No. 31789-7-III
(Consolidated with No. 31451-1-III)

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants,

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)
(Hon. Salvador Mendoza, Jr.)

Case No. 10-2-02357-4

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The trial court did not abuse its discretion by denying Walter Tamosaitis's motion to vacate the judgment in favor of respondents Bechtel National, Inc., Frank Russo, and Gregory Ashley (collectively "BNI"). Tamosaitis based his motion on new evidence, namely his alleged dissatisfaction with a March 2013 bonus decision made by his employer, URS Energy & Construction, Inc. ("URS"). He brought the motion, however, more than a year after final judgment was entered, thereby violating CR 60(b)(3)'s express timeliness requirement for motions to vacate based on "new evidence." Tamosaitis himself concedes that the "one year deadline had expired under CR 60(b)(3)." App. Br. 2. He cannot credibly maintain that the trial court committed a manifest abuse of discretion by denying his admittedly untimely motion.

Tamosaitis attempts to avoid the plain language of CR 60(b)(3) by arguing that his disappointment with his 2013 URS bonus somehow meets the "exceptional circumstances" standard of CR 60(b)(11). This argument is meritless. Relief from a judgment under CR 60(b)(11) is reserved for exceedingly rare and truly extraordinary circumstances, and is not to be used to sidestep the timeliness requirements of CR 60(b)(3). Tamosaitis fails to cite a single case in which a judgment has been vacated under factual circumstances even remotely analogous to those in the instant case.

In any event, the March 2013 bonus decision has no relevance to any of the multiple bases for the trial court's January 2012 entry of summary judgment, or to Tamosaitis's appeal of that ruling. The evidence

is undisputed that the bonus decision was made solely by a **non-party** to this litigation, Tamosaitis's employer URS, and was made **nearly three years** after July 2, 2010, the date of Tamosaitis's last contact with BNI or the WTP project. In short, the bonus decision was an internal URS employment matter that came about long after Tamosaitis had transferred off the WTP project and that concerned URS's evaluation of Tamosaitis's performance as a URS employee working on URS projects in 2012. If Tamosaitis feels aggrieved by the amount of his annual URS performance bonus, his remedy is with his employer, URS. That bonus has nothing at all to do with BNI, WTP, or the issues in this action.

Tamosaitis offers no actual evidence to the contrary. Instead, he attempts to obscure the distinction between the respondents in this case and his employer, URS, by repeatedly making the unsupported and wholly conclusory argument that "respondents" somehow acted to "manipulate the facts" to ensure that the 2013 URS bonus decision occurred more than a year after the date the judgment became final. *See, e.g.*, App. Br. 1. That assertion is flatly contradicted by Tamosaitis's own witness, Donna Busche (another URS employee), whose declaration submitted with the CR 60 motion states that URS annual incentive bonuses are typically paid in March of each year. More fundamentally, Tamosaitis has offered **no evidence whatsoever** that respondents in this case had anything to do with the substance, timing, or any other aspect of URS's 2013 bonus decision, or indeed were even aware of that decision before he brought it up in his underlying CR 60 motion.

Finally, Tamosaitis never explains (nor can he) how new evidence whose alleged relevance extends only so far as the "economic loss" basis for summary judgment could conceivably justify vacation of that judgment, given that the trial court's summary judgment ruling was supported by *four other separate and independent grounds*.

In sum, the trial court's ruling on Tamosaitis's CR 60 motion was well within its sound discretion and should be affirmed.

II. RESTATEMENT OF ISSUES

Should this Court affirm the trial court's denial of Tamosaitis's CR 60 motion where:

(1) That motion, which was premised on "new evidence" regarding a URS bonus decision, was time-barred because it was admittedly brought more than one year after entry of the underlying final judgment in contravention of CR 60(b)(3);

(2) No extraordinary circumstances exist that would justify vacation of the underlying judgment under CR 60(b)(11);

(3) The annual performance bonus decision in question was made solely by Tamosaitis's employer, a non-party to this litigation, and was made nearly three years after Tamosaitis's last contact with BNI or the WTP project;

(4) The record is devoid of evidence that BNI had any connection with that bonus decision, or was even aware of it;

(5) Tamosaitis does not claim that the bonus decision has any relevance to four of the five separate and independent bases for the trial court's entry of summary judgment; and

(6) The trial court's decision must be affirmed unless it was so unreasonable as to constitute a "manifest abuse of discretion"?

III. RESTATEMENT OF THE CASE

Tamosaitis entirely ignores the substantial evidence upon which the trial court exercised its discretion to deny his untimely motion to vacate. A detailed discussion of the facts relating to the trial court's entry of summary judgment, and to the procedural history of Tamosaitis's first appeal (Case No. 31451-1-III), is set forth in the Statement of the Case set forth at pages 4-22 in the Brief of Respondents dated August 15, 2012. Certain additional facts that are specifically relevant to Tamosaitis's collateral attack on that judgment, at issue on this second appeal, are stated below:

At the time of all events relevant to this lawsuit, Walter Tamosaitis was employed as an engineer by URS.[1] Tamosaitis has never been

[1] In a footnote, Tamosaitis asks this Court to take judicial notice of the "fact of Dr. Tamosaitis's termination from URS." App. Br. 3 n.2. The only "evidence" offered by Tamosaitis in support of this request is a news article that is not part of the record on review but is attached as an appendix to the Brief of Appellants. Washington law is clear that "the contents of a newspaper article are not the proper subject of judicial notice." *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 476, 90 P.3d 42 (2004). This Court should strike Tamosaitis's appendix and refuse to consider any reference to it. Tamosaitis also mentions RAP 9.11, but has made no motion to supplement the record under that provision. In any event, Tamosaitis offers no *admissible* evidence whatsoever regarding his termination—let alone any evidence that BNI was involved in any

employed by, or compensated by, BNI. BNI is the prime contractor to the United States Department of Energy ("DOE"), at its Waste Treatment & Immobilization Project ("WTP") in Richland, Washington. URS is a subcontractor of BNI at WTP. URS assigned Tamosaitis to WTP from 2003 to 2010. *See* Record on Consolidated Matter No. 31451-1-III ("First Appeal"), CP 1662, 1668-69, 1721-24, 1735.

Following his transfer off the Project on July 2, 2010, Tamosaitis brought certain claims in Benton County Superior Court against URS, BNI and several individuals employed either by URS or BNI. Tamosaitis eventually dropped his claims against the URS defendants and all of his claims against the BNI defendants except for a single claim of tortious interference with business expectancy. First Appeal CP 1522-24.

On January 9, 2012, the trial court granted BNI's summary judgment motion and dismissed Tamosaitis's remaining tortious interference claim with prejudice. First Appeal CP 2503-04. That ruling was supported by *five separate and independent grounds*, all of which

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way in, or even knew about, the termination decision. In addition, the termination, which he describes in the same footnote as having taken place in October 2013, was even more temporally remote from his July 2010 departure from WTP than URS's March 2013 bonus decision. That event, like the bonus decision, would fall well outside the one-year outer limit for "new evidence" on which a motion to vacate a judgment under CR 60(b)(3) could be based. Tamosaitis's termination, like the bonus decision, is a matter between Tamosaitis and URS.

were based on the inconsistencies between the admitted facts in the record and the legal requirements of a tortious interference claim. CP 104-108, 131-140. The trial court denied Tamosaitis's motion for reconsideration, entering final judgment in favor of BNI, on February 23, 2012. First Appeal CP 2576.

Tamosaitis appealed (Case No. 31451-1-III). By order dated February 6, 2013, the Supreme Court denied Tamosaitis's motion for direct review and transferred the appeal (which had been fully briefed since October 15, 2012) to this Court.

On May 8, 2013—over fourteen months after entry of final judgment, and several months after the briefing on Tamosaitis's main appeal had been completed—Tamosaitis filed his CR 60 motion. The sole basis for this untimely collateral attack on the final judgment was his claimed disappointment with an annual performance bonus he received in March 2013 from a *non-party* to this litigation, his employer URS. CP 2.

On June 28, 2013, the trial court denied Tamosaitis's CR 60 motion. CP 549-51. Tamosaitis timely appealed that ruling, Case No. 31789-7-III. By order dated October 14, 2013, the Court Commissioner consolidated Tamosaitis's two appeals pursuant to RAP 3.3(b).

IV. ARGUMENT

A. The Denial of Tamosaitis's CR 60 Motion Must be Affirmed Unless the Trial Court Committed a "Manifest Abuse of Discretion."

This Court reviews a trial court's ruling on a CR 60 motion for "manifest abuse of discretion." *In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003). A manifest abuse of discretion occurs only if the trial court's "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) (*citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971)). This Court affords substantial deference to the trial court and will affirm its decision unless it is one that "no reasonable person would have made." *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989); *see also In re Sutton*, 85 Wn. App. 487, 492, 933 P.2d 1069 (1997) (if there is a rational basis for a trial court decision, no manifest abuse of discretion will be found).[2]

[2] Appellants suggest in a footnote that review can be de novo if the CR 60 motion was made in "conjunction" with the summary judgment ruling. App. Br. 12 n.4. This is a gross misreading of *Folsom v. Burger King*, which held that appellate courts review evidentiary rulings de novo where those rulings limit the evidence considered by a trial court on summary judgment. 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion"). *Folsom* applies only to evidentiary rulings and thus has no application to a CR 60 motion seeking to vacate a summary judgment ruling, as opposed to being decided in "conjunction" with one.

B. The Trial Court's Ruling was Consistent With—and Indeed Mandated by—the Undisputed Facts and the Plain Language of CR 60.

Not only was the denial of Tamosaitis's CR 60 motion well within the trial court's discretion, it was the only possible disposition of that motion consistent with the undisputed facts and applicable law.

1. Tamosaitis's motion ran afoul of the express timing requirement of CR 60(b)(3).

It is undisputed that Tamosaitis's motion to vacate was based solely on allegations of new evidence concerning the amount of the performance bonus he received from his employer, URS, in March 2013. A CR 60(b)(3) motion to vacate a judgment based on newly discovered evidence must be made within one year of entry of the judgment. *See* CR 60(b). In addition, the evidence in question must have existed when the judgment was entered. *Knutson*, 114 Wn. App. at 872.

The trial court entered summary judgment on January 9, 2012, and denied plaintiffs' motion for reconsideration on February 23, 2012, thereby rendering the judgment final over a year before the evidence cited by Tamosaitis came into existence, and over fourteen months before his CR 60 motion was filed on May 8, 2013. Accordingly, it is beyond dispute that Tamosaitis did not satisfy the timing requirements of a Rule 60 motion premised on newly discovered evidence. In denying Tamosaitis's motion, the trial court expressly noted that he brought his motion "beyond one year" from the date of the underlying judgment. RP 18.

2. Tamosaitis may not use CR 60(b)(11) to evade the timing requirements of CR 60(b)(3).

While acknowledging that his motion to vacate was untimely under CR 60(b)(3), Tamosaitis argues that the trial court should nonetheless have granted it under CR 60(b)(11) because this case, he claimed, presents "extraordinary circumstances" within the meaning of that provision. App. Br. 2, 17. This Court has repeatedly emphasized, however, that subsection (b)(11) is to be applied "sparingly" and only to situations "involving extraordinary circumstances ***not covered by any other section of the rules***." *Knutson*, 114 Wn. App. at 872-73 (emphasis added); *see also In re Marriage of Tang*, 57 Wn. App. 648, 655-56, 789 P.2d 118 (1990). In particular, courts have held that CR 60(b)(11) should not be used to thwart the one-year time limit of CR 60(b). *Friebe v. Supancheck*, 98 Wn. App. 260, 267, 992 P.2d 1014 (1999) (holding that CR 60(b)(11) "cannot be used to circumvent the one-year time limit" restrictions of subsections (b)(1), (2) and (3)); *see also Bergren v. Adams Cnty.*, 8 Wn. App. 853, 857, 509 P.2d 661 (1973) (refusing to grant motion to vacate under CR 60(b)(1) because the motion was brought fourteen months beyond the date of judgment and finding CR 60(b)(11) inapplicable for failure to demonstrate an "other reason").

As the Ninth Circuit explained in *Corex v. United States*, 638 F.2d 119, 121 (9th Cir. 1981), the catch-all provision of CR 60(b)(11) and the specific enumerated provisions preceding it are "mutually exclusive."[3]

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[3] Fed. R. Civ. P. 60(b) is the federal counterpart to Washington CR 60(b), and, "thus, federal decisions may be considered an aid in reaching [its] appropriate

Where, as here, the motion is admittedly based on new evidence and indisputably was brought beyond the one-year deadline, the trial court would have abused its discretion if it had allowed Tamosaitis re-cast it as a subsection (b)(11) motion.

The trial court's refusal to disregard CR 60(b)(3)'s temporal limits for collateral attack on a final judgment was in furtherance of important public policy considerations. The timing requirements applicable to subsection (b)(3) would be rendered a nullity if a litigant in possession of new evidence falling outside the one-year deadline could simply switch the focus to CR 60(b)(11). The one-year deadline is a crucial bulwark of the state's strong public policy interest in drawing a reasonable line beyond which judgments must be final and not subject to collateral attack. *See Knutson*, 114 Wn. App. at 873 ("[T]he interests of finality are well served by carefully observing the dictates of CR 60(b)"); *Suburban Janitorial Servs.*, 72 Wn. App. at 307 (a court "may not extend the time for taking any action under rules . . . 60(b)").[4] To hold otherwise would leave all judgments vulnerable to subsequent attack any time a disappointed litigant claims to have come up with new information, *ad infinitum*.

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construction." *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 308, 863 P.2d 1377 (1993), *rev. denied*, 124 Wn.2d 1006 (1994).

[4] Even in the rare instances in which courts find sufficiently exceptional circumstances to vacate a judgment under CR 60(b)(11), the importance of the doctrine of finality is reaffirmed. *See, e.g., In re Marriage of Flannagan*, 42 Wn. App. 214, 218, 709 P.2d 1247 (1985), in which this Court took pains to "emphasize the importance of finality and the limited nature of our deviation from the doctrine."

3. Tamosaitis's disappointment with his employer's 2013 bonus decision did not present the type of "extraordinary circumstance" contemplated by CR 60(b)(11).

Timing aside, the trial court properly exercised its discretion in rejecting Tamosaitis's attempt to invoke subsection (b)(11), because this case in no way presents the type of "extraordinary circumstances" that could justify vacating a judgment. The trial court expressly noted the absence of any exceptional circumstances at the hearing on the motion, stating, "I simply don't see that." RP 18. The trial court's observation was supported by the record before it. How could a bonus decision made by a *non-party* to the litigation be relevant to a judgment entered more than a year earlier? To allow an existing judgment to be compromised based on such a disconnected, after-the-fact event would open the floodgates to re-litigation any time a former plaintiff feels aggrieved by a subsequent occurrence. Such an outcome would create confusion and uncertainty among litigants and would be immensely wasteful of judicial resources.

Mindful of this, the appellate courts have carefully circumscribed the applicability of CR 60(b)(11). In *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985), the Court of Appeals made it clear that only an exceedingly narrow set of circumstances can justify relief under CR subsection (b)(11): "Such circumstances ***must*** relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Id.* at 902 (emphasis added)

(citation omitted); *see also Friebe*, 98 Wn. App. at 266. Courts have accordingly stressed the need for the presence of "truly unusual" circumstances in order to apply CR 60(b)(11). *State v. Gamble*, 168 Wn.2d 161, 175, 225 P.3d 973 (2010); *see also In re Adoption of Henderson*, 97 Wn.2d 356, 360, 644 P.2d 1178 (1982). In short, CR 60(b)(11) is reserved for genuinely extraordinary and unique situations, such as in *Gamble* (cited by Tamosaitis), where the court applied CR 60(b)(11) by analogy to permit prosecution of defendants for homicide after an extraordinary change in the law that eliminated the crime for which they were originally convicted (second degree felony murder); the court observed that the situation was truly extraordinary in that the previously convicted killers could otherwise "*never* have any viable homicide charges brought against them . . . for the deaths they caused." 168 Wn.2d at 170-71 (emphasis in original).

The remaining cases cited by Tamosaitis (App. Br. 13-15) illustrate not only the types of highly unusual circumstances that are necessary to support relief under CR 60(b)(11), but also the fact that appellate courts give deference to the trial court's discretionary determination whether exceptional circumstances are present. None of those cases involved facts that are even remotely analogous to the facts of this case. *Flannagan* upheld the vacation of judgments that were based upon a temporary and unjust change in the law regarding characterization of military retirement benefits in marital property divisions—a change that had been *retroactively* overruled by Congress just 20 months after it was

enacted. 42 Wn. App. at 215. The court took great pains to "emphasize the limited nature" of its application of CR 60(b)(11), and cautioned that its decision was not intended to "provide a springboard for attacks on other final judgments." *Id.* at 222. *In re Marriage of Thurston*, 92 Wn. App. 494, 503, 963 P.2d 947 (1998) affirmed the vacation of a marital property division premised upon a material condition that did not occur, rendering it *literally impossible* to effect the transfer of a "significant part" of the property settlement. *Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) affirmed vacation of a judgment obtained while a party's attorney suffered from mental illness that was unknown to his client. Finally, *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 22 P.2d 225 (2009) was decided under CR 60(b)(6), not (b)(11), and involved the truly unique circumstance of an inmate's creation of dummy invoices to further the fraudulent procurement of a cost bill.

None of the limited circumstances in which the appellate courts have affirmed an order vacating a judgment under CR 60(b)(11) is even remotely applicable to the tenuous factual basis for Tamosaitis's motion before the trial court. Indeed, Tamosaitis has failed to cite a single case in which an appellate court *reversed* a trial court's refusal to vacate a judgment under CR 60(b)(11), or for that matter any case in which judgment has been vacated pursuant to that subsection under even arguably analogous circumstances.

The case law is in fact replete with instances in which attempts to expand the scope of Rule 60(b)(11) have been rejected. For example, in

Knutson, 114 Wn. App. at 873, this Court *reversed* a trial court's order granting a motion to vacate a judgment, holding that a 401(k) plan's vulnerability to market forces failed to rise to the level of an extraordinary circumstance under CR 60(b)(11). *See also Yearout*, 41 Wn. App. at 902 (affirming denial of motion where defendant's claims of unfairness in the parties' separation agreement and emotional instability failed to constitute extraordinary circumstances that could entitle defendant to relief under CR 60(b)(11)); *Tang*, 57 Wn. App. at 655-56 (reversing the granting of a motion to vacate based on a failure to list, value and characterize the parties' property and a challenge to the propriety of converting the form of ownership to tenancy in common, because those issues were exclusively matters of law unsuitable for a CR 60(b)(11) motion).

In the instant case, the trial court had ample grounds to exercise its discretion to deny extraordinary relief. Tamosaitis offered no *evidence* demonstrating a genuine, non-speculative link between URS's 2013 bonus calculation and any action taken by BNI. Instead, he attempts to manufacture a connection between the respondents and his dissatisfaction with his bonus by repeatedly asserting, in a wholly conclusory manner, that respondents have "manipulated the facts of this case." App. Br. 16. He can cite to no *evidence* that any "manipulation" has occurred,[5] and in

[5] Tamosaitis goes so far as to insert into both his "Assignment of Error" and "Issue pertaining to Assignment of Error" the concept that the trial court's ruling should be overturned and the judgment vacated because "respondents manipulated [Tamosaitis's] employment status." App. Br. 7. **The record, however, contains no evidence whatsoever supporting that assertion.** An appeal explicitly premised on a factual assertion that is unsupported by the record

fact the "evidence" Tamosaitis offered in connection with his CR 60 motion suggests otherwise. For example, Tamosaitis's URS co-employee Donna Busche states at ¶ 4 of her declaration (CP 38), that it has long been URS's practice to provide incentive bonuses in March of each year. This testimony undermines Tamosaitis's unsupported speculation that BNI somehow prevailed on URS to wait until March to reveal the amount of his 2013 bonus to ensure that the one-year deadline applicable to new evidence under CR 60(b)(3) would expire beforehand. *See* App. Br. 18.

In any event, the record contains zero evidence that BNI had any connection with, or was even aware of, URS's bonus calculation. BNI barely appears (except as a conclusory afterthought) in Tamosaitis's own declaration submitted with the CR 60 motion (CP 13-22), which is mainly focused on his disappointment with how his employer has treated him, and his contention that URS failed to pay him the incentive bonus to which he was contractually entitled. *See also* Tamosaitis's Rule 60 Motion, at p. 6 (CP 6): "Dr. Tamosaitis's [URS] offer letters do not state his incentive pay is contingent on billing a particular project code." Tamosaitis's appellate brief is similarly focused on a litany of technical complaints concerning URS's calculation and payment of annual performance bonuses, matters that do not concern BNI at all. See, for example, App. Br. 17: "URS's stated reasons for denying Dr. Tamosaitis his 2012 [sic]

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must be rejected. *Cf. In re Disciplinary Proceeding Against Simmerly*, 174 Wn.2d 963, 985, 285 P.3d 838 (2012) (when appellant failed to provide a citation to the record supporting a factual assertion, his argument based on that assertion was not considered by the appellate court).

incentive pay are fictional because the rules do not apply to other URS managers." Tamosaitis's remedy, if any, appears to be a breach of employment contract claim against URS, not vacation of the longstanding judgment in this case in which URS is not even a party.

Tamosaitis also attempts to make much of BNI's observation, in the summary judgment briefing, that the URS bonus payment received by Tamosaitis in early 2011 was as high as in the immediately preceding years. App. Br. 7. In so doing, he misses the crucial point that Tamosaitis's 2011 URS performance bonus was for *work done in 2010*, the first half of which Tamosaitis spent assigned to WTP. BNI correctly pointed out that the size of Tamosaitis's 2011 bonus reinforced the conclusion that Tamosaitis (1) was not retaliated against, and (2) suffered no damages, in connection with his alleged "whistleblowing" at WTP and the circumstances of his departure from the project. CP 130. By contrast, URS's 2013 performance bonus payment to Tamosaitis had no connection at all with his time at WTP. Instead, it presumably reflected a wide range of considerations bearing on his employer's evaluation of his performance as a URS employee on URS-run projects in 2012.[6] Those issues are

[6] At paragraph 12 of his declaration submitted with the CR 60 motion, CP 17, Tamosaitis complained that he was not able to return to WTP, and speculated that BNI was "exerting its influence to have my job options restricted." Tamosaitis's inability to return to WTP after his assignment there ended in mid-2010 is *not* a new fact, and was in fact fully briefed in BNI's summary judgment motion. *See, e.g.*, CP 117-19, 126-27, 132-34, 149-51, 179-88, 200-05. In addition, Tamosaitis based his speculation about BNI on a conversation he claimed to have had with his URS superior Bob McQuinn in August 2012. Tamosaitis Declaration at ¶ 12, CP 17. Thus, that speculation was based entirely on inadmissible hearsay and was properly disregarded by the trial court. Moreover,

between Tamosaitis and URS alone. In addition, the 2013 bonus—coming approximately 32 months after Tamosaitis left WTP—was so temporally remote from the time frame relevant to this lawsuit as to be entirely irrelevant, a conclusion echoed by CR 60's strict one-year deadline applicable to newly discovered evidence. The trial court's refusal to find "exceptional circumstances" was not an abuse of discretion.

C. Tamosaitis's Bonus-Related Contentions Could Not Possibly Have Justified Vacation of the Judgment, Because They Admittedly Related to Only One of the Five Separate and Independent Bases for the Trial Court's Entry of Summary Judgment.

Even if Tamosaitis's Rule 60 motion had not been untimely, and even if he were somehow able to demonstrate both that "extraordinary circumstances" existed and that he suffered genuine economic damage that was proximately caused by his departure from WTP, the trial court still would not have abused its discretion in denying the CR 60 motion. The absence of pecuniary loss was just one of *five separate and independent bases* for entry of summary judgment in favor of the defendants. Tamosaitis's motion did not address the other four bases, including the fact that BNI, as the DOE's prime contractor that exercises management control over WTP, cannot, as a matter of law, be considered

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Tamosaitis waited *nine months* after speaking with McQuinn to bring his CR 60 motion—until eight days after Judge Matheson (who granted the summary judgment motion) retired and was replaced by Judge Mendoza (who denied the CR 60 motion), and until long after the one-year period for newly discovered information applicable to CR 60(b)(3) had expired. The trial court did not abuse its discretion in refusing to vacate the judgment based on a hearsay allegation of what was said in a conversation between Tamosaitis and a fellow URS employee.

a "third party intermeddler" with respect to Tamosaitis's alleged expectancy in a WTP management position.[7]

Nor did Tamosaitis explain why this motion based on a single, temporally remote interaction between Tamosaitis and a third party should supplant the trial court's careful consideration of the voluminous factual record bearing on all five grounds for summary judgment.[8] Significantly, all of those grounds were supported by testimonial admissions by Tamosaitis himself. *See* BNI's summary judgment briefing (CP 104-162) and brief in opposition to Tamosaitis's main appeal (CP 164-228) for further explanation of the multiple reasons the trial court's summary judgment ruling was correct.

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[7] Tamosaitis correctly observes that BNI did not move for summary judgment on yet another required element of his tortious interference claim, the "improper purpose" element. BNI nonetheless strongly disputed Tamosaitis's allegation that he was a "whistleblower" and vigorously denied that he was ever retaliated against. *See* the Statement of Facts at pp. 6-28 in Defendant's Motion for Summary Judgment (CP 109-131), and in particular the discussion of the huge body of evidence refuting Tamosaitis's claim of retaliation, at pp. 18-22 therein (CP 121-25).

[8] Contrary to Tamosaitis's suggestion (App. Br. 14), the fact that the trial court's order did not specify the grounds on which summary judgment was granted is of no consequence. It is *inappropriate* for a trial court to include findings and conclusions in an order granting summary judgment. *See Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) ("findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court"). Findings and conclusions are unnecessary because an appellate court will review the granting of the motion de novo, and will affirm it on any ground(s) supported by the record. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005).

V. CONCLUSION

The trial court correctly denied Tamosaitis's CR 60 motion to vacate. That motion was admittedly untimely, and was based on an annual performance bonus decision made by Tamosaitis's employer, a non-party to this litigation, nearly three years after Tamosaitis left WTP. Tamosaitis offered no evidence that BNI had anything to do with that decision, or was even aware of it. Nor did Tamosaitis explain how that decision, even if it could somehow be considered relevant to the "economic loss" issue, could possibly affect any of the other four other separate and independent bases for the trial court's entry of summary judgment. Under such circumstances, it would be unreasonable to conclude that the trial court abused its discretion. The denial of Tamosaitis's CR 60 motion should be affirmed.

DATED this 4th Day of December, 2013.

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DECLARATION OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondents herein.

2. On December 4, 2013, I caused copies of the foregoing Brief of Respondents to be served on the parties to this action as follows:

John P. Sheridan MacDonald Hoague & Bayless Hoge Building, Suite 1500 705 Second Avenue Seattle, WA 98104	☐ Facsimile ☒ Messenger ☐ U.S. Mail ☐ E-Mail
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of December, 2013, at Seattle, Washington.

Mary Beth Dahl

Mary Beth Dahl