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STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
COMPANY,

Appellant,

v.

ALICYN KOMINE,

Respondent.

BRIEF OF RESPONDENT ALICYN KOMINE

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I. INTRODUCTION

Civil Rule 60 grants the trial court broad equitable power to modify or vacate a judgment or order of dismissal for “mistakes, inadvertence, surprise, excusable neglect,” for “any other reason justifying relief from the operation of the judgment,” or to correct clerical mistakes in orders and errors arising from oversight or omission.

The trial court here properly vacated an August 27, 2012, Stipulation and Order of Dismissal as to Alicyn Komine’s claim against her uninsured motorist carrier, MetLife. Neither Alicyn nor her attorney intended to give up the UIM claim when counsel signed the Stipulation – prepared *and presented by* the tortfeasor’s insurance defense counsel. MetLife was not a party to the settlement that lead to the Stipulation, MetLife is nowhere mentioned in the Stipulation, MetLife did not sign the Stipulation, and indeed, MetLife did not even know about it until many weeks after its entry. Moreover, the Stipulation, lacking the signatures of “all parties” as required under CR 41(a)(1)(A), could not have dismissed all claims. The trial court was well within its authority under CR 60(a) and (b) when it vacated the dismissal as to the UIM claim.

There can be no serious dispute that the CR 60 Motion was timely filed – as the trial court found. Alicyn’s attorney advised MetLife’s counsel immediately that she disagreed that the Dismissal Order applied to

Alicyn's claim and consistently maintained that position in all communications with MetLife. At MetLife's invitation, she engaged in settlement discussions over a matter of months after learning that the Clerk had applied the dismissal to the UIM claim, and when those efforts to resolve the case were unsuccessful, she promptly filed the CR 60 Motion.

MetLife's appeal relies on a version of the record that is notable for its omissions and on an equally incomplete review of pertinent Washington case law as well as corroborating authority from the Ninth Circuit and Western District of Washington. MetLife strains to cast Alicyn and her attorney in a negative light and to concoct some sort of "prejudice" resulting from the trial court's order. The effort is unavailing.

The record amply supports the trial court's findings that Alicyn's CR 60 motion was timely filed, that the risk of prejudice to MetLife was "minimal," that there was no evidence of detrimental reliance by MetLife, and that there was no evidence that Alicyn or her counsel acted with bad faith or in an effort to attain strategic advantage. This court should affirm the trial court and allow Alicyn to proceed with her UIM claim against MetLife. Any other outcome would give MetLife a windfall – a result not consistent with the spirit or the letter of the civil rules.

II. STATEMENT OF THE CASE

A. The Car Crash and Pre-Filing Events.

Alicyn Komine and her husband Jon were injured on December 20, 2009 when their car, stopped at a light in Mill Creek, was rear-ended by an SUV driven by Humberto Anguiano. CP 85-88. Jon sustained soft-tissue back and neck injuries. Alicyn sustained back injuries and also tore a ligament in her wrist. *Id.* That injury continues to limit her use of the hand and arm. *Id.*; CP 18.

B. October 2011 – August 2012: The Lawsuit, *Komine v. Anguino*, and Plaintiffs' Settlement with Farmers' Insurance.

The Komines, through counsel, attempted to settle their claims with Farmers Insurance, Mr. Anguiano's auto insurer, before filing a lawsuit. When those negotiations were unsuccessful, the Komines filed a lawsuit on October 31, 2011. CP 85-88. MetLife, the Komine's insurance carrier, intervened as the "UM / UIM carrier" in February 2012. CP 70-77. In its Answer, filed April 17, 2012, MetLife admitted that defendant Anguiano was "at fault" in causing the collision. CP 65-69.

Throughout the case, Alicyn consistently communicated her position that her damages exceeded the \$30,000 policy limits available from Farmers, and that she intended to seek recovery from MetLife, her UIM insurer, as a result. *See* CP 9-10 (Yackulic Reply Dec.) For

example, in April 2012, after Farmers tendered the \$30,000 policy limits, Alicyn notified MetLife of the offer and invited MetLife to “buy out” her claim, as required by *Hamilton v. Farmers Ins. Co. of Washington*, 107 Wn.2d 721, 733 P.2d 213 (1987) to preserve her right to seek recovery under her UIM policy. CP 39 (Yackulic Dec., ¶5). By letter dated April 25, 2012, a MetLife adjuster advised that MetLife would not buy out Alicyn’s claim, and the adjuster gave its “consent for your client to settle with the tort carrier.” CP 43. This freed Alicyn to pursue her UIM claim against MetLife. *Id.* There was no other reason for her to inform MetLife of Farmers’ offer.

In May 2012 – without even taking her deposition -- Farmers agreed to pay Alicyn the \$30,000 policy limits. CP 38 (Yackulic Dec., ¶2). In early August 2012, Jon Komine settled his claims within policy limits, again before his deposition was taken. CP 39. None of the parties had filed any motions in the case and very little other litigation-type activity took place before each plaintiff reached settlement with Farmers.

C. August 2012: The Komines Sign Farmers’ Proposed Stipulation and Order of Dismissal; Alicyn Authorizes MetLife to Obtain Her Medical Records for Her Forthcoming UIM Claim.

In early August, once both Jon’s and Alicyn’s claims were resolved with Farmers, counsel for Farmers sent a standard “Stipulation

and Order of Dismissal” to the Komines’ attorney. *MetLife is not mentioned anywhere in that Order. It is not in the caption, and there is no signature line for MetLife’s counsel.* Nor does the Order reference Alicyn’s UIM claim. The Order states explicitly that it is “between” the two parties – the Komines and Anguiano– referenced in the Order. CP 63-64 (“it is “hereby stipulated by and between the parties hereto....”).

The Komines’ attorney signed the Stipulation and Order on August 9, 2012, but she *waived* “Notice of Entry.” *Id.* She then mailed the pleading back to Farmers’ counsel. Also on August 9, 2012 she served a demand for settlement of the UIM claim on MetLife. CP 39, 48 (Yackulic Dec. and Ex. C thereto). On or around August 14, 2012, MetLife’s attorney called Alicyn’s attorney to discuss next steps in the case and a timeline for responding to the settlement demand. During that conversation counsel agreed that (1) Alicyn would authorize the release of all her medical records to MetLife and MetLife’s attorneys would take responsibility for retrieving those records;¹ (2) after the parties had new copies of all the medical records, MetLife would take Alicyn’s deposition, and (3) Alicyn and her attorney would hold the demand for settlement open until after MetLife had taken Alicyn’s deposition. CP 48. Counsel

¹ Alicyn’s attorney had already provided these records to MetLife but MetLife insisted that it needed another complete set that it obtained directly from the providers. CP 37 (Yackulic Dec., ¶ 7).

also confirmed that Jon Komine had settled his claim completely with Farmers so he would not be pursuing a UIM claim. *Id.*

On **August 23, 2012** – two weeks *after* her attorney signed the Stipulation and Dismissal with Farmers Insurance – Alicyn executed a written authorization to allow MetLife to obtain another set of her medical records. Her attorney then provided that authorization to MetLife’s counsel. Over the next three months, pursuant to Alicyn’s authorization, MetLife then obtained Alicyn’s medical records. CP 40 (Dec., ¶9).

Farmers’ counsel – who had drafted the Stipulation – presented it for entry and filing on August 27, 2012, more than two weeks after Alicyn’s attorney had signed it and four days after Alicyn had authorized MetLife to obtain her records for her UIM claim. CP 63-64.² At an ex parte proceeding that same day a Snohomish County pro tem commissioner signed and entered the Stipulated Order. *Id.*

There is no evidence that pro tem Commissioner Patterson even knew that MetLife was a defendant-intervener in the case. MetLife was not mentioned anywhere on the pleading, did not sign it, and no MetLife attorney was present when the order was presented.

² MetLife repeatedly makes the erroneous statement that Alicyn “presented” the Stipulation and Order. *See* App. Br. at 1, 3 (Metlife: Alicyn “**intentionally presented** the Stipulation . . . to the trial court”) (emphasis in original). In fact, the Stipulation states on its face that it was “Presented by” Farmers, and the pleading is on Farmers’ counsel’s pleading paper. CP 63-64.

D. **September-December 2012: Events After the Dismissal Order Was Entered on August 27, 2012.**

On October 8, 2012, while MetLife was still gathering Alicyn's medical records, MetLife's attorneys filed a "Notice of Unavailability" from October 26 – December 7, 2012, because of an upcoming trial.³

Five weeks later, on November 13, 2012, MetLife's lawyer, Eric Newman, informed Alicyn's attorney by letter that he had "finally received the last of your client's out-of-state medical records from the providers last week: but that it had "just come to my attention that back in August you dismissed not just the claims against the underlying tortfeasor . . . but all claims with prejudice in the lawsuit, which would include the claims against MetLife." CP 50 (emphasis added). He then asked, "Should I take that to mean that your client is no longer seeking to recover UIM benefits from MetLife for the subject accident? Please let me know." Id.

Alicyn's attorney immediately telephoned Mr. Newman to assure him that Alicyn was still pursuing her UIM claim against MetLife. After all, she had authorized MetLife to gather her medical records just days before the Stipulation was entered and she had never revoked that authorization. On that same call Mr. Newman said that he learned of the "dismissal" *after he filed the October 8, 2012 Notice of Unavailability –*

³ That case later settled and the trial never occurred.

which had occurred five weeks earlier – when the Court Clerk allegedly contacted him to advise that “the court” interpreted the August 27, 2012 Stipulation and Notice of Dismissal to have dismissed all claims in the case, including those against MetLife. CP 40 (Yackulic Dec., ¶10). Mr. Newman never revealed the specific date he allegedly received this call from the clerk, and he never revealed why he waited until a *week after* he had *all* of Alicyn’s medical records to notify Alicyn’s attorney of his call from the clerk.

Mr. Newman’s news obviously came as a surprise to Alicyn’s attorney, as it apparently had to Mr. Newman. Both parties had conducted themselves throughout the fall as if Alicyn’s UIM claim was live and viable. Indeed, Alicyn, by allowing MetLife to obtain her personal medical information, had clearly communicated her intent to proceed with her UIM claim.

On November 14, 2012, one day after Mr. Newman’s call, Alicyn’s attorney provided a letter to Mr. Newman explaining why the Stipulated Order of Dismissal did *not* dismiss Alicyn’s UIM claim, and that even if it had been construed in that manner, the Order was clearly subject to amendment or to vacation pursuant to CR 60. She also provided a proposed “Stipulated Motion to Vacate or Amend Order of Dismissal.” CP 40 (Yackulic Dec., ¶12).

In December 2012 Mr. Newman informed Ms. Yackulic that MetLife would not authorize him to sign the Stipulated Motion to Vacate or Amend Order of Dismissal but that the insurance company desired nonetheless to attempt to settle Alicyn's UIM claim. He requested a settlement demand. *Id.* (Yackulic Dec. ¶13).

E. January – May 2013: Unsuccessful Settlement Negotiations, Resulting in Alicyn's June 2013 Filing of The Motion to Vacate.

In January 2013 Alicyn's attorney communicated a settlement demand to MetLife. CP 41. The parties then proceeded over the next several months to try to negotiate a settlement of the UIM claim. *Id.*

On February 25, 2013, MetLife communicated an offer that it stated would remain open until March 13, 2013. Alicyn did not accept the offer. In May 2013 counsel had further settlement discussions.⁴ Despite the supposed March 13 expiration of MetLife's offer, the record is undisputed that during those May discussions it was clear that MetLife's offer *was* still on the table. CP 9-10 (Yackulic Reply Dec., ¶2). When the May 2013 negotiations did not resolve the claim, Alicyn's attorney filed the Motion to Vacate Order of Dismissal on June 13, 2013. CP 51-62. She had informed MetLife throughout the settlement negotiations that she

⁴ MetLife indicates that it "received a voicemail message" from Ms. Komine's counsel on May 24, 2013, but it omits any discussion of the parties' settlement *discussions* that followed. *See* Br. at 9; CP 9-10.

would file a motion to vacate if the parties could not reach a settlement.

CP 9-10 (Yackulic Reply Dec., ¶2).

F. The Trial Court's Order Granting Plaintiff's Motion to Vacate the August 2012 Stipulated Order Dismissal Only as to Alicyn's UIM Claim Against MetLife.

Snohomish County Superior Court Judge Marybeth Dingley

heard argument on Alicyn's Motion to Vacate on June 28, 2013.

Following argument Judge Dingley ruled from the bench, granting plaintiff's motion and vacating the Dismissal Order as to Alicyn's UIM claims against MetLife. CP 7-8.

Immediately afterwards the attorneys drafted the Order to incorporate Judge Dingley's remarks and presented it to her for signature that morning. These findings are incorporated into the Order (CP 7-8):

- 1) The risk of prejudice to MetLife is minimal, and there is no evidence of detrimental reliance;
- 2) Delay is not an issue;
- 3) The reason for any delay was the lag in the parties' discovery of the entry of the Order as to the UIM claim, and then the parties' mutual effort to resolve the claim;
- 4) There is no evidence of bad faith or effort to attain strategic advantage.

Counsel for MetLife approved the Order as to form. *Id.* MetLife appealed that order on July 25, 2013. CP 1-6.

III. ISSUE PRESENTED

Given the broad equitable powers granted the trial court under Civil Rule 60, did the court abuse its discretion when it vacated a stipulated order of dismissal that was executed exclusively between counsel for plaintiff and defendant's insurance company, when neither Alicyn Komine nor her attorney intended to give up her UIM claim, when MetLife did not sign or even know of the dismissal until weeks after its entry, during which time both parties continued to actively litigate the claim, and when Alicyn's attorney promptly filed the motion to vacate once settlement negotiations (invited by MetLife) finally broke down.

IV. ARGUMENT

Both CR 60(a) and (b) supply grounds on which a "reasonable person" could conclude that the dismissal order should be vacated.⁵

The trial court properly exercised its equitable discretion to vacate the dismissal order as to Alicyn's UIM claim, when the record is clear that Alicyn did not authorize dismissal of her UIM claim – a "substantial right" – nor did her attorney intend to dismiss that claim, that MetLife did not sign, participate in, present, or even know about the purported dismissal at

⁵ See RAP 2.5(a) (allowing a party to present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground).

the time of its entry, and when both parties in fact believed and conducted themselves as if UIM claim was live for weeks after entry of the order.

The cases on which MetLife relies are inapposite since MetLife was *not* a party to the agreed order, MetLife did *not* sign off on it, and MetLife did not rely on it. Moreover, though MetLife ignores those cases, Washington courts have repeatedly vacated dismissals that, like this one, give up a party's "substantial right" when entered without the plaintiff's consent.

The trial court did not abuse its discretion in finding that "delay is not an issue," given that Alicyn filed the CR 60 motion less than three weeks after settlement negotiations concluded unsuccessfully. Nor did the trial court abuse its discretion in finding that the risk of prejudice to MetLife was "minimal." MetLife did not even know about the dismissal until many weeks after its entry. MetLife's complaint about "prejudice" due to the passage of time is ironic considering that over a year ago it could have stipulated to vacate the dismissal – but instead chose to resist reasonable settlement opportunities and then delay matters even further by taking this appeal after it lost the motion to vacate.

MetLife is wrong that a plaintiff must show that she has a "valid cause of action" to obtain relief under CR 60 – but even if such requirement existed the record clearly shows that Alicyn's claim is valid.

MetLife admits that Alicyn was fault-free, and Farmers agreed to pay her policy limits without even taking her deposition. MetLife made her offers to settle her claim. The only reasonable inference from this record is that Alicyn's claim is valid – and MetLife knows it. Its insinuation to the contrary now is inconsistent with the entire history of this dispute.

CR 60(a) also supplies a basis for affirming the trial court's order. A CR 41(a)(1)(A) stipulation of dismissal requires the signatures of "all parties who have appeared." MetLife did not sign the Stipulation, and therefore it was deficient. There is no evidence that the pro tem commissioner who signed it had any idea that MetLife was a defendant-intervenor in the case. The clerk's interpretation of the order to dismiss the UIM claims against an absent party was in error, which the trial court's order properly corrected.

Finally, though dismissal was not, of course, the result of a default judgment, MetLife cannot seriously claim that Alicyn's UIM claim has been adjudicated "on the merits." It has not.

A. The Standard of Review Is Abuse of Discretion.

"It has long been the rule in Washington that motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion." *Hope v. Larry's Markets*, 108 Wn.

App. 185, 197, 29 P.3d 1268, 1275 (2001). *Accord Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

“A trial court abuses its discretion by issuing a manifestly unreasonably or untenable decision.” *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). Therefore, “if a trial court’s ruling is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld.” *Id.* (citations omitted). *Accord Morgan v. Burks*, 17 Wn. App. 193, 198, 563 P.2d 1260 (1977). “An abuse of discretion exists only when no reasonable man would take the position adopted by the trial court.” *Hope*, 108 Wn. App. at 197

In this case, the record supplies ample evidence -- under CR 60(b) or CR 60(a) for a “reasonable person” to conclude that the original stipulated order of dismissal should have been vacated as to Alicyn’s UIM claim against MetLife. This court should, therefore, affirm the trial court’s decision.

B. The Trial Court Did Not Abuse Its Discretion Under CR 60(b) In Vacating The Dismissal Order As to Alicyn’s UIM Claim.

1. Civil Rule 60(b) Grants Trial Courts Broad Equitable Power to Amend or Vacate A Dismissal Order That Does Not Reflect The Parties’ Intent.

Civil Rule 60 “is an embodiment of the court’s inherent power to grant relief [from judgments].” *Morgan v. Burks*, 17 Wn.App. 193, 198 n.1, 563 P.2d 1260 (1977). Thus,

The trial court should exercise its authority “liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968).

Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1298 (1979). *Accord Marriage of Hardt*, 39 Wn.App. 493, 496, 693 P.2d 1386 (1985) (“Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally ‘to preserve substantial rights and do justice between the parties.’”)

Such admonitions are consistent with Washington courts’ oft-expressed “strong preference” that cases be decided on their merits. *See, e.g., Showalter v. Wild Oats*, 124 Wn.App. at 510 (default judgment vacated even though defendant’s failure to appear or answer was due to miscommunication between insurance company’s paralegal and risk management person, so that company failed to hire counsel to appear and defend claim); *Griggs*, 92 Wn.2d at 581 (affirming order vacating

dismissal so that controversy could be determined on the merits); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996)⁶ (refusing to apply the rules according to the “sporting theory of justice,” the Court vacated a dismissal based on landowner’s failure to sign writ application as required by statute). Appellate courts are less likely to find an abuse of discretion where the trial court set aside a default judgment than where it upheld such judgment. *Griggs*, 92 Wn.2d at 582.

Civil Rule 60(b) recognizes the trial court’s equitable power to vacate all or part of an order or judgment for a variety of reasons, including “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order,” CR 60(b)(1), and “any other reason justifying relief from the operation of the judgment.” CR 60(b)(11). *See, e.g., Fowler v. Johnson*, 167 Wn.App. 596, 605, 273 P.3d 1042 (2012) (affirming the “applicability of equitable principles” to CR 60(b)

⁶ Here is what the Supreme Court stated in reversing the lower courts’ refusal to vacate the dismissal:

we have adopted civil rules that place substance over form and aim to resolve cases on the merits.

"The basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized . . . as 'the sporting theory of justice.'" Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.

(Citations omitted.) *First Fed. Sav. & Loan Ass'n v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) (quoting *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974)).

motions and the trial court's "broad authority" to vacate all or part of a judgment).

Washington courts have applied CR 60(b) to vacate or modify judgments under a wide variety of circumstances involving mistakes, inadvertence, excusable neglect, or for other reasons justifying relief. For example, in *Hope v. Larry's Markets*, 108 Wn.App. 185, 197, 29 P.3d 1268 (2001), this Court vacated an order of dismissal, signed by the plaintiff's counsel upon the trial court's grant of the defendant's motion for summary judgment. The plaintiff's attorney, in signing the order, had overlooked the words "approved as to form and content" above her signature line. She "did not have authority to approve the dismissal 'as to content.'" 108 Wn.App. at 197. The trial court refused to vacate the order; this Court reversed: "A mistaken signature of an order of dismissal is ineffective and a trial court should grant a motion to vacate or reconsider that order." *Id.* While counsel had clearly intended to sign the order of dismissal, and her signature line plainly stated that she was agreeing to the order of dismissal "as to content," she had not in fact intended that concession.

The "mistake" that was excused in *Hope* was far more blatant than the "mistake" MetLife attempts to attribute here to plaintiffs' counsel: signing a stipulation of dismissal of claims where MetLife played no role

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in the underlying settlement, was not listed in the caption of the order and did not sign the pleading. The record here clearly shows that plaintiff's counsel intended to dismiss *only* Alicyn's claims against Anguiano, the only other party that signed the pleading.

An honest error of communication can also support vacating a judgment. In *Showalter v. Wild Oats*, 124 Wn.App. 506 a "misunderstanding" between a paralegal and a risk manager at an insurance company office resulted in the defendant's failure to appear before a default judgment was entered. This Court noted that the error "was inadvertent" and the two individuals involved "did not intentionally fail to respond to Showalter's lawsuit." 124 Wn.App. at 514. Such a miscommunication was "a mistake and excusable neglect." *Id.* at 516.

Thus,

given the equitable nature of a motion to vacate, reversing the trial court's order under these circumstances would unjustly deny Wild Oats a trial on the merits.... [W]e uphold a trial court decision here that is reasonable under all of the circumstances, and more favorably review a trial court decision that vacates a default judgment.

Id. at 515. *Accord Pfaff v. State Farm*, 103 Wn.App. 829, 830, 836, 14 P.3d 837 (2000), *rev. denied*. 143 Wn.2d 1021, 25 P.3d 1019 (2001) (affirming order vacating dismissal because failure to appear "resulted from a mistake" when a secretary faxed the complaint to the wrong

number so the attorney did not see it before the default judgment was entered); *Gutz v. Johnson*, 128 Wn.App. 901, 919, 117 P.3d 390 (2005) (“excusable neglect is determined on a case by case basis;” a misunderstanding between an insured and his insurer as to who was responsible for answering the complaint constituted “mistake and excusable neglect”); *Moe v. Wolter*, 124 Wash. 340, 343, 235 P.803 (1925) (abuse of discretion *not* to vacate order; defendant’s failure to make a timely appearance because of his reliance on the erroneous advice of out-of-state attorneys – who “misconstrued the situation” -- was sufficient “to justify the setting aside of the default judgment and awarding a trial upon the merits”), *cited with approval in* 4 Tegland, Washington Practice, at p. 609 (2013); *Reitmeir v. Siegmund*, 13 Wash. 624, 43 P.878 (1896) (attorney’s mistake in noting the wrong day for filing an answer “will warrant the court in setting aside the default), *cited with approval in* 4 Tegland, Washington Practice, at p. 610.

In addition, Washington courts have relieved parties from settlements and dismissals that “compromise[d] or bargain[ed] away [their] substantive rights” – even when their attorney knowingly and intentionally agreed to such dismissals. Thus, in *Morgan v. Burks*, 17 Wn.App. 193, 563 P.2d 1260 (1977) the plaintiffs entered into a settlement and dismissal of all claims, apparently based on their

misunderstanding of its effect and on the basis of bad advice from their attorney that the dismissal would not prejudice their right to seek additional damages from a different party. The court of appeals held that the “dismissal order resulted from serious misunderstandings between attorney and client, as the result of which the Morgans did not in fact authorize their attorneys to bind them to the settlement and dismissal. . . . This is reason enough to vacate the dismissal order under CR 60.” 17 Wn.App. at 199. Thus, the court concluded, “[a] stipulated settlement which is entered into improvidently is subject to being vacated. *See Stevenson v. Hazard*, 152 Wash. 104, 277 P.450 (1929).” *Id.* at 200. Without specifying which subsection of CR 60(b) applied, the court stated that the trial court had properly invoked the rule “to avoid a manifest injustice.” *Id.* *Accord Ebsary v. Pioneer Human Servs.*, 59 Wn.App. 218, 226, 796 P.2d 769 (1990) (dismissal vacated where signatories to dismissal did not have authority to settle claims of children, non-parties to the agreement).

The Supreme Court in *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980), *aff’d in part, rev’d in part on other grounds*, 94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980), cited *Morgan v. Burks* favorably (along with many other cases) to state the “general rule,” that “an attorney is without authority to surrender a substantial right of a client

unless special authority from his client has been granted him to do so.”
94 Wn.2d at 303. A tort claim is a “substantial right.” *Id.* at 305. Citing
CR 60(b)(11) the Court then affirmed an order vacating summary
judgment for the plaintiff, because the defense lawyer had stipulated --
without his client’s consent -- to his client’s vicarious liability for the
actions of a deceased truck driver. “Since liability turns on this issue [the
defendant company’s vicarious liability], the defendant has a substantial
right to have it tried.” *Id.* at 305.

2. **The Trial Court Was Well Within Its Equitable Power
to Vacate the Dismissal as to Alicyn Komine.**

In this case the trial court did not abuse its discretion or exceed its
equitable powers when it vacated the Dismissal as to Alicyn’s MetLife
claim. The Stipulation and Dismissal here was far less clear as to its scope
and effect than the dismissal order vacated in *Hope v. Larry’s Markets*, for
example. In *Hope* the order clearly indicated that the attorney had
approved it as to “form *and content*.” Yet, despite signing the order – as
she intended – the attorney did not have authority to approve the dismissal
as to content nor was that her intent. The court of appeals concluded, on
those facts, that the trial court had abused its discretion in refusing
plaintiff’s motion to vacate.

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The Stipulation and Dismissal here, on its face, was effective “*by and between the parties hereto*”. The “parties hereto” were identified *only* as Defendants Anguiano and Plaintiffs, the Komines. MetLife was not referenced anywhere in the pleading, was not a signatory to the Stipulation, and did not participate in the settlements from which the Stipulation arose. The preposition “between” is used to connect *two* entities; in case of more than two, the preposition “among” is used. The only *two parties* that the pleading could be “by and between” were those mentioned – Anguianos and Komines, and *not* MetLife. Moreover, it was abundantly clear from the circumstances surrounding that stipulation, including plaintiff counsel’s simultaneous discussions with MetLife regarding Alicyn’s UIM claim, that the Stipulated Order of Dismissal was intended to apply only to plaintiffs’ claims against Farmers and not also dismiss Alicyn’s claims against MetLife. Thus, unlike the trial court in *Hope* that improperly refused to correct an obvious error and was reversed on appeal, the trial court here recognized the problem with the clerk’s alleged interpretation of the stipulated dismissal and did not abuse its discretion in clarifying the scope of the original stipulated dismissal order to preserve Alicyn’s UIM claim.

Moreover, here – as in *Showalter*, *Pfaff*, *Gutz*, and the other cases cited above – signing of the Stipulation and Dismissal was not an act of

“bad faith or effort to attain strategic advantage.” *See* CP 7-8. MetLife does not and cannot argue that the trial court’s finding on this point was in error.

Finally, under *Morgan, Ebsary, and Graves*, even if Alicyn’s attorney had fully intended that the Stipulation and Dismissal cut off Alicyn’s UIM claim – which she did not, of course – Alicyn did not authorize such a result and it cannot be binding on her. If she had intended to dismiss her UIM claim, she never would have authorized the release of her personal medical information to MetLife that same month, and she certainly would have revoked that authorization immediately after the dismissal order was entered, just days after she authorized the release of her medical records to MetLife.

This presents a more compelling case for affirming the trial court’s order vacating the dismissal than did *Morgan, Ebsary, and Graves* in an important respect: MetLife, the party who is claiming the benefit of the dismissal here, was not a party nor did it participate in the negotiations leading to the stipulated dismissal that was vacated. In the cited cases, the parties opposing the CR 60 motions had participated fully in the proceedings that resulted in the orders that were later challenged. Because of their involvement in those proceedings they had at least some right to rely on the finality of those proceedings. MetLife had no such

involvement. Unlike the parties in the cited cases MetLife did not even *know* about the dismissal until a court clerk called its counsel at some unspecified date several weeks after its entry. The trial court thus correctly found “no evidence of detrimental reliance” by MetLife as a result of the entry of the Stipulation and Dismissal.

3. **MetLife’s Argument Ignores the Distinguishing Facts of This Case As Well As The Relevant *Washington* Case Law.**

a. **There Was No Agreed Order With MetLife.**

MetLife states that no Washington case addresses precisely the situation presented here. *See* Br. at 14. But as discussed above, Washington courts have often approved CR 60 motions under analogous and often less compelling circumstances than those here. Although plaintiff discussed those cases in the trial court, MetLife fails even to try to distinguish them.

Instead, relying mostly on out-of-state authority, MetLife now claims that because the Stipulation and Dismissal was an “agreed order” that “Ms. Komine . . . intentionally filed” the trial court abused its discretion in vacating the dismissal in part. *See* App. Br. at 10-13. But as the record makes abundantly clear, neither Alicyn nor her lawyer intended to give up Alicyn’s UIM claim in August 2012. Otherwise, counsel would not have sent a settlement demand package to MetLife that month, she

would not have had her client authorize the release of her medical records to MetLife, and she would not have engaged in a plan with MetLife's counsel to position the case for resolution later that year. CP 48.

MetLife ignores another key distinction between this case and every single case on which it relies: the "agreed order" in this case was between parties *other than* the party (MetLife) claiming benefit from it. The "agreed order" here was "by and between" Anguinos and Komines. Indeed, MetLife did not even know about it.

Lane v. Brown & Haley, 81 Wn.App. 102, 912 P.2d 1040 (1996), *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978), and *Mortenson Co. v. Timberline Software*, 93 Wn.App. 819, 970 P.2d 803 (1999), on which MetLife relies, illuminate the significance of this distinction. Unlike Alicyn's claim against MetLife here, both *Lane*, *Haller*, and *Mortenson* involved claims that were fully adjudicated on the merits. (MetLife cannot seriously contend that Alicyn's UIM claim was actually litigated on the merits.)⁷

In *Lane*, the challenged order was a "fully adversarial" summary judgment against the plaintiff. 81 Wn.App. at 108. In *Haller*, the challenged

⁷ In *Barr v. McGuigan*, 119 Wn. App. 43, 78 P.3d 660 (2003), also cited by MetLife, the appeal court *affirmed* an order vacating an order of dismissal, because the attorney's mental illness had eroded the attorney-client relationship. The case does not stand for the sweeping proposition that such extreme circumstances provide the *only* basis for vacating an order of dismissal that surrenders a substantial right without the client's consent.

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order was a settlement of a minor child's injury claim that had been reviewed and approved by a superior court before being entered. In *Mortenson*, the order was also a summary judgment entered after the claims were fully litigated. After losing on summary judgment the plaintiff then tried, unsuccessfully, to reopen the case to assert two new claims. In each case, the parties defending the orders participated directly in the extensive proceedings prior to dismissal. In *Lane* "the merits of the case were fully addressed" in the summary judgment motion, *id.*; in *Haller*, the court held an evidentiary hearing before approving the minor settlement, 89 Wn.2d at 549. In *Mortenson* the case had been thoroughly litigated for a year-and-a half before the summary judgment hearing and the plaintiff had known of the basis for the "new" claims for a year before summary judgment was granted. 93 Wn.App. 838. Thus, the defendants in those cases were justified in their expectations that the dismissals were final. *MetLife cannot claim any such involvement in the agreement that resulted in the stipulated dismissal at issue here.* Indeed, MetLife does not challenge the trial court's finding that "there is no evidence of detrimental reliance" by MetLife as a result of entry of the dismissal.

- b. **CR 60 Gives The Trial Court Power to Vacate A Dismissal Where The Attorney Gave Up A Client's Substantial Right Without Consent.**

MetLife also insists that if Alicyn's attorney was "negligent" in signing the Stipulation and Order, her "sin" is binding on Alicyn. Br. at 12-13. But there was no "sin" by Alicyn's attorney and Washington law is not so doctrinaire as MetLife contends.

MetLife cites *Lane* but, again, it helps Alicyn here. *Lane* notes that where an attorney surrenders a "substantial right" of his client through "unauthorized stipulations or compromises," vacation of the judgment under CR 60(b) is "warranted." 81 Wn. App. at 107-108, *citing Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 126, 605 P.2d 348, *aff'd in part, rev'd in part*, 94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980); *Burkey*, 36 Wn. App. at 490 n.2; *Morgan v. Burks*, 17 Wn. App. 193, 199-200, 563 P.2d 1260 (1977) (upholding vacation of settlement and order of dismissal entered without client's authorization).

MetLife does not even acknowledge the Washington appellate authorities cited in *Lane* that undermine its argument – including *Graves v. P.J. Taggares* and *Morgan v. Burks* -- in which courts vacated final orders that surrendered substantial rights because the clients had not authorized such action by their attorneys. MetLife knew of these cases because they were briefed to the trial court below. CP 12-19 (Reply Br.).

In any event, unlike the attorneys in *Graves* and *Morgan* Alicyn's attorney did *not* intend to sign away Alicyn's UIM claim when she signed

the Stipulation and Dismissal prepared by Farmers. If she had, she would not have served a demand for settlement on MetLife the same day, she would not have had her client sign authorizations for the release of her medical records, and she would not have conferred with counsel for MetLife on a schedule and process for bringing the UIM claim to resolution in 2012. But even if she had fully intended to surrender Alicyn's UIM claim – a “substantial right” per *Graves v. P.J. Taggares* -- such action was certainly not authorized by Alicyn. Otherwise she never would have authorized her adversary – MetLife – to obtain her personal medical information.

c. None of the Cited Out-of-Jurisdiction Cases Involved Facts Remotely Close To This Case.

As it did in its trial court briefing, MetLife devotes significant ink to discussions of out-of-state cases, focusing in particular on *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) and *Bevard v. Kelly*, 15 Neb. App. 960, 739 N.W. 2d 243 (Neb. 2007). These cases are factually distinguishable in material ways, are inconsistent with Washington law, and are not, of course, controlling in this Washington court interpreting Washington's civil rules.

In *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) the plaintiff's attorney – misunderstanding the law – made a calculation that he would be

better off dismissing his state court action *with prejudice*, then refile in federal court against the same defendant alleging claims based on the same facts. His calculation was made in ignorance of the law of *res judicata*. Here, as the trial court expressly found, there was “no evidence of bad faith or effort to attain strategic advantage” here. CP 8. Nor was there any misunderstanding of the law. Moreover, unlike MetLife here, the defendant in Nemaizer was a party to the agreement dismissing the state claims, and so – as in *Lane* and *Haller* – it had a right to rely on the finality of the dismissal. Finally, the case was decided seven years before the Supreme Court relaxed the test for “excusable neglect” in *Pioneer Inv. Servs. Co.*, 507 U.S. 380, rendering it of questionable authority.

MetLife also discusses at length a Nebraska court of appeals case that it claims is “extremely similar” to this one. Br. at 19, citing *Bevard v. Kelly*. Applying the *Nebraska civil code*, the Nebraska appeals court held that the trial court had abused its discretion when it modified a dismissal order that included more defendants than intended by plaintiff. What MetLife fails to disclose is that Nebraska’s law is far more restrictive than Washington’s. Nebraska does not have a Civil Rule 60. Instead, the trial court’s power to modify judgments is governed by Neb. Rev. Stat. 25-2001. That provision allows the trial court to modify or vacate a judgment *only* “for mistake, neglect, or omission *of the clerk*, or irregularity in

obtaining a judgment or order.” NRS 25-2001 (4) (emph. added). Finding no “mistake, neglect or omission *of the clerk*,” the court of appeals concluded that the trial court had no power to vacate or modify the judgment. 15 Neb. App. at 963. MetLife’s reliance on this case exposes the vacuity of its position.⁸

4. Ninth Circuit Law, While Not Binding Here, Nonetheless Provides Additional Support Under CR 60(b) for the Trial Court’s Order.

Ironically, after arguing the precedential effect of federal cases from jurisdictions far afield, MetLife then takes the position that the law of the Ninth Circuit is inapposite. *See* Br.at 28-30. But to reach that conclusion, MetLife misinterprets the sole case upon which it relies for that proposition, *Barr v. McGuigan*, 119 Wn. App. 43 (2003), and ignores the fact that *Barr* expressly looked to Ninth Circuit case law to determine whether an attorney’s negligence should be excused in that case because

⁸ None of the federal cases cited by MetLife remotely supports its appeal in this case. *See* Br. at 15-17. For example, in *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143 (10th Cir. 1990) the plaintiff – a sophisticated and frequent litigator – and his attorney failed entirely to respond to a summary judgment motion. The district court, making clear that its ruling was limited to the *facts of that case*, refused to vacate the dismissal order. *Id.* at 1147 (“Each case is different, and must be so treated. There are very few right and wrong answers in this arena.”) In *Ohliger v. United States*, 308 F.2d 667 (2d Cir. 1962) the plaintiff’s attorney repeatedly failed to respond to discovery or otherwise prosecute the case, claiming “ignorance of the court’s rules.” The court of appeals agreed that this was not “excusable neglect” justifying vacation of the dismissal. Equally inapposite is *Edw. H. Bohlin Co. v. Banning*, 6 F.3d 350 (5th Cir. 1993), a complex multi-party, multi-state case that was fully litigated by all the parties involved, in which the appellate court did not accept the moving party’s account of the record below, and in which the moving party had clearly had its day in court. These cases and the others cited by MetLife provide no basis for reversing the trial court in *this case*.

there were no comparable Washington cases. *See Barr*, 119 Wn. App. at 46- 48. Contrary to MetLife’s portrayal, Br. at 28, the *Barr* court did not hold that an attorney’s negligence can never constitute grounds for vacating a judgment under CR 60(b); it merely recited the general rule argued by the defendant – but then noted that those cases “provide little guidance” for resolving the case before it. *Id.* at 46.

Just as in *Barr*, Ninth Circuit case law is instructive here. The Ninth Circuit follows U.S. Supreme Court guidance interpreting Fed.R.Civ.P. 60, and such guidance is relevant to interpretation of CR 60. In *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 394 (1993), the Supreme Court established a four-part, equitable test to determine whether an attorney’s neglect is excusable under Rule 60(b)(1). *See also Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (adopting equitable test articulated in *Pioneer*). Whether neglect is excusable depends on at least the following factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *See Pioneer*, 507 U.S. at 395.

In *Bateman v. United States Postal Service*, 231 F.3d 1220, 1223-24 (9th Cir. 2000), the Ninth Circuit applied that test to excuse the neglect

of plaintiff's counsel who had failed to timely respond to a summary judgment motion because he had left the country for two weeks on short notice for a family emergency. The *Bateman* court reversed the trial court's denial of plaintiff's 60(b) motion because the court had focused only on the reason for the delay but had failed to acknowledge the other factors of prejudice to the defendant, length of the delay and its potential impact on the proceedings and whether plaintiff had acted in good faith. 231 F.3d at 1224; accord *Wagstaff v. Wagstaff*, 3 Fed. Appx. 612 (9th Cir. 2001); *PLU Investments, LLC v. Intraspect Group, Inc.*, 2011 U.S. Dist. LEXIS 42020 (Apr. 12, 2011) (Lasnik, J. applying four-factor *Pioneer Inv. Servs.* test. to find that attorney's failure to timely file motion for attorneys' fees was "excusable neglect," even though based on her error of judgment; "[t]he key issue is not the existence but the degree of counsel's negligence, carelessness, and inadvertence."). See also *Brandt v. American Bankers Ins. Co.*, 653 F.3d 1108, (9th Cir. 2011) (affirming order *vacating* default judgment, even though trial court found that the defendant failed "to provide a credible explanation for its failure to respond to Plaintiff's lawsuit;" equities favored vacating the default judgment because the defendant "had a meritorious defense and prejudice to [plaintiffs] from setting aside default could be cured," since plaintiffs got their day in court).

The factors applied in *Bateman* mirror the standards Washington courts apply in Rule 60(b) cases, despite MetLife's arguments to the contrary. *See* Discussion, *supra*. MetLife argues that plaintiff's "neglect" stemmed from an alleged delay in filing her motion to dismiss. Br. at 28-30. But, MetLife omits materially important facts from its description of the parties' interactions between November 2012, when it first informed plaintiff's counsel about the alleged impact of August 2012 stipulated dismissal, and the June 2013 date when plaintiff filed her motion to vacate. *See* Discussion regarding "Due Diligence," *infra*. MetLife repeats the misleading claims that "seven months passed from when [plaintiff] learned of the effect of the dismissal and when she brought her motion," Br. at 28, that "three months had passed since she had failed to respond to MetLife's final settlement offer and ceased to negotiate," and "Ms. Komine provides no explanation for the three month delay" which was "substantially longer than the two week and one month delays" in *Bateman*. Br. at 29.

Missing from MetLife's explanation is the fact that the parties exchanged settlement offers through March 2013 (the first four months of the alleged "seven month" delay), that plaintiff's counsel reached out to MetLife again in May 2013, two months after MetLife's allegedly "final" settlement offer had "expired," and MetLife again participated in

settlement negotiations at that time. Plaintiff filed her motion to vacate less than three weeks after those discussions broke down. Thus, there was no “three month delay” where plaintiff ceased to negotiate, and MetLife is wildly inaccurate in claiming that Alicyn “offers no explanation for much of [the seven month] delay.” *See* Br. at 29; CP 9-10 (Yackulic Reply Dec.); CP 38-50 (Yackulic Dec.). *No* authority supports MetLife’s contention that the CR 60 motion was not timely under such circumstances. Moreover, there was no prejudice to MetLife by the trial court’s Order vacating the Dismissal. MetLife did not negotiate or win the August 27, 2012 order of dismissal, or even know about it for many weeks – so could hardly have relied on it. *See Bateman*, 231 F.3d at 1225 (if defendant “lost a quick victory” when the court vacated the summary judgment order, it suffered minimal prejudice as a result).

Bateman and the other Ninth Circuit cases cited above indicate that to the extent there is any “trend” under CR 60, *see* Br. at 15, it is to apply the rules so that claims are not barred when to do so would work an injustice with no countervailing benefit. Here, as the trial court recognized, vacating the dismissal would work no prejudice on MetLife, while to enforce the Stipulation and Dismissal against Alicyn’s UIM claim would cut off her rights against MetLife and preclude her day in court – or even a fair opportunity for her to negotiate a settlement. Applying the

Ninth Circuit and Western District of Washington cases here, the trial court's order should be affirmed.

5. **Though CR 60(b) Does Not Require Alicyn To Show She Has A Valid Cause of Action, Such Showing Has Been Made.**

Before promulgation of CR 60 in 1972, there was RCW 4.72.010-.090, which authorized trial courts to vacate or modify judgments under certain conditions and according to certain procedures. While the statute has not been abrogated it remains in effect only to the extent that it was not "modified by this rule." CR 60(e)(4).

The civil *rule* contains no requirement that a *plaintiff*, as moving party, make any showing that she has a valid cause of action. Only if the moving party is a defendant must the party set forth in its motion "the facts constituting a defense to the action or proceeding." CR 60(e)(1). The rule thus departs from the statute, which imposed a much higher bar to parties seeking vacation of an order:

The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

RCW 4.72.050.

This section of the statute was clearly "modified" by promulgation of CR 60. For example, under CR 60(e)(1) a defendant need only come

forward with a “prima facie defense” – rather than be “adjudged” to have a “valid defense” as was required by the statute. The “prima facie defense” requirement is not onerous; the court “must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant.” *Pfaff v. State Farm Auto Ins. Co.*, 103 Wn.App at 835. A “tenuous” defense may be enough support a motion to vacate. *White v. Holm*, 73 Wn.2d at 353.

And while the rule substantially relaxed the defendant’s burden of demonstrating the merits of its claim on a motion to vacate, the rule dispensed altogether with any requirement of such showing by a plaintiff. Under CR 60(e)(4), RCW 4.72.050 no longer has any force or effect. MetLife’s attempt – unsupported by *any* authority – to resurrect RCW 4.72.050 is another example of the lengths to which it will go to keep Alicyn Komine from having her day in court.

But even if RCW 4.72.050 still controlled, the record and all reasonable inferences therefrom firmly establish that Alicyn has a “valid cause of action.” First, of course, MetLife conceded in April 2012 that defendant Anguiano is 100% liable for Alicyn’s damages, having rear-ended her car while she was stopped at a red light. CP 65-69 (Answer). Second, Farmers Insurance paid full policy limits to Alicyn without even taking her deposition. CP 38. Such conduct was an unequivocal

acknowledgement that the value of Alicyn's claim was well above the insurance policy limits – and thus not worth spending attorney time or incurring costs to defend. Finally, MetLife invited settlement discussions and made Alicyn monetary settlement offers – even while arguing that the claim had been dismissed. MetLife's own conduct belies its suggestion that Alicyn's UIM claim has no merit. Viewing this record in the light most favorable to Alicyn, *see Pfaff*, 103 Wn. App. at 834, it is clear that she has a "valid cause of action."

C. The Trial Court Did Not Abuse Its Discretion When It Found That "Delay Is Not An Issue" and That the Reason for Any Delay Was The Parties' Mutual Effort to Resolve the Claim.

"[A] motion brought under CR 60(b)(1) is timely only if it is filed within a reasonable time and not more than one year from the date of the judgment, order, or proceeding from which relief is sought. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310, 989 P.2d 1144 (1999). Here, it is undisputed that Alicyn's June 20, 2013 motion to vacate (CP 51) was filed within one year of the August 27, 2012 Stipulation and Dismissal. Thus, the only issue for this Court is whether the motion was filed "within a reasonable time." The "reasonable time" requirement applies to motions under all sections of Rule 60(b).

The trial court found that "delay is not an issue" and "the reason for any delay was the lag in the parties' discovery of the entry of the Order

as to the UIM claim and then the parties' mutual effort to resolve the claim." CP 8. MetLife ignores or distorts the evidence on which the trial court relied for these findings, straining to make an argument that Alicyn's motion was untimely. MetLife falls well short of showing that the trial court's findings amount to an abuse of discretion.

Whether a motion to vacate is filed within a "reasonable time" depends on the facts and circumstances of the particular case. *Lockett*, 98 Wn. App. at 312. Courts consider whether the nonmoving party is prejudiced by any delay and whether the moving party has good reasons for having not taken action sooner. *Id.* at 313; *see also In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998), *rev. denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999) (in determining what constitutes a reasonable time, the court should consider the facts of each case, the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties).

1. **Ms. Komine Reasonably Relied on MetLife's Offer to Engage in Settlement Discussions Before Filing Her Motion to Vacate and Refrained From Filing Until Settlement Negotiations Broke Down.**

It is undisputed that MetLife waited until November 13, 2012 to inform plaintiff that a clerk of the Snohomish County Superior Court had

informed him, after he filed the October 8 Notice of Unavailability, that she believed the August 2012 dismissal order applied to plaintiff's UIM claims. CP 40. *See In re Marriage of Thurston*, 92 Wn. App. at 500 ("The mere passage of time between the entry of the judgment and the motion to set it aside is not controlling. Rather, a triggering event for the motion may arise well after entry of the judgment that the moving party seeks to vacate.").

Immediately on learning about the purported dismissal, Alicyn's counsel acted to resolve the matter. The day after she received MetLife's November 13, 2012 letter, she contacted MetLife's counsel by telephone and letter explaining why the Order of Dismissal did not dismiss Alicyn's UIM claim against MetLife, and that even if it were mistakenly interpreted that way, it was subject to amendment or vacation pursuant to CR 60. CP 40 (Yackulic Dec., ¶¶9-12). Alicyn's counsel also provided a "Stipulated Motion to Vacate or Amend Order of Dismissal." *Id.* Weeks passed. In December 2012, MetLife's attorney stated that he had not been given permission to sign the Stipulation. *Id.*, ¶13. But he did propose to engage in settlement negotiations.⁹ *Id.*

⁹ MetLife, curiously, waited to notify Alicyn's counsel of the call from the clerk until *a week after* it had obtained *all* Alicyn's medical records, and five weeks after MetLife's counsel filed a Notice of Unavailability (on October 8, 2012), the document that allegedly prompted the call from the clerk. CP 39-40. By that time, of course, MetLife

Thus, in January 2013, Alicyn communicated a settlement demand. More weeks passed. On February 25, 2013, MetLife made a “final” settlement offer that allegedly “expired” on March 13, 2013. CP 21. Alicyn did not accept the offer. But in May she and MetLife re-engaged in settlement discussions. CP 40-41, CP 9-10. After further back-and-forth, it became clear that the case would not resolve through settlement at that point. CP 9-10. Alicyn then filed her motion to vacate on June 20, 2013, less than one month later. CP 51-62. That motion was filed promptly – within three weeks – after the parties’ final effort to negotiate a settlement failed.

MetLife inexplicably fails to mention the parties’ settlement negotiations when it argues that Alicyn improperly waited “seven months after she learned there was a problem, and six months after being told that MetLife would not agree to vacate the order.” Br. at 5. As the trial court expressly found, “The reason for any delay was the lag in the parties’ discovery of the entry of the Order as to the UIM claim, and then the parties’ mutual effort to resolve the claim.” CP 8. MetLife offers no basis for overturning that finding.

had sufficient time to review all of Alicyn’s medical records that would support her UIM claim and assess its potential exposure if the claim proceeded.

MetLife also makes the remarkable – and wholly unsupported – argument that Ms. Komine “*did not exercise the requisite due diligence as a matter of law.*” Br. at 23 (emphasis added). No case cited by MetLife supports this statement, and indeed none could. To the contrary, MetLife is asking this court to rule, as a matter of law, that Alicyn should be penalized for attempting to settle a case – at MetLife’s invitation – before seeking relief from the Court.

Plaintiff-Respondent’s actions between November 13, 2012 when she received the MetLife letter and June 2013 when she filed the CR 60 motion contrast sharply with the attorneys’ actions in *Luckett* and *Stevens* – the only cases on which MetLife relies. Br. at 22. In *Luckett*, plaintiff’s counsel had failed to file a confirmation of joinder and attend a status conference in a discrimination action, and then failed to respond to the trial court’s order continuing the status conference, an order that specifically indicated that failure to comply was grounds for dismissal. After the action had been dismissed, plaintiff’s counsel claimed he did not learn of that dismissal until eight months later, and then waited four months to file a motion to vacate. On those facts, the court refused to find that the trial court abused its discretion when it held that plaintiff’s counsel’s “inner turmoil,” was not a reasonable basis for the delay in filing the motion to vacate. *Id.* at 313. That situation is hardly comparable to

Alicyn's counsel's efforts to settle the matter in the months before filing her motion to vacate.

MetLife's reliance on *In re Estate of Stevens*, 94 Wn. App. 20 (1999) is even more far-fetched and confused. MetLife trumpets in bold that, according to the *Stevens* court, "[a]s a matter of law, 'three months is not within a reasonable time to respond to an order of default'". Br. at 22, quoting *Stevens*, 94 Wn. App. at 35. MetLife then claims that *Stevens* is somehow instructive because the default *judgment* standard allegedly applied in *Stevens* is more lenient. But *Stevens* did not involve a default judgment. It involved a vacation of an *order* of default, and the opinion explained at length how the standards differ for setting aside orders of default and default judgments. *Stevens*, 94 Wn. App. at 30-32. The *Stevens* court upheld the trial court's refusal to vacate an *order* of default because it had made the requisite finding of no excusable neglect, required under either test. *Id.* at 31-32.

Moreover, the *Stevens* court made no statement that a lag of more than three months is *per se* unreasonable, as MetLife argues. Indeed no court has laid down a hard and fast rule about how long is too long to file a motion to vacate. It is a fact-specific determination.

Alicyn's motion to vacate was filed within a reasonable time and she had good reasons to accept MetLife's offer to negotiate before rushing

to file a motion to vacate. Accordingly, this Court should affirm the trial court's findings on that issue.

2. **MetLife Is Not Prejudiced By the Timing of Plaintiff's Motion to Vacate.**

The trial court specifically found that “[t]he risk of prejudice to MetLife is minimal and there is no evidence of detrimental reliance,” and that “there is no evidence of bad faith or effort to attain strategic advantage.” CP 8. MetLife has come forward with no credible evidence to the contrary.

MetLife complains here that it is somehow harmed because of a “ten-month delay” from the August 2012 dismissal to the June 2013 motion to vacate. Br. at 26-27. But as discussed above, it fails to acknowledge that the alleged “delay” is entirely of its own doing. It received Ms. Komine’s authorization to obtain (anew) all of her medical records on August 23, 2012, four days before the Stipulation and Dismissal was entered after Ms. Komine settled with Farmers for full policy limits.¹⁰ CP 38-40. Ms. Komine never revoked that authorization and MetLife continued to gather those records until November 2012. It is also undisputed that MetLife had intended to schedule depositions for October 2012, and waited until a week after it obtained *all* her records in

¹⁰ MetLife had already been provided most of Alicyn’s records as part of a settlement package sent in August 2012. CP 39 (Yackulic Dec., ¶7).

early November 2012 before informing her counsel that it intended to invoke the August 2012 dismissal against Ms. Komine. *Id.* The record demonstrates, therefore, that MetLife was actively preparing for litigation in this matter until at least November 2012.

The record also demonstrates that MetLife invited settlement discussions in early 2013 and engaged in further settlement discussions in May 2013, less than one month before Ms. Komine filed her motion to vacate, a time period for which it now claims undue delay and prejudice. CP 9-10. MetLife knew throughout these discussions that plaintiff intended to file a motion to vacate if those discussions were not successful. *Id.* Finally, after losing the motion to vacate, MetLife could have foregone this appeal – but instead it chose to obstruct further progress toward resolving the case by challenging the trial court’s order. No case cited by MetLife stands for the proposition that a party can invite settlement discussions, fail to offer a fair amount in settlement, and then claim prejudice for that period after a plaintiff files a motion to vacate.

In any event, MetLife’s effort to contrive “prejudice” from defendant Anguiano’s dismissal from the case is a red herring. Br. at 27. MetLife already conceded Mr. Anguiano was at fault in the accident that injured Ms. Komine. CP 65-69. The only issue in Ms. Komine’s UIM claim against MetLife is the amount of damages she suffered. The only

evidence MetLife needs to evaluate that claim are her medical records, which it obtained *before* notifying Ms. Komine it intended to assert her UIM claims had already been dismissed. MetLife was not prejudiced in any way by the timing of Ms. Komine's motion to vacate. The trial court's findings on that issue should be affirmed.

D. CR 60(a) Supplies An Alternative Basis for Affirming The Trial Court's Order Vacating The Dismissal As To Alicyn's UIM Claim.

Rule 60(a) provides relief from an order due to "clerical mistakes in judgments [or] orders" and "errors therein arising from oversight or omission." Civ. R. 60(a). CR 60(a) allows a court to correct clerical mistakes in an otherwise final order by correcting language that did not convey the court's intention, or to supply language that was inadvertently omitted. *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wash.2d 320, 326, 917 P.2d 100 (1996). Trial court determinations under Rule CR 60(a) are reviewed for abuse of discretion. *Id.* at 325-26.

In this case, the parties focused their arguments below on Rule 60(b), but the trial court's order vacating the August 2012 stipulated dismissal order as to Alicyn's UIM claim was also appropriate under Rule 60(a).¹¹ As a stipulated dismissal, the original August 2012 order could

¹¹ RAP 2.5(a) allows a party to "present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."

not have dismissed Ms. Komine's claims against intervener MetLife without its signature. *See* Civ. R. 41(a)(1)(A) (dismissal is "mandatory" **only** "[w]hen all parties who have appeared so stipulate in writing"); *see also, In re Marriage of Stern*, 68 Wn. App. 922, 927, 846 P.2d 1387 (1993) (trial court did not abuse its discretion under CR 60(b), but the relief was more appropriately granted under CR 60(a)). MetLife is thus incorrect in its assertion that "Ms. Komine presumably agrees that CR 60(a) does not apply to the circumstances of this case. . . ." Br. at 30.

CR 60 (a) may be used to correct a clerical error but not a judicial error. *Presidential Estates v. Barrett*, 129 Wash.2d 320, 326, 917 P.2d 100 (1996). The test for distinguishing between "clerical" error and "judicial" error is whether, based on the record, the order embodies the trial court's intent. *Id; accord, In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). In this case, the August 2012 Stipulation was entered without argument on the ex parte calendar by a pro tem commissioner unfamiliar with the case. CP 63-64. There is no evidence in the record to suggest that the commissioner was even aware of MetLife's presence in this case. MetLife was not listed on the caption. *Id.* The text of the order states that it is "stipulated *by and between the parties hereto*," and it included signature lines only for plaintiff's counsel and defendant Anguiano's counsel. *Id.* MetLife was not present or even

aware of the Stipulation when it was presented by Farmers' counsel and entered by the Commissioner.¹²

CR 41 provides that the court must dismiss an action by stipulation *only* when “*all* parties who have appeared so stipulate in writing.” CR 41 (a)(1)(A)(emphasis added).¹³ Since the dismissal of August 2012 was by stipulation, the governing rule was CR 41(a)(1)(A). CP 63-64. It is undisputed that MetLife had (1) previously appeared in this matter when it was granted intervener status in February 2012, and (2) MetLife did *not* stipulate to the dismissal – in writing or otherwise. The August 2012 stipulation, therefore, could not have been effective against MetLife as a matter of law. *See e.g., Wheeler v. American Home Products Corp.* 582 F.2d 891, 896 (5th Cir. 1977) (district court improperly dismissed the action, including the claims of the interveners on the basis of a stipulation between the original parties).

MetLife, however, now insists that “there is no question that the trial court’s intent was to dismiss this entire matter with prejudice, and that intent cannot be changed based on post-judgment information regarding

¹² MetLife repeatedly misleads this court with inaccurate statements that “Alicyn Komine intentionally presented the Stipulation and Order of Dismissal to the trial court to voluntarily dismiss this case.” Br. at 1; *see also* Br. at 5. To the contrary, it was defendant’s counsel, Farmers’ Insurance, who prepared and presented the August 2012 stipulation. The stipulation is written on defense counsel’s letterhead, and states that it “Presented by” counsel for defendant. CP 63-64.

Ms. Komine's subjective intent." Br. at 31. To the contrary, it is unlikely that the commissioner would have entered a stipulated order of dismissal as to all claims and parties in the case if he knew that the stipulation lacked the signature of an intervener-defendant and thus did not comply with CR 41(a)(1)(A). MetLife's only "evidence" of the court's "intent" is a telephone call it allegedly received from a *clerk* in the Superior Court, six or more weeks after the order was entered, advising that she or he interpreted the August 2012 order to have dismissed all claims in the case, including those against MetLife, notwithstanding that MetLife was not a signatory to that order. That communication from a court clerk cannot impute a legally deficient "intent" to the commissioner because, on its face, the August 2012 order could not have applied to MetLife. *See e.g., Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002) (reversing trial court that refused to vacate dismissal where clerk was unaware that the parties had attended a required hearing, and therefore the clerk's order of dismissal did not reflect the intent of the court).

To the extent "the court," speaking through a clerk, construed the August 2012 stipulation to dismiss Alicyn's UIM claims against MetLife, it made a clerical error and an error of oversight that is subject to correction by CR 60(a). MetLife offers no authority that a clerk's *ex parte* communication with an intervener represents the "intent" of the

commissioner signing an order. *See Presidential Estates*, 129 Wash.2d at 326 (distinguishing judicial and clerical error under Rule 60(a)). On these facts the trial court's order modifying the dismissal to preserve only Alicyn's UIM claims against MetLife was not an abuse of discretion.

E. **The Dismissal Was Not, Of Course, The Result Of A Default, But Ms. Komine's UIM Claim Against Has Certainly Not Been Adjudicated "On The Merits."**

MetLife devotes considerable effort to explaining why a default judgment is different from an "adjudication on the merits." Br. at 31-34. But Alicyn does not contend that the Stipulation and Dismissal was the same as a default judgment. At the same time MetLife is incorrect in suggesting that Alicyn actually adjudicated her UIM claim. She did not. Although counsel had agreed on a process for bringing her claim to the point of resolving it – gathering all her records via stipulation, taking her deposition, mediating the case, and if necessary trying it – that process was suspended after the Snohomish County clerk's call to defense counsel. The dismissal order here was not the upshot of a thorough litigation of the parties' claims and defenses. Unlike the parties in cases like *Lane* and *Haller*, Alicyn has not had her "day in court" against MetLife. There has been no adjudication of her UIM claim. This fact is unchanged by MetLife's technical argument about the difference between default judgments and adjudications on the merits.

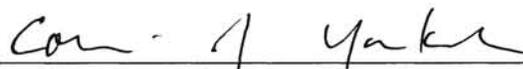
V. CONCLUSION

For the above-stated reasons the trial court did not abuse its discretion in vacating the dismissal as to Alicyn Komine's UIM claim against MetLife. The Order of June 28, 2013 should be affirmed.

DATED this 3rd day of January, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on January 3, 2014, I caused a true copy of the foregoing document to be filed with the Washington Court of Appeals, Division I, and to be served on the following in the manner indicated:

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Via
 Legal Messenger
 Email
 First Class Mail
 Hand Delivery

DATED THIS 3rd day of January 2014, at Seattle, Washington.

Dianna L. Sheets
Dianna L. Sheets