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Washington Supreme Court

In re the Marriage of:

STEVEN WOLFE THOMPSON,
Petitioner,

vs.

ROBERT TEDDY THOMPSON,
Co-Petitioner.

Supreme Court
Case No. 96113-1

Court of Appeals
Case No. 50564-9-II

Superior Court: 14-3-01500-1

JOINT PETITION FOR REVIEW

S. Wolfe Thompson
Wolfe Thompson PS
Attorney for Appellant
NSB 6463
6785 S. Eastern Ave. Ste 4
Las Vegas, NV 89119
702-263-3030
wolfe@wolfelawyer.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. IDENTITY OF PETITIONERS..... 4

B. COURT OF APPEALS DECISION 4

C. ISSUES PRESENTED FOR REVIEW 4

D. STATEMENT OF THE CASE 5

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED ... 7

I. The court’s interpretation of the vacation rules based on the federal rules tips the balance too far in favor of finality..... 7

II. The Commissioner erroneously determined that vacation of the stipulated judgment was not supported under CR 60(b)(6)...8

III. The court’s interpretation of CR 60(b)(11) is defective because "extraordinary circumstances" is an empty set in the court’s analysis. 10

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

American Games, Inc. v. Trade Products, Inc., 142 F.3d 1164, 1168-69 (9th Cir. 1998)	10
Automobile Club of Southern California v. Mellon Bank, 224 F.R.D. 657 (C.D. Cal. 2004)	12
Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir.1996).....	11
Harris v. Commonwealth, Ky., 296 S.W.2d 700 (1956)	9
Hartford Casualty Insurance Co. v. Crum & Forster Specialty Insurance Co., 828 F.3d 1331 (11th Cir. 2016)	12
Marseilles Hydro Power LLC v. Marseilles Land & Water Co., 481 F.3d 1002, 1003-04 (7th Cir. 2007)	11
Mayfield v. Dalton, 109 F.3d 1423 (9th Cir.1997)	11
Michigan Surety Co. v. Service Machinery Corp., 277 F.2d 531 (1960).....	9
U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994)	11
United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)	11
Wurzelbacher v. Kroeger, 40 Ohio St.2d 90 (Ohio 1974)	9

Rules

CR 60(b)(11) 7, 8, 10
CR 60(b)(6) 7, 8, 9
FRCP 60(b)(5) 9
FRCP 60(b)(6) 10, 11

A. IDENTITY OF PETITIONERS

Steven Wolfe Thompson and Robert Teddy Thompson

jointly asks this court to accept review of the following

Appellate Court decisions designated in Part B

B. COURT OF APPEALS DECISION

Exhibit 1: Order Denying Motion for Reconsideration

Exhibit 2: Opinion Affirming Trial Court's Decision

C. ISSUES PRESENTED FOR REVIEW

1. The Superior Court Commissioner erred in refusing to grant the joint motions of Steven Wolfe Thompson and Robert Teddy Thompson, Petitioner and Respondent herein, to (a) vacate the Decree of Dissolution of Marriage and (b) to dismiss the action with prejudice.

2. The Superior Court Commissioner erred in sua sponte altering the proposed agreed order and entering the “Exparte [sic] Order Denying Request to Vacate Decree of Dissolution of Marriage & Dismissal with Prejudice.”

3. Division II's interpretation of CR 60(b)(6) and (11) makes it impossible for parties affected by a judgment to execute any agreement affecting the judgment after the judgment is entered.

D. STATEMENT OF THE CASE

Steven and Robert Thompson married in August 2008. In July 2014, Steven filed a petition to dissolve the marriage. Robert joined in the petition. In the joint petition, the Thompsons stated that they had no children and that they had already distributed their property and debt at the time of their separation. Neither party requested maintenance or any additional relief. In October 2014, a Clark County Superior Court commissioner found that the marriage was irretrievably broken and entered a decree of dissolution.

In May 2017, after the Thompsons reconciled, they filed a "joint ex parte motion for order vacating decree of dissolution of marriage [and] dismissal with prejudice" and a "stipulation

to vacate decree of dissolution of marriage [and] to dismiss with prejudice.” Clerk’s Papers (CP) at 69-70 (capitalization altered). They cited to CR 60(b)(6) and (11), and asserted that the decree of dissolution should be vacated because they had reconciled. After finding “no basis for vacating the decree under CR 60,” the commissioner denied the motion to vacate the dissolution. CP at 72.

The Thompsons moved to revise the commissioner’s order denying the CR 60 motion, arguing that the commissioner should have granted the order because they had reconciled and had agreed that the decree should be vacated. The superior court denied the motion to revise. The Thompsons jointly appealed.

**E. ARGUMENT WHY REVIEW SHOULD BE
ACCEPTED**

**I. THE COURT’S INTERPRETATION OF THE VACATION
RULES BASED ON THE FEDERAL RULES TIPS THE
BALANCE TOO FAR IN FAVOR OF FINALITY.**

Normally, the entry of an unappealed final judgment ends the case forever, even if later developments undermine faith in the accuracy of the decision or the fairness of its procedural grounds. Litigation must have an end, and a final judgment usually marks that point.

CR 60(b)(6) however, has long been available to provide relief from judgment to losing litigants where justice so demands. The rule states that a court may relieve a party from final judgment when "it is no longer equitable that the judgment should have prospective application."

CR 60(b)(11) provides that a court can relieve a party from judgment for "Any other reason justifying relief from the operation of the judgment." Here the court’s opinion lacks any definition of what the court finds "extraordinary circumstances"

that it requires for application of CR 60(b)(11). The category is empty but should apply when the parties agree on a resolution.

CR 60(b)(6) and CR 60(b)(11) has caused discord among the courts. While providing some guidance, current case law is of uncertain scope when the parties settle their differences.

At its broadest, the rule announced in this court's decision here completely swallows CR 60(b)(6) and CR 60(b)(11) and tips the balance too far in favor of finality. This motion suggests a narrower construction, one founded on the realities of litigation and the true interests of finality. This construction, which limits the rule to those movants who settle, opens space for a more equitable consideration of extraordinary circumstances in the context of providing relief from judgments.

II. THE COMMISSIONER ERRONEOUSLY DETERMINED THAT VACATION OF THE STIPULATED JUDGMENT WAS NOT SUPPORTED UNDER CR 60(B)(6).

CR 60(b)(6) allows for vacation of a judgment where "it is no longer equitable that the judgment should have

prospective application." CR 60(b)(6) was intended to codify the common law writ of *coram nobis*. *Coram nobis* "is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief." *Harris v. Commonwealth, Ky.*, 296 S.W.2d 700 (1956). The language of our rule is parallel and virtually identical to FRCP 60(b)(5).

Courts interpreting the federal rule have determined that FRCP 60(b)(5) should be "liberally construed" in favor of avoiding the continued enforcement of inequitable judgments. *Blanchard v. St. Paul Fire Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965), *Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531 (1960); *Wurzelbacher v. Kroeger*, 40 Ohio St.2d 90 (Ohio 1974). When the parties jointly agree that the Decree herein is inequitable, and should be vacated, the direct language CR 60(b)(6) directly supports vacation of Decree.

III. THE COURT’S INTERPRETATION OF CR 60(B)(11) IS DEFECTIVE BECAUSE "EXTRAORDINARY CIRCUMSTANCES" IS AN EMPTY SET IN THE COURT’S ANALYSIS.

CR 60(b)(11) applies when there is "Any other reason justifying relief from the operation of the judgment." This is identical to the federal Rule, FRCP 60(b)(6).¹

The Ninth, Seventh and Eleventh Circuits provide that the extraordinary- or exceptional-circumstances test apply to a number of cases involving settlement. In those circuits, courts may grant vacatur based on the balance of the equities.

In *American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1168-69 (9th Cir. 1998), the Ninth Circuit held that the standard for “exceptional circumstances” of vacatur under FRCP 60(b)(6) occurs when the decree is “mooted by settlement” or “mooted by ‘happenstance.’” *Citing, U.S.*

¹ FRCP 60(b)(6) says “any other reason that justifies relief.”

Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *Mayfield v. Dalton*, 109 F.3d 1423 (9th Cir.1997); *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir.1996).

In *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1003-04 (7th Cir. 2007), the court remanded the matter for the court to consider an FRCP 60(b)(6) motion by the parties based on settlement. In its decision the court stated “on remand the district court would not be cabined by the ‘exceptional circumstances’ test. The Court in *Bancorp* said that the court of appeals can remand a case even in the absence of such circumstances, 513 U.S. at 29, 115 S.Ct. 386, which would make no sense if the district court could not vacate its judgment in that absence.”

Recently, the Eleventh Circuit ruled that the exceptional circumstances test applied to a post-settlement motion asking a district court to vacate its summary judgment order. The court

found the test satisfied and reversed the district court's denial of the motion to vacate. *Hartford Casualty Insurance Co. v. Crum & Forster Specialty Insurance Co.*, 828 F.3d 1331 (11th Cir. 2016).

In *Automobile Club of Southern California v. Mellon Bank*, 224 F.R.D. 657 (C.D. Cal. 2004), the court vacated its judgment, noting that there was little chance of subsequent litigation between the parties, "the effect of res judicata is of secondary importance" because the settlement was final, and there was little precedential value because the "action involved a fact-specific contract formed under Delaware law." *Id.* at 659. Here, there is no res judicata effect and there is no precedential value inherent in the outcome.

F. CONCLUSION

The Supreme Court should accept review.

Dated July 19, 2018

 /s/ S. Wolfe Thompson
S. WOLFE THOMPSON,
WSBA #13986
Pro Se and Attorney for Appellant,
6785 S. Eastern Ave. Ste 4
Las Vegas, NV 89119

 /s/ Robert Teddy Thompson
ROBERT TEDDY THOMPSON,
Pro Se Respondent/Cross-Appellant,
222 Karen Ave. #908
Las Vegas, NV 89109

Exhibit 1

July 11, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of:

STEVEN WOLFE THOMPSON,

Appellant/Cross-Respondent,

v.

ROBERT TEDDY THOMPSON,

Respondent/Cross-Appellant.

No. 50564-9-II

ORDER DENYING MOTION FOR
RECONSIDERATION

The parties jointly move for reconsideration of the Court's June 5, 2018 unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. JOHANSON, BJORGEN, SUTTON

FOR THE COURT:


JUDGE

Exhibit 2

June 5, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of:

STEVEN WOLFE THOMPSON,

Appellant/Cross-Respondent,

v.

ROBERT TEDDY THOMPSON,

Respondent/Cross-Appellant.

No. 50564-9-II

UNPUBLISHED OPINION

SUTTON, J. — Steven Wolfe Thompson and Robert Teddy Thompson jointly appeal from a superior court commissioner’s order denying their joint CR 60 motion to vacate the 2014 decree of dissolution of their marriage. We affirm.

FACTS

Steven and Robert¹ married in August 2008. In July 2014, Steven filed a petition to dissolve the marriage. Robert joined in the petition. In the joint petition, the Thompsons stated that they had no children and that they had already distributed their property and debt at the time of their separation. Neither party requested maintenance or any additional relief. In October 2014, a Clark County Superior Court commissioner found that the marriage was irretrievably broken and entered a decree of dissolution.

¹ Because the parties share the same last name, we refer to them by their first names when necessary to avoid confusion. We intend no disrespect.

In May 2017, after the Thompsons reconciled, they filed a “joint ex parte motion for order vacating decree of dissolution of marriage [and] dismissal with prejudice” and a “stipulation to vacate decree of dissolution of marriage [and] to dismiss with prejudice.” Clerk’s Papers (CP) at 69-70 (capitalization altered). They cited to CR 60(b)(6) and (11), and asserted that the decree of dissolution should be vacated because they had reconciled. After finding “no basis for vacating the decree under CR 60,” the commissioner denied the motion to vacate the dissolution.² CP at 72.

The Thompsons moved to revise the commissioner’s order denying the CR 60 motion, arguing that the commissioner should have granted the order because they had reconciled and had agreed that the decree should be vacated. The superior court denied the motion to revise.

The Thompsons jointly appeal.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court’s denial of a CR 60(b) motion for a manifest abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion when its “decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). The

² The commissioner’s order was an altered version of the proposed order the Thompsons submitted with their motion. In their assignments of error, the Thompsons assert that the commissioner erred when she “sua sponte alter[ed] the proposed agreed order.” Br. of Appellant at 2-3. But they present no argument regarding whether the court can alter a proposed draft order, so we do not address this assignment of error. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

abuse of discretion standard is also violated when a trial court bases its decision on an erroneous view of the law. *Mayer*, 156 Wn.2d at 684.

II. EFFECT OF STIPULATION

The Thompsons argue that because there is a strong presumption in favor of allowing stipulated reversals, the commissioner should have granted their stipulated joint motion to vacate the decree of dissolution “absent ‘extraordinary circumstances.’” Br. of Appellant at 5 (quoting *Neary v. Regents of the Univ. of California*, 3 Cal.4th 273, 834 P.2d 119 (1992)). But the case they rely on, *Neary*, is inapplicable here because that case addressed a joint agreement to settle a dispute and reversed a trial court judgment when the matter was still pending on appeal, and not when the matter was, as it is here, already final. 3 Cal.4th at 275, 277; see RCW 26.09.150(1) (decree of dissolution is final when entered if the parties did not appeal from the decree). Thus, *Neary* does not establish that the commissioner should have applied a presumption in favor of granting the parties’ CR 60 motion made after the decree of dissolution was final or that the commissioner was required to grant the motion and vacate the decree absent extraordinary circumstances.

The Thompsons also argue that the commissioner erred by not granting the CR 60 motion and vacating the decree of dissolution because they stipulated to vacating the decree. The Thompsons rely on *Gustafson v. Gustafson*, 54 Wn. App. 66, 772 P.2d 1031 (1989), but *Gustafson* is not persuasive.

In *Gustafson*, Division One of this court vacated a stipulated dismissal of a party’s indemnification claims after another court reversed the summary judgment order that had dismissed the underlying action. *Gustafson*, 54 Wn. App. at 74. Division One held that vacation

of the stipulated dismissal was appropriate under CR 60(b)(6) because it was not equitable for the stipulated dismissal to have prospective application when the stipulated dismissal had been made in reliance on a summary judgment order that no longer existed. *Gustafson*, 54 Wn. App. at 74. Here, unlike in *Gustafson*, the decree of dissolution does not rely on another court order that has subsequently changed.

Thus, the Thompsons do not cite to, nor can this court find, any authority that required the commissioner to grant the CR 60 motion or the stipulated motion to vacate the decree of dissolution solely because the Thompsons stipulated to the decree's vacation. Instead, we must examine whether the commissioner was required to vacate the decree of dissolution under CR 60(b)(6) or (11).

III. CR 60(B)(6): NO PROSPECTIVE APPLICATION

The Thompsons argue that they were entitled to relief under CR 60(b)(6) because their reconciliation made it inequitable for the decree to have prospective application. Br. of Appellant at 6-7. We disagree.

CR 60(b)(6) allows relief from judgment when “it is no longer equitable that the judgment should have prospective application.” “This provision allows the trial court to address problems arising under a judgment that has continuing effect ‘where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment.’” *Pac. Sec. Companies v. Tanglewood, Inc.*, 57 Wn. App. 817, 820, 790 P.2d 643 (1990) (quoting *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986)). To succeed on their motion for relief under CR 60(b)(6), the Thompsons must, however, first meet the threshold requirement that the

judgment at issue has prospective application. *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995).³ The Thompsons do not meet this burden.⁴

“Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect That a court’s action has continuing consequences, however, does not necessarily mean that it has prospective application for the purposes of [CR] 60(b)[(6)].” *Maraziti*, 52 F.3d at 254 (internal quotations marks omitted) (quoting *Twelve John Does v. Dist. Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)). Prospective application exists only when the judgment is “executory or involves the supervision of changing conduct or conditions.” *Maraziti*, 52 F.3d at 254 (internal quotation marks omitted) (quoting *Twelve John Does*, 841 F.2d at 1139). A decree of dissolution that does nothing more than dissolve the marital relationship between two parties, such as the one at issue here, is not that type of order. The decree of dissolution, at least in this instance, is not executory nor does it involve the supervision of the parties’ conduct or any changing conditions. Accordingly, the commissioner did not err when she found that the Thompsons did not demonstrate they were entitled to relief under CR 60(b)(6).

³ “Washington courts look to federal cases interpreting federal counterparts to state court rules as persuasive authority when the rules are substantially similar.” *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 542, 248 P.3d 1047 (2011). Fed. R. Civ. P. 60(b)(5) is substantially similar to CR 60(b)(6). *Geonerco*, 159 Wn. App. at 542.

⁴ In fact, the Thompsons do not address whether the decree of dissolution has prospective application.

IV. CR 60(B)(11): NO EXTRAORDINARY CIRCUMSTANCES

The Thompsons further argue that the commissioner should have granted relief under CR 60(b)(11). Again, we disagree.

Under CR 60(b)(11), the commissioner had the discretion to vacate the order for “[a]ny other reason justifying relief from the operation of the judgment.” *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). But CR 60(b)(11) is “reserved for situations involving *extraordinary circumstances* not covered by any other section of CR 60(b).” *Furrow*, 115 Wn. App. at 673 (emphasis added). The extraordinary circumstances “must relate to ‘irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.’” *Furrow*, 115 Wn. App. at 674 (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)). And the application of CR 60(b)(11) must be balanced with the importance of finality. *See Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017).

Here, the Thompsons assert that their reconciliation is an extraordinary circumstance. In support of that argument, they cite *Ackermann v. United States*, 340 U.S. 193, 200, 95 L. Ed. 207, 71 S. Ct. 209 (1950). *Ackermann* is not persuasive.

The *Ackermann* court held that although vacation of a default order is proper when the party’s failure to contest the prior action is due to circumstances outside of the party’s control, vacation is not appropriate when the party’s failure to appeal is “a considered choice” and the party does not establish that the failure to appeal is justifiable. 340 U.S. at 198. The court emphasized that “[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” *Ackermann*, 340 U.S. at 198.

In this instance, not only was there no default order because Robert joined in the dissolution action, there are no extraordinary circumstances. When the decree of dissolution was entered, both parties were aware of the dissolution action and agreed to the dissolution. The fact that the Thompsons later reconciled does not mean that the decree itself was improper or defective in any way. *See In re Marriage of Moody*, 137 Wn.2d 979, 990, 976 P.2d 1240 (1999) (reconciliation alone does not invalidate decree of legal separation). In a dissolution action, a reconciliation is always a possibility and can easily be contemplated by parties. And the Thompsons do not assert that they did not enter into the decree voluntarily and knowingly, that it was not made with free choice, or that it was obtained by fraud. The fact that something that could have been contemplated by the parties has occurred, does not justify sacrificing the finality of litigation.

The Thompsons also rely on *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985). In *Flannagan*, we addressed motions to reopen final decrees of dissolution that had not been appealed. 42 Wn. App. at 222. When the dissolution decrees were entered, a judicial decision prohibited the distribution of military retirement payments as part of community property. *Flannagan*, 42 Wn. App. 222. Twenty months later new federal legislation granted trial courts the discretion to include the division of military retirement payments in final dissolution decrees. *Flannagan*, 42 Wn. App. at 222. We held that this change in the law created circumstances that were sufficiently extraordinary to require reopening the judgments and reexamination of the final decrees. *Flannagan*, 42 Wn. App. at 222. But, as discussed above, the Thompsons do not direct us to any change of circumstances that was not wholly within their control, so *Flannagan* is not helpful.

The Thompsons also rely on *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) and *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003). But these cases merely reiterate that CR 60(b)(11) authorizes vacation of judgments only “for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings” and for irregularities outside of the moving party’s and the court’s control. *Keller*, 32 Wn. App. at 140-41; *Barr*, 119 Wn. App. at 48. And whether to reconcile a relationship was entirely within the Thompsons’ control.

The Thompsons additionally rely on *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 863 P.2d 1377 (1993). But *Suburban Janitorial* involved an allegation that the default judgment was taken without the other party’s knowledge and the party applied for relief promptly upon learning of the judgment. 72 Wn. App. at 308, 312. In this case, however, there was joinder. And there is no allegation that any party was unaware of the motion for dissolution or the resulting decree.

Here, there were no extraordinary circumstances outside of the Thompsons’ control. Thus, the Thompsons fail to show that they were entitled to relief under CR 60(b)(11).

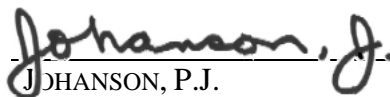
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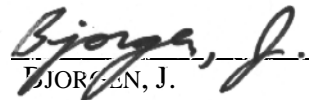
Because the Thompsons fail to establish grounds to vacate the decree of dissolution under CR 60(b)(6) or (11), the commissioner did not abuse her discretion when she denied the CR 60 motion. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


JOHANSON, P.J.


BJORKEN, J.

WOLFE THOMPSON PS

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Transmittal Information

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