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No. 73038-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
Nov 04, 2015  
Court of Appeals  
Division I  
State of Washington

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In re the Marriage of

DIANE KOWNACKI,

Respondent,

and

VICTOR VASQUEZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JUDITH H. RAMSEYER

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BRIEF OF RESPONDENT

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SMITH GOODFRIEND, P.S.

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. RESTATEMENT OF FACTS.....1

    A. As part of their property settlement in 2009, Vasquez received a \$115,000 judgment in his favor against Kownacki. ....1

    B. After the divorce, Vasquez left the state, stopped participating in child rearing, and failed to pay child support..... 2

    C. In July 2012, Vasquez signed both a full satisfaction of judgment and a request for full reconveyance, releasing Kownacki from the judgment..... 3

    D. The trial court denied Vasquez’s motion to enforce the judgment, filed two years after signing the satisfaction of judgment. .... 6

III. ARGUMENT .....7

    A. This Court reviews only the trial court’s revision order, not the commissioner’s ruling. ....7

    B. The trial court considered the extrinsic evidence offered by Vasquez to support his claim that the parties had an oral contract that relieved him from the satisfaction of judgment that he had executed, and found that evidence insufficient. .... 8

        1. Vasquez failed to offer any evidence of objective manifestations supporting his interpretation of the alleged oral contract. .... 11

        2. One party’s unilateral, unexpressed subjective belief does not create a legally binding oral contract. ....14

IV. CONCLUSION .....18

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990) .....	11
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995) .....	9, 12
<i>Burrill v. Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003) .....	11
<i>Dave Johnson Ins., Inc. v. Wright</i> , 167 Wn. App. 758, 275 P.3d 339, <i>rev. denied</i> , 175 Wn.2d 1008 (2012) .....	15
<i>DewBerry v. George</i> , 115 Wn. App. 351, 62 P.3d 525, <i>rev. denied</i> , 150 Wn.2d 1006 (2003).....	11
<i>Dwelley v. Chesterfield</i> , 88 Wn.2d 331, 560 P.2d 353 (1977).....	16
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003) .....	16
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	12-13
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	13
<i>Markov v. ABC Transfer &amp; Storage Co.</i> , 76 Wn.2d 388, 457 P.2d 535 (1969) .....	10
<i>Marriage of Fiorito</i> , 112 Wn. App. 657, 50 P.3d 298 (2002).....	11
<i>Marriage of Krieger &amp; Walker</i> , 147 Wn. App. 952, 199 P.3d 450 (2008).....	13

<i>Marriage of Moody,</i> 137 Wn.2d 979, 976 P.2d 1240 (1999) .....	7
<i>Marriage of Rich,</i> 80 Wn. App. 252, 907 P.2d 1234, <i>rev. denied</i> , 129 Wn.2d 1030 (1996).....	11
<i>Marriage of Rideout,</i> 150 Wn.2d 337, 77 P.3d 1174 (2003) .....	8
<i>Marriage of Selley,</i> ___ Wn. App. ___, ___ P.3d ___ (2015 WL 5124177) (Sept. 1, 2015).....	14
<i>Olympia Police Guild v. City of Olympia,</i> 60 Wn. App. 556, 805 P.2d 245 (1991).....	16
<i>Petersen v. Turnbull,</i> 68 Wn.2d 231, 412 P.2d 349 (1966).....	10
<i>Plumbing Shop, Inc. v. Pitts,</i> 67 Wn.2d 514, 408 P.2d 382 (1965) .....	12, 16
<i>State v. Ramer,</i> 151 Wn.2d 106, 86 P.3d 132 (2004) .....	7
<i>State v. Wicker,</i> 105 Wn. App. 428, 20 P.3d 1007 (2001).....	8
<i>Western Community Bank v. Grice,</i> 55 Wn. App. 290, 777 P.2d 39 (1989) .....	10
<b>Statutes</b>	
RCW 4.56.100 .....	14
RCW 19.36.010 .....	9
RCW 26.19.020.....	13

## I. INTRODUCTION

Appellant Victor Vasquez appeals the superior court's order denying his motion for a judgment of \$115,000, plus interest, even though he had years earlier executed a full satisfaction of judgment releasing respondent Diane Kownacki from payment. The premise of this appeal is Vasquez's claim that the trial court failed to consider "extrinsic evidence" that the satisfaction of judgment was part of an "oral contract" with Kownacki so that she could refinance her home, with the understanding that she would still pay the judgment. But the trial court did consider Vasquez's extrinsic evidence, including both parties' declarations, and concluded that Vasquez failed to prove the existence of any oral contract relieving him from the consequences of the satisfaction of judgment he executed. (CP 126) This Court should affirm.

## II. RESTATEMENT OF FACTS

**A. As part of their property settlement in 2009, Vasquez received a \$115,000 judgment in his favor against Kownacki.**

Respondent Diane Kownacki ("Kownacki") and Appellant Victor Vasquez ("Vasquez") were married for seventeen years and have two daughters. (CP 13) When Vasquez moved out in 2007, Kownacki was left paying 100% of the monthly mortgage payments

on the family home where she and the parties' daughters resided (CP 14) – an obligation of \$4,000, which was more than half of Kownacki's monthly net income. (See CP 15, 42) Kownacki was also responsible for over half of the support for the parties' daughters, with Vasquez paying 47% under a May 1, 2009 child support order. (See CP 14, 42)

As part of their agreed decree of dissolution entered in May 2009, Kownacki was awarded the family home, and Vasquez was awarded a \$115,000 judgment, plus interest at the rate of 5% per annum. (CP 93-96) The judgment, secured by a deed of trust on the family home, was to be paid within five years, or by May 2014. (CP 93-96, 108, 119).

**B. After the divorce, Vasquez left the state, stopped participating in child rearing, and failed to pay child support.**

In 2008, while the parties were separated but before the final orders dissolving their marriage were entered, Vasquez was arrested and charged with second-degree domestic violence assault. (CP 14, 58) He entered a plea, was sentenced for fourth-degree assault, and paid his bail with money from their daughters' college savings accounts. (CP 58, 14)

Vasquez, who had been working at Boeing, was fired in 2008. (CP 14) He was still unemployed when the final orders were entered in May 2009. (CP 14) Because of his unemployment, the parties agreed to a downward deviation in Vasquez' child support obligation, from \$752 to \$600 per month. (CP 36) Despite this downward deviation, Vasquez failed to pay any support for the daughters, who were 10 and 12 when the parties divorced. (CP 14) Several months after the divorce was finalized, Vasquez moved to El Paso, Texas, and stopped participating in his daughters' lives entirely. (CP 14) By October 2014, Vasquez owed approximately \$26,000 in back child support payments. (1/09 RP 12)

**C. In July 2012, Vasquez signed both a full satisfaction of judgment and a request for full reconveyance, releasing Kownacki from the judgment.**

By 2011, two years after the parties' divorce, Kownacki was still 100% responsible for the care and support of the parties' daughters; Vasquez paid no child support and exercised no residential time with his daughters. (CP 14-15, 17) In addition to their daily care, Kownacki was entirely responsible for the cost of the daughters' medical expenses, orthodontics, extracurricular activities, including tutoring for the older daughter who has learning disabilities, and summer camps. (CP 14-15) These were expenses

that Vasquez was obligated to pay over and above his transfer payment in the child support order. (CP 38) The \$26,000 that was owed at the time of the enforcement hearing in 2014 does not include the tens of thousands of dollars Vasquez owed for the daughters' extraordinary expenses that Kownacki bore alone.

Under the terms of the child support order, Kownacki could have sought increased child support once Vasquez found full-time employment (CP 38), and when the younger daughter reached age 12. Since Vasquez was not even paying the minimum amount of support that he was required to under the 2009 child support order, she did not. Without any support from Vasquez, Kownacki was no longer able to afford the monthly \$4,000 mortgage, and attempted to refinance her house to reduce her monthly payments. (CP 15)

On February 18, 2011, a branch manager at Fidelity National Title emailed Vasquez regarding Kownacki's refinance. (CP 54) Vasquez asked how he could help with the refinance, and the branch manager told him that he would need to sign a payoff statement and "the proper release documentation in order to release the judgment and Deed of Trust." (CP 53, 54) Vasquez replied: "I will forward this to my attorney for review. I still have not received payment so I cannot sign any forms at this time." (CP 53) Vasquez eventually

followed up and reported to the branch manager that he would complete the paperwork and return it by the end of the day on March 28, 2011. (CP 52)

Vasquez and Kownacki were also informally discussing the refinance during this period. (CP 15) Based on the parties' conversations, as well as conversations that Vasquez was having with the parties' daughters, then ages 12 and 14, Kownacki understood that Vasquez was no longer seeking payment on the judgment because of his lack of involvement with the daughters, and his failure to financially support them in the years since he had moved from Washington. (CP 15) Kownacki understood that by discharging Kownacki's obligation, Vasquez wished to "call it even" between them. (CP 16)

Vasquez signed a partial satisfaction of judgment (CP 49-50)<sup>1</sup> and a Request for Reconveyance, "certify[ing] that all sums owing under said Note and Trust Deed have been paid in full," on June 29, 2012. (CP 56) On July 5, 2012, Vasquez signed and had notarized a full satisfaction of judgment (CP 46-47), which was filed with the

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<sup>1</sup> Although the reason is unclear, Vasquez first signed a satisfaction of judgment that was marked "partial" on June 29, 2012. (CP 49-50) Six days later, on July 5, 2012, he signed a "full" satisfaction of judgment. (CP 46-47)

King County Superior Court Clerk on August 22, 2012. (CP 46)  
Consistent with Kownacki's understanding that Vasquez was "forgiving" her debt for the judgment, Vasquez did not seek a new deed of trust, subordinate to the refinance, even though he had the advice of counsel. (CP 15-16)

**D. The trial court denied Vasquez's motion to enforce the judgment, filed two years after signing the satisfaction of judgment.**

Despite having executed a satisfaction of judgment more than two years earlier, Vasquez brought a motion on the family law motions calendar asking for an order enforcing the judgment, plus interest, on August 22, 2014. (CP 3-5, 108)<sup>2</sup> Vasquez filed two sworn declarations in support of his motion. (CP 3-6, 57-102) In those declarations, Vasquez claimed that Kownacki had promised to pay the \$115,000 judgment, and that he "justifiably relied" on that promise when signing the satisfaction of judgment. (CP 4, 62)

Commissioner Bonnie Canada-Thurston denied Vasquez's motion to enforce the judgment, as a full satisfaction had been filed and he could not produce any written evidence that Kownacki still

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<sup>2</sup> The attorney that represented him at the enforcement hearing was also his counsel in the original dissolution action. (*Compare* CP 4 and CP 96) It is not clear whether this was the attorney that Vasquez consulted when he signed the satisfaction of judgment.

owed him the judgment. (CP 105-06; 10/06 RP 8) King County Superior Court Judge Judith Ramseyer (“the trial court”) denied Vasquez’ motion for revision for “failure of proof” for his claim. (CP 126; 1/09 RP 15) The trial court noted that to the extent that Vasquez was making a claim for fraudulent inducement, he also failed to meet the burden of proof for that claim, based on the record that was before the court on a motion to revise a ruling decided on the family law motions calendar. (CP 126; 1/09 RP 15-16)

Vasquez appeals.

### III. ARGUMENT

#### A. **This Court reviews only the trial court’s revision order, not the commissioner’s ruling.**

Vasquez assigns error to both the commissioner’s ruling denying his motion to enforce the judgment as well as the trial court’s order denying the motion to revise the commissioner’s ruling. (App. Br. 1) However, “[o]nce the superior court makes a decision on revision, the appeal is from the superior court’s decision, not the commissioner’s.” *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). The trial court’s de novo review of the commissioner’s ruling is limited to the same record that had been before the commissioner. *Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999) (Upon a motion for revision, the trial court’s review “is limited to the

evidence and issues presented to the commissioner.”). On appeal, this Court applies a substantial evidence standard of review and gives deference to the trial court’s determinations of the sufficiency of the evidence. *See Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003) (applying a substantial evidence standard of review of a documentary record “where the proceeding at the trial court turned on credibility determinations”); *see also State v. Wicker*, 105 Wn. App. 428, 433, 20 P.3d 1007 (2001) (appellate court’s review of a trial court’s decision on revision “is far more deferential” than the trial court’s de novo review of commissioner’s ruling).

**B. The trial court considered the extrinsic evidence offered by Vasquez to support his claim that the parties had an oral contract that relieved him from the satisfaction of judgment that he had executed, and found that evidence insufficient.**

Below and on appeal, Vasquez claims an oral contract, purportedly reached when he executed a satisfaction of judgment in July 2012, required Kownacki to pay the satisfied judgment under the terms of the parties’ dissolution decree. This would have required Kownacki to pay the judgment by May 2014 – five years after the decree was entered, and more than two years after the alleged oral contract was entered. (CP 61) Such an agreement would have been void under the statute of frauds because it was not in

writing, and by its purported terms was “not to be performed in one year from the making thereof.” RCW 19.36.010.

In order to prove the existence of an oral agreement that would take the contract alleged by Vasquez out of the statute of frauds, the contract must “be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.” *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). Vasquez did not meet this burden, and the trial court properly concluded that Vasquez failed to prove the existence of any oral agreement that would relieve him from the satisfaction of judgment that he had executed more than two years earlier.

Vasquez’s argument on appeal centers entirely on whether he should have been allowed to offer extrinsic evidence of the alleged oral agreement between him and Kownacki. (App. Br. 2) But the trial court did consider the extrinsic evidence offered by Vasquez. Vasquez argued that he signed the satisfaction of judgment based on an alleged promise that Kownacki would still repay him in his: (1) Motion/Declaration for an Order to Enforce Final Decree of Dissolution and Establish a Judgment; (2) Declaration in Strict Reply; (3) Motion for Revision of Court Commissioner’s Ruling; and (4) oral argument before the trial court. (CP 3-5, 57-64, 107-11; 1/09 RP 3-5)

The trial court noted that it had reviewed and considered all of the pleadings, and understood Vasquez's contention that the satisfaction was "entered into only on the basis of his understanding that he would receive this judgment payment of \$115,000 as a consequence of the refi[nance]." (1/09 RP 15) Thus, the trial court did consider Vasquez's extrinsic evidence of the alleged oral contract. However, based on the conflicting declarations of Vasquez and Kownacki, the trial court concluded that Vasquez's evidence failed to prove the existence of an oral contract releasing him from his executed satisfaction of judgment. *See Western Community Bank v. Grice*, 55 Wn. App. 290, 777 P.2d 39 (1989) (reversing an order vacating satisfactions of judgment when there was no evidence to support vacation other than the creditor's "bare assertion" that the judgment was not satisfied).<sup>3</sup>

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<sup>3</sup> The trial court also concluded that to the extent Vasquez was also claiming fraudulent inducement, he failed to meet his burden of establishing that claim on the record before the trial court. (CP 126; 1/09 RP 15-16) A party bringing a claim for fraudulent inducement has the burden of proving each of the nine elements of fraud by clear, cogent, and convincing evidence. *See Petersen v. Turnbull*, 68 Wn.2d 231, 235, 412 P.2d 349 (1966) (In order for "alleged misrepresentations to qualify as an adequate defense of fraudulent inducement to enter into [a] transaction, they must meet the essential elements of fraud."); *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 395, 457 P.2d 535 (1969) (listing elements and standard of proof for fraud).

This Court defers to the trial court's determination on the sufficiency of the evidence presented. *Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030 (1996) (this Court's "role or function is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses"); *see also Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) (credibility determinations are left to the trier of fact and are not subject to review); *DewBerry v. George*, 115 Wn. App. 351, 362, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (credibility findings should not be subject to review on appeal) (*citing Marriage of Fiorito*, 112 Wn. App. 657, 667, 50 P.3d 298 (2002)). Because the trial court considered all of the evidence Vasquez presented and concluded it was insufficient to prove an oral agreement, the trial court properly denied his motion to enforce the judgment.

- 1. Vasquez failed to offer any evidence of objective manifestations supporting his interpretation of the alleged oral contract.**

The trial court properly concluded that the extrinsic evidence Vasquez presented was insufficient to prove an oral contract. Vasquez misplaces his reliance on *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and its progeny to argue that absent

evidence of any objective manifestations, the trial court should have given weight to extrinsic evidence of his subjective intent in executing the satisfaction of judgment. (App. Br. 5) While *Berg* was “[i]nitially . . . viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis,” our Supreme Court later clarified that “Washington continues to follow the objective manifestation theory of contracts” in *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under both *Berg* and *Hearst*, the court “attempt[s] to determine the parties’ intent by focusing on the objective manifestations of the agreement, *rather than on the unexpressed subjective intent of the parties.*” *Hearst*, 154 Wn.2d at 503 (emphasis added).

Here, the record is devoid of any objective manifestations supporting Vasquez’s interpretation of the alleged oral contract. To the contrary, Vasquez’s actions in signing two separate documents stating that the judgment was “satisfied,” signing another document stating that the judgment was “paid in full,” and failing to pursue imposition of a new deed of trust after the refinance was completed are all clear objective manifestations that Vasquez did *not* intend to be paid by Kownacki. *See, e.g., Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 517, 408 P.2d 382 (1965) (“We impute to a person an

intention corresponding to the *reasonable* meaning of his words and acts.”) (emphasis added); *Hearst*, 154 Wn.2d at 503 (courts may use extrinsic evidence to determine the meaning of words and terms used, but “*not* to show an intention independent of the instrument or to vary, contradict or modify the written word.”) (emphasis added) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (internal quotation marks omitted).

Further, Vasquez points to no objective manifestation by Kownacki to support his claim that she “promised” to pay the judgment under the terms of the original decree. Instead, under what appeared to be an agreement to “call it even” by Vasquez discharging Kownacki’s obligation, she continued to raise the children fulltime on her own without seeking any additional support from Vasquez. (CP 14, 16-17; 1/09 RP 8) For instance, in 2011, Kownacki could have sought to increase child support, as the younger daughter aged into a new age category. RCW 26.19.020. Kownacki could have also sought additional support because Vasquez was exercising no residential time with the daughters. *Marriage of Krieger & Walker*, 147 Wn. App. 952, 965, 199 P.3d 450 (2008) (An obligor parent’s “failure to spend any residential time with the children may provide a basis for a support award above the

advisory amount,” as the obligee parent then “necessarily carries an increased financial burden.”); *see also Marriage of Selley*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2015 WL 5124177) (Sept. 1, 2015) (“[B]ecause an obligee parent pays a higher portion of child expenses when the obligor parent chooses to abdicate most or all visitation,” the trial court may deviate upward from the standard calculation.).

Vasquez’s proffered evidence that he did not intend to release Kownacki from her obligation to pay him \$115,000 contradicts the written word and very purpose of the documents he signed, including the full satisfaction of judgment, which were to release Kownacki from further obligation under the judgment. *See* RCW 4.56.100 (upon entry of a satisfaction of judgment, the clerk is required to discharge the judgment). Accordingly, Vasquez’s purported evidence contradicts the reasonable meaning of his act of signing the satisfaction by showing an intention independent of and contrary to the instrument itself.

**2. One party’s unilateral, unexpressed subjective belief does not create a legally binding oral contract.**

The trial court properly concluded that Vasquez failed to prove an oral agreement when his claim rested largely on his subjective belief that he would still be paid. Vasquez misplaces his

reliance on *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012) (App. Br. 6-8), to support the existence of an oral agreement between the parties. *Wright* does not help Vasquez because there, unlike here, the trial court found sufficient evidence to prove an oral agreement. In *Wright*, the parties had entered into a buy and sell agreement contemporaneously with the transfer of the plaintiff's life insurance policies to the defendant. The plaintiff testified that he transferred the policies solely to provide the defendant with a means of buying the plaintiff's business upon the latter's death.

The *Wright* court affirmed the trial court's determination that, because the buy and sell agreement was executed at the same time as the transfer, both parties understood that the policies were transferred in conjunction with this business transaction – rather than as a gift, as the defendant argued – and were thus to be returned if the defendant's employment with the plaintiff terminated. The plaintiff's oral testimony thus corroborated his *expressed* intent – as well as both parties' objective manifestations – of their agreement that the plaintiff's business was to eventually be transferred to the defendant.

Here, Vasquez’s claim that he believed he would still be repaid even if he signed a satisfaction of judgment is little more than his *unexpressed* subjective intent, which the trial court properly found was insufficient to prove an oral contract that would have relieved Vasquez of the satisfaction of judgment. *Plumbing Shop*, 67 Wn.2d at 517 (“Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties.”); *see also Dwelley v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977) (“[U]nexpressed impressions are meaningless when attempting to ascertain the mutual intentions” of the parties.); *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 559, 805 P.2d 245 (1991) (“Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties.”) (internal quotation marks omitted); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003) (admissible extrinsic evidence does not include evidence of a party’s unilateral or subjective intent as to a contract’s meaning).

Vasquez was fully aware of the legal significance and meaning of the satisfaction of judgment: When first contacted by the mortgage company to complete the payoff statements and other documentation required to release the judgment lien and deed of

trust, Vasquez not only said that he would be forwarding them to his attorney for review, but also initially refused to sign the forms because he had not yet received payment. (CP 53: "I still have not received payment so I cannot sign any forms at this time."). Apparently on the advice of counsel, he completed the bank's payoff statement later that month, and, over a year later, signed both a partial and full satisfaction of judgment. (CP 52, 46-47, 98-99)

Vasquez's words and actions indicate only that he was discharging Kownacki's obligation, not that there was any collateral agreement for a subsequent payoff. He was aware of the legal implications of signing the satisfaction of judgment and that he should not sign it if he had not been or did not intend to be paid. (See CP 53) Additionally, he knew that he should seek the advice of counsel, and did. (See CP 53) He not only signed a full satisfaction of judgment, but also a request for full reconveyance, to remove the deed of trust securing the judgment. (CP 46-47, 56) Vasquez also failed to procure a new deed of trust to take effect upon refinance, to subordinate his original deed of trust to the new mortgage, or otherwise take any steps to ensure that the debt would remain. (See CP 16; 10/06 RP 7-8)

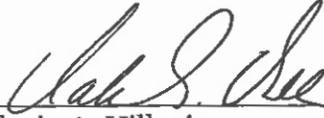
Although Vasquez contends that Kownacki agreed to pay him with the funds secured by the refinancing, aside from sending a single brief and vaguely worded email to a Wells Fargo mortgage consultant asking for the “status on [his] check” (and providing no further details on the nature of that request), there was no evidence that Vasquez made any attempts to obtain the judgment amount after the refinance was completed. (CP 60-62, 101) On the contrary, Vasquez waited over two years after the refinancing was approved in 2012 before bringing his motion to enforce the judgment in August 2014. (CP 3-5, 15) All of Vasquez’s actions are thus consistent with fully discharging Kownacki’s obligation, with absolutely no indication or evidence, by word or deed, that he expected Kownacki to still repay him at a later date. The trial court properly denied Vasquez’s motion to enforce the judgment.

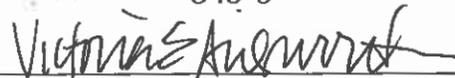
#### **IV. CONCLUSION**

The trial court considered the appellant’s proffered extrinsic evidence to support his claim of an oral agreement that would have released him from his executed satisfaction of judgment, and properly concluded it was insufficient. This Court should affirm.

Dated this 4<sup>th</sup> day of November, 2015.

SMITH GOODFRIEND, P.S.

By:   
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By:   
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Attorneys for Respondent

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 4, 2015, I arranged for service of the foregoing Brief of Respondent to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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**DATED** at Seattle, Washington this 4th day of November,  
2015.

  
\_\_\_\_\_  
Tara D. Friesen