No. 86455-5

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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LEIGH BENNETT, Respondent,

v.

BRIAN MALNES obo HAROLD MALNES.

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# PETITION FOR REVIEW BY WASHINGTON STATE SUPREME COURT

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## I. IDENTITY OF PETITIONER

Brian Malnes is the petitioner. He is the appellant in this cause.

## II. CITATION TO COURT OF APPEALS DECISION

On 7/28/2025, Court of Appeals, Division I, Judge J. Coburn wrote the unanimous decision of the Court that affirmed the lower court's ruling. The motion for reconsideration was denied on 8/22/2025.

> "On appeal, Brian asserts that the superior court erred when it dismissed his cases due to his failure to appear at the hearing on his own motions for revision of the commissioner's orders denying certain vulnerable adult protection order petitions that he filed on behalf of his father, Harold Malnes. We conclude that the superior court did not abuse its discretion in dismissing Brian's cases and that Brian has not otherwise established an entitlement to appellate relief. Accordingly, we affirm."

## III. ISSUES PRESENTED FOR REVIEW

1. The Appellant Court introduced the entirety of the argument to dismiss based on Brian's failure to appear sua sponte. Neither party introduced the case law used by the Appellant Court in its ruling of 7/28/2025.
2. The Appellant Court created a loophole in the law in which Brian's 14th Amendment right to due process was eliminated.

## IV. STATEMENT OF THE CASE

On 1/11/2024, case *Malnes v. Malnes* (No. 86434-3-I, No. 23-2-07978-31), was dismissed.

On 1/11/2024, case *Malnes v. Bennett* (No. 86433-5-I, No. 23-2-07781-31), was dismissed.

On 2/2/2024, case *Malnes v. Malnes* (No. 86434-3-I, No. 23-2-07978-31), was dismissed without review.

On 2/2/2024, case *Malnes v. Bennett* (No. 86433-5-I, No. 23-2-07781-31), was dismissed without review.

On 7/28/2025, case *Malnes v. Malnes* (No. 86434-3-I, No. 23-2-07978-31), dismissal upheld by Court of Appeals.

On 7/28/2025, case *Malnes v. Bennett* (No. 86433-5-I, No. 23-2-07781-31), dismissal was upheld by Court of Appeals.

## V. ARGUMENT

The due process of law is guaranteed under the 14th Amendment, which was ratified in the State of Washington's Constitution Article I § 3, "No person shall be deprived of life, liberty, or property, without due process of law." No review was conducted by Judge Bruce Weiss on January 11, 2024. And so, Brian was not afforded due process.

The Court of Appeals, in its Opinion signed July 28, 2025 (Opinion), upheld the dismissal of the lower court.

The Opinion correctly states that Brian does not ask for a review of the ruling made by Judge Weiss, as it was thought superfluous by the Appellant, who had sought the review of the Court of Appeals of the rulings made by the Commissioner.

Brian simply wanted a review. Because of clerical mistakes made, in part, by court staff, Brian did not connect to the hearing on 2/2/2024. Instead, of refiling, which was presented to him,[1] Brian chose to appeal the decision of the Commissioner.

Brian believed he was entitled to a review of the record. He did not get it, and because of the Court of Appeals ruling he will not get his right to due process. How is this loophole possible?

Why would Brian ask for review of a non-decision?

Then, the Court cites information about the Judges Civil Motions calendar:

> "All questions related to the Judge's Civil Motions calendar should be directed to the Judge's law clerk. Law clerk contact information is available online at https://www.snohomishcountywa.gov/1345/Judicial-Officers. .. Remote appearance information can [be] found on the court's website at: https://www.snohomishcountywa.gov/5772/."

This information is irrelevant as hearing did not occur on the Judge's Civil Motions calendar.

This case is a protection order case. Brian argues that the Snohomish County Superior Court failed by not abiding by RCW 7.105.205

[1] Judge Weiss's Clerk Zoe Taylor informed ADA Coordinator Lisa Galvin on 2/1/2024 that Brian need accommodations making note that he could have accommodation, not where the hearing would take place. Taylor then informed Galvin that all that was happening on 2/2/2024 was the case would be set for Hearing, not that hearing, not revision would be conducted.

"Hearings - Remote Hearings." Brian cannot provide evidence of a negative. Nowhere in the record does the lower court provide Brian with an Order providing the information the Statute orders. Additionally, this Court in its Order failed to acknowledge the lower court failed to abide by RCW 7.105.205(g):

> "Courts should provide the parties, in orders setting the hearing, with a telephone number and an email address for the court, which the parties may use to inform the court if they have been unable to appear remotely for a hearing. **Before dismissing or granting a petition due to the petitioner or respondent not appearing for a remote hearing, or the court not being able to reach the party via telephone or video, the court shall check for any notifications to the court regarding issues with remote access or other technological difficulties. If any party has provided such notification to the court, the court shall not dismiss or grant the petition, but shall reset the hearing by continuing it and reissuing any temporary order in place. If a party was unable to provide the notification regarding issues with remote access or other technological difficulties on the day of the hearing prior to the court's ruling, that party may seek relief via a motion for reconsideration**" (emphasis added).

The Court cites Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 429, 886 P.2d 231 (1994), however, the court left out the term, "willfully." Alexander states: CR 41(b).

> "Under this rule, 'a trial court may exercise its discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order.' *Walker v. Bonney-Watson Co.,* 64 Wn. App. 27, 37, 823 P.2d 518 (1992). It may also exercise its discretion to dismiss for the 'failure of the plaintiff to prosecute...' CR 41(b). The failure to attend trial is both a failure to prosecute and a failure to comply with the order setting trial. Given that Alexander had notice of both the requirements of RCW 4.24.010 and notice of the trial, and, for whatever reason, willfully chose not to attend, the trial court did not abuse its discretion in dismissing the case."

Nowhere in the record does Brian demonstrate his "willful,"[2] actions

The Court cites In re Marriage of Tupper, 15 Wn. App. 2d 796, 801, 478 P.3d 1132 (2020), but the circumstances of that case do not reflect the reality of this case as no review was done by the Superior Court judge. In fact, the cited caselaw clearly states:

> "Instead, the revision court has full jurisdiction over the case and is *authorized to determine its own facts based on the record* before the commissioner. In re Dependency of B.S.S., 56 Wn. App. 169, 171,782 P.2d 1100 (1989); In re Welfare of McGee, 36 Wn. App. 660, 679 P.2d 933 (1984)" (Emphasis added).

The judge did not look at the record before making his decision. The case was dismissed because Brian missed the hearing. Thus, Brian does not enjoy due process as described in RCW 2.24.050, which states in part: "Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." No review of fact or conclusion was made. The term "revision," as defined by *Black's Law Dictionary* states:

> "A re-examination or careful reading over for correction or improvement. State Road Commission of West Virginia v. West Virginia Bridge Commission, 112 W.Va. 514, 166 S.E. 11, 13."

Thus, because the judge did not attempt any re-examination, no revision occurred under RCW 2.24.050.[3]

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[2] "Willful," is defined by the Merriam-Webster Dictionary to mean: "done deliberately: intentional."

[3] Brian freely agrees to the contention made in the Opinion that RCW 2.24.050 makes: "Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of

This Court of Appeals did not provide case law that suggests Brian does not get a review of the Commissioner. If the Judge does not review, and instead simply dismisses the case, is it the contention of the State of Washington that Brian does not get due process?

No party in this case argued the case law referred to by the Court in its Order. Instead, the Court denied review based on case law that does not address the specifics of this case. Particularly the "willful," component of missing the hearing on 2/2/2025.

RAP 12.1 states:

> "**(a) Generally.** Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.
> **(b) Issues Raised by the Court.** If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court."

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the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge." But no revision was made. "The meaning of a statute is a question of law reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wash. 2d 801, 807, 16 P.3d 583 (2001). The court's fundamental objective is to ascertain and carry out legislative intent. State v. Alvarez, 128 Wash. 2d 1, 11, 904 P.2d 754 (1995). Words used in a statute must be considered in the context of the general object, purpose, and subject matter of the statute in order to give effect to that intent. Strenge v. Clarke, 89 Wash. 2d 23, 569 P.2d 60 (1977). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning in order to *288 effectuate legislative intent. State v. J.M., 144 Wash. 2d 472, 480, 28 P.3d 720 (2001). Further, under the '"plain meaning' rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained."'" City of Seattle v. Allison, 148 Wash. 2d 75, 81, 59 P.3d 85 (2002) (quoting Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash. 2d 1, 10, 43 P.3d 4 (2002), and citing C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash. 2d 699, 708-09, 985 P.2d 262 (1999)). In addition, a reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results. State v. Vela, 100 Wash. 2d 636, 641, 673 P.2d 185 (1983); State v. Gaines, 109 Wash. 196, 200, 186 P. 257 (1919); see also State v. Fjermestad, 114 Wash. 2d 828, 835, 791 P.2d 897 (1990)" State v. Wentz, 149 Wash. 2d 345, 68 P.3d 282 (2003).

Neither party proposed in their briefs that the case should be dismissed because Brian missed the hearing. And the Court of Appeals provided the case law for its own sua sponte argument.

In *Dalton M, LLC v. N. Cascade Tree Srvs., Inc.,* 2 Wn.3d 36, (2023), the Court found:

> "an appellate court may raise a new issue sua sponte if it is necessary to resolve the questions presented; an appellate court may not raise a new issue sua sponte if it is separate and distinct from the questions presented and unnecessary to resolve those questions—especially when the new 'issue' is more like a whole new unpleaded claim depending on factual allegations that were never presented in or proved to the trial court. RAP 12.1. The Court of Appeals violated these rules: it sua sponte raised a new issue that is more like an unpleaded claim, that new issue was distinct from issues or theories raised before, resolution of that new issue was not necessary to resolve the questions presented about the claims actually pleaded, and resolution of that new issue depended on facts that the parties never had a chance to develop at trial."

Not only did the Court of Appeals introduce a separate question along with all supporting case law, but the Court's analysis relied on facts neither party had an opportunity to develop at trial.

## VI. CONCLUSION

Therefore Brian requests this case be remitted to the Court of Appeals to review the rulings of the Commissioner in this case as put forth in the Brief and Responses.

Dated this the 22nd day of August, 2025.

The undersigned certifies that this brief contains 2601 words in compliance with RAP 18.17(c).

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DECLARATION OF SERVICE

The undersigned declares that on this date I caused to be served by U.S. First-Class mail postage prepaid and via-e-mail the foregoing document upon the following party:

Randy Boyer
7017 196th St. SW
Lynnwood, WA. 98036
randyedlynlaw@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of September, 2025.

Brian Malnes

Brian Malnes, *pro se*

**BRIAN MALNES - FILING PRO SE**

**September 22, 2025 - 3:40 PM**

**Transmittal Information**

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| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 86433-5 |
| **Appellate Court Case Title:** | Brian Malnes obo Harold Malnes, Appellant v. Leigh Bennett, Respondent |
| **Superior Court Case Number:** | 23-2-07781-2 |

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FILED
7/28/2025
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| In the Matter of the Vulnerable Adult Petition for:<br><br>HAROLD ERLING MALNES.<br><br>BRIAN MALNES,<br><br>Appellant,<br><br>and<br><br>LEIGH BENNETT,<br><br>Respondent. | No. 86433-5-I<br>(Linked with<br>No. 86434-3-I)<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

COBURN, J. — In linked appeals,[1] Brian Malnes, representing himself, challenges the orders of the superior court dismissing his cases against his brother, David Malnes, and Leigh Bennet. On appeal, Brian[2] asserts that the superior court erred when it dismissed his cases due to his failure to appear at the hearing on his own motions for revision of the commissioner's orders denying certain vulnerable adult protection order petitions that he filed on behalf of his father, Harold Malnes. We conclude that the superior court did not abuse its discretion in dismissing Brian's cases and that Brian has not otherwise established an entitlement to appellate relief. Accordingly, we affirm.

[1] This appeal is linked with In re Vulnerable Adult Pet. for Malnes, No. 86434-3-I.

[2] We use the first names of the members of the Malnes family for clarity because they share the same last name.

FACTS

On October 23, 2023, Brian, pro se, filed a petition for a vulnerable adult protection order on behalf of his father, Harold, and against his father's attorney, Bennett, in Snohomish County Superior Court. A little over one week later, Brian filed another petition seeking the same against his brother, David Malnes.

A superior court commissioner proceeded to consider Brian's petitions alongside one another. Brian initially participated in the proceedings without legal counsel and, as pertinent here, he noted at least one hearing on a motion on the court's calendar. Bennett and David each retained legal counsel. The superior court commissioner later appointed legal counsel for both Brian and Harold.

On January 11, 2024, the commissioner held a remote video-conference hearing on both of Brian's petitions. At that hearing, Brian, among others, appeared virtually. After listening to argument from all parties, the commissioner issued oral rulings denying Brian's petitions and entered corresponding written orders.

On January 22 at 8:30 a.m., Brian, again representing himself, filed separate motions for revision of the commissioner's orders denying his petitions against Bennett and David. Later that day, Brian signed and filed a calendar note setting his motion for revision in his case against Bennett on the superior court's calendar to be heard on February 2. As pertinent here, the informational portion of the calendar note that he filed indicated that

> All questions related to the Judge's Civil Motions calendar should be directed to the Judge's law clerk. Law clerk contact information is available online at https://www.snohomishcountywa.gov/1345/Judicial-Officers. . . .

> Remote appearance information can [be] found on the court's website at: https://www.snohomishcountywa.gov/5772/.[3]

Then, on February 2, a superior court clerk minute entry for the motion for revision hearing, with the case caption of his case against David, indicated that the superior court judge found and ruled as follows: "The Petitioner was approved to appear for this hearing via Zoom; the Petitioner did not appear for this hearing today and therefore the motion for revision of [the commissioner's] order entered on January 11, 2024 is dismissed."

Shortly thereafter, the superior court judge entered separate orders dismissing Brian's cases against David and Bennett. Each order provided that "THIS MATTER having come before the Honorable Bruce I. Weiss per Plaintiff's Motion for Revision, the Plaintiff having not appeared, in-person or via Zoom, it is hereby: ORDERED ADJUDGED AND DECREED that this case is DISMISSED."

Brian timely appealed each order. By letter, we advised the parties that Brian's appeals in these matters would be linked for the purpose of argument and disposition.

## DISCUSSION

Brian focuses the majority of his opening brief on the actions of the commissioner who denied Brian's petitions. His only assertion of error by the superior court is that it did not provide him information on how to remotely access the hearing on his motion for revision.

[3] This record was designated for review by respondent Bennett.

"Once a judge rules on a motion for revision, any appeal is from the judge's decision, not the commissioner's." In re Marriage of Tupper, 15 Wn. App. 2d 796, 801, 478 P.3d 1132 (2020) (citing State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004)). In ruling on a motion for revision,

> the revision court's scope of review is not limited merely to whether substantial evidence supports the commissioner's findings. In re Smith, 8 Wn. App. 285, 288, 505 P.2d 1295 (1973). Instead, the revision court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner. In re Dependency of B.S.S., 56 Wn. App. 169, 171, 782 P.2d 1100 (1989); In re Welfare of McGee, 36 Wn. App. 660, 679 P.2d 933 (1984); Smith, 8 Wn. App. at 288-89.

In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004) (emphasis added).

"A court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented." Snohomish County v. Thorp Meats, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (footnote omitted).[4] Relatedly, we have recognized that, "[i]n its discretion a trial court may dismiss a case because of a plaintiff's failure to appear for trial." Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 429, 886 P.2d 231 (1994) (citing Thorp Meats, 110 Wn.2d at 167)). Therefore, we review the superior's court's dismissal of Brian's motion for abuse of discretion. Id. at 429. A court abuses its discretion when its decision is based on untenable grounds or made for untenable reasons. Luckett v. Boeing Co., 98 Wn. App. 307, 309-10, 989 P.2d 1144 (1999).

[4] Brian does not contest that a court rule or statute governs the circumstances presented.

Here, in considering Brian's motions for revision, the superior court judge dismissed Brian's cases against Bennett and David on the basis that Brian did not appear at the hearing set on the court's calendar for his motions. On appeal, Brian does not contest that he filed the motions for revision in his case, that he signed and filed a calendar note setting a hearing date of February 2 in the superior court in his motion for revision in his case against Bennett, that the calendar note contained instructions on the manner in which he could access the hearing via video-conferencing software and provided law clerk contact information if he had any further questions, or that the clerk minute entry from the February 2 hearing reflected that Brian did not appear. He also does not contest the superior court judge's ultimate findings that he did not appear either in person or virtually for the hearing scheduled on his motions.

The superior court did not abuse its discretion in dismissing Brian's case. Brian did not appear at the superior court hearing that he himself scheduled on his own motions and the judge dismissed his cases on that basis. The superior court judge did not err in so doing.

Nevertheless, Brian contends that the superior court violated RCW 7.105.205(5)(a) by not providing him with adequate information on how to access the hearing via video-conferencing software. The record is to the contrary.

RCW 7.105.205 provides, in pertinent part,

> (5) If a hearing is held with any parties or witnesses appearing remotely, the following apply:
> (a) Courts should include directions to access a hearing remotely in the order setting the hearing and in any order granting a party's request for a remote appearance. Such orders shall also include

> directions to request an interpreter and accommodations for disabilities.

The record in this matter does not contain the court order setting the hearing in this matter. The burden is on the party seeking review to provide a record sufficient to review the error assigned on appeal. RAP 9.6(a). Therefore, as an initial matter, Brian fails to carry his burden to present an adequate record to review his contention.

Regardless, the record in this matter contains a superior court document that Brian signed and filed in noting a hearing on the court's calendar for his motion for revision against Bennett. As set forth above, the informational portion of that document provided as follows:

> JUDGE'S CIVIL MOTIONS: All questions related to the Judge's Civil Motions calendar should be directed to the Judge's law clerk. Law clerk contact information is available online at https://www.snohomishcountywa.gov/1345/Judicial-Officers. . . . Remote appearance information can [be] found on the court's website at: https://www.snohomishcountywa.gov/5772/.

Brian does not establish superior court error. The record reflects that the superior court provided him with the means to obtain the information that the court allegedly did not provide to him. Moreover, he does not present citation to the record or argument in support of the proposition that he attempted and failed to rely on those resources made available to him by the court.

Furthermore, the record suggests that Brian was already familiar with the information that he allegedly did not have. For instance, the record contains documentation supporting that Brian had himself previously noted at least one motion on the superior court's calendar and the transcript from the January 2024

hearing reflects that he had successfully attended at least one hearing remotely in the course of the proceedings arising from his superior court filings. Given all of this, the record does not support his contention that the superior court failed to provide him with the instructions necessary to access the hearing in question. Thus, Brian's contention fails.[5]

The remainder of Brian's assertions involve challenges to the substance of the commissioner's orders denying his petitions. However, as set forth above, on review of a superior court decision on a motion for revision, our review is from the decision of the superior court, not from that of the commissioner. Tupper, 15 Wn. App. 2d at 801 (citing Ramer, 151 Wn.2d at 113). Here, the superior court decisions to be reviewed are its dismissals of his cases against Bennett and David due to his failure to appear for the hearing on his motions that he set on the court's calendar. Indeed, the superior court, by its orders, did not enter any findings or conclusions with regard to the substance of the commissioner's orders. Therefore, Brian's remaining assertions are not properly before us and we decline to consider them. Accordingly, Brian does not establish an entitlement to appellate relief.

[5] In each of his opening briefs, Brian requests permission to add evidence to the record in support of his claim that the court did not provide him with information on how to access the remote hearing on his motion. RAP 9.11 sets forth several bases on which we may direct that additional evidence on the merits of a case be taken before the decision of a case on review. However, Brian does not indicate with specificity which evidence he seeks to add to the record nor does he present argument or authority in support of establishing any of these bases. Nevertheless, after consideration, we conclude that none of the RAP 9.11 bases apply to this matter. Therefore, we decline his request.

Request for Attorney's Fees

Bennett and David each request an award of attorney fees on appeal pursuant to RAP 18.9 on the basis that Brian's appeals in this matter are frivolous and without merit. We disagree and therefore deny their requests.

Affirmed.

Coburn, J.

WE CONCUR:

Feldman, J.

, ACJ