

CASE NO. 73108-4-1

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION I

GREGORY H. KIRSCH,

Appellant,

vs.

CRANBERRY FINANCIAL, LLC,

Respondent.

BRIEF OF RESPONDENT
CRANBERRY FINANCIAL, LLC

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF ISSUES	4
III.	STATEMENT OF THE CASE.....	5
	A. The Promissory Note and Guaranty	5
	B. The Deed of Trust	6
	C. Terms of the Note and Channel’s Default	6
	D. The 2004 Lawsuit	7
	E. Kirsch File the Current Lawsuit Almost Four-Years Ago Asserting a Single Cause of Action	7
	F. Kirsch Moves for Summary Judgment And It Is Granted In Part	8
	G. The Trial Court Granted Cranberry Financial’s Summary Judgment Motion	9
	H. This Appellate Court Reversed Summary Judgment.....	10
	I. Kirsch’s Second Motion for Summary Judgment.....	10
	J. Kirsch Was Declared the Prevailing Party in the Lawsuit And Awarded His Attorneys Fees and Costs.....	11
	K. Cranberry Financial Paid the Judgments and Satisfactions of Judgment Were Entered.....	11
	L. After the Case Was Over and Cranberry Financial’s Appeal Deadlines Had Run, Kirsch Moved to Amend His Complaint.....	11
	M. The Trial Court Denied Kirsch’s Motion to Amend His Complaint On the Grounds the Lawsuit Was Over	12

IV.	ARGUMENT	14
A.	Standard of Review	14
B.	The Trial Court Correctly Ruled that Kirsch Court Not Amend His Complaint After the Case Concluded.....	16
C.	Because the Litigation Had Concluded, the Trial Court Could Not Even Consider Kirsch’s Motion to Amend His Complaint Until He First Filed a Motion to Vacate the Order Quieting Title and Money Judgment Under Civil Rule 60(b)	30
D.	Assuming, <i>Arguendo</i> , Kirsch Can Somehow Overcome the Fact the Case Had Concluded and He Failed to Vacate the Order and Judgment Under Civil Rule 60(b), Kirsch’s Motion to Amend his Complaint Still Fails Because It is Extremely Untimely and Prejudicial.....	35
V.	ATTORNEY’S FEES	45
VI.	CONCLUSION.....	45

TABLE OF AUTHORITIES

Cases

<i>Anderson & Middleton Lumber Co. v. Quinault Indian Nation</i> , 79 Wn.App. 221, 225, 901 P.2d 1060 (Div. II 1995)	16, 19
<i>Baskin v. Livers</i> , 181 Wn. 370, 374, 43 P.2d 42 (1935)	17, 19
<i>Bunko v. City of Puyallup Civil Service Com'n</i> , 95 Wn.App. 495, 500, 975 P.2d 1055 (Div. II 1999)	36
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 493, 933 P.2d 1036 (1997)	14, 34, 45
<i>Caruso v. Local Union 690 of Int'l Bhd. Of Teamsters</i> , 100 Wn.2d 343, 351, 670 P.2d 240 (1983)	15, 26, 35
<i>Currier v. Perry</i> , 181 Wn. 565, 569, 44 P.2d 184 (1935)	17, 19
<i>Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.</i> , 105 Wn.2d 878, 888, 719 P.2d 120 (1986)	15, 35, 36, 43
<i>Donald B. Murphy Contractors, Inc. v. King County</i> , 112 Wn.App. 192, 199-200, 49 P.3d 912 (Div. I 2002)	36, 43
<i>Ensley v. Mollmann</i> , 155 Wn.App. 744, 759, 230 P.3d 599 (Div. I 2010)	36, 44
<i>Ennis v. Ring</i> , 56 Wn.2d 465, 470, 341 P.2d 885 (1959)	26
<i>Estate of Randmel v. Pounds</i> , 38 Wn.App. 401, 404, 685 P.2d 401 (Div. I 1984)	26
<i>Forbus v. Knight</i> , 24 Wn.2d 297, 310, 163 P.2d 822 (1946)	35, 36, 44
<i>Forman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227 (1962)	27, 28
<i>Greenlaw v. Smith</i> , 67 Wn.App. 755, 759, 840 P.2d 223 (Div. II 1992)	16

<i>Hadley v. Cowan</i> , 60 Wn.App. 433, 444, 804 P.2d 1271 (Div. I 1991).....	14, 34, 45
<i>Herron v. Tribune</i> , 108 Wn.2d 162, 168, 736 P.2d 249 (1987).....	15, 26, 35
<i>In re Campbell</i> , 19 Wn.2d 300, 142 P.2d 492 (1943).....	27
<i>In re Dependency of J.M.R.</i> , 160 Wn.App. 929, 938 FN4, 249 P.3d 193 (Div. I 2011), <i>review granted in part</i> , 172 Wn.2d 1017, 262 P.3d 64 (2011).....	15
<i>In re Estate of Harford</i> , 86 Wn.App. 259, 936 P.2d 48 (Div. K 1997)	31
<i>In re Peterson</i> , 138 Wn.2d 70, 88, 980 P.2d 1204 (1999).....	16
<i>Ives v. Ramsden</i> , 142 Wn.App. 369, 387, 174 P.3d 1231 (Div. II 2008)	35
<i>La Mon v. Butler</i> , 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), <u>cert. denied</u> , 493 U.S. 814, 110 S.Ct. 61 (1989).....	14, 34, 45
<i>Lane v. Brown & Haley</i> , 81 Wn.App. 102, 107-09, 912 P.2d 1040 (Div. II 1996)	31
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 93 Wn.App. 819, 838, 970 P.2d 803 (Div. I 1999)	31
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 40, 891 P.2d 725 (1995).....	15
<i>Oliver v. Flow Intern. Corp.</i> , 137 Wn.App. 655, 663, 155 P.3d 140 (Div. I 2007).....	41
<i>Olson v. Roberts & Schaeffer Co.</i> , 25 Wn.App. 225, 228, 607 P.2d 319 (1980).....	26
<i>Pederson v. Potter</i> , 103 Wn.App. 62, 69, 11 P.3d 833 (Div. III 2000).....	24
<i>Purse Seine Vessel Owners Ass'n v. State</i> , 92 Wn.App. 381, 387, 966 P.2d 928 (Div. II 1998).....	16

<i>Rapid Settlements, Ltd. v. Symetra Life Insur. Co.</i> , 166 Wn.App. 683, 690, 271 P.3d 925 (Div. III 2012).....	14
<i>Rhodes v. D & D Enterprises, Inc.</i> , 16 Wn.App. 175, 178, 554 P.2d 390 (Div. I 1976).....	16
<i>Rose ex rel. Estate of Rose v. Fritz</i> , 104 Wn.App. 116, 121, 15 P.3d 1062 (Div. II 2001).....	18
<i>Seattle-First Nat. Bank Connell Branch v. Treiber</i> , 13 Wn.App. 478, 480-81, 534 P.2d 1376 (Div. III 1975)	33
<i>State v. Lewis</i> , 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990)	15
<i>Stanley v. Cole</i> , 157 Wn.App. 873, 879, 239 P.3d 611 (Div. I 2010).....	31
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)	15
<i>State v. Rundquist</i> , 79 Wn.App. 786, 793, 905 P.2d 922 (1995).....	16
<i>State v. Scott</i> , 20 Wn.App. 382, 386, 580 P.2d 1099 (Div. I 1978).....	32
<i>State Farm Mut. Auto. Ins. Co. v. Avery</i> , 114 Wn.App. 299, 304, 57 P.3d 300 (Div. III 2000).....	24
<i>Tex Enterprises, Inc. v. Brockway Standard, Inc.</i> , 110 Wn.App. 197, 39 P.3d 362 (Div. I 2002)	36
<i>Tagliani v. Colwell</i> , 10 Wn.App. 227, 10 Wn.App. 227 (Div. III 1973).....	27, 28
<i>U.S. v. Vorachek</i> , 563 F.2d 884 (8 th Cir. 1977)	25
<i>Vance v. Offices of Thurston County Comm'rs</i> , 117 Wn.App. 660, 671, 71 P.3d 680 (2003).....	14
<i>Wagers v. Goodwin</i> , 92 Wn.App. 876, 881, 964 P.2d 1214 (Div. II 1998)	31

<i>Walla v. Johnson</i> , 50 Wn.App. 879, 884, 751 P.2d 334 (Div. I 1988)	26
<i>Wallace v. Lewis County</i> , 134 Wn.App. 1, 25-27, 137 P.3d 101 (Div. II 2006)	36, 43
<i>White v. Johns-Manville Corp.</i> , 103 Wn.2d 344, 348, 693 P.2d 687 (1985).....	29
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 505, 974 P.2d 316 (1999)	35, 37
<i>Wlasiuk v. Whirlpool Corp.</i> , 76 Wn.App. 250, 253-58, 884 P.2d 13 (Div. I 1994).....	17

Statutes

RCW 4.16.040	8, 9
RCW 4.16.080	24
RCW 4.64.030	16
RCW 7.28.300	8

Rules

Civil Rule 15	3, passim
Civil Rule 15(a).....	35, 38
Civil Rule 15(c).....	26
Civil Rule 15(d)	26
Civil Rule 54(a).....	16
Civil Rule 54(c).....	33
Civil Rule 59 (h)	30, 33
Civil Rule 60	23, 30-32
Civil Rule 60(b)	3, passim
RAP 2.2.....	17, 21
RAP 2.2(a)(1).....	17, 20
RAP 5.2.....	21
RAP 18.1.....	45

I. INTRODUCTION

Appellant/Plaintiff, Gregory H. Kirsch (“Kirsch”), filed this lawsuit on January 19, 2012, nearly four-years ago. Kirsch’s Complaint (and two subsequent Amended Complaints) asserted a single-cause of action to Quiet Title against a lien of a Deed of Trust (“DOT”) that was used as security for a Guaranty Kirsch executed as part of a loan made by Respondent/Defendant Cranberry Financial, LLC’s (“Cranberry Financial”) predecessor to Kirsch’s company. The only relief Kirsch pled in his Complaint (and two subsequent Amended Complaints) was for attorney fees and costs.

In January 2013, Cranberry Financial moved for summary judgment against Kirsch on a counterclaim for breach of the Guaranty. The trial court granted Cranberry Financial’s Motion for Summary Judgment and judgment was entered against Kirsch on the Guaranty. Kirsch appealed that ruling, and on December 23, 2013, this Appellate Court reversed summary judgment in favor of Cranberry Financial, remanded this case back to the trial court to reinstate Kirsch’s Quiet Title action, and awarded Kirsch attorney fees and costs on appeal.

Thereafter, Kirsch moved for summary judgment for an Order Quieting Title on his single cause of action and for an award of attorney

fees and costs as the prevailing party in the lawsuit under the loan documents. On May 30, 2014, the Order Quietening Title on Kirsch's single cause of action to Quiet Title against the lien of the DOT encumbering his Property was entered, and the DOT was removed.

On June 20, 2014, Kirsch was declared the prevailing party in the lawsuit and a money Judgment was entered awarding Kirsch his attorney fees and costs at the trial court level. On September 3, 2014, both the Judgments for attorney fees and costs awarded to Kirsch at the trial court level and on appeal were paid in full by Cranberry Financial and Satisfactions of Judgment were entered.

On November 26, 2014, nearly three-years after Kirsch filed the Complaint, Kirsch filed a Motion to Amend his Complaint for a third time to assert five new tort and contract theories of recovery and allege additional damages of \$73,984.58. Kirsch's basis for the third amendment after the lawsuit was over, is that counsel did "not clearly outline the claim for damages" and "damages remained ongoing."

Cranberry Financial argued Kirsch's Motion to Amend his Complaint should be denied for three separate reasons. First, it should be denied because the litigation had concluded in May 2014 when the Order Quietening Title was entered on Kirsch's only cause of action, and thus, the case was over and the Complaint could not be amended. Second, it should

be denied because before the trial court could even entertain Kirsch's Motion to Amend his Complaint, Kirsch must first vacate the Order and Judgment under Civil Rule 60(b). And, finally, even assuming, *arguendo*, Kirsch can somehow overcome these two barriers, Kirsch's Motion should be denied under Civil Rule 15 because Cranberry Financial would be prejudiced if he was permitted to amend his Complaint to assert five new tort and contract theories of recovery and over \$70,000.00 in additional damages based on the same transaction that was filed almost four-years ago and litigated for almost two-and-a-half years, among other reasons.

On January 16, 2015, following oral argument, the trial court correctly denied Kirsch's Motion to Amend his Complaint because the case was over on May 31, 2014, when the Order Quietening Title was entered resolving Kirsch's only cause of action pled. The trial court, having found that Kirsch could not amend his Complaint because the case had concluded, did not address Cranberry Financial's additional arguments under Civil Rule 60(b) and prejudice pursuant to Civil Rule 15. These two alternative grounds provide an additional basis in which this Court can uphold the trial court's Order denying Kirsch's Motion to Amend his Complaint.

Kirsch appealed. Cranberry Financial submits this brief in answer to Kirsch's appeal, and respectfully requests this Appellate Court affirm the trial court's ruling.

II. STATEMENT OF ISSUES

1. Whether the trial court manifestly abused its discretion when it denied Kirsch's Motion to Amend his Complaint for a third time because the case had concluded when the May 31, 2014 Order Quieting Title was entered (and subsequent June 20, 2014 money Judgment for attorney fees and costs), resolving the single cause of action and relief pled by Kirsch in his Second Amended Complaint, and because of that, there was no complaint left to be amended.

2. Whether Kirsch's Motion to Amend his Complaint should be denied because before the trial court could even consider that Motion, Kirsch was first required to file a Motion to Vacate the Order Quieting Title and money Judgment under Civil Rule 60(b), as the case had concluded.

3. Whether Kirsch's Motion to Amend his Complaint should be denied as untimely and prejudicial under Civil Rule 15, where Kirsch is attempting to Amend his Complaint for a third time to assert five new theories of recovery and over \$70,000.00 in additional damages based on the same transaction in which the Complaint was filed almost four-years

ago; was litigated by the parties for two-and-a-half years; where Kirsch was declared the prevailing party and a money Judgment was entered that was satisfied by Cranberry Financial; and where his Motion to Amend was filed almost six-months after the litigation ended.

4. Whether Cranberry Financial is entitled to its attorney fees and costs under the same Note in which Kirsch was awarded his attorney's fees and costs at the trial court level and on the prior appeal.

III. STATEMENT OF THE CASE

A. The Promissory Note and Guaranty

On August 14, 1998, for valuable consideration, Channel Marine, Ltd., a Washington corporation ("Channel"), as borrower, made and delivered to the United States Small Business Administration ("SBA") a promissory note in the principal sum of Three Hundred Eighty-Seven Thousand Eight Hundred Dollars (\$387,800.00). (CP 0221)

On October 7, 1999, in consideration of advancing additional funds to Channel, the promissory note was modified pursuant to a modification of promissory note (the promissory note and modification of promissory note are collectively referred to herein as the "Note"), which increased the principal sum to Seven Hundred Eighty Thousand Four Hundred Dollars (\$780,400.00). The maturity date of the Note was August 14, 2023. (CP 0221)

As partial inducement to make the loan to Channel, on August 14, 1998, the Appellant/Plaintiff, Kirsch, executed a personal guaranty. The guaranty was amended on October 7, 1999 pursuant to an SBA amended guaranty (the guaranty and the amended guaranty are collectively referred to herein as the "Guaranty"). The Guaranty was executed in favor of the SBA guaranteeing the obligations of Channel under the Note. (CP 0223) By successive assignment, Cranberry Financial succeeded to and is the owner and holder of all of the SBA's right, title and interest in the Note and Guaranty. (CP 0222-0223)

B. The Deed of Trust

Additionally, on August 19, 1998, Kirsch, as Guarantor for that loan, executed a Deed of Trust ("DOT") in favor of the SBA for the property located at 4365 Y Road, Bellingham, Washington 98225 ("Property"). On October 20, 1999, in accordance with the additional funds advanced under the Note, an amendment to the DOT was recorded. By successive assignment, Cranberry Financial succeeded to and was the holder of all of the SBA's right, title and interest in the DOT. (CP 0054) Kirsch held fee title in the Property secured by the DOT. (CP 0054)

C. Terms of the Note and Channel's Default

Under the terms of the Note, Channel agreed to pay annual installment payments of Fifty-One Thousand Three Hundred & Ninety-

Four Dollars (\$51,394.00), with the first payment due on February 14, 2000, and successive payments due on the 14th day of February each year thereafter to the date of maturity – August 14, 2023. (CP 0221-0222) On February 14, 2000, Channel made its first and only payment under the Note. Thereafter, Channel failed to pay the annual installment payments for the years 2001 to the present. (CP 0222)

D. The 2004 Lawsuit

On August 5, 2004, Cranberry Financial's predecessor, Capital Crossing Bank, filed suit against Channel, as maker of the Note, and Kirsch, as Guarantor, for breach of the Note, breach of the Guaranty and foreclosure of the DOT, under Whatcom County Superior Cause No. 04-2-01811-7. On April 17, 2009, the 2004 lawsuit was dismissed, without prejudice, on the clerk's motion for want of prosecution. (CP 0228-0229)

E. Kirsch Filed the Current Lawsuit Almost Four-Years Ago Asserting a Single Cause of Action

On January 19, 2012, nearly four-years ago, Kirsch filed his Complaint. (CP 0004-0010) Kirsch's Complaint asserted a single cause of action seeking to Quiet Title against a lien of the DOT encumbering his Property and the only damages pled by Kirsch were for attorney fees and costs. (CP 0004-0009) On January 25, 2012, Kirsch filed his "Amended Complaint to Quiet Title and for Declaratory Relief." The single cause of

action and relief sought in his Amended Complaint remained the same. (CP 0210-0216) On April 13, 2013, Kirsch filed his “Second Amended Complaint to Quiet Title and for Declaratory Relief” (“Second Amended Complaint”). Again, the single cause of action and only relief pled remained the same in his Second Amended Complaint. (CP 0053-0059)

On April 23, 2012, Cranberry Financial filed its Answer to Kirsch’s Second Amended Complaint that included a counterclaim for breach of Guaranty. (CP 0217-0225) On July 3, 2012, Kirsch Answered Cranberry Financial’s counterclaim. The only damages pled in Kirsch’s Answer were for attorney fees and costs. (CP 0235-0238)

F. Kirsch Moves for Summary Judgment and It is Granted in Part

On May 17, 2012, Kirsch moved for summary judgment arguing that Cranberry Financial was barred from enforcing the Note against the maker, Channel and/or against Kirsch, the guarantor, pursuant to R.C.W. § 4.16.040's six-year statute of limitations. Kirsch sought, by virtue of that alleged bar, an order quieting title against the lien of the DOT pursuant to R.C.W. § 7.28.300, securing the Guaranty and the loan to Channel. (CP 0227-0234)

On June 22, 2012, the trial court ruled that annual installment payments under the Note for the years 2001-2005 were barred by R.C.W.

§ 4.16.040's six-year statute of limitations, but not annual installment payments under the Note for the years 2006 and thereafter.¹ The Court further ruled that the allegation of acceleration in the 2004 lawsuit, dismissed for want of prosecution, did not result in an acceleration of the Note.² Since annual installment payments under the Note for the years 2006 forward were not barred by the statute of limitations, the Court denied Kirsch's attempt to quiet title against the lien of the DOT.³ (CP 239-0242)

G. The Trial Court Granted Cranberry Financial's Summary Judgment Motion

In January 2013, Cranberry Financial moved for summary judgment against Kirsch on its counterclaim for breach of the Guaranty. (CP 0247-0248) On February 8, 2013, the trial court granted Cranberry Financial's Motion for Summary Judgment and judgment was entered

¹ Cranberry Financial acknowledged that the annual installment payments due under the Note for the years 2001-2005 were barred by R.C.W. § 4.16.040, as beyond the six-year statute of limitations. (CP 0240)

² Kirsch moved for reconsideration of that summary judgment order, and the trial court upheld its prior ruling. (CP 0244-0246)

³ The Court held that the annual installment payments under the Note for the years 2006 forward were not barred by the statute of limitations, because the statute of limitations ran separately for each annual payment, and thus, the annual payments for the years 2006 forward were not barred by the six-year statute of limitations governing written contracts.

against Kirsch on the Guaranty. (CP 0250-0257) Kirsch appealed that ruling.

H. This Appellate Court Reversed Summary Judgment

On December 23, 2013, this Appellate Court reversed summary judgment in favor of Cranberry Financial finding that it had accelerated the debt in the 2004 lawsuit dismissed for want of prosecution and that such debt was barred by the six-year statute of limitations. This Court remanded the case back to the trial court to reinstate Kirsch's Quiet Title action and awarded Kirsch attorney fees and costs on appeal. (*See*, Appellant's Brief, Appendix A, December 23, 2013 Unpublished Opinion No. 69959-8-1)

I. Kirsch's Second Motion for Summary Judgment

On April 18, 2014, Kirsch filed a second Motion for Summary Judgment for an (a) Order Quieting Title on his **single cause of action**; and (b) for an award of attorney fees and costs as the prevailing party in the lawsuit under the loan documents. (CP 0143-0144) On May 30, 2014, the Order Quieting Title on Kirsch's **single cause of action** to Quiet Title against the lien of the DOT encumbering Kirsch's Property was entered by agreement of counsel, and the DOT on Kirsch's Property was removed. (CP 0145-0147) On June 30, 2014, Cranberry Financial's right to appeal the Order Quieting Title on Kirsch's single cause of action ran.

J. Kirsch Was Declared the Prevailing Party in the Lawsuit and Awarded His Attorney Fees and Costs

On June 20, 2014, Kirsch, having already prevailed on his Motion for Summary Judgment on his only cause of action, was declared the prevailing party in the lawsuit. (CP 0260) A Judgment was entered at that time awarding Kirsch his attorney fees and costs at the trial court level in the amount of \$27,325.00. (CP 0261-0263) On July 21, 2014, Cranberry Financial's right to appeal the Judgment awarding Kirsch his attorney fees and costs as the prevailing party also ran.

K. Cranberry Financial Paid the Judgments and Satisfactions of Judgment Were Entered

On September 3, 2014, both the Judgments for attorney fees and costs awarded as the prevailing party and on appeal were paid in full by Cranberry Financial. On November 13, 2014, the Satisfaction of Judgment for attorney fees and costs awarded to Kirsch as the prevailing party in the litigation was filed. (CP 0264-0267) On November 21, 2014, the Satisfaction of Judgment for attorney fees and costs awarded to Kirsch on appeal was filed. (CP 0268-0269)

L. After the Case Was Over and Cranberry Financial's Appeal Deadlines Had Run, Kirsch Moved to Amend His Complaint

On November 26, 2014, nearly three-years after Kirsch filed his initial Complaint, Kirsch filed a Motion to Amend his Complaint for a

third time to assert five new tort and contract theories of recovery and allege additional damages of \$73,984.58, based on a theory that he was forced to make mortgage payments on his Property secured by the DOT.⁴ Kirsch again sought attorney fees and costs under the same loan documents. Kirsch's basis for the third amendment after the lawsuit was over is that counsel did "not clearly outline the claim for damages" and "damages remained ongoing." (CP 0148-0150)

M. The Trial Court Denied Kirsch's Motion to Amend His Complaint On the Grounds the Lawsuit Was Over

Cranberry Financial opposed Kirsch's motion to amend his Complaint for three separate reasons. First, because the litigation had concluded in May 2014 when the Order Quietening Title was entered on Kirsch's only cause of action (leaving only the issue of attorney fees), the case was over and the Complaint could not be amended. Second, because the litigation had concluded, the trial court could not even entertain Kirsch's Motion to Amend his Complaint until he first filed a Motion to Vacate the Order and Judgment under Civil Rule 60(b). (CP 0168-0183) And, finally, even assuming, *arguendo*, Kirsch could somehow overcome these two barriers, Kirsch's Motion should be denied under Civil Rule 15

⁴ The five additional theories of recovery are failure to reconvey, slander of title, consumer protection, lack of good faith, breach of contract and attorney fees and costs.

because Cranberry Financial would be extremely prejudiced by five new tort and contract theories of recovery and over \$70,000.00 in additional damages arising from the same transaction alleged in Kirsch's first Complaint, which had been filed almost four-years previously and litigated for almost two-and-a-half years. (CP 0168-0183)

On January 16, 2015, following oral argument, the trial court correctly denied Kirsch's Motion to Amend his Complaint because the case "was resolved as to all claims in the Second Amended Complaint by the Order of March [*sic*] 30, 2014, and the judgment was final as of that date."⁵ (CP 0202-0203, 0270) In that regard, the trial court correctly held that Kirsch could not amend his Complaint for a third time because the case had concluded when the May 31, 2014 Order Quietening Title was entered (and subsequent June 20, 2014 money Judgment for attorney fees and costs), thereby resolving the single cause of action pled by Kirsch in his Second Amended Complaint. Because of that, there was no complaint left to be amended – *i.e.*, Kirsch could not amend a complaint in a case that was over. (RP, January 16, 2015 Hearing, at 17 // 21-25; 18 // 1-4, 12-25; 19 // 1-25; 20 // 1-14; 21 // 3-9) Kirsch appealed. (CP 0204)

⁵ The Order Quietening Title was actually dated May 30, 2014, not March 30, 2014, as the trial court incorrectly transcribed. (CP 0145-0147)

The trial court, having found that Kirsch could not amend his Complaint because the case had concluded, did not address Cranberry Financial's additional arguments under Civil Rule 60(b) and prejudice pursuant to Civil Rule 15. (CP 0202-0203, 0270) These two alternative grounds are also addressed below and provide an additional basis for this Court to uphold the trial court's Order denying Kirsch's Motion to Amend his Complaint. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) (quoting Hadley v. Cowan, 60 Wn.App. 433, 444, 804 P.2d 1271 (Div. I 1991)) (an appellate court may uphold the trial court's ruling on appeal "on any basis supported by the record"); La Mon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), cert. denied, 493 U.S. 814, 110 S.Ct. 61 (1989) ("an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it") (citation omitted)

IV. ARGUMENT

A. Standard of Review

The appellate court reviews a trial court's ruling on a Civil Rule 60(b) motion for relief from judgment for abuse of discretion. Rapid Settlements, Ltd. v. Symetra Life Insur. Co., 166 Wn.App. 683, 690, 271 P.3d 925 (Div. III 2012) (citing Vance v. Offices of Thurston County

Comm'rs, 117 Wn.App. 660, 671, 71 P.3d 680 (2003)). The trial court's ruling on a Civil Rule 60(b) motion will not be overturned unless the court abused its discretion on untenable grounds or for untenable reasons. In re Dependency of J.M.R., 160 Wn.App. 929, 938 FN4, 249 P.3d 193 (Div. I 2011), *review granted in part*, 172 Wn.2d 1017, 262 P.3d 64 (2011).

“The standard of review of a trial court's denial of a motion to amend a pleading is ‘manifest abuse of discretion.’” Herron v. Tribune Pub. Co., Inc., 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citing Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wn.2d 878, 888, 719 P.2d 120 (1986); Caruso v. Local Union 690 of Int'l Bhd. Of Teamsters, 100 Wn.2d 343, 351, 670 P.2d 240 (1983)). “An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.” Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

A decision is “manifestly unreasonable” if the court adopts a view that no other reasonable person would take despite applying the correct legal standard to the supported facts. State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990). A decision is based “‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rohrich,

149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)).

B. The Trial Court Correctly Ruled That Kirsch Could Not Amend His Complaint After the Case Concluded.

A judgement is defined as “the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.” Civil Rule 54(a). Judgments include money judgments. R.C.W. § 4.64.030.

The litigation is concluded upon entry of a final judgment or order that leaves “nothing for the court to do but execute the judgment.” Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wn.App. 221, 225, 901 P.2d 1060 (Div. II 1995), affirmed, 130 Wn.2d 862, 929 P.2d 379 (1996); see also, Greenlaw v. Smith, 67 Wn.App. 755, 759, 840 P.2d 223 (Div. II 1992), reversed on other grounds, 123 Wn.2d 593, 869 P.2d 1024 (1994); In re Peterson, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999); Rhodes v. D & D Enterprises, Inc., 16 Wn.App. 175, 178, 554 P.2d 390 (Div. I 1976) (final judgment settles all issues in a case); Purse Seine Vessel Owners Ass’n v. State, 92 Wn.App. 381, 387, 966

P.2d 928 (Div. II 1998) (a judgment is final “if it concludes the action by resolving the plaintiff’s entitlement to the requested relief”).⁶

In that regard, the judgment replaces the claim sued upon; the claim is established and merged with the judgment. Currier v. Perry, 181 Wn. 565, 569, 44 P.2d 184 (1935); see also Baskin v. Livers, 181 Wn. 370, 374, 43 P.2d 42 (1935). The judgment is the final determination of all issues presented and decided in the action; and includes all other matters and issues which belonged to the subject matter of the lawsuit and could have been asserted in the action. Id. As noted by the trial court, none of Kirsch’s briefing, including this Appellate Brief, addresses the line of cases upon which the trial court based its decision. (RP, January 16, 2015 Hearing, at pp. 17 // 21-25; 18 // 1-4)

Entry of judgment also triggers the thirty (30) day deadline for filing an appeal of the judgment or order. RAP 5.2 (notice of appeal must be filed within thirty (30) days after entry of judgment); see also, RAP 2.2 (a final judgment or order is appealable). The thirty (30) day deadline for filing an appeal begins even if the issue of attorney fees are reserved for future determination. RAP 2.2(a)(1); see also Wlasiuk v. Whirlpool Corp.,

⁶ Contrary to Kirsch’s suggestion, this is the standard for determining whether a judgment is “final,” not whether it is actually titled “final judgment,” as Kirsch would suggest. (Appellant’s Brief, at p. 19)

76 Wn.App. 250, 253-58, 884 P.2d 13 (Div. I 1994) (the judgment is final and appealable, even if the issue of attorney fees to be awarded to the prevailing party remains). If not appealed within thirty (30) days, the judgment or order directly precludes all further proceedings in that matter. Rose ex rel. Estate of Rose v. Fritz, 104 Wn.App. 116, 121, 15 P.3d 1062 (Div. II 2001).

In January 2012, nearly four-years ago, Kirsch filed this action asserting a single cause of action to Quiet Title against a lien of a DOT encumbering his Property and seeking attorney fees and costs under the terms of the loan documents. (CP 0004-0010) Kirsch then amended his Complaint twice, again asserting a single cause of action to Quiet Title and seeking only attorney fees and costs.⁷ (CP 0053-0059, 0210-0216)

Over the next two-and-a-half years, the parties litigated that single cause of action. The litigation included three complaints, a counterclaim, three summary judgment motions, a motion for reconsideration, numerous hearings, an appeal, a motion to enforce a settlement agreement,⁸ and a

⁷ In all three Complaints Kirsch sought declaratory relief to Quiet Title and for attorney fees and costs. (CP 0004-0010, 0053-0059, 0210-0216) The trial court noted in oral argument that Kirsch's declaratory relief claim was to Quiet Title against the lien of the DOT and for attorney fees and costs, the same as his Quiet Title Claim. (RP, January 16, 2015 Hearing, at p. 16 // 4-11)

⁸ In February 2014, Cranberry Financial attempted to enforce a settlement reached in which Cranberry Financial would release the lien of the DOT and pay Kirsch's attorney

motion for attorney fees and costs, among other matters. (CP 0053-0059, 0080-0081, 0143-0144, 0210-0225, 0227-0234, 0244-0248; Appellant's Brief, Appendix A, December 23, 2013 Unpublished Opinion)

On May 31, 2014, the litigation concluded when the Order Quietening Title was signed and entered by the Court. (CP 0145-0147; see also Anderson, 79 Wn.App. at 225 (the litigation is concluded upon the entry of a final judgment or order that leaves "nothing for the court to do but execute the judgment"). The Order concluded the action; including all other matters or issues which belonged to the subject matter of the lawsuit and could have been asserted in the action. Currier, 181 Wn. 565, at 569; see also Baskin, 181 Wn. at 374.

In that regard, Kirsch misses the point when he claims the Order Quietening Title "deals only with the quiet title cause of action;" "[t]here was no language in the order cutting off the claim, or dismissing the case;" and "[r]esolution of the quiet title claim does not bar the resolution of other claims." (Appellant's Brief at pp. 19-20) **The only cause of action asserted by Kirsch in the lawsuit was a cause of action to Quiet Title on the DOT.** (CP 0053-0059, 0210-0216) That claim was fully resolved

fees at the appellate court level in exchange for a mutual release and Kirsch's waiver of attorney fees at the trial court level. (CP 0083-0095) The trial court denied the motion on the grounds that the parties were still negotiating the terms of the deal. (RP, March 28, 2014, at pp. 16 // 16-24; 17 // 6-17)

by the May 31, 2014 Order Quietening Title. Kirsch's counsel acknowledged this at the hearing on his Motion to Amend his Complaint – *i.e.*, that the Order Quietening Title resolved the only claim pled by Kirsch:

THE COURT: What issue that was pled was not determined?

MR. LONG: There - - well, you mean - -

THE COURT: What issue that had been pleaded in this complaint or the first amended or the second amended complaint, which of those issues that was pleaded there was not resolved?

MR. LONG: Well, I suppose you could argue declaratory relief amount, **although we got the relief we requested, I mean, in terms of the quiet judgment**, quiet - -

(RP, January 16, 2015 Hearing, at p. 17 // 11-20) (emphasis added)

Simply stated, after the Order Quietening Title was entered, there was nothing left to litigate, as Kirsch had prevailed on his only cause action, leaving only the issue of whether Kirsch was entitled to attorney fees and costs as the prevailing party. RAP 2.2(a)(1) (party may appeal from a judgment regardless of whether the issue of attorney fees is reserved for future determination).

On June 20, 2014, Kirsch was declared the prevailing party under the loan documents and was awarded his attorney fees and costs in the form of a money Judgment – the only relief he had pled. (CP 0260-0263) On June 30, 2014 (thirty-days after the Order Quietening Title was signed)

and July 20, 2014 (thirty-days after the money Judgment was signed), Cranberry Financial's appeal rights expired. RAP 5.2; see also, RAP 2.2. On September 3, 2014, Cranberry Financial satisfied the money Judgments for attorney fees and costs awarded on appeal and at the trial court level.⁹ (CP 0264-0269)

Consequently, the trial court correctly ruled that Kirsch could not amend his Complaint for a third time because the case had concluded when the May 31, 2014 Order Quieting Title was entered (and subsequent June 20, 2014 money Judgment for attorney fees and costs), resolving the single cause of action and relief pled by Kirsch, and because of that, there was no complaint left to be amended:

THE COURT: I think that's the crux of the matter here. I looked at the cases cited by Mr. Cunningham. There are a bunch of them which have not been distinguished here that say when a case goes to final judgment, a lot of them are about when can you appeal, but there are a number of them that say once a case goes to final judgment, which means there's nothing left to do but execute on the judgment, that the case is complete, and it's subject to appeal, and it's for all intents and purposes finished.

* * *

What I think I have to do then is look at this order that ended this [May 30, 2014 Order Quieting Title in Plaintiff],

⁹ Cranberry Financial satisfied the money Judgments on September 3, 2014. However, Kirsch did not file the Satisfactions of Judgment until November 13, 2014 and November 21, 2014. (CP 0264-0269)

allegedly ended this case, and I find the following language significant. It talks about how on July 27, 2013, the Court granted partial summary judgment, so those issues of quiet title issues except as to payments under the note for 2006 to present. That's what is appealed.

The Court of appeals said, no, those are gone, too. They cannot - - Cranberry can't collect on those, and the order then says Court hereby grants judgment to Guarantor Kirsch and dismisses with prejudice the counterclaims of Cranberry against Guarantor Kirsch, denies Cranberry any relief, and quiets title to the property, which is what was pled for, against the claims of Cranberry and/or any entity from which it received or claims to have received, any security position.

It is further ordered that upon filing this order with the Whatcom County Auditor's deed of trust, then there's numbers there that specify, are extinguished and expunged as liens against the title as legally described in the complaint therein.

I don't know what is left in that case once that is done, because at the time of the second amended complaint, the cause of action was quiet title or declaratory relief that the property belongs to Mr. Kirsch, and I look at that line of cases, and maybe I'm misreading them, but when I look at that line of cases, it sounds to me that those, that which was plead is final. We have a final judgment on that, either the partial summary judgment this Court granted, but the summary judgment is the equivalent of a judgment. I don't that's any different than a jury trial in terms of the outcome, and the court of appeals has decided the other issue and said that's done, too. There can be no claim by Cranberry.

So if the cases that say that that ends a case are still good law, and they appear to be, that would also preclude any other claims that could have been pleaded, and these could have been pleaded at the time of the second amended complaint in 2012. They could have been added. They weren't. I think they're foreclosed, and I know it's difficult

for Mr. Kirsch. It's harsh. It is a Catch .22, but claim preclusion can produce that.

The cases that involve claim preclusion say if you didn't file it, you didn't bring in a claim, and you litigated the rest of it, you lose that claim. You can't bring it in later, and I think that's what we've got.

I don't think this is really a matter of amending the complaint. It's a matter of whether or not there's a complaint still alive to amend.

So I'm going to deny the motion because I think it is a final judgment based on the language in that document [May 30, 2014 Order Quietening Title in Plaintiff], and the intent, everybody considered it was a final judgment other than Mr. Kirsch at this point.

* * *

THE COURT: What I've written in here is versus plaintiff is denied leave to file the third amended complaint attached to this motion, this cause of action was resolved as to all claims in the second amended complaint by the order of March 30, 2014 [sic], and the judgment was final as of that date. That's your finding. I think that's consistent with the court rule.

(RP, January 16, 2015 Hearing, at 17 // 21-25; 18 // 1-4, 12-25; 19 // 1-25; 20 // 1-14; 21 // 3-9) (emphasis added)

Allowing Kirsch to amend his Complaint six-months after the litigation had concluded would create extremely dangerous precedent for several reasons. First, allowing Kirsch to amend his Complaint without first vacating the Order and Judgment under Civil Rule 60 (as discussed below), would undermine the policy supporting finality in litigation

because parties could conduct piecemeal litigation, periodically moving to amend a complaint to assert new causes of action after initial claims were adjudicated. Second, the statutes of limitation would have no meaning if a party could assert additional causes of action based on the same transaction that the parties finished litigating.¹⁰

Third, such precedent would allow Kirsch to escape *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion). Upon entry of the Order and Judgment, all claims and defenses merge with the judgment, and *res judicata* “bars relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” Pederson v. Potter, 103 Wn.App. 62, 69, 11 P.3d 833 (Div. III 2000). Similarly, *collateral estoppel* prevents relitigation of issues litigated in a prior action. State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn.App. 299, 304, 57 P.3d 300 (Div. III 2000).

Res judicata and *collateral estoppel* are designed to ensure finality and prevent repetitive litigation on the same matters. If Kirsch was permitted to amend his Complaint after this action concluded, he would thwart the preclusive effect that *res judicata* and *collateral estoppel*

¹⁰ Notably, several of the additional causes of action Kirsch sought to assert in his fourth Amended Complaint were tort causes of action likely barred by Washington’s three-year statute of limitations, R.C.W. § 4.16.080, governing torts.

provide Cranberry Financial, prohibiting Kirsch from relitigating five additional theories of recovery that could or might have been litigated in this matter (*res judicata*), including the issues that have previously been litigated in this matter (*collateral estoppel*).

The trial court noted that *res judicata* and *collateral estoppel* may preclude Kirsch from asserting these theories of recovery in a subsequent lawsuit, stating, in pertinent part, that:

There are also cases that say at that point in time, if you did not plead a claim, or if you didn't bring forth a claim you could have brought but didn't, that those are precluded as well, and that's the whole issue of claim preclusion, why you can't split lawsuits and file this one here and then get a result, and file that one there, and then file the next one.

(RP, January 16, 2014 Hearing, at p. 18 // 5-11)

Kirsch appears to argue that the trial court's discussion of *res judicata* and *collateral estoppel* was somehow inappropriate. (Appellant's Brief, at pp. 18-19) However, the trial court denied Kirsch's Motion to Amend because the case was over, not on the grounds of *res judicata* and *collateral estoppel*.¹¹ The trial court simply noted that because these

¹¹ The *U.S. v. Vorachek*, 563 F.2d 884 (8th Cir. 1977) case cited by Kirsch to address *res judicata* and *collateral estoppel* is distinguishable from the present. (Appellant's Brief, at pp 18-19) In that case, the trial court's reasoning for denying the motion to amend was to preserve a possible defense of *res judicata* in a subsequent lawsuit. Here, the trial court just noted that Kirsch's failure to bring these causes of action before this lawsuit ended may preclude him from asserting them in a subsequent lawsuit on the grounds of *res judicata* and *collateral estoppel*.

proposed causes of action relate to the transaction litigated by the parties for the last two-and-a-half years, Kirsch's failure to assert these claims in this lawsuit before it concluded may prevent him from asserting these claims in a subsequent lawsuit on the grounds of *res judicata* and *collateral estoppel*. Presumably, Kirsch's recognition of the preclusive effect of *res judicata* and *collateral estoppel* is the reason he is attempting to amend his Complaint after the litigation has ended rather than bringing a new lawsuit on these claims.

To that end, Kirsch fails to cite a single case or court rule allowing a party to amend a complaint after the litigation has concluded. See e.g., (Appellant's Brief, at pp. 13-15, 17, 20-21 citing Civil Rule 15(c) and (d) (relates to amendments requested while the litigation is occurring, not after the case is over); Ennis v. Ring, 56 Wn.2d 465, 470, 341 P.2d 885 (1959) (amendment allowed after appellate court remanded for new trial); Olson v. Roberts & Schaeffer Co., 25 Wn.App. 225, 228, 607 P.2d 319 (1980) (party sought amendment while the case was proceeding); Herron v. Tribune, 108 Wn.2d 162, 168, 736 P.2d 249 (1987) (same); Walla v. Johnson, 50 Wn.App. 879, 884, 751 P.2d 334 (Div. I 1988) (party sought to amend his pleading three months before trial); Caruso v. Local Union No. 690, 100 Wn.2d 343, 670 P.2d 240 (1983) (party sought amendment during the litigation); Estate of Randmel v. Pounds, 38 Wn.App. 401, 404,

685 P.2d 401 (Div. I 1984) (party sought an amendment to the complaint at the summary judgment hearing); In re Campbell, 19 Wn.2d 300, 142 P.2d 492 (1943) (amendment filed at hearing). These civil rules and cases are irrelevant to this action in which the case concluded; Kirsch was declared the prevailing party; Cranberry Financial did not appeal the Order or Judgment; the Judgment was satisfied; and Kirsch only sought to amend his complaint several months after the case was over.

For similar reasons Tagliani v. Colwell, 10 Wn.App. 227, 10 Wn.App. 227 (Div. III 1973) and Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962), cases cited Kirsch, are distinguishable. (Appellant's Brief, at pp. 20-22)

In Tagliani, the plaintiff filed a motion for leave to amend the complaint after the trial court had orally granted the defendants' motion for summary judgment, but before the order had been entered, dismissing the plaintiff's claim against the original defendants. Tagliani, 10 Wn.App. at 228-29. The trial court reasoned that a pleading could "not be amended after the trial court has orally ruled upon a motion for summary judgment but before the order is entered." Id. at 234. The appellate court reversed, finding this reasoning is in error. Id.

The Forman case involved an action to enforce an alleged oral agreement regarding an inheritance. The district court dismissed the

complaint for failure to state a claim. A day after the judgment was entered, the plaintiff moved to vacate the judgment and amend the complaint to seek recovery in quantum meruit. The district court denied that amendment. Forman, 371 U.S. at 179. The Supreme Court reversed, constructing the motion to vacate as a motion to alter or amend a judgment filed pursuant to Civil Rule 59(e), and holding the district court abused its discretion in denying leave. Id. at 182.

In the present matter, contrary to Tagliani and Forman, not only was Kirsch granted summary judgment, but (a) the Order Quietening Title on Kirsch's single cause of action was entered; (b) Kirsch was declared the prevailing party and a money Judgment was entered; (c) Kirsch did not move to amend, alter or vacate the Order or Judgment; (d) Cranberry Financial satisfied the Judgment; (e) Cranberry Financial's appeal rights ran; and (f) five-months after all of this occurred and the case was over, **for the first time**, Kirsch moved to amend his Complaint. Unlike Tagliani and Forman, in which the cases had not concluded, Kirsch's motion to amend cannot be considered timely under any theory – the case was over.

Equally unavailing is Kirsch's statement that he "sought to supplement the original complaint by clearly setting forth the allegations and causes of action upon which he expected to proceed to trial" and

“[m]onetary damages could not be quantified until quiet title was obtained.” (Appellant’s Brief, at pp. 14-15 and 17)

Kirsch referred to these mortgage payments back in a December 2011 email before the litigation was filed.¹² (CP 0162, at ¶ 2) At that time, Kirsch had in his possession all the facts necessary to plead his tort and contract theories of recovery related to the mortgage payments. White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985) (a cause of action accrues at the time the party knew or should have known of the elements of a cause of action). Kirsch similarly was aware of these facts for the three-years prior to filing his Motion to Amend his Complaint.

Despite that, Kirsch’s Complaint (and Amended Complaints) do not even hint at the contract and tort theories of recovery he sought to add after the case was over. Moreover, damages are often ongoing at the time a claim is filed (*e.g.*, personal injury, breach of contract, employment *etc.*), yet Kirsch never asserted these tort and contract theories of recovery until well after the case was over. Thus, even ignoring the fact that the case

¹² Kirsch’s counsel even referenced these mortgage payments in correspondence on February 3, 2014, but again, never moved to amend the complaint to assert these theories of recovery until almost six-months after the litigation had concluded. (CP 0115, at ¶ 2)

was over when Kirsch moved to Amend his Complaint, it is irrelevant that Kirsch's damages were ongoing under theories he did not plead.

In that regard, the lien of the DOT was the sole subject of the litigation and Kirsch could have asserted these additional theories of recovery (and claimed additional damages) four-years ago by pleading that failure to remove the lien caused him to make mortgage payments that he would not otherwise have made. This information was clearly within Kirsch's knowledge since the beginning of the litigation – *i.e.*, Kirsch was aware he was making mortgage payments on the home; the home had a lien; and the lien on the home was the subject of the litigation.

Kirsch's attempts to assert these theories after the litigation has concluded were too late. Consequently, the trial court did not manifestly abuse its discretion in ruling that Kirsch could not Amend his Complaint for a third time after the case concluded.

C. **Because the Litigation Had Concluded, the Trial Court Could Not Even Consider Kirsch's Motion to Amend His Complaint Until He First Filed a Motion to Vacate the Order Quietening Title and Money Judgment Under Civil Rule 60(b)**

Entry of a judgment triggers the deadline for a motion to vacate the judgment.¹³ Civil Rule 60(b). Civil Rule 60 establishes the procedure for

¹³ The entry of a judgment also triggers the ten (10) day deadline for amending a judgment. Civil Rule 59(h).

obtaining relief from a judgment or order of the court based on eleven (11) different grounds.¹⁴ Id. Judgments are only vacated in exceptional circumstances. Wagers v. Goodwin, 92 Wn.App. 876, 881, 964 P.2d 1214 (Div. II 1998). In that regard, if the judgment is a judgment on the merits, then courts apply a strict standard for vacating under Civil Rule 60(b). Stanley v. Cole, 157 Wn.App. 873, 879, 239 P.3d 611 (Div. I 2010).

Attorney error is not a ground to vacate a judgment. Lane v. Brown & Haley, 81 Wn.App. 102, 107, 912 P.2d 1040 (Div. II 1996), review denied, 129 Wn.2d 1028, 922 P.2d 98 (1996); see also In re Estate of Harford, 86 Wn.App. 259, 936 P.2d 48 (Div. I 1997); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 93 Wn.App. 819, 838, 970 P.2d 803 (Div. I 1999).

Here, the entry of the May 31, 2014 Order Quieting Title and June 20, 2014 money Judgment further triggered the restriction that any further proceedings in the litigation would first require Kirsch to vacate the Order and Judgment under Civil Rule 60. (CP 0145-0147, 0261-0263; Civil Rule 60(b) (the entry of an order or judgment triggers the deadline for a motion to vacate the judgment). Kirsch attempted to circumvent Civil

¹⁴ A motion to vacate under Civil Rule 60 requires: (a) a motion stating the grounds relied upon; (b) declaration setting forth the facts or errors upon which the motion is based; and (c) a hearing on the same.

Rule 60 by seeking to amend his Complaint, for the third time, six-months after the litigation concluded (May 30, 2014) and almost five-months after Cranberry Financial's appeal rights had run (June 30, 2014 on the Order Quieting Title and July 20, 2014 on the money Judgment).

Thus, before the trial Court could even entertain the idea of amending Kirsch's Complaint for the third time, and after the litigation had concluded, Kirsch was first required to file a Motion to Vacate the Order and Judgment under Civil Rule 60(b) relief "from a final judgment, order or proceeding," under one of the eleven enumerated subparts for vacating an order or judgment. State v. Scott, 20 Wn.App. 382, 386, 580 P.2d 1099 (Div. I 1978) (Civil Rule 60 is the exclusive basis for vacating judgments in civil cases).

However, Kirsch never filed a Civil Rule 60 motion to vacate the Order or Judgment.¹⁵ Having failed to do so, Kirsch could not even ask to amend his Complaint because the Order and Judgment had not been vacated and the litigation remained closed. Civil Rule 60(b) ("[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding") Regardless, Civil Rule 60

¹⁵ Notably, Cranberry Financial was not required to guess under which Rule 60(b) subpart Kirsch would move to vacate the Order and Judgment, and therefore, did not prognosticate the same.

bars any attempt by Kirsch to amend his Complaint after the action concluded and attorney error is not a ground to vacate a judgment. Lane, 81 Wn.App. at 107.

For similar reasons, Kirsch's Civil Rule 54(c) argument fails. (Appellant's Brief at pp. 13-14) This rule provides that the court shall grant relief to which the party is *entitled*, even if the party has not demanded the relief in his or her pleadings. This rule is inapplicable because the case is over. Furthermore, Kirsch is not entitled to damages under tort and contract theories that he never pled, proved, argued or sought in the two-and-a-half years of the litigation. Moreover, Kirsch never argued he was entitled to \$70,000.00 in additional damages at the time the Order Quieting Title was entered, nor when he argued and prevailed on his claim for attorney fees and costs as the prevailing party. In addition, Kirsch never filed a Civil Rule 54(c) Motion to demand such additional damages at the time the money Judgment was entered in July 2014, nor did he file a Motion to Alter or Amend the Judgment under Civil Rule 59(h) after its entry.¹⁶

¹⁶ If a party does not file a Civil Rule 59(h) Motion to Alter or Amend the Judgment within the ten (10) day time limit, then "the appropriate device to amend a judgment after the time has elapsed under CR 59(h)" is Civil Rule 60. Seattle-First Nat. Bank Connell Branch v. Treiber, 13 Wn.App. 478, 480-81, 534 P.2d 1376 (Div. III 1975).

Given the foregoing, Kirsch cannot circumvent Civil Rule 60 and amend his Complaint after the litigation has concluded. Cranberry Financial should be allowed to continue its affairs in reliance on the finality of the Order and Judgment, **which it paid in full and ended the litigation**, and avoid the vexation and exhaustion of resources that this repetitive litigation would entail. In recognition that he is barred by Civil Rule 60 from amending his Complaint, Kirsch has not even addressed this issue in his Appellate Brief, or his prior briefing to the trial court.

Therefore, this Court should uphold the trial court's ruling denying Kirsch's Motion to Amend because the litigation had concluded, and the trial court could not even consider Kirsch's Motion to Amend his Complaint until he first filed a Motion to Vacate the Order Quieting Title and money Judgment under Civil Rule 60(b).¹⁷

¹⁷ This Court can uphold the trial court's ruling denying Kirsch's Motion to Amend on this alternative Civil Rule 60(b) ground, as this argument is established by the pleadings and supported by the record before this Court. Burnet, 131 Wn.2d at 493 (quoting Hadley, 60 Wn.App. at 444) (an appellate court may uphold the trial court's ruling on appeal "on any basis supported by the record"); La Mon, 112 Wn.2d at 200-01, cert. denied, 493 U.S. 814 ("an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it") (citation omitted)

D. Assuming, Arguendo, Kirsch Can Somehow Overcome the Fact the Case Had Concluded and He Failed to Vacate the Order and Judgment Under Civil Rule 60(b), Kirsch's Motion to Amend His Complaint Still Fails Because It is Untimely and Prejudicial.

Civil Rule 15(a) governs motions to amend pleadings. A party may amend a complaint once as a matter of course before a responsive pleading is served. Thereafter, the party may amend a complaint only by leave of court. Civil Rule 15(a). Refusal to permit an amendment will not be overturned except for manifest abuse of discretion. Forbus v. Knight, 24 Wn.2d 297, 310, 163 P.2d 822 (1946); see also, Herron, 108 Wn.2d at 165 (citing Del Guzzi Const. Co., Inc., 105 Wn.2d at 888; Caruso, 100 Wn.2d at 351).

A motion to amend a complaint should be denied where the nonmoving party would be prejudiced by allowing the amendment. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); see also, Ives v. Ramsden, 142 Wn.App. 369, 387, 174 P.3d 1231 (Div. II 2008). Prejudice may be demonstrated through undue delay or unfair surprise. Denying a motion to amend a complaint because of undue delay or unfair surprise serves the purpose of Civil Rule 15 – to provide parties with adequate notice of claims and defenses asserted against them. Id. at 505-06. The moving party bears the burden of demonstrating timeliness.

Bunko v. City of Puyallup Civil Service Com'n, 95 Wn.App. 495, 500, 975 P.2d 1055 (Div. II 1999).

Courts routinely deny motions to amend where undue delay prejudices the nonmoving party. See e.g., Wallace v. Lewis County, 134 Wn.App. 1, 25-27, 137 P.3d 101 (Div. II 2006) (denying a motion to amend complaint to assert additional claims eighteen months after action was filed); see also, Del Guzzi Const. Co., Inc., Inc., 105 Wn.2d at 888-89 (denying a motion to amend pleadings a week before summary judgment); Donald B. Murphy Contractors, Inc. v. King County, 112 Wn.App. 192, 199-200, 49 P.3d 912 (Div. I 2002) (denying a motion to amend a year after the litigation was filed and ten (10) days before summary judgment); Tex Enterprises, Inc. vs. Brockway Standard, Inc., 110 Wn.App. 197, 39 P.3d 362 (Div. I 2002), reversed on different grounds, 149 Wn.2d 204, 66 P.3d 625 (2003) (denying motion to amend complaint a week after discovery closed); Forbus, 24 Wn.2d at 310 (denying a motion to amend complaint twenty months after the action was filed); Ensley v. Mollmann, 155 Wn.App. 744, 759, 230 P.3d 599 (Div. I 2010) (denying motion to amend two years after litigation was filed and two weeks before the discovery cutoff).

Even assuming, *arguendo*, Kirsch is somehow able to avoid the fact that the litigation concluded in May 2014 with the filing of the Order

Quieting Title resolving his single cause of action, and the fact that Kirsch cannot even move to amend his Complaint without first vacating the Order and Judgment under Civil Rule 60, Kirsch's motion to amend his Complaint is properly denied under Civil Rule 15 because it was untimely and prejudicial.

Cranberry Financial would be extremely prejudiced if Kirsch was permitted to avoid Civil Rule 60 by amending his complaint to assert five new theories of recovery and over \$70,000.00 in additional damages based on the same transaction that was (a) filed almost four-years ago (January 19, 2012); (b) that was litigated for almost two-and-a-half years (January 19, 2012 to May 30, 2014 with the entry of the Order Quieting Title); and (c) where his Motion to Amend was filed almost six-months after the litigation ended (November 26, 2014) and almost five-months after Cranberry Financial's appeal rights expired (June 30, 2014).

Cranberry Financial litigated this matter for years based on the cause of action and relief represented by Kirsch in his Complaint (and Amended Complaints). Allowing Kirsch to amend his Complaint for a third time conflicts with the central purpose of Civil Rule 15 – to provide each party with adequate notice of claims asserted against them. Wilson, 137 Wn.2d at 505-06.

On January 19, 2012, nearly four-years ago, Kirsch filed this action asserting a single cause of action to Quiet Title against a lien of a DOT encumbering his Property and seeking only attorney fees and costs in relief. (CP 0004-0010) Kirsch amended his Complaint twice, again, asserting **only the single cause of action to Quiet Title** and seeking **only** attorney fees and costs in relief. (CP 0053-0059, 0210-0216)

For the next two-and-a-half years, the parties litigated that cause of action. In May 2014, the litigation concluded when the Order Quieting Title was signed and entered by the Court resolving Kirsch's sole cause of action. (CP 0145-0147) In June 2014, Kirsch was declared the prevailing party and awarded his attorney fees and costs, which was the relief Kirsch sought. (CP 0260-0262) Thereafter, Cranberry Financial's appeal rights expired, and recognizing that the matter concluded, Cranberry Financial satisfied the money Judgments (at the trial court level and appellate court level) for attorney fees and costs awarded to Kirsch. (CP 0264-0269)

After pleadings are closed, Civil Rule 15 allows a complaint to be amended only by leave of court when "justice so requires" and not when the opposing party will suffer prejudice. Civil Rule 15(a). Here, for a multitude of reasons Cranberry Financial would be greatly prejudiced if an amendment to Kirsch's Complaint was allowed for a third time after this matter had concluded.

First, Cranberry Financial would be prejudiced because this matter is over. There is not a single case in Washington that has permitted a party to avoid Civil Rule 60 and amend a complaint to assert new theories of recovery months after the litigation has concluded. Kirsch has failed to cite a single case in any of his briefing, including his Appellate Brief, which contemplates a motion to amend after the litigation has concluded. It stands to reason that Kirsch would not have asserted these additional causes of action if he had lost. Permitting an amendment after the litigation has concluded would set a dangerous precedent of allowing a party too piecemeal out causes of action as they see fit, to see if they obtain favorable results first.

What Kirsch is attempting to do here is equivalent to a party in a personal injury case seeking additional types of damages following a favorable verdict at trial. Here, Kirsch prevailed at summary judgment on his only cause of action (same result as prevailing at trial) and was awarded attorney fees and costs as the prevailing party in the litigation (which Cranberry Financial paid). Having liked the result, Kirsch then attempted to allege additional theories of recovery based on the same transaction the parties began litigating almost four-years ago. Simply stated, there is no difference between what Kirsch is attempting to do here

and a party seeking additional damages or alleging new theories of recovery after a favorable verdict at trial.

Second, allowing Kirsch to assert theories and to request over \$70,000.00 in additional damages carries with it a level of potential liability that would be prejudicial and unfair for Cranberry Financial to have to defend against after the matter has already concluded. Cranberry Financial did not conduct discovery for, argue or defend against such allegations or causes of action during the two-and-a-half years the litigation proceeded. In that regard, Cranberry Financial has fundamental right to an even playing field, fair notice of Kirsch's claims, and a full and fair opportunity to defend itself.

To allow such amendment at this time after the litigation has concluded would deprive Cranberry Financial of all such rights, completely change the nature of its liability, and would greatly prejudice and disadvantage it. Had Kirsch asserted these causes of action four-years ago and alleged over \$70,000.00 in additional damages, Cranberry Financial would likely have proceeded differently. Not the least of which, extensive discovery would have been required to defend against these tort and contract theories of recovery and internal decisions regarding the totality of the new level of liability asserted may have changed Cranberry Financial's defenses and decision making in the litigation.

To that end, Kirsch's request goes far beyond simply clarifying damages as he claims, but instead, seeks to add five entirely new tort and contract theories of recovery and over \$70,000.00 in damages. At a minimum, new discovery would include the depositions of Kirsch and his ex-wife, Susan Kucera, written discovery, the location and disclosure of lay witnesses, the retention of expert witnesses, significant research, subpoenas and the 30(b)(6) deposition of the companies servicing Kirsch's prior mortgage, and a series of motion practice, including moving for summary judgment, among other discovery. See Oliver v. Flow Intern. Corp., 137 Wn.App. 655, 663, 155 P.3d 140 (Div. I 2007) (“[a] new round of discovery” is adequate prejudice to deny a motion to amend)

This would come on the heels of four-years of Cranberry Financial already litigating this matter on the only cause of action pled by Kirsch. Such result reflects precisely the kind of prejudice that Civil Rule 15 is concerned with. To require Cranberry Financial to repeat four-years of exercises with respect to five entirely new contract and tort theories of recovery would be highly prejudicial, and would set a dangerous precedent going forward.

Along these lines, Kirsch's claim that Cranberry Financial was not prejudiced because it on “notice” of the damages (*i.e.*, mortgage payments) before the litigation commenced, is irrelevant. (Appellant's

Brief, at pp. 15 and 17-18) Although Cranberry Financial did receive a letter in December 2011 that referenced mortgage payments being made by Kirsch and he referenced making such payments in a few pleadings, it is absurd to argue these references put Cranberry Financial on notice that Kirsch would assert five new tort and contract theories of recovery and over \$70,000.00 in additional damages almost six-months after the case was completed and almost three-years after it was filed. Similarly, Kirsch's statement that Cranberry Financial is not prejudiced because "a trial had not even been set," completely misses the point. (Appellant Brief, at pp. 18 and 20) No trial was set because Kirsch prevailed on summary judgment and the Order Quieting Title was filed, ending the case – *i.e.*, there was nothing left to have a trial on.

Furthermore, allowing Kirsch to assert several new theories of recovery after the litigation has concluded would create significant problems with the money Judgment awarded to Kirsch (**and paid by Cranberry Financial**). In June 2014, Kirsch sought and was declared the prevailing party in the litigation at the trial court level and was awarded his attorney fees and costs under the loan documents. (CP 0261-0262) Cranberry Financial did not appeal that decision. Thereafter, recognizing the litigation had concluded, Cranberry Financial satisfied that money Judgment for attorney fees and costs. (CP 0264-0269) If Kirsch was

permitted to amend his Complaint and assert five new theories of recovery after (a) the litigation concluded; (b) the Judgment was entered; and (c) the Judgment was satisfied; Kirsch would be forced to return to Cranberry Financial the \$27,325.00 plus interest it received on the Judgment.

To that end, there is a significant possibility that Cranberry Financial would prevail on some, if not all, of the additional theories of recovery. If that were the case, Cranberry Financial would be declared the prevailing party in the litigation and be entitled to its attorney fees and costs for the entire litigation. Thus, allowing Kirsch to amend his Complaint after he was declared the prevailing party and the money Judgment for attorney fees and costs having been satisfied, creates significant issues for both Parties in the litigation.

Finally, allowing Kirsch to amend his Complaint after the litigation concluded would be unprecedented, prejudicial and inappropriate. Courts consistently deny motions to amend on far shorter time periods than the almost three-years we have here (almost four-years from this appeal). See e.g., Wallace, 134 Wn.App. at 25-27 (denying a motion to amend complaint to assert additional claims eighteen months after action was filed); see also, Del Guzzi Const. Co., Inc., 105 Wn.2d at 888-89 (denying a motion to amend pleadings a week before summary judgment); Donald B. Murphy Contractors, Inc., 112 Wn.App. at 199-200 (denying a motion

to amend a year after the litigation was filed); Forbus, 24 Wn.2d at 310 (denying a motion to amend complaint twenty months after the action was filed); Ensley, 155 Wn.App. at 759 (denying motion to amend two years after litigation was filed).

Given the foregoing, although the trial court did not address prejudice under Civil Rule 15 in its ruling – having found that Kirsch could not amend his Complaint for a third time because the case had concluded – Kirsch’s Motion to Amend his Complaint should be denied not only as untimely, but because Cranberry Financial would be extremely prejudiced if Kirsch was permitted to amend his complaint to assert five new theories of recovery and over \$70,000.00 in additional damages based on the same transaction in which (a) the Complaint was filed almost four-years ago; (b) was litigated by the parties for two-and-a-half years; and (c) where the Motion to Amend was filed almost six-months after the litigation ended. Simply stated, such amendment would be unprecedented, breathtaking in its untimeliness, extremely prejudicial, and disadvantageous to Cranberry Financial.

Cranberry Financial is entitled, at a minimum, to fair notice of Kirsch’s claims, legal representations and an opportunity to defend itself. Thus, Cranberry Financial requests that this Court protect these basic rights, by upholding the trial court’s denial of Kirsch’s Motion to Amend

his Complaint on this alternative ground that it would be prejudiced by allowing the same.¹⁸

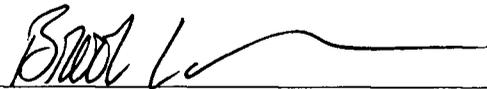
V. ATTORNEY'S FEES

Cranberry Financial requests an award of attorney's fees and costs on appeal pursuant to RAP 18.1 and the attorney's fees and costs provision in the Note. As noted by Kirsch, this is the same Note in which Kirsch was awarded his attorney's fees and costs at the trial court level and on appeal.

VI. CONCLUSION

For the reasons stated above, Cranberry Financial, LLC, respectfully requests that this Appellate Court affirm the trial court's ruling denying Kirsch's Motion to Amend his Complaint and deny Kirsch's request for fees and costs on appeal.

RESPECTFULLY Submitted this 11th day of December, 2015.



BROOK CUNNINGHAM, WSBA #39270
Attorney for Defendant/Respondent
Cranberry Financial, LLC

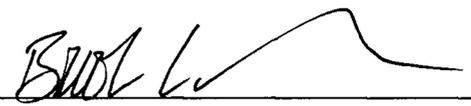
¹⁸ This Court can uphold the trial court's ruling denying Kirsch's Motion to Amend on this alternative prejudice under Civil Rule 15 ground, as there is ample evidence of prejudice established in the pleadings and record before this court. Burnet, 131 Wn.2d at 493 (quoting Hadley, 60 Wn.App. at 444); La Mon, 112 Wn.2d at 200-01, cert. denied, 493 U.S. 814 (citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 11th day of December, 2015, addressed to the following:

K. Garl Long	<input type="checkbox"/>	Hand Delivered
Law Office of K. Garl Long	<input type="checkbox"/>	U.S. Mail
1215 S. 2 nd Street #A	<input checked="" type="checkbox"/>	Overnight Mail
Mount Vernon, WA 98273	<input type="checkbox"/>	Fax Transmission

Timothy G. Krell Real Estate Law	<input type="checkbox"/>	Hand Delivered
301 Prospect Street	<input type="checkbox"/>	U.S. Mail
Bellingham, WA 98225	<input checked="" type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Fax Transmission



Brook L. Cunningham