was the lead detective on the case. It seems unlikely that this report could be immaterial in any circumstance and it was certainly material as to how defense counsel would have interviewed the investigator at trial. ***The delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.***

Brooks, 149 Wn. App. at 390 (emphasis added).

This Municipal Court reached the same conclusion in this case:

> [T]here are four witnesses that have all refused to talk to defense counsel. These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed. Now trial readiness is tomorrow. . . . Because the defendant's speedy trial right expires February 2nd, 2015, this matter must proceed to trial this month and begin on January 20. ***Defense counsel has not had a sufficient opportunity to adequately prepare a material part of the defense and the defendant will clearly be impermissibly prejudiced if the trial were to proceed this month.***

(Appendix O, at pp. 14-15).

In *Brooks* the Court of Appeals affirmed the dismissal of the charges finding no abuse of discretion because the undisputed facts supported the legal conclusion that there was mismanagement:

> We hold that the trial court did not abuse its discretion by finding governmental mismanagement and prejudice.

Brooks, 149 Wn. App. at 391. The same is true here.

E. Here, as in *Brooks*, the trial court applied the correct test set forth in *Michielli.*

In *Brooks* the Court applied the two part test outlined in *State v. Michielli*, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997), which requires a defendant seeking dismissal to show (1) that the prosecution engaged in "simple mismanagement" of the case, and (2) that such conduct prejudiced the defendant's right to a fair trial.

> Such prejudice incudes the right to a speedy trial and the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense."

Brooks, at 384, quoting *Michielli*, at 240.

The trial court judge was fully aware of the legal standard set forth in *Michielli* and found exactly the same type of prejudice had resulted from the City's mismanagement of the case. He noted that Stevens either had to give up her right to effective assistance of counsel and a fair trial with a prepared defense attorney, or she had to give up her right to a speedy trial. "The government simply cannot force a defendant, a criminal defendant, to choose between these rights." (Appendix O, p. 15).

"A trial court's power to dismiss charges is reviewable under the manifest abuse of discretion standard. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *Michielli*, 132 Wn.2d at 240 (citations omitted). The Municipal Court's decision that the two part test for dismissal had been met was not a manifest abuse of discretion. Indeed, the only manifest abuse of discretion in this case was committed by the Superior Court. The Superior Court's failure to apply the manifest abuse of discretion review standard was itself a manifest abuse of discretion.

F. No matter what definition of "abuse of discretion" is used, the Municipal Court's conclusion that there was mismanagement or arbitrary action was not an abuse of discretion.

The City says:

The Superior Court found that, while there was "significant

> evidence" of prejudice to the defendant, there was no governmental misconduct or arbitrary action.

City's Answer, at 7. This statement essentially concedes the case, since it shows that the Superior Court made its own determination – its own "finding" ("it found") – that there was no mismanagement or arbitrary action. But it is not within the Superior Court judge's power to make such a determination himself. His only power was to decide whether the Municipal Court's decision was so unreasonable that no reasonable judge would ever have made such a decision.

II. CONCLUSION

Stevens was entitled to have the Superior Court apply the highly deferential manifest abuse of discretion standard but she did not get it. The Superior Court's failure to apply the manifest abuse of discretion review standard to the Municipal Court's decision constitutes a radical departure from the usual course of judicial proceedings which warrants discretionary review under RAP 2.3(d)(4).

As the language from *Michielli* quoted above demonstrates, although there are several different ways of articulating the manifest abuse of discretion test, all of the phrases employed by Washington Courts state the same basic test. The test is simply whether the appellate court can say that the decision rendered below is unreasonable, which is the same thing as saying the reasons given for the decision are untenable, or as saying that

no reasonable judge would have made such a decision.

In this case, none of those things can be said about the Municipal Court's decision to dismiss the case. Obviously, (1) the trial judge did have "tenable reasons" for concluding that mismanagement or arbitrary governmental action has been shown; (2) it cannot be said that his decision was "manifestly unreasonable"; and (3) it cannot be said that "no reasonable judge" would have made the same decision.

The Superior Court RALJ judge violated both RALJ 9.1(b) and RALJ 9.1(g), and disregarded the cases that hold that an appellate judge cannot reverse the dismissal of a criminal case absent a manifest abuse of discretion. Moreover, this is a case that presents an issue of public interest since hundreds of RALJ appeals are decided in this State every year, and there is not a single published decision that alerts the Superior Court bench to the danger of missing the important procedural distinction between the manner in which appellate review of factual determinations is conducted when the decision under review is one that was made by a court of limited jurisdiction rather than a Superior Court. Therefore discretionary review of the decision below is *also* warranted under RAP 2.3(d)(3).

Respectfully submitted this 29th day of January, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz

ALLEN HANSEN MAYBROWN & OFFENBECHER

By _____
Todd Maybrown

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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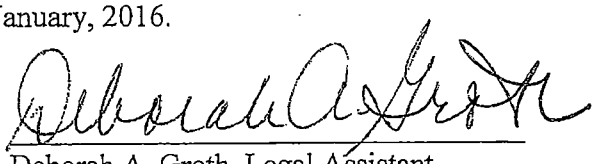
DATED this 29th day of January, 2016.



Deborah A. Groth, Legal Assistant

APPENDIX W

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

CITY OF KIRKLAND, Respondent, v. HOPE STEVENS, Petitioner.	)	No. 74300-7-I COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

This case comes to this Court on a motion for discretionary review of a superior court decision entered in a proceeding to review a municipal court decision under RALJ (rules for appeal of decisions of court of limited jurisdiction). Hope Stevens, charged with fourth degree assaults in municipal court, seeks discretionary review of a superior court decision that reversed the dismissal of the charges and remanded for trial. The superior court concluded that there is no supportable finding of governmental misconduct warranting the extraordinary remedy of dismissal and that the municipal court conflate the prosecutor's discovery obligations with witnesses' conduct. Stevens argues that the superior court rejected the established abuse of discretion standard of review and failed to accept the municipal court's implicit findings of governmental mismanagement. But she fails to show that the superior court decision is in conflict with any Washington case, that her appeal involves an issue of public interest that should be determined by an appellate court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court. Review is denied.

FACTS

In June 2014, the City of Kirkland charged Hope Stevens with two counts of domestic violence fourth degree assault in Kirkland Municipal Court. The City alleged that Stevens intentionally assaulted her half-sister Teresa Obert and Obert's teenage son (Stevens' nephew) C.O. Stevens pleaded not guilty to the assault charges. She asserts that she was the victim and that she was hit by her nephew C.O. with a stick.

Stevens' counsel sought to either depose Obert and C.O. or interview them with a court reporter. Obert and C.O. retained independent legal counsel. Counsel for Obert and C.O. agreed to an informal interview, but not any recording other than Stevens' counsel taking notes, or participation by any "extraneous people," including a court reporter.[1] Stevens filed a motion for depositions. On November 4, 2014, the trial court granted her motion and allowed her counsel to schedule depositions of Obert and C.O.

Stevens' counsel scheduled the depositions of Obert and C.O. for November 25, 2014 but re-scheduled the depositions for December 2, 2014 at the City's request. Stevens' counsel served all parties with notices of the depositions. On the morning of December 2, counsel for Obert and C.O. notified Stevens' counsel and the City's counsel that C.O. was hospitalized. Counsel also asserted that neither Obert nor C.O. had been subpoenaed for the depositions. Stevens' counsel responded that this case is governed by Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 4.6, which requires only a notice of deposition, not a subpoena. Obert and C.O. did not appear at the depositions.

Stevens filed a motion to dismiss under CrRLJ 4.7 and 8.3 or for alternative relief

[1] Appendix to Answer to Motion for Discretionary Review (City App.) C(A) at 2 (October 23, 2014 6:01PM email).

for Obert's and C.O.'s refusal to be "interviewed and/or deposed."[2] The trial court scheduled a hearing on the motion for December 30, 2014. Meanwhile, the City's counsel arranged for Obert and C.O. to be available for depositions on December 19, 2014 and subpoenaed them to appear at the depositions.

On December 19, 2014, Obert and C.O. appeared with their counsel. Each of their depositions lasted about 90 minutes. Both answered Stevens' counsel's questions, but not all of them. In particular, C.O. did not answer questions about what medications he was using at the time of the incident, his medical history, and his recent hospital stay. C.O.'s counsel objected to those lines of questions by asserting doctor-patient privilege.

After the depositions, Stevens' counsel filed a supplemental declaration in support of the pending motion to dismiss. The transcript of the depositions was not available then, but counsel asserted that Obert's and C.O.'s counsel made improper objections and that the witnesses refused to answer questions that could be used to impeach them at trial. Counsel asserted that during the depositions, Obert "repeatedly made malicious claims" about Stevens.[3] Counsel also asserted that C.O. admitted having burned the stick he used to hit Stevens. Counsel also complained that the City had refused to provide its prosecutor's notes from the City's October 2014 interview of Obert and C.O.

On December 29, 2014 (22 days before the trial was set to begin on January 20, 2015), the City filed an amended witness list. The City added four witnesses and disclosed their contact information and a summary of the witnesses' expected testimony.

On December 30, 2014, about 1:00 p.m., the trial court conducted a hearing on Stevens' motion to dismiss. After the hearing, the court ordered Obert and C.O. to

[2] Appendix to Motion for Discretionary Review (Stevens App.) H.
[3] Stevens App. I (supplemental declaration of Todd Maybrown) at 4 ¶ 14.

appear three days later on January 2, 2015 for second depositions to answer questions about C.O.'s medical history and medications the court found relevant. The court also ordered the City to produce its prosecutor's interview notes by the end of that day over the City's objection that the notes were privileged attorney work product.[4] The City produced the notes on that day and prepared subpoenas for Obert and C.O. to appear for the ordered depositions. Because the postal service had gone out, the City arranged for personal service by a Kirkland police officer. The City later reported that the officer could not serve the subpoenas because no one answered the door. Counsel for Obert and C.O was out of the country. About 4:30 p.m. on that day, the City's counsel called Obert to inform her of the depositions. Obert said: "I don't know if we can make that."[5]

On January 2, 2015, Obert and C.O. did not appear at the ordered depositions. Stevens filed a renewed motion to dismiss under CrRLJ 8.3(b), arguing that the "City's gross mismanagement in this case calls for the extraordinary remedy of dismissal."[6]

On January 6, 2015, about 1:00 p.m., the trial court conducted a hearing and ordered Obert and C.O. to appear two days later on January 8, 2015 for depositions. The court also ordered all parties to reconvene on January 13, 2015. The City prepared subpoenas for the witnesses to appear for the ordered depositions and again arranged for a Kirkland police officer to personally serve the witnesses with the subpoenas. The City's counsel later reported that Jeff Obert answered the door when the officer attempted to serve the subpoenas and that Jeff Obert told the officer that Teresa Obert

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[4] See State v. Garcia, 45 Wn. App. 132, 137-38, 724 P.2d 412 (1986) (prosecutor's notes are not per se work product, and the State failed to show the notes were protected work product when the prosecutor did not assert that her notes contained her opinions, theories, or conclusions but resisted disclosure on the basis that the notes were incomplete).

[5] City App. F (declaration of Lacey Offutt) at 3 ¶ 22.

[6] Stevens App. L (renewed motion to dismiss) at 7.

and C.O. were out of the state. The City's counsel unsuccessfully attempted several times to make direct contact with Teresa Obert. On the same day (January 6), the prosecutor gave a notice of the depositions to counsel for Obert and C.O. by phone. On January 8, Obert and C.O. did not appear at the ordered depositions.

On January 13, 2015, the trial court conducted a hearing and dismissed all charges under CrRLJ 4.7 and 8.3(b). The court incorporated its oral rulings of November 6 and December 30, 2014 and January 6 and 13, 2015. The court noted that the "pattern of the City's witnesses' failure to cooperate with defense interviews is well documented."[7] It also noted that the City filed an amended witness list to add four witnesses "more than six months after the government filed charges against the defendant, and less than two weeks before trial readiness[.]"[8] The court noted that according to Stevens' counsel, the added witnesses had refused to talk to counsel. The court stated that because Stevens' speedy trial right would expire on February 2, 2015, the case would have to go to trial on January 20, 2015. The court stated that the City could not force Stevens to choose between her right to speedy trial on one hand and her right to effective assistance of counsel, confrontation, and due process on the other:

> A dismissal of a criminal prosecution is an extraordinary remedy, as both counsel bring up many times, available only if the accused rights have been prejudiced to the degree that the accused right to a fair trial has been materially affected, in that the defendant is now at the point where she is compelled to choose between two distinct rights, either proceed as scheduled and hear testimony from many witnesses for the first time during trial, thereby violating her effective assistance of counsel, right to confront witnesses, and right to fair due process, or give up her right to speedy trial and ask for yet another extension in hopes the witnesses may cooperate. The government simply cannot force a defendant, a criminal defendant, to

[7] Stevens App. P; RP (Jan. 13, 2015) at 10.
[8] Stevens App. P; RP (Jan. 13, 2015) at 12.

choose between these rights.[9]

The City appealed the dismissal to King County Superior Court. The City argued that the trial court abused its discretion in resorting to the extraordinary remedy of dismissal without considering any less drastic remedy. It argued that adding witnesses 22 days before trial did not rise to the level of egregious governmental conduct found by the courts to justify dismissal. The City argued that the trial court improperly conflated the City's obligations with the witnesses' conduct.

Stevens responded that the trial court found "very clear discovery violations" when "these witnesses are willfully failing to abide by these orders. And that's sufficient."[10] She argued that CrRLJ 4.7 "does not say in that section anywhere that the willful violation of the order must be by the prosecutor. It doesn't say that."[11] She also argued that the trial court found the City's mismanagement based on its adding witnesses six months after the setting of the trial and less than two weeks before trial readiness.

After a hearing, the superior court reversed the dismissal as an abuse of discretion and remanded to the municipal court for trial. The court reasoned that dismissal "requires willful or arbitrary action on the part of the government, not on the basis of the witnesses."[12] The court rejected Stevens' argument that if it believed the municipal court did not enter sufficient findings, it could remand for the municipal court to enter finings of "gross mismanagement" or "gross negligence on the part of the prosecutors."[13] The superior court explained that "there wouldn't be any basis for

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[9] Stevens App. P; RP (Jan. 13, 2015) at 15.
[10] City App. S; RP (Oct. 2, 2015) at 8.
[11] City App. S; RP (Oct. 2, 2015) at 9.
[12] City App. S; RP (Oct. 2, 2015) at 14.
[13] City App. S; RP (Oct. 2, 2015) at 11.

entering those findings."[14] The court said:

> There, there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Now there is by the witnesses. But, but, but you're conflating the witnesses with the prosecuting entity.[15]

Stevens filed a notice for discretionary review to this Court.

DECISION

Stevens seeks discretionary review of the superior court's decision that reversed the dismissal and remanded to the municipal court for trial. This Court may accept review of a superior court decision entered on review of a municipal court decision, only if the petitioning party (Stevens) satisfies one of the following criteria under RAP 2.3(d):

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.[16]

Stevens seeks review under RAP 2.3(d)(1) (conflict), (3) (issue of public interest), and (4) (far departure from the accepted and usual course of judicial proceedings). She makes two primary arguments. First, she argues that the superior court erroneously

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[14] City App. S; RP (Oct. 2, 2015) at 11.
[15] City App. S; RP (Oct. 2, 2015) at 12.
[16] RAP 2.3(d).

rejected the established abuse of discretion standard of review. Second, she argues that the court violated RALJ 9.1(b), which requires the court to accept all findings, including unspoken ones that can reasonably be inferred from the lower court's decision. But neither argument demonstrates any conflict with Washington precedent, any issue of public interest that should be determined by this Court, or such a far departure from the accepted and usual course of judicial proceedings that calls for review by this Court.

The municipal court dismissed the charges under CrRLJ 4.7 and 8.3(b). Under CrRLJ 4.7, a trial court may dismiss the action "if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure."[17] Under CrRLJ 8.3(b), a court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."[18] A dismissal of charges "is an extraordinary remedy, one to which a trial court should turn only as a last resort."[19] A trial court should consider "intermediate remedial steps" before "ordering the extraordinary remedy of dismissal."[20] Our Supreme Court has repeatedly and "unequivocally" stated that dismissal "is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct."[21]

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[17] CrRLJ 4.7(g)(7)(ii).

[18] CrRLJ 8.3(b).

[19] City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010) (citation omitted).

[20] Holifield, 170 Wn.2d at 237 (citation omitted).

[21] Id. (citation omitted).

A dismissal of charges is reviewed for a manifest abuse of discretion.[22] Stevens quotes the following dialogue between her counsel and the superior court to argue that the court erroneously rejected the proper abuse of discretion standard of review:

> COUNSEL: But here we're, the question is whether any reasonable judge in Washington, faced with these circumstances, could have reached the decision it reached?
>
> COURT: No, that's not the proper . . . I realize that there are cases that articulate the standard that way but that, that's a fundamental misstatement of what, what the, abusive discretion means. It's a decision made for untenable grounds or for untenable reasons. And the untenable grounds here is that there is no finding by the trial court of a governmental misconduct or arbitrary action.[23]

"Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons."[24] A trial court's decision is "manifestly unreasonable" if the court adopts a view "that no reasonable person would take."[25] A trial court abuses its discretion "if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."[26] If "there is no evidence of arbitrary prosecutorial action nor governmental misconduct (including mismanagement of the case . . .), the court's dismissal will be reversed."[27]

Here, the superior court's oral ruling, viewed in its entirety, appears to apply the correct standard. The court concluded that the dismissal was based on untenable

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[22] State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).
[23] City App. S; RP (Oct. 2, 2015) at 15 (emphasis added).
[24] Michielli, 132 Wn.2d at 240 (emphasis added).
[25] Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458-59, 229 P.3d 735 (2010) (citation omitted); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) ("An appellate court finds abuse only 'when no reasonable judge would have reached the same conclusion.'")
[26] State v. Slocum, 183 Wn. App. 438, 449, 333 P.3d 541 (2014).
[27] State v. Blackwell, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993) (citation omitted).

grounds – dismissal without a supportable finding of *the City's* arbitrary action or misconduct warranting dismissal. Specifically, the court concluded that the trial court improperly conflated the City's obligations with the witnesses' conduct. Stevens' contrary argument does not satisfy any of the criteria for review under RAP 2.3(d).

Stevens asserts that the superior court was "fixated on" the lack of written findings and conclusions, inconsistent with RALJ 9.1(b)(2). The rule provides as follows:

> The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction."[28]

In support of her assertion, Stevens quotes the following statement by the superior court: "But obviously one of the problems we have here is there weren't actual written findings and conclusions entered."[29] But the court also stated:

> Well, I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something, of, you know, but there, it isn't there.[30]

The superior court concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal.[31] Under RALJ 9.1(b)(2), a finding must be supported by substantial evidence. The record does not appear to support the premise of Stevens' apparent argument that the superior court reversed the dismissal simply because the municipal court failed to enter written findings.

In her reply brief, Stevens argues that the evidence supports a finding of the City's mismanagement, that the City's failure to timely provide discovery constitutes

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[28] RALJ 9.1(b).
[29] City App. S; RP (Oct. 2, 2015) at 7.
[30] City App. S; RP (Oct. 2, 2015) at 16.
[31] City App. S; RP (Oct. 2, 2015) at 12.

mismanagement, and that the superior court's decision is in conflict with Brooks[32] and Michielli.[33] But her motion for discretionary review did not cite Brooks or Michielli or argue that these cases present a conflict for review under RAP 2.3(d)(1). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration."[34]

I did consider Stevens' argument in her reply brief. But Brooks and Michielli appear distinguishable and do not present a conflict for review. Also, Stevens' argument about the sufficiency of the evidence is specific to the facts of this case and does not present an issue of public interest that warrants discretionary review. Nor does she explain how the superior court so far departed from the accepted and usual course of judicial proceedings in concluding that the evidence did not support the City's misconduct or mismanagement sufficient to justify the extraordinary remedy of dismissal. At most, she asserts a legal error, not a far departure from the judicial proceedings.

Brooks involved "severe governmental mismanagement," including a failure to produce 60-page victim statement, lead detective's report, the entire police file, witness names, and multiple other documents routinely produced in discovery.[35] The State's failure to comply with its discovery obligations forced the court to continue trial. The trial

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[32] State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009).

[33] State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997).

[34] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In her motion for discretionary review, Stevens argued in one sentence and a footnote, without citation to any authority, that "the record is replete with facts that support the trial court's judge's decision and from which a finding of governmental mismanagement of the case can reasonably be inferred." Motion for Discretionary Review at 20, 20 n.18. An appellate court may decline to consider argument raised in a footnote or without sufficient analysis. See State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993) (declining to address argument raised in a footnote); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

[35] Brooks, 149 Wn. App. at 393 ("The trial court here faced very difficult decisions caused by the severe governmental mismanagement, which in turn affected the accuseds' ability to receive a fair trial.").

court in Brooks stated: "Dumping the amount of information into the lap of the defense attorneys subsequent to the omnibus hearing and on the day of trial when it was not newly created or discovered and which had been available for weeks is simply unfair and unacceptable."[36] On appeal from the dismissal, Division Two of this Court stated that although dismissal is an extraordinary remedy, Brooks was "an extraordinary case" where the trial court, despite multiple continuances, "was unable to get the State to comply with its discovery order, even on the eve of trial."[37]

Michielli involved a prosecutor's decision to add four new *charges* three business days before trial, although the prosecutor admittedly had all the information and evidence supporting those charges months earlier.[38] The Supreme Court stated that the facts "strongly suggest that the prosecutor's delay in adding the extra charges was done to harass Defendant."[39] The court held that the trial court did not abuse its discretion in dismissing the charges under CrR 8.3(b), stating: "Even though the resulting prejudice to Defendant's speedy trial right may not have been extreme, the State's dealing with Defendant would appear unfair to any reasonable person."[40]

In view of the record, neither Brooks nor Michielli appears analogous to the facts of this case. Stevens argues that "gross mismanagement" is not required and that "simple mismanagement" is sufficient. Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient."[41] But "Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court

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[36] Brooks, 149 Wn. App. at 387.
[37] Id. at 393.
[38] See Michielli, 132 Wn.2d at 233, 244.
[39] Id. at 244.
[40] Id. at 246.
[41] State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

should resort only in 'truly egregious cases of mismanagement or misconduct.'"[42] For example, when the State's key witness (victim) refused to cooperate with the defense and did not meet court-imposed deadlines for an interview by the defense, our Supreme Court held that dismissal was improper and was properly reversed where the prosecutor "did not engage in unfair gamesmanship, nor did he egregiously neglect his obligation."[43]

Stevens fails to demonstrate that the superior court's decision is in conflict with any Washington precedent, that her appeal involves an issue of public interest that should be determined by this Court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court. Discretionary review is not warranted under RAP 2.3(d).

Therefore, it is

ORDERED that discretionary review is denied.

Done this 7th day of June, 2016.

Masako Hanagawa
Court Commissioner

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STATE OF WASHINGTON
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[42] Wilson, 149 Wn.2d at 9.
[43] Id. at 11.

APPENDIX X

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KIRKLAND, Respondent, v. HOPE STEVENS, Petitioner	NO. 74300-7-I PETITIONER'S MOTION TO MODIFY COMMISSIONER'S RULING

1. IDENTITY OF MOVING PARTY

Hope Stevens, Petitioner, seeks the relief designated below.

2. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 17.7 and RAP 2.3(d), Petitioner asks the Court to modify the ruling of Commissioner Masako Kanazawa denying discretionary review, and to enter a ruling granting discretionary review.

3. FACTS RELEVANT TO MOTION

Petitioner was charged in Kirkland Municipal Court with two counts of Assault 4 for allegedly assaulting Teresa Obert and Obert's teenage son C.O. "Stevens asserts that she was the victim and that she was hit by her nephew C.O. with a stick." *Commissioner's Ruling*, at 2. As she attempted to prepare for trial, petitioner encountered serious difficulties obtaining discovery. Some of her difficulties were created by the witnesses C.O. and Teresa Obert. Other difficulties were created by the conduct of the prosecutor for the City of Kirkland.

The prosecution's witnesses repeatedly refused to comply with the trial court's discovery orders. On November 6, 2014, the Municipal Court judge granted Petitioner's motion for leave to take their depositions. Although initially scheduled for November 26, 2014, at the request of the prosecution their depositions were rescheduled to December 2, 2014. *Commissioner's Ruling,* at 2. But on that date the witnesses failed to appear. *Id.* at 2-3. A new deposition date of December 19, 2014 was set, and the witnesses appeared for deposition on that date, but they refused to answer several relevant questions. *Id.* at 3. On December 30, 2014, the trial court ordered them to submit to another deposition on January 2, 2015 and to answer the relevant questions, but on that date the witnesses failed to appear again. *Id.* at 3-4. The trial judge issued yet another order directing them to appear for a deposition on January 8, 2015, but for the third time the witnesses failed to appear for deposition. *Id.* at 4-5.

Petitioner's counsel also encountered difficulties obtaining discovery from the prosecution. Although the Commissioner fails to mention it in her ruling, when Petitioner made a discovery request for copies of the prosecutor's notes of their own witness interviews, the City refused to produce them, claiming that they were protected by the work product privilege. The City persisted in refusing to produce these notes, even after Petitioner cited the case of *State v. Garcia,* 45 Wn.App. 132, 724 P.2d 412

(1986).[1] *Garcia* specifically rejected the argument that a prosecutor's notes of a witness interview were *per se* work product. *Id.* at 138.

Petitioner also sought to examine the stick that witness C.O. had hit her with, but she was informed that the investigating police officers failed to collect this piece of evidence when they responded to take the witnesses' complaint.[2]

Petitioner filed a motion seeking an order of dismissal pursuant to CrRLJ 8.3, and the trial court judge held three separate hearings on this motion. At the first hearing, held on December 30, 2014, the trial court judge ordered the City to immediately produce to Petitioner the prosecutors' notes of its own witness interviews. RP I, 29. The court also faulted the prosecutor for delaying before setting a new deposition date when the witnesses failed to appear for their deposition on December 2, 2014. RP I, 26.[3] But the trial judge declined to dismiss the charges at that time, choosing instead to enter remedial orders.

Also on December 30th, the City prosecutors chose to amend their witness list and to add four new witnesses including two expert witnesses.[4]

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[1] See Appendix I, ¶25 in Appendices to Motion for Discretionary Review.

[2] Appendix I, ¶¶29-30.

[3] "On December 11, 2014, *after* the court scheduled this hearing to address defense counsel's motion to dismiss, the prosecutors called defense counsel indicating that the witnesses would now agree to a deposition on December 19, 2014." (Italics added).

[4] Appendix K to Motion for Discretionary Review. A copy of the City's supplemental witness list is also attached to this brief as Appendix A.

As the trial judge later noted, the City never offered any explanation as to why these witnesses were not added until six months after the charges were initially filed. RP IV, 13.

When the witnesses failed to appear for deposition on January 2, 2015, Petitioner filed a renewed motion to dismiss, and the trial judge heard that motion on January 6, 2015. For the second time, the trial judge declined to grant the motion, choosing instead to give the witnesses yet another chance to appear for deposition, and ordering Petitioner's counsel to see if he could obtain discovery from the prosecution's four new witnesses. RP II, 30.

It was not until the trial court held its third hearing on Petitioner's motion to dismiss that the trial court judge granted that motion on January 13, 2015.[5] At that hearing the trial judge was informed that Petitioner's counsel had not been able to interview any of the City's four new witnesses; both of the recently disclosed expert witnesses refused to be interviewed because they had not been subpoenaed by the prosecution for trial and because they had not been supplied with a patient release form.[6]

When the trial judge orally granted the Petitioner's motion to dismiss, Petitioner's counsel raised the question of whether the court

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[5] Appendix P to Motion for Discretionary Review.

[6] Appendix N, ¶8 to Motion for Discretionary Review.

wanted to enter written findings. The court asked the prosecutor if she wanted to be heard on that question but she declined the invitation to speak to that issue:

> MR. MAYBROWN: Your Honor, I have an order which reflects what the court has considered and incorporates the court's oral ruling. If that would be sufficient with the court, that would be sufficient with the defense. If the court wants us to prepare findings, we would prepare findings and conclusions. I'm satisfied either way, but I'll defer to the court. And perhaps the prosecutor would have –
>
> THE COURT: Does the prosecutor wish to be heard?
>
> MS. McELYEA: No, your Honor.
>
> THE COURT: Then I'll sign your order, Counsel.

RP III, 16-17.

In his oral ruling granting Petitioner's motion to dismiss, the Municipal Court judge specifically faulted the City for disclosing four new witnesses two weeks before the readiness hearing, one of whom had left the State.

> [O]n December 30, 2014, ***more than six months after the government filed charges against the defendant, and less than two weeks before trial readiness, the City filed an additional witness list endorsing four additional witnesses.*** The witness list included two medical health professionals, a doctor and a physician's assistant. Both apparently took part in examining the alleged victim/witness after the assault.
>
> ***The defense again moved to dismiss charges, citing mismanagement on the part of the prosecutors by waiting over six months to endorse expert witnesses only days before the trial.*** Again, [on January 6th] the court chose to

> reserve ruling and urged defense counsel to attempt to interview the newly-endorsed witnesses with the time left before trial.
>
> Today, according to declarations filed by the defense, the two medical professionals have declined to discuss their involvement in this case citing privilege. ***It's interesting to note that the government has endorsed two doctor witnesses, albeit late, to testify as to the condition of the alleged victim following the altercation.*** Still, both medical witnesses are refusing to discuss the case with the defense. Consequently, the defendant will hear this crucial testimony for the first time during trial in front of the jury. The testimony, and that of others – this testimony, and that of others, will be a complete surprise to the defendant.
>
> According to defense counsel, ***the third witness endorsed by the City on December 30th, 2014*** is Jeffrey Obert. . . . Mr. Obert declined to appear for the [defense] interview.
>
> ***The fourth witness added to the government's list on December 30, 2014 is a Corey Parks.*** According to the declaration filed by the defense, this witness lives in Florida and has also declined to be interviewed over the phone. According to the declaration, ***Ms. Parks states she has not received a subpoena to appear in court . . .***
>
> Consequently, there are four witnesses that have all refused to talk to defense counsel. ***These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed . . . .***

RP III, 12-14 (emphasis added). Acknowledging that "a dismissal of a criminal prosecution is an extraordinary remedy," the municipal court judge concluded that he had no choice but to grant the requested dismissal because "the government simply cannot force a defendant, a criminal defendant, to choose between" her right to a speedy trial, and her due process rights to

adequately prepare for trial. RP III, 15-16. The Municipal Court's written order dismissing the charges with prejudice states: "IN REACHING THIS DECISION the Court further incorporates its oral rulings of November 6, 2014, December 30, 2014, January 6, 2015 and January 13, 2015)."[7]

The City of Kirkland appealed the dismissal to the King County Superior Court. Even though the City had expressly declined to comment when asked in the Municipal Court if the City thought written findings of fact and conclusions of law were necessary, in the Superior Court the City complained that the Municipal Court judge never made any finding that the City did something wrong. RP IV, 7. Petitioner Stevens responded that the prosecution's delay in waiting to identify four new witnesses, including two experts, until less than two weeks before readiness hearing, was governmental misconduct which "deprived the defense of any fair opportunity to prepare the case for trial, and the Court so found." RP IV, 7. But the Superior Court RALJ judge did not agree that it was clear that the Municipal Court "so found," and he faulted the Municipal Court judge for not entering any written findings of fact and conclusions of law:

> COURT: Well, I guess I'm, ***I'm not sure the Court so found.*** The Court certainly said that the defense was presented with enormous difficulties by this case. ***But obviously one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge*** in making his decision. And certainly he

[7] Appendix P to Motion for Discretionary Review.

> substantially agrees with you, Mr. Maybrown, that there were enormous difficulties presented to the defense. ***I'm not sure that he actually made a finding that it, that it prevented the defense from, from going forward.***

RP IV, 7-8 (emphasis added).

Stevens' counsel replied noting that the RALJ 9.1(b) requires the Superior Court to accept the "implicit" findings made by the trial court:

> MR. MAYBROWN: Well, first of all, under the RALJ rules, because the courts of limited jurisdiction are somewhat less formal than these provisions, ***there's a very specific rule, 9.1B that says the Court must accept all findings, both explicitly made and implicit in the Court's findings.***
>
> Here what the Court very clearly found is that endorsing these witnesses six months after the trial had been set, less than two weeks before readiness without any explanation or justification was mismanagement.

RP IV, 8 (emphasis added). Defense counsel also noted that the City had foregone the opportunity to have written findings entered. RP IV, 8.[8]

Petitioner's counsel pointed out that the Municipal Court judge's decision to dismiss was reviewable under the abuse of discretion standard which precludes reversal unless the appellate court concludes that no reasonable person could have reached the conclusion that the trial court judge reached. RP IV, 15. But the Superior Court RALJ judge asserted that this was *not* a correct statement of the abuse of discretion standard. RP IV,

[8] "[At the hearing] I asked whether the court wanted to enter written findings or conclusions ... [T]he prosecutor did not want to be heard on this so the prosecutor did not seek the entry of findings."

15. The Superior Court judge said the proper standard was whether the trial court's decision rested on untenable grounds, and he went on to rule that the Municipal Court judge's decision was "untenable" because the Municipal Court judge did not make a finding of governmental misconduct:

> MR. MAYBROWN: . . . ***[T]he question is whether any reasonable judge in Washington, faced with these circumstances, could have reached the decision it [the Municipal Court] reached.***
>
> COURT: ***No, that's not the proper...*** I realize that there are cases that articulate the standard that way but that, ***that's a fundamental misstatement of what, what the, abusive [sic] discretion means.*** It's a decision made for untenable grounds or for untenable reasons. And ***the untenable grounds here is that there is no finding by the trial court*** of a governmental misconduct or arbitrary action.

RP IV, 15 (emphasis added). The Superior Court then entered this order:

> The above entitled court having heard a motion to remand this case back to the trial court for an abuse of discretion under 8.3 and 4.7.
>
> IT IS HEREBY ORDERED THAT this case be remanded back to the trial court for a trial. Court finds there was an abuse of discretion.[9]

4. ISSUES FOR REVIEW BY A PANEL OF JUDGES

(a) The Superior Court, sitting as an appellate court, held that the Municipal Court's decision to dismiss the charges was based on "untenable grounds" because the Municipal Court never made any finding that there was governmental misconduct. Was this ruling erroneous because RALJ 9.1(b)(2) mandates that the appellate court "shall accept

[9] Appendix A to Motion for Discretionary Review.

those factual determinations . . . that may be reasonably inferred from the judgment" of the Municipal Court?

(b) Is the question of whether written findings of fact and conclusions of law are required when a Municipal Court dismisses a prosecution a question of substantial public interest given that there is no published appellate decision that addresses the part of RALJ 9.1.(b)(2) which requires appellate court acceptance of all "reasonably inferable" factual determinations?

(c) The Superior Court ruled that the test for an abuse of discretion was *not* whether any reasonable judge could have made the decision that the trial judge made. Was this ruling in conflict with the decisions of the Washington Supreme Court in *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001); and *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (2014).

5. GROUNDS FOR RELIEF AND ARGUMENT

a. Whether explicit "findings" are required when a Municipal Court dismisses a case, notwithstanding the fact that RALJ 9.1(b)(2) requires a reviewing Superior Court to accept all factual determinations "that may be reasonably inferred from the judgment," is an issue of public interest that should be decided by an appellate court. RAP 2.3(d)(3).

The Superior Court was fixated on what it erroneously saw as a "problem":

> But obviously one of the problems we have here is ***there weren't actual written findings and conclusions entered.*** There are oral statements by the judge in making his decision.

RP IV, 7 (emphasis added).

But the RALJ rules specifically recognize that written findings of fact are *not required* in courts of limited jurisdiction. RALJ 9.1(b), specifically refers to *two* types of "factual determinations." Subsection (b)(1) refers to factual determinations "which were expressly made by the court of limited jurisdiction" and subsection (b)(2) refers to factual determinations "that may reasonably be inferred from the judgment of the court of limited jurisdiction." The rule recognizes that sometimes a municipal court judge will "expressly" make factual determinations, but at other times the court will not say anything – either orally or in writing – about its factual determinations. In the latter situation the appellate court is required to accept any factual determination that can reasonably be inferred "from the judgment."

RALJ 9.1(b)(2) accommodates the generally informal nature of judging that takes place in the municipal courts. The rule recognizes that it would be completely unworkable to require the judges of these courts to support all their decisions with written FF&CL. Instead of requiring such findings, RALJ 9.1(b)(2) *requires* appellate courts to accept all reasonably inferable findings that *could* support the judgment of the lower court.

In her ruling denying discretionary review, the Commissioner acknowledges that the Superior Court judge said that "one of the problems" with the Municipal Court's dismissal order was that "there weren't actual

written findings and conclusions entered." *Commissioner's Ruling*, at 10. The Commissioner reasons, however, that because the Superior Court judge went on to make an additional statement about "the record," that there was no violation of RALJ 9.1(b)(2). The Commissioner states:

> But the [Superior] court also stated:
>
> Well, I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something, of, you know, but there, it isn't here.

RP IV, 16.

Petitioner respectfully submits that the Commissioner has misconstrued RALJ 9.1(b)(2). The Rule mandates acceptance of findings that can be inferred "from the judgment." The Rule does *not* limit its mandate to findings that can be inferred from the municipal court's oral remarks.

Moreover, the Commissioner states that the superior court judge "concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal." *Commissioner's Ruling*, at 10. But that is not an accurate statement of what the Superior Court judge actually said. What he explicitly said is that he was "not sure" what the Municipal Court judge found. Petitioner's counsel told the Superior Court "you have the City endorsing" four new witnesses

"six months after the case was filed [and] less than two weeks before the readiness . . . . This deprived the defense of any fair opportunity to prepare the case for trial, *and the Court so found.*" RP IV, 7. And in reply the Superior Court judge responded:

> COURT: Well, I guess I'm, I'm not sure the Court so found.

RP IV, 7.

The Superior Court judge did *not* say, there was insufficient evidence to support the Municipal Court judge's factual determinations. Instead, he said it was simply unclear to him what the Municipal Court judge found.

Moreover, the Commissioner's conclusion that what the Superior Court judge really did was find a lack of substantial evidence to support the Municipal Court's "inferred" finding of governmental mismanagement is completely inconsistent with the Superior Court's comment to Petitioner's counsel that he might still prevail on remand because the Municipal Court might ultimately enter the written findings that the Superior Court judge (erroneously) believed were required. The Superior Court judge said that while the municipal court discussed prejudice to the defendant, he did not discuss the requirement of governmental mismanagement. And yet he said this defect could be cured on remand:

> Now, you may very well be able to accomplish the same result for your client upon remand.

RP IV, 17.

Petitioner's counsel complained that the case should not have to go back for the entry of written findings when the City prosecutors were expressly asked whether they wanted written findings to be entered and they expressly declined to address that question. RP IV, 18. But the Superior Court ruled that nevertheless written findings were necessary:

> And so I think that, that yes, that you need to go back to the trial court and go through the process again.

RP IV, 19.

Petitioner submits that the RALJ judge was wrong because no such written findings are necessary and RALJ 9.1(b)(2) explicitly says so. But RALJ 9.1(b)(2) is not a well known rule. There is only one published decision that makes even a passing reference to RALJ 9.1(b). *State v. Basson*, 105 Wn.2d 314, 714 P.2d 1188 (1986) states that because the Superior Court was sitting as an appellate court, RALJ 9.1(b) applied, and thus it was improper for the Superior Court to make its own evaluation of the evidence. But *Basson* only addresses subsection (b)(1) which requires acceptance of all findings "supported by substantial evidence"; it does not address subsection (b)(2) which requires acceptance of all "reasonably inferred" findings.

Because there is no published opinion analyzing subsection (b)(2), this case presents a question of substantial public interest. In the absence of

a published decision, other Superior Court judges are likely to make the same mistake that the Superior Court judge made in this case, and they too will fail to follow the Rule's mandate that they must accept all factual determinations that are reasonably inferable from the judgment.

In the present case, the record is replete with facts that support the trial court judge's decision and from which a finding of governmental mismanagement of the case can reasonably be inferred.[10] The Superior Court's decision remanding this case for trial ignores all of the Municipal Court judge's oral statements, all the reasonable inferences that can be drawn from the judgment dismissing the case, and the clear command of the applicable appellate rule.

b. The Superior Court's decision conflicts with numerous Washington Supreme Court cases which state the proper test for determining whether a trial court has abused its discretion.

The test for deciding whether an abuse of discretion has occurred is well established: "An appellate court finds abuse [of discretion] only when no reasonable judge would have reached the same conclusion." *State v.*

[10] For example, there was unrebutted evidence that the police failed to collect physical evidence that supported the self-defense defense; the prosecutors delayed the deposition of their witnesses; failed to promptly reschedule them when the witnesses failed to appear; refused to provide discovery of their own interview notes; defended their refusal with a frivolous claim of work-product privilege; waited for six months to identify four new witnesses just two weeks before the readiness hearing; failed to subpoena their belatedly disclosed experts; and failed to provide their experts with medical releases thus making it impossible for defense counsel to interview them.

Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). This test has been around for a long time and is often cited. *Accord Emery*, 174 Wn.2d at 765; *Rodriguez*, 146 Wn.2d at 269; *Woods*, 143 Wn.2d at 595; *Bourgeois,* 133 Wn.2d at 406. Petitioner's counsel said that this was the applicable standard. But the Superior Court said that it was *not* the proper test, and that even though "there are cases that articulate the standard that way, but that, that's a fundamental misstatement of what, what the, abusive [sic] discretion means." RP IV, 15.

The Superior Court was wrong. That standard is not a misstatement of the proper appellate test for determining whether an abuse of discretion has occurred. The Superior Court's rejection of this test is contrary to dozens of Washington decisions and his refusal to apply this test was a radical departure from the usual course of proceedings which calls for discretionary review.

c. A reason need not be written in order to be "tenable." The Superior Court's ruling – that the Municipal Court's reasoning was untenable because it was not expressed in writing – is itself "untenable."

The Commissioner concluded that because the Superior Court restated the test for abuse of discretion as a ruling made for "untenable reasons" that "the superior court's oral ruling, viewed in its entirety, appears to apply the correct standard." *Commissioner's Ruling,* at 9. But the

Commissioner ignores what the Superior Court judge said as to *why* the municipal court's decision was untenable.

> [An abuse of discretion is] a decision made for untenable grounds or for untenable reasons. And ***the untenable grounds here is that there is no finding by the trial court*** of a governmental misconduct or arbitrary action.

RP IV, 15 (emphasis added).

But a reason does not have to be expressed in writing in order to be tenable. A reason can be tenable, *even if it is not expressed at all*, either in writing or orally. The only thing that RALJ 9.1(b)(2) requires is that a tenable reason be reasonably "inferable from the judgment." The very definition of the word "infer" conveys the notion that something that is *not* expressed can nevertheless be deduced from other things.

Anyone who reads the Municipal Court judge's two pages of comment regarding the City's addition of four new witnesses six months after charging and shortly before trial (RP III, 12-14) can easily *infer* that the Municipal Court judge found governmental mismanagement.

d. The Superior Court's decision is in conflict with all numerous Supreme Court cases on dismissals pursuant to CrR 8.3(b). Gross mismanagement is not required; simple mismanagement is sufficient.

When he reversed the Municipal Court's dismissal order, the Superior Court judge faulted the lower court for failing to make a finding of "gross mismanagement" of the case by the City prosecutors. RP IV, 12.

But it is well settled that gross mismanagement is not required, and that "simple mismanagement" is sufficient. *State v. Dailey,* 93 Wn.2d 454, 457, 610 P.2d 357 (1980) ("we have made it clear that "governmental misconduct" need not be of an evil or dishonest nature, ***simple mismanagement is sufficient.***"); *State v. Michielli,* 132 Wn.2d 229, 243, 937 P.2d 587 (1997) (same); *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993) (same); *State v. Brooks*, 149 Wn.App. 373, 384, 203 P.2d 397 (2009) (same).

The Commissioner did not directly address the conflict between the Superior Court's oral statement and the case law. Instead, she seems to reason that since the case law also says that a dismissal can only be ordered in cases of "egregious" governmental misconduct, the Superior Court's use of the "gross mismanagement" standard is excusable:

> Stevens argues that "gross mismanagement" is not required and that "simple mismanagement" is sufficient. Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." But "Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct.'"

Commissioner's Ruling, at 12-13 (footnotes omitted), citing *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

Petitioner submits that the holdings of *Blackwell, Dailey, Michielli* and *Brooks* cannot be so easily evaded. If the Supreme Court thought that

egregious misconduct was synonymous with gross mismanagement, it would never have explicitly held that gross mismanagement is *not* required. If the Supreme Court thought that the two phrases had the same meaning, then one would have to read all of the above cited opinions – and *Wilson* – as simultaneously holding that gross mismanagement is *not* required and that gross mismanagement *is* required. Obviously, the Supreme Court cannot have meant that those two completely contradictory propositions are both true. Consequently, the Superior Court's explicit use of a standard which the Supreme Court has repeatedly condemned calls for appellate review and correction by this court under both RAP 2.3(d)(1) and RAP 2.3(d)(4).

6. CONCLUSION

For these reasons, Petitioner asks this Court to modify the Commissioner's Ruling, and to grant discretionary review of the Superior Court's RALJ decision. Petitioner respectfully submits that several of the criteria for discretionary review are met in this case: (1) the Superior Court's decision conflicts with several decisions of the Washington Supreme Court (RAP 2.3(d)(1)); the case involves an issue of public interest regarding the command of RALJ 9.1(b)(2) requiring Superior Courts to accept all reasonably inferable factual determinations, and no published appellate decision addresses this requirement (RAP 2.3(d)(3)); and the Superior

Court's refusal to confine its appellate review to asking whether any reasonable judge could have decided that there was governmental misconduct in this case, was a radical departure so far from the accepted and usual course of appellate review for manifest abuse of discretion as to call for discretionary review by this court (RAP 2.3(d)(4)).

Respectfully submitted this 5th day of August, 2016.

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ALLEN HANSEN MAYBROWN & OFFENBECHER

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrown & Offenbecher, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 5th day of August, 2016.

Sarah Conger
Sarah Conger
Legal Assistant

APPENDIX A

FILED

DEC 29 2014

KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND,	)	
Plaintiff,	)	NO. 38384
vs.	)	
STEVENS, HOPE A.	)	CITY'S ADDENDUM TO WITNESS LIST
Defendant.	)	

In addition to the witnesses identified in the pre-trial order, the City intends to call the following individuals and a summary of their intended testimony:

1. Dr. Jing Jin: Immediate Clinic Rose Hill 13131 NE 85th St. Kirkland, WA. 425-702-8002. Will testify to her interactions, observations, and medical diagnosis of Teresa Obert and C.O. on June 21, 2014.
2. Lindsay Taylor, PA-C: Immediate Clinic Rose Hill. (See contact information above)Will testify to her interactions, and observations of Teresa Obert and C.O. on June 21, 2014.
3. Jeff Obert: Will testify to his observations on the morning of June 21, 2014 and to the type of equipment he uses for work. He will testify to the type of broomstick that C.O. grabbed that morning.
4. Cori Parks: Will testify to her observations of Ms. Stevens, Teresa Obert, and C.O. demeanors prior to the assaults.

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DATED this 29th day of December, 2014.

Respectfully submitted,

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APPENDIX Y

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

CITY OF KIRKLAND, Respondent, v. HOPE STEVENS, Petitioner.	)	No. 74300-7-I ORDER DENYING MOTION TO MODIFY

Petitioner, Hope Stevens, has filed a motion to modify the commissioner's June 7, 2016 ruling denying her motion for discretionary review. The respondent, City of Kirkland, has not filed a response. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 4th day of October, 2016.

Spearman, J

Dwyer, J.

Cox, J.

2016 OCT -4 AM 9:04
COURT OF APPEALS DIV I
STATE OF WASHINGTON