UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Brian P. Carr Plaintiff versus Sam Reed, in his official capacity as Secretary of State of the State of Washington, Wanda Briggs in her official capacity as Chair of the State of Washington Commission of Judicial Conduct, and Rob McKenna, in his official capacity as Attorney General of the State of Washington and representing in their official capacity as representatives of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eiesland, Rich Melnick, John Hagensen, Kelli E. Osler, Joel Penoyar, (J.) C. C. Bridgewater, J. Robin Hunt, Gerry L. Alexander, Barbara Madsen, Mary E. Fairhurst, Susan Owens and James M. Johnson as well as other currently unnamed parties as determined by the Court Defendants	Civil No. 3:07-cv-05260-RJB Plaintiff's Combined Reply to Defendants' Motions for Summary Judgement and Motions to Dismiss Noting Date: September 28, 2007 Oral Argument: Plaintiff is amenable to oral argument at the pleasure of the court

In this reply, plaintiff urges the Court to deny the defendant's Motions for Summary Judgement and Motions to Dismiss with a Calendar Noting Date of September 28. 2007.

While the defendants seem compelled to typify this matter as an attempt to relitigate the dissolution (divorce) between my former wife and I, that is a completely different matter. It was resolved in King County Superior Court (which is a different court) by Judge Borst and was only mentioned in passing in the introduction of the complaint to give the Court an understanding of the context of other events. It was later mentioned in plaintiff's declaration (document 17, paragraph 11), but only in the computation of the amount of damages.

Argument 1

No Conflict in Relief Sought and Decisions of State Courts

The Defendants claim that the decisions of the state courts are inextricably intertwined with the issues raised in this case, while, in truth, there is no such conflict. All of the relief sought in this matter does not conflict in any way with the decisions of the state courts.[1]

In the Opinion[2] in 32671-0-II, it is noted that Superior Court Commissioners have the ability to issue full Orders for Protection and that Family Law (or Court) Commissioners do not count in the numeric limit of Superior Court Commissioners (neither of which was raised as an issue by the plaintiff). This in no way conflicts with the relief sought in paragraphs one and two of the Amended Complaint as that relief clearly excludes Family Court (or Law) Commissioners from the numeric limit (only Commissioners appointed under Washington State Constitution, Article IV, Section 23 are counted) and only those Orders (temporary and otherwise) which are issued when the numeric limit is exceeded are invalidated. Those circumstances were not addressed in the Opinion (though it was raised by plaintiff) or by any of the defendants. The relief sought is completely in line with the state decision in Ordell v. Gaddis, 99 Wn.2d 409, (1983) where it '*affirm*[ed] *the trial court holding that Const. art. 4, 23 limits each county to three court commissioners*'. As the Opinion notes that there were questions of jurisdiction, the omission of the identity of any individual deciding any decision is surprising.

It may be that the relief requested would invalidate the decisions of October 15, 2004 and October 27, 2005 in case 04-2-008824-4 on November 12, 2004 and January 19, 2005 in case 04-2-008908-9. However, it was never established who the deciding authority was for each decision and whether they had individual jurisdiction to make those decisions. If the individuals are found to not have had jurisdiction and were fraudulently submitting decisions of the Superior Court, then this court would not be invalidating any decisions of the state courts as those

1 There is one exception in the phrase of 'and lack of evidence in accordance with RCW 26.50' which: was added as an afterthought to the first relief, is not consistent with the other relief sought, and is not adequately supported in the Amended Complaint. The court is asked to dismiss only that phrase from the relief sought if it is found to conflict with state court decisions and the Plaintiff will submit an Amended Complaint with that correction if leave is granted by the court.

2 Document 27-2, pages 52-60.

decisions were never made by any person capable of making such a decision.[3]

Paragraph three of the relief asks that all decisions where the deciding authority can not be determined from the record be declared void for that reason. The plaintiff raised the concern that there was nothing in the record to identify who made the decision in case 04-2-008908-9 on November 12, 2004 but this was not addressed in the Opinion[4]. This is still an issue of contention as the clerk in the matter indicated that it was Defendant Melnick who made the decision[5] (which is consistent with normal practice) while Defendant B. Johnson has changed her allegations and now contends that it was Defendant Nichols who made the decision (though Defendant Nichols does not generally hear these matters and has significantly different handwriting). However, the relief sought does not conflict with any decision of the court as it applies only to cases where it can not be determined that the voided order was ever a decision of the court.

The relief in paragraphs seven and eight deals with the lack of ex parte hearings as required in RCW 26.50.070 (3) and which must be 'in person or by telephone'. Had this required hearing been held in 04-2-008908-9 on November 12, 2004, there would be a clear record of who made the decision. The omission of this hearing was raised by the Plaintiff but this was not addressed in the Opinion. Of course the Court of Appeal could not address the lack of a record of the deciding authority without considering this issue which it was not inclined to do. However, that being the case, this court can grant the relief sought concerning ex parte hearings without conflicting any state court decisions and in full support of the state statutes.

The relief in paragraph four deals with the lack of jurisdiction of Family Court commissioners to issue Orders of Protection of duration greater than 24 days. When the Plaintiff submitted his Brief to the Court of Appeals, this was not an issue and was not addressed by the trial court or the

3 While defendants claim that they rely only on the allegations in the Amended Complaint (footnote 4, Motion of August 30, 2007, document 26, page 3), they refer to defendants Eiesner, Melnick, Hagensen, and Osler as Superior Court Commissioners while the plaintiff has only recognized them as District Court Judges and Commissioners and Family Court Commissioners. The lack of valid appointments as Superior Court Commissioners is a central issue of the Complaint and defendants' motions simply attempt to ignore it.

4 Document 27-2, pages 52-60.

5 Plaintiff's Declaration of September 24, 2007, paragraph 4.

Court of Appeals in their Opinion[6]. The Opinion stated that Commissioners appointed under the constitution do have authority to issue full Orders of Protection but they are limited in number. Family Court Commissioners do not count in that limit, but also only have jurisdiction to issue temporary restraining orders. The relief sought in this matter does not conflict with the decisions of the state courts and simply supports state statutes as interpreted by state court decisions. This issued was raised to the Washington Supreme Court through a Motion to Supplement the Record, but the Motion was denied without comment. As the Washington Supreme Court chose not to address the issue, this court can address the issue without any conflict with state court decisions.

The relief sought in paragraphs five, six, twelve, and thirteen deal with the right to attend court hearings, the right to seek modifications to Orders of Protection, and access to information in the Judicial Information System. They were all raised as issues to the trial court and in the appeals process. However, no decision of the courts directly addressed any of these decisions so that this court can grant the relief sought without conflicting any state court decisions.

The relief sought in paragraphs nine, ten, and eleven deals with preserving the appeals process from abuse. None of the complaints raised by the plaintiff were addressed by the trial court or in the appeal process, so there is no conflict with any state court decision. The Opinion states in the last paragraph of page 7 that the plaintiff had made the nonsensical claim that he was deprived of the right of appeal, but that claim was only made as part[7] of a logical argument as to why defendants Eiesland and Melnick did not have jurisdiction as District Court judges. The Court of Appeals apparently agreed as there was no mention of their status as District Court judges; all decisions were those of the Superior Court. Further, these issues were raised to the Court of Appeals to establish the jurisdiction of the Court of Appeals to review the decisions of October 15, 2004 and October 27, 2004 in case 04-2-008824-4 where the Notice of Appeal was not filed until January 18, 2005. The court reviewed those early decisions and apparently must have accepted the arguments to support that jurisdiction via the attempt to file a Notice of Appeal on November 23, 2004 (document 17, pg 12, Exhibit B) and the Motions for Review submitted instead on that date.

6 Document 27-2, pages 52-60.
7 Page 18 of plaintiff's Brief, document 27-2, page 41

The relief sought in paragraph fourteen and fifteen refers to sexual bias which is mentioned in the Opinion (bottom of page 6) of the Court of Appeals. The Court of Appeals simply noted that the one case cited did not demonstrate sexual bias, which is completely consistent with the request of the plaintiff. At no time has the plaintiff inferred that one or two cases can provide anything beyond anecdotal evidence which is often misleading, but in the appeal brief (pg. 33), the plaintiff simply sought a review to determine if there were an underlying sexual bias. The plaintiff independently reviewed over 100 cases and found dramatic sexual biases (document 17, page 7) which indicates that Orders against men are about ten times more likely than Orders against women and about ten times more likely than one would expect based on peer reviewed determinations of the rate of occurrence of domestic violence in the population (men and women are approximately equally likely to use physical violence against their domestic partner). A finding that one case does not demonstrate sexual bias does not conflict in any way with a finding that 300 to 600 cases can clearly indicate sexual bias.

The remainder of the relief sought (paragraphs sixteen through nineteen) is unrelated to any previous case which the plaintiff was involved with and should be decided based on existing federal and state law. They refer to damages, requirements for candidates for judicial office in Washington state, and the Washington Commission of Judicial Conduct each of which will be addressed separately except for the Washington Commission of Judicial Conduct which was not been addressed by the defendants in their motions.

Argument 2

Rooker-Feldman Doctrine Does Not Apply

The Defendants claims of a defense based on the Rooker-Feldman doctrine is unfounded. While many of the issues in this case were raised before the trial court and in the briefs to the appellate courts, none of the decisions of the court or appeals court addressed these issues. Indeed, the lack of a right of appeal (Count IV of the Complaint) was not and could not be raised before the appellate courts, but is a fundamental right of the Plaintiff from the Fourteenth Amendment. While the defendants argues that the issues which were addressed by the state courts are inextricably intertwined with those not addressed, by the criteria established in Doe & Assoc. Law Offices v. Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001); Samuel v. Michaud, 980 F.

Supp 1381, 1411 (D. Idaho 1996) of:

> *Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.*

this is clearly not the case. As noted above, none of the relief sought conflicts with any decision of a state court.

Argument 3

Res Judicata Does Not Apply

The Defendants claims of a defense based on Res Judicata also fails. The defendants cite:

> *Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court "to give the same preclusive effect to a state-court judgment as another court of that State would give."*

from *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, at 1527. However, the relief sought in this matter does not conflict with any decision of a state court but instead relies on the state constitution, state statutes, and past state court decisions in other matters. On that basis certain '*decisions*' which were made by individuals with no jurisdiction to enter those decisions would be declared void, but they were, according to state law, not decisions of the state court.

The defendants also cite *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 343, 125 S. Ct. 2492 (2005) with '*the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.*', but in this case no question of fact or law were resolved by the state court that is required for the relief sought in this case. The defendants also cite *Gallagher v. Frye*, 631 F.2d 127, 129 (9th Cir. 1980) with '*Where the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same*', but in this case the parties are different as the defendants were never parties to any prior suit which included the plaintiff. State decisions also require that the parties be the same (as cited in *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000)), but again none of the defendants were a party to any of suits cited in the complaint.

The absence of any conflict between the relief sought in this matter and the Opinion of the Court

of Appeals is most remarkable. It indicates that the Court of Appeals carefully focused on minor issues which were raised only peripherally and conscientiously avoided any references to the serious issues which would have required that the plaintiff receive the relief sought. Had the Court of Appeals declared:

1. The Superior Court can ignore the numeric limits on commissioners established in the state constitution;
2. Trial Courts do not need to hold the ex parte hearings required in RCW 26.50.070 (3);
3. It is not necessary for the respondent to be permitted to testify at RCW 26.50 hearings;

and so on, then, if Washington Supreme court chose not to review the matter, both Res Judicata and the Rooker-Feldman Doctrine would apply and the plaintiff would have been required to apply to the U.S. Supreme Court for relief. However, in that case, there would be a compelling case for the review of U.S. Supreme Court as the decisions of the state courts would be in obvious conflict with constitutional and statutory provisions.

Given the reality that there are hundreds of appellate courts in the U.S. which make thousands of decisions every month, the U.S. Supreme Court does not have the resources to review every decision to insure that decision does not intentionally overlook or conceal important issues. Of course this is not necessary as the Res Judicata and the Rooker-Feldman Doctrine only apply to the actual decisions of the state courts and not to what they overlook or intentionally conceal. The great care with which the Court of Appeals avoided addressing central issues before it indicates that this was an intentional effort to avoid fulfilling the requirements of well established law rather than a simple mistake on their part, but this will be addressed later.

Argument 4

Individual Defendants Not Qualified for Judicial Immunity

None of the defendants identified in the Complaint for damages meet the requirements for judicial immunity though the rationale for their exclusion depends on six different cases.

Defendants Hagensen and Osler are a Clark County District Court Judge and Commissioner who were also appointed as Clark County Family Court Commissioners. Both the District Court and

Family Court are courts of limited jurisdiction and do not have the broad 'general jurisdiction' of the Superior Court or that referred to in *Stump v. Sparkman*, 435 U.S. 349 (1978). They routinely processed RCW 26.50 (domestic violence) matters in Clark County without the ex parte hearings required in RCW 26.50.070 (3) and issues restraining orders (or Orders for Protection) which are not temporary and for which they do not have jurisdiction.[8] While Family Court Commissioners are authorized to *'cause the orders and findings of the family court to be entered in the same manner as orders and findings are entered in cases in the superior court*' (RCW 26.12.060 (6))[9], their jurisdiction is restricted to that of the Family Court and to '*exercise all the powers and perform all the duties of court commissioners*' (RCW 26.12.060 (3)) which is only the statutory powers of commissioners and only includes temporary restraining orders[10]. By refusing to hold ex parte hearings and issuing Orders for which they do not have jurisdiction, defendants Hagensen and Osler have deprived numerous residents of Clark County of the right to due process in RCW 26.50 (domestic violence) matters to include the plaintiff in this matter who is still seeking an ex parte hearing in case 04-2-008908-9. While the plaintiff could simply submit another petition, the Clark County courts do not process the petitions as required by statute and there is, hence, no forum in Clark County where these matters are handled with due process. The efforts made by the Clark County courts to conceal the lack jurisdiction of Defendants Hagensen and Osler demonstrates that they knew they had no jurisdiction in these matters.

Defendants Eiesland and Melnick are alleged to have made the decisions of October 15, 2004 and October 27, 2005 in case 04-2-008824-4 on November 12, 2004 and January 19, 2005 in case 04-2-008908-9 of Clark County Superior Court. However, these defendant had no

8 In *State v. Karas*, 108 Wn. App. 692 it was found that Superior Court Commissioners could issue Orders for Protection which were not listed in the statutory powers of said commissioners because of the broad powers provided to these commissioners under the Washington State Constitution, Article IV, Section 23. However, these constitutionally empowered commissioners are limited in number, Ordell v. Gaddis, 99 Wn.2d 409. While Family Court Commissioners do not count in the numerical limit, they also only have the powers provided via statute in RCW 2.24.040 which only includes the issuing of temporary restraining orders (3).

9 This clause can be a little confusing, but what it really says is that once the Family Court is finished with its matters (ex parte hearings and temporary restraining orders), the decisions are automatically transferred to the Superior Court for completion. The Family Court is not given the broad jurisdiction of the Superior Court, it remains a court of extremely limited jurisdiction, but those decisions it enters are then matters for the Superior Court. As a commissioner, their decisions can be reviewed by the Superior Court for ten days and are then Superior Court decisions which can be appealed through the Court of Appeal.

10 The powers are listed in RCW 2.24.040 which only includes the issuing of temporary restraining orders (3)and holding ex parte hearings (9).

jurisdiction to enter decisions for the Superior Court and thereby deprived the plaintiff of due process. While they were judges of the Clark County District Court, a court of limited jurisdiction, they had no more jurisdiction to enter decisions of the Superior Court than they did to impeach the President of the U.S. as an act of the U.S. Congress. There were orders purporting to appoint these defendants as Superior Court Commissioners[11], but these orders were issued in clear violation of Washington State Constitution, Article IV, Section 23 which says that Superior Court Commissioners '*may be appointed in each county ... not exceeding three in number*' and there were at least four such orders. It is also apparent that these defendants knew that they had no jurisdiction as Superior Court Commissioners because of the manner in which their lack of jurisdiction as Superior Court Commissioners was concealed.

For defendants Eiesland, Melnick, Hagensen, and Osler, there is a further lack of jurisdiction in that in no case did they ever hold the ex parte hearing required in RCW 26.50.070 (3) and which must be 'in person or by telephone'. As this hearing is a prerequisite for issuing the temporary Order for Protection and holding the later hearings, these defendants did not have any jurisdiction to make further decisions in the matters cited.

Defendant Harris signed the orders purporting to appoint defendants Eiesland and Melnick as Superior Court Commissioners in clear violation of Washington State Constitution, Article IV, Section 23 and violating the rights of numerous Clark County residents including the plaintiff who were deprived of their rights under RCW 26.50 proceedings because of the lack of jurisdiction of the deciding authority. No judicial immunity applies to these orders as they are administrative in nature which provides only qualified immunity. *Forrester v. White*, 484 U.S. 219 (1988) states:

> *it does not serve to distinguish judges from other public officials who hire and fire subordinates. In neither case is the danger that officials will be deflected from the effective performance of their duties great enough to justify absolute immunity. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions, a question not decided here*

Superior Court Commissioners serve at the discretion of the Superior Court and can be 'hired' (or appointed) at will, making them subordinates as described above. Further, qualified immunity applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511

11 See plaintiff's Declaration of September 24, 2007, Exhibits B and C.

(1985), which is obviously the case when the restrictions of the state constitution are ignored.

Defendants B. Johnson and Nichols are alleged to have conspired to issue an order on January 3, 2005 in case 04-2-008908-9 with defendant Nichols signing the Order and defendant B. Johnson falsely claiming in a letter[12] dated January 7. 2005 that defendant Nichols had decided the previous decision[13] in 04-2-008908-9 on November 12, 2004 but it was actually decided by defendant Melnick[14]. As a Notice of Appeal [15] had been filed in this matter on December 10, 2004, just after defendant B. Johnson had issued an order from the bench denying the plaintiff's Motion to Review and as there were no outstanding motions in this matter, the Superior Court did not have any jurisdiction in this matter (see Washington State Court Rules: Rules of Appellate Procedure (RAP) 7.2, Authority of Trial Court After Review Accepted) and could only perform the administrative task of issuing a written decision which corresponded with the decision delivered from the bench. These defendants were attempting to conceal the lack of jurisdiction of defendant Melnick from the Court of Appeals, thereby conspiring to deprive the plaintiff of his rights to due process in this matter. Their actions also indicate that they knew defendants Eiesland and Melnick were acting without jurisdiction (their appointment orders as Superior Court Commissioners[16] violated the state constitution) and as judges of the Superior Court they were also responsible for approving the violating orders along with defendant Harris.

Defendants Penoyar, Bridgewater, and Hunt are judges of the Court of Appeals, Division II which is a court of limited jurisdiction created by RCW 2.06 with jurisdiction defined by RCW 2.06.030. As a court of limited jurisdiction, it is not accorded the broad relief of a court of general jurisdiction as described in *Stump v. Sparkman*, 435 U.S. 349 (1978). Further, the plaintiff's former wife never submitted a respondent's brief or paid the sanctions imposed on her (as far as the plaintiff knows), so it appears that the Court of Appeals never had jurisdiction over her in case 32671-0-II. As the plaintiff's brief was unopposed, the role of the Court of Appeals was more administrative rather than judicial. There were not '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court*' as

12 Document 30-2.
13 Document 30-3.
14 Declaration of Defendant, September 24, 2007
15 Declaration of Defendant, September 24, 2007, Exhibit A.
16 See plaintiff's Declaration of September 24, 2007, Exhibits B and C.

described in *Forrester v. White*, 484 U.S. 219 (1988). In this case, the primary responsibility of the Court of Appeals is to determine what of the relief sought by the appellant can be legally granted and to grant that relief. In this capacity they only have the qualified immunity which applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which is obviously the case when violations of the state constitution are ignored. The damages cited by the plaintiff were the result of the failure of these defendants to fulfill their oath of office and support and uphold the state and federal constitution.

Further, the Court of Appeals intentionally and knowingly concealed the violations of the state constitution through fabricating facts which were not present in the record to include the claim that both parties '*each testified about whether the temporary protective order should be extended*' and '*on January 19, 2005,* [the plaintiff] ... *filed another temporary protective order, which was denied*'.[17] The normal acts (whether judicial or administrative) of an appellate courts is to review the record presented to it and draw out the relevant facts, not to fabricate events not present in the record in order to conceal violations of statutes and constitutions. These fabrications are so outside the realm of normal appellate acts as to preclude immunity in its own right according the test of '*the nature of the act itself (whether it is a function normally performed by a judge)*' as specified in *Stump v. Sparkman*, 435 U.S. 349 (1978).

It is alleged that the defendants Alexander, Madsen, Fairhurst, Owens and J. Johnson who are members of the Washington Supreme Court improperly denied the petition in case 78768-9. The Washington Supreme Court is similarly a court of limited jurisdiction (Washington State Constitution Art. 4 § 17 , section 4 and RCW 2.04.010) and is not accorded the broad relief of a court of general jurisdiction as described in *Stump v. Sparkman*, 435 U.S. 349 (1978). Further, the review of the petitions for review is an administrative function as there is not '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court*' as described in *Forrester v. White*, 484 U.S. 219 (1988)[18]. In this capacity they only have the qualified immunity which applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which is obviously the case when

17 This second petition is completely the invention of the Court of Appeals in order to conceal the actions of defendants B. Johnson and Nichols in early January of 2005 to improperly schedule that hearing in their efforts to conceal the violations of the state constitution.

18 The petitions are reviewed on face only without any disputes between parties.

violations of the state constitution are ignored. The damages cited by the plaintiff were the result of the failure of these defendants to fulfill their oath of office and support and uphold the state and federal constitution.

None of the defendants for whom damages are sought are eligible for any form of immunity whether judicial or otherwise.

Argument 5

Interference with Appeal Precludes Judicial Immunity

There is an apparent lack of recent decisions concerning judicial immunity by the U.S. Supreme Court. In the ground breaking decision of *Stump v. Sparkman*, 435 U.S. 349 (1978), they rely heavily on *Bradley v. Fisher*, 80 U.S. 335 (1871), from more than 100 years earlier, but ignore *Randall v. Brigham*, 74 U.S. 523 (1869) from just two years earlier. The common themes and contrasts between these three decisions is revealing. The underlying theme for these cases as well as *Forrester v. White*, 484 U.S. 219 (1988) appears to be that in all cases the judge who was granted immunity was making a good faith effort to uphold their oath of office and do the right thing. After the fact, it was found that their efforts were sometimes misguided, unfounded (no jurisdiction) and just plain wrong (illegal). However, judges (and especially trial judges) have to make tough calls every day and don't have the time to carefully research and consider every decision (cases need to move forward to some conclusion, sometimes in a very short time frame). Because of these difficulties, Judges have been granted broad, special immunity from civil damages, but the Supreme Court has struggled with defining the limits of this immunity (as the contrasts between the four cases clearly shows). In *Forrester* there is a suggestion of the basis of these limits with:

> *Most judicial mistakes and wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.*

Of all the elements of due process, the right of appeal is certainly the most fundamental as it allows for the correction of the common errors which occur with even a good faith effort. However, efforts to conceal actions and interfere with the right of appeal strike at the very foundation of our system of rule of law. They are also indicative of intentional and knowing violations of the basic oath of office for all such positions. Knowing and intentional violations of

the oath of office are never normal judicial acts which would be afforded the absolute immunity from civil damages. The critical factor is an effort to conceal the improper or illegal actions (not the illegal or improper actions themselves which could be simple error or even negligence).

According to this criteria, if a judge in open court, before all parties and their attorneys, and on the record were to make an offer of a favorable (and legal) finding to one party in exchange for sexual favors and a threat of an unfavorable finding if the favors were not provided, the judge would not be subject to civil damages[19], but then there is virtually no possibility that the offending judge would actually be able to carry out the threatened result. However, if the same offer were made in an improper ex parte communication, efforts were made to keep the offer secret, and these elements were proved then the offending judge would be subject to civil damages.

According to this standard, each of the defendants cited previously knowingly and intentionally violated their oath of office which is, intrinsically, not a normal judicial act and, hence, judicial immunity is not applicable.

Argument 6

Admitted to Practice Law Requirement Improper

The defendants misstate the concerns raised in the complaint concerning the eligibility requirements for judicial office in Washington state. The primary concern is the role that the supreme court has in setting the standards for who can run against them in upcoming elections. RCW 2.48.060 states that the rules for admitting and disbarring attorneys are '*subject to the approval of the supreme court*'.[20] Were the supreme court assiduous in supporting and following the rule of law and insisting that attorneys do the same, this would be a reasonable requirement. However, given the supreme court's record of ignoring the constitution and statutes and

19 A finding of diminished mental capacity might be appropriate under these circumstances.

20 The constitutional requirement includes the alternative of having been admitted to practice in the courts of 'the Territory of Washington' which, if it were interpreted as a geographical restriction, could include any federal court in the region of Washington state. This could be broadly construed to be any attorney from any state as well as anyone who served on active duty in the U.S. military as a commissioned officer (and could have practiced in a military court at any of the major commands in Washington state). This liberal interpretation would be sufficient to bypass the central role played by the Washington supreme court, but does not address the restriction in statutes which do not include references to the territory of Washington.

supporting those who do likewise, there is a need to break the cycle of attorneys who use their knowledge of the law to bypass and ignore the requirements of the law. By all indications, Clark County courts have issued domestic violence orders for almost a decade without jurisdiction and no one has been permitted to raise the issue or seek correction. Under these circumstances, the restrictions of having been admitted to practice law to become a judicial candidate is not reasonable or in the best interest of the state. Conscientiously following the rule of law is in the best interest of the state and at this time it appears that individuals who have not had to work in the current tainted judicial system would be most able of reforming the system and returning to a rule of law.

Argument 7

Petitions Improperly Restricted to Indigent Candidates

The defendants also misstate the concerns raised in the complaint concerning the availability of petitions as an option to becoming a candidate for a judicial office[21], the plaintiff seeks to have that option made available to him. RCW 29A.24.091 states '*A candidate who lacks sufficient assets or income at the time of filing to pay the filing fee* [may submit petitions]' and this has been interpreted as requiring '*A candidate must declare and be indigent in order to submit a nominating petition in lieu of paying the filing fee.*' If a potential candidate has assets which can be sold to cover the filing fee or has income that would allow the taking on of debt sufficient to cover the filing fee, then petitions would not be an option, even if paying the fee would leave the candidate penniless, homeless, and unable to support their self or their family. This rather draconian restriction defeats the purpose of adding petitions as it leaves economic status as a central criteria for eligibility to be a candidate.

> *Closer scrutiny is required in such cases because '[e]conomic status is not a measure of a prospective candidate's qualifications to hold elective office.' Clements, 457 U.S. at 964, 102 S.Ct. at 2844.*

from *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994). Further, in *Andress v. Reed*, 880 F.2d 239 (9th Cir. 1989) as cited by the defendants, the court upheld petitions as a valid option to a filing fee where it was stated

> *Upon receipt of the minimum number of in-lieu filing-fee signatures required, or*

21 In document 26, page 13, the defendants claim '*Requiring plaintiff in this case to amass merely 1,320 signatures is constitutional.*' so the defendants seem to agree that the plaintiff should be allowed to submit petitions instead of the filing fee irrespective of his economic status.

> *a sufficient combination of such signatures and pro-rata filing fee, the clerk shall issue nomination papers provisionally*

Note that there was no requirement that petitions be restricted to indigent candidates and pro-rata filing fees were deemed acceptable. The relief sought allows petitions to be submitted by any candidate, not just indigent candidates, and adds the option of pro-rata filing fees.

Argument 8

Eleventh Amendment Does Apply to This Action

The defendants also misapplies the Eleventh Amendment protections of the state. Defendants rely heavily on *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966), but this case was one of disbarment in which Clark did not raise the issue of violations of due process in state proceedings or other constitutional issues. *Clark* states:

> *Clark does not directly contest the application of this constitutional principle in the case of defendant state*

In *Clark* there were not any readily apparent violations of due process or other constitutional rights in the prior disbarment proceedings.

While defendants cite numerous applications of one half of the Eleventh Amendment question, they all rely directly or indirectly on *Hans v. Louisiana*, 134 U.S. 1 (1890) which states:

> *Nor is the State divested of its immunity "on the mere ground that the case is one arising under the Constitution or laws of the United States."*

(the first half of the question which the defendants cite in various forms) but *Hans* goes on to say on page 20

> *After thus showing by incontestable argument that a writ of error to a judgment recovered by a state, in which the state is necessarily the defendant in error, is not a suit commenced or prosecuted against a state in the sense of the amendment ... if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by 'a citizen of another state' or 'of any foreign state,' and so was not affected by the amendment, but was governed by the general grant of judicial power, as extending 'to all cases arising under the constitution or laws of the United States, without respect to parties.'*

This discusses the circumstances of injunctive relief (and not monetary judgments). *Hans* held that the monetary judgments against the state were not permitted under the Eleventh Amendment and no injunctive relief was sought so the exception listed above was not considered.

The exception for injunctive relief was refined in *Ex parte Young*, 209 U.S. 123 (1908) with '*the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States*.' This was stated more clearly in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) with '*The Court in Ex parte Young, supra, recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State*.' Further, *Pennhurst* is a more recent case than *Clark*, is from a higher court, and is on point with the case at hand.

In the present matter, the state is not a defendant nor are any agencies of the state. Further, for those individuals who are sued in their official capacity (which could be construed as representing the state), only injunctive relief is sought, no damages are cited. All of the injunctive relief is based on violations of U.S. constitutional provisions and so the Eleventh Amendment restrictions do not apply as in *Young* and *Pennhurst*. Where damages are sought, it is only against private individuals who it will be shown acted knowingly and intentionally in violation of their of oath office and which precluded any form of immunity which might have applied had they been acting in their official capacity.

Conclusion

The defendants have raised numerous arguments against the Amended Complaint, but none of them can withstand careful review, they are all defective. In many cases the defendants simply avoided the issues at hand and argued against issues which weren't raised in the claim (as with the argument that the plaintiff can submit petitions in lieu of a filing fee to become a candidate when the relief sought is just that ability) or assumed contested facts (as with claiming that defendants Melnick and Eiesland were Superior Court Commissioners when the Complaint only states that there were orders appointing to them that position which were in violation of the constitutional numerical limits). It should be possible to resolve many of these issues via summary judgment, but first contested facts need to be resolved such as the circumstances under which appointment orders were made for defendants Melnick and Eiesland as alleged Superior

Court Commissioners and who made the decision[22] in case 04-2-008908-9 on November 12, 2004.

In those cases where the defendants did not address the complaint or simply assumed contested facts, their relief should be denied without consideration of rebuttal arguments as new arguments which might be applicable to the case at hand were not presented in time for the plaintiff to rebut their arguments. Similarly, the relief related to the Commission of Judicial Conduct must remain as there were no arguments against it presented in a manner allowing the plaintiff to timely rebut the arguments.

For the reasons set forth above, Plaintiff respectfully requests that the defendants' Motions for Summary Judgment and Motions to Dismiss be denied.

Respectfully submitted, September 24, 2007 (Vancouver, WA).

s/ Brian P Carr
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CERTIFICATION

I hereby certify that on September 24, 2007, a true and accurate copy of the foregoing Plaintiff's Combined Reply Brie to Defendants' Motions for Summary Judgement and Motions to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system as all parties have elected electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System.

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