

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JAMES and DEBORAH SHARBONO,
individually and the marital community
comprised thereof, CASSANDRA
SHARBONO,
Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and
"JANE DOE" VAN DE WEGE,
husband and wife and the marital
community composed thereof,

Appellant,

CLINTON L. TOMYN, individually
and as Personal Representative of the
Estate of CYNTHIA L. TOMYN,
deceased; and as Parent/Guardian of
NATHAN TOMYN, AARON
TOMYN, and CHRISTIAN TOMYN,
minor children,
Respondents/Intervenors.

No: 38425-6-II

**INTERVENOR TOMYNS'
SUPPLEMENTAL
AUTHORITY PURSUANT
TO RAP 10.8**

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DIVISION II
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Intervenors Tomyn provide the following supplemental authority in support of its Joinder and Response to Appellant Universal's Reply to the Sharbonos' Motion to Modify Ruling Denying Motion to Strike Brief of Appellant.

ORIGINAL

The following additional authority is provided pursuant to RAP 10.8, and as further authority in support of Intervenors' Joinder in the Sharbonos' Motion to Modify Ruling Denying Motion to Strike Brief of Appellant Universal Underwriters. ¹

The following supplemental authority is submitted with respect to the following described issue:

1. *Allyn v. Asher*, 132 Wn.App 371, 131 P.3d 339 (2006), on the issue as to whether or not the Court of Appeals has jurisdiction over the trial court's Order Executing on Appeal Bond when such an Order (with the exception of the award of post-judgment interest) was an Order to enforce the Mandate under RAP 12.2;
2. *Bjurstrom v. Campbell*, 27 Wn.App 449, 618 P.2d 33 (1980), on the issue of whether or not the Appellate Court has any jurisdiction over the previously affirmed Judgment when an appeal of a denial of a CR 60 motion only brings up the propriety of the denial of the motion and not the underlying

1

Unfortunately, Intervenors' Joinder in Response to Appellant Universal's Reply to the Sharbonos' Motion to Modify Ruling Denying Motion to Strike Brief of Appellant and Reply was inadvertently mistitled as being Intervenors' Joinder and Response to Appellant Universal's Motion to Modify Ruling Denying Motion to Strike Brief of Appellant and Reply. It is humbly submitted that it should be self-evident that the document was mistitled and the document should most properly be characterized as noted above.

Judgment;

3. *Thomas v. Bremer*, 88 Wn.App 728, 946 P.2d 800 (2997), after a Judgment has been affirmed on appeal, the Superior Court no longer has jurisdiction to consider a CR 60 motion to vacate its own Judgment, citing to *Kath v. Brown*, 53 Wn.App 480, 482-83, 102 P. 424 (1909).

Copies of these above-referenced cases are attached hereto for the Court's convenience.

DATED this 27 day of May, 2009.



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131 P.3d 339
132 Wash.App. 371, 131 P.3d 339
(Cite as: 132 Wash.App. 371, 131 P.3d 339)
▽

Court of Appeals of Washington,
Division 2.

Jill D. ALLYN, individually and as Administrator of the Estate of Joseph Steven Allyn, deceased, and Eric P. Johnson, as
Guardian ad Litem for Joseph Bryce Allyn, a minor, Plaintiffs,

v.

Steven ASHER and Vickie Asher, husband and wife, and the marital community composed thereof, Defendants,
Scott Malfait and Cheryl Malfait, husband and wife, dba Hi-Way Fuel, Third Party Defendants.
Mark S. Farhood, Plaintiff,

v.

Steven Asher and Vickie Asher, husband and wife, and the marital community composed thereof; Jill D. Allyn, individually
and as Administrator of the Estate of Joseph Steven Allyn, deceased, and Eric P. Johnson, as Guardian ad Litem for Joseph
Bryce Allyn, a minor; Scott Malfait and Cheryl Malfait, husband and wife, dba Hi-Way Fuel, Defendants.
Mark S. Farhood, Tee Jay Vaughn, Patricia Vaughn, Trustee of the Vaughn Family Trust, Respondents,

v.

Jill D. Allyn, individually and as administrator of the Estate of Joseph Steven Allyn, deceased, and Eric P. Johnson, as
guardian ad litem for Joseph Bryce Allyn, a minor, Appellants.

No. 33365-1-II.

April 4, 2006.

Background: After the appellate court reversed the trial court's summary judgment in favor of judgment debtor in an unpublished opinion in a quiet title action, ruling that the ex parte prejudgment writ of attachment from which judgment debtor derived its title violated constitutional due process standards, owner of the disputed real property prior to the sale erroneously

ordered by the trial court sought to enforce the appellate mandate by obtaining an order vacating the writ and quieting title in his favor. The Superior Court, Clark County, John Nichols, J., entered the requested order. Judgment debtor appealed.

Holding: The Court of Appeals, Bridgewater, P.J., held that order fulfilling appellate mandate was not appealable. Appeal dismissed.

West Headnotes

Appeal and Error 30 ↩️118

30 Appeal and Error

30III Decisions Reviewable

30III(E) Nature, Scope, and Effect of Decision

30k118 k. In Proceedings After Decision of Appellate Court. Most Cited Cases

Trial court's order voiding sale of real property to satisfy judgment in wrongful death case and quieting title in favor of owner of property prior to sale, following appellate court's reversal of trial court's summary judgment in favor of judgment debtor in quiet title action, was order fulfilling appellate mandate that was not appealable; appellate decision ruling that the ex parte prejudgment writ of attachment from which judgment debtor derived its title violated constitutional due process standards was binding on trial court, and thus judgment debtor was not entitled either to request that order fulfilling appellate mandate not be entered, or to appeal entry of such order. U.S.C.A. Const.Amend. 14; RAP 2.2(a), 12.2.

****339** Ben Shafton, Attorney at Law, Vancouver, WA, for Appellant.

Arnold Joseph Barer, Attorney at Law, Seattle, WA, for Respondent.

BRIDGEWATER, P.J.

372** ¶ 1 Mark Farhood moves to dismiss Jill Allyn's appeal of the trial court's order enforcing this court's mandate in a prior appeal. After a commissioner initially denied his motion, we heard oral argument on his motion under RAP 17.5(b) and 17.7. We hold that RAP 12.2 limits RAP 2.2(a) to prohibit an appeal of an order enforcing mandate because RAP 12.2 makes our earlier decision ***373** binding on the parties and on the trial court unless a postjudgment motion challenges issues not already decided by the *340** appellate court. Here, the issue raised is one we previously decided. We dismiss the appeal.

FACTS

¶ 2 This court summarized the facts underlying the original appeals in its earlier opinion as follows:

On January 22, 1999, Steven Asher lost control of his car, resulting in serious spine, rib, pelvis, and other injuries to him. His passenger, Joseph Allyn, died. Allyn's widow (Allyn) filed a wrongful death action, and the State brought vehicular homicide and vehicular assault charges against Asher.

Upon filing the complaint in March 1999, Allyn obtained an ex parte writ of prejudgment attachment on some of Asher's real property, including three lots in Washougal, Washington. Allyn received the attachment by alleging, "the damages for which the action is brought are for injuries arising from the commission of some felony" under RCW 6.25.030(9). The trial court issued an order to show cause why the attachment should not continue, attached a statement of Asher's right to a hearing, and set a hearing date for April 16, 1999. Asher submitted a written opposition to the attachment. But there is no record presented of that hearing and, as Allyn admits, the trial court did not issue any order or findings afterward.

Asher then negotiated and completed the sale of his three Washougal properties to Farhood during August to September 1999. Farhood learned of the felony-injury attachment and spoke with Asher's criminal defense attorney before purchasing the property.

On May 2, 2000, a jury found Asher not guilty of both vehicular homicide and vehicular assault.

A year later, on May 16, 2001, Farhood attempted to intervene in Allyn's wrongful death suit; he noted that Asher had been acquitted. That trial court denied Farhood's motion to intervene. On August 10, 2001, Farhood then initiated a declaratory judgment action to quiet title. On cross motions for summary judgment, the trial court granted summary judgment in Allyn's favor.

*374 On November 7, 2001, a jury in the wrongful death case found Asher negligent and awarded \$1,001,736.13, including costs. Asher appealed. After Allyn collected payment from Asher's insurance policy, the judgment debt remained at \$545,829.65 as of January 18, 2002.

On February 22, 2002, Allyn began the process to compel a sale of the Washougal properties by obtaining a writ of execution. Allyn took the properties by bidding \$400,000 of the outstanding judgment debt.

Farhood v. Allyn, noted at 118 Wash.App. 1050, 2003 WL 22183939, at *1, 2003 Wash.App. LEXIS 2116, at *2-*4 (footnote omitted). Farhood then appealed "the confirmation of the sale in the wrongful death suit and the ... summary judgment in favor of Allyn in the quiet title action." *Farhood*, 2003 WL 22183939, at *1, 2003 Wash.App. LEXIS 2116, at *2.

¶ 3 During the first appeal, Farhood argued that the ex parte prejudgment writ of attachment was unconstitutional. Allyn responded by asserting that the adversarial hearing took place on April 16, 1999, and cured any error. At the earlier oral argument, Allyn argued extensively exactly what she argues now: that the hearing cured the unconstitutionality of the ex parte writ of attachment. After oral argument, we ordered Allyn to supplement the record by providing all documents relating to that hearing, including any clerk's minutes, any report of proceedings, any trial court briefs, and any orders resulting from the hearing. Allyn provided only an electronic notation that the hearing occurred and a copy of a brief filed in opposition to the ex parte writ; Allyn conceded that the trial court entered no order after this hearing.

¶ 4 Farhood replied by arguing that the adversarial hearing could not cure the unconstitutional nature of the writ of attachment, especially because no order issued from the later hearing. We resolved this issue in Farhood's favor. Although we could tell that some kind of hearing had occurred, there was no record and the trial court did not **341 issue any appealable order as a result of the hearing.

*375 ¶ 5 Our opinion held that the ex parte prejudgment writ of attachment violated constitutional due process standards. We then explained that

the due process violation was complete when Allyn invoked the ex parte attachment. We need not address whether a later hearing could have cured the constitutional problem because there is no record that the hearing took place and no orders were issued from that date from which an appeal could have issued.

Farhood, 2003 WL 22183939, at *3, 2003 Wash.App. LEXIS 2116, at *10. Because there was no appealable order (either continuing the attachment or purporting to cure it), the hearing was irrelevant; Allyn executed on Farhood's property under the unconstitutional temporary ex parte order. Nevertheless, the second sentence of the above quotation is the basis for Allyn's current claim that the trial court was allowed to take post-mandate action other than simply enforcing this court's mandate.

¶ 6 Because this court had held the attachment invalid and because that ex parte attachment was the only basis for Allyn's forced sale of property that belonged to someone other than the judgment debtor, this court reversed both lower court actions:

Because we hold that there was no valid attachment, the sale on writ of execution was improper. The appropriate remedy is nullifying the attachment, and the court should quiet title to the property in Farhood, free and clear of Allyn's interest.

Farhood, 2003 WL 22183939, at *4, 2003 Wash.App. LEXIS 2116, at *11. We held that the unconstitutionality of the original prejudgment attachment was determinative; thus, the later amendment of that writ was irrelevant. *Farhood*, 2003 WL 22183939, at *4 n. 4, 2003 Wash.App. LEXIS 2116 at *11 n. 4. This court then “[r]everse[d] and remanded for orders consistent with this opinion.” *Farhood*, 2003 WL 22183939, at *4, 2003 Wash.App. LEXIS 2116, at *11.

¶ 7 Allyn unsuccessfully moved for reconsideration, arguing the same issue: the effect of the later hearing. She then unsuccessfully petitioned the Washington State Supreme *376 Court for review. We filed the mandate on July 19, 2004. On April 18, 2005, Farhood filed in superior court a “Motion for Judgment on Remand Quieting Title.” Clerk's Papers (CP) at 69-71. By this motion, he sought to enforce this court's mandate by obtaining an order “vacating the writ, setting aside the sale and quieting title in the property to Farhood.” CP at 71.

¶ 8 On approximately May 3, 2005, Allyn filed a “Response to Motion for Judgment on Remand.” Allyn did not file a formal motion for new trial under CR 59 or for relief from judgment under CR 60.

¶ 9 In her “Response,” Allyn objected to the trial court entering Farhood's requested order vacating the writ, voiding the sale, and quieting title in Farhood. She argued that she now had new evidence not part of the earlier appellate record regarding an issue this court had not considered. Specifically, she claimed that she now had proof^{FN1} that there was an adversarial hearing regarding the prejudgment writ on the date scheduled, April 16, 1999. She further claimed that this cured the constitutional violation and made the writ valid from that point forward.

^{FN1}. Allyn still did not provide formal clerk's minutes or a transcript; instead, she provided some informal notes of the courtroom clerk on the docket sheet listing the hearing.

¶ 10 As noted above, after Allyn relied on the effect of this hearing at the previous oral argument on June 23, 2003, we issued an order on June 30, 2003, directing Allyn to supplement the record with all documentation of that hearing by July 25, 2003. Allyn could provide only an electronic notation, and she conceded that the trial court entered no order after this hearing. Allyn provided no clerk's minutes or transcript. Thus, whether this minimal hearing cured the unconstitutional ex parte attachment was both briefed and argued before we issued our previous opinion and mandate.

¶ 11 On May 10, 2005, the trial court entered Farhood's requested order; as required by this court's opinion, the order voided the attachment, set aside the writ of **342 execution, *377 and quieted title in Farhood. The trial court did not file a separate order regarding Allyn's arguments against entry of this order, but it sent a letter to the parties explaining that "[a] clear and precise reading of the Opinion compels me to execute this Order," because "the Writ of Attachment was void at its issuance." Resp't's Motion to Dismiss Appeal, Ex. F. The trial court also noted that whatever happened at the adversarial hearing, "there is no record of any decision following the hearing," which the court believed to be fatal, given this court's opinion. Resp't's Motion to Dismiss Appeal, Ex. F. Allyn filed a notice of appeal to the trial court's order enforcing our mandate; Farhood has moved to dismiss her attempted appeal.

ANALYSIS

¶ 12 The Rules of Appellate Procedure (RAP) "govern proceedings in the ... Court of Appeals for review of a trial court decision." RAP 1.1(a). The Washington State Supreme Court has inherent constitutional authority to promulgate rules governing court procedures and adopted the RAP under that authority. See City of Seattle v. Hesler, 98 Wash.2d 73, 80-81, 653 P.2d 631 (1982). The RAP supersede conflicting statutes unless explicitly noted within the RAP. RAP 1.1(g), (h).

¶ 13 Thus, whether a particular decision is appealable is governed exclusively by the provisions of the RAP. RAP 2.2(a), with certain limits, provides the exclusive list of superior court decisions that may be reviewed as a matter of right (appealed). See also RAP 2.1(a)(1). Allyn is attempting to appeal an order that voids the sale of property to satisfy the judgment in a wrongful death case and that quiets title in a quiet title action. The trial court's order also denies Allyn the ability to present what it claims is additional evidence and additional issues to the trial court. Thus, the trial court's order appears to fall within the following appealable categories of superior court decisions, found in RAP 2.2(a):

*378 (1) *Final judgment*. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

....

(3) *Decision determining action*. Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

....

(13) *Final order after judgment*. Any final order made after judgment which affects a substantial right.

¶ 14 RAP 2.2(a) provides, however, that such superior court decisions are appealable only if not “otherwise prohibited by statute or court rule.” Under the particular facts of this case, RAP 12.2 is a court rule that prohibits the appeal of the order enforcing mandate otherwise appealable under RAP 2.2(a). RAP 12.2 provides, in part, that

[u]pon issuance of the mandate ..., the action taken or decision made by the appellate court is *effective and binding* on the parties to the review and *governs all subsequent proceedings in the action in any court*, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court*.

RAP 12.2 (emphasis added).

¶ 15 Allyn fails to recognize this rule is a limit on the appealability of the order enforcing the mandate in this case. RAP 12.2 is a broad statement of the authority and binding power of the appellate decision. The decision is binding unless the appellate court recalls the mandate or unless the trial court properly makes a new substantive decision and the appellate court changes its view of the law during the second appeal. RAP 2.5(c), 12.2, 12.9.

¶ 16 Significantly, the trial court's authority to take actions not in strict conformance with the appellate decision *379 are limited to post-judgment motions raising issues not already decided by the appellate court. Here, Allyn did not formally file any post-judgment motion, such as a motion for new trial or **343 relief from judgment. Instead, she simply asked the trial court to refuse to enter the order enforcing the mandate in order to preserve the status quo, suggesting that the parties “may” “develop further facts” for a future trial or summary judgment motion.

¶ 17 Further, the issue Allyn raises—the effect, if any, of the adversarial hearing after issuance of the ex parte prejudgment writ—was one we tried to fully consider during the first appeal. From our first opinion it is clear that, out of an abundance of caution and respect for the parties to present a full record supporting their argument, we wanted to review whatever record existed of this purported adversarial hearing. We did not remand to develop the record; rather, we issued a final decision based on the record the parties provided.

¶ 18 But we also held that the “due process violation was complete when Allyn invoked the ex parte attachment” and that the subsequent hearing was irrelevant because of Allyn's stipulation that no appealable order resulted from the hearing, whatever else occurred. *Farhood*, 2003 WL 22183939, at *3, 2003 Wash.App. LEXIS 2116, at *10. Our holding that execution on the writ was impermissible was bolstered by the fact that the temporary ex parte (and unconstitutional) attachment was the one still in effect when Allyn executed on it. Allyn made the same arguments she raises now during the earlier appeal; we simply agreed with Farhood that this particular hearing could not cure the constitutional violation. Thus, the issue Allyn raised in the trial court is one “already decided by the appellate court” under RAP 12.2. RAP 12.2 *380 bars Allyn's attempt to appeal the order enforcing the clear mandate of this court.

¶ 19 The appeal is dismissed.^{FN2}

FN2. Without significant argument, Farhood requests sanctions under RAP 18.9(a). We are sympathetic to a claim

that this appeal merely seeks to delay enforcement of our earlier mandate and increases Farhood's legal expenses. But we cannot say that there were no debatable issues, given that a Division Two commissioner initially denied Farhood's motion to dismiss and given the lack of published post-RAP decisions. See Pearson v. Schubach, 52 Wash.App. 716, 725-26, 763 P.2d 834 (1988), review denied, 112 Wash.2d 1008 (1989).

We concur: HUNT and PENYOYAR, JJ.

Wash.App. Div. 2,2006.

Allyn v. Asher

132 Wash.App. 371, 131 P.3d 339

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Court of Appeals of Washington, Division 3,
Panel 4.

M. O. BJURSTROM, Respondent,

v.

William CAMPBELL, Jr., and Joanne Campbell, husband and wife, Appellants.

No. 3625-III-1.

Oct. 16, 1980.

Purchaser brought action against vendors, alleging that vendors had conveyed real property by warranty deed to purchaser for \$40,000 after falsely representing to purchaser that they owned the land free and clear when in fact they had no interest in the property and it was encumbered with liens and obligations. Following entry of judgment in favor of purchaser, the Superior Court, Spokane County, John J. Ripple, J., denied vendors' motion to vacate judgment, and vendors appealed. The Court of Appeals, McInturff, J., held that: (1) where vendors failed timely to appeal judgment or to proceed under rule allowing extension of time within which to appeal, vendors were barred from arguing, on motion to vacate judgment, that judgment was improperly entered due to lapse of eight years, and (2) interest constituted part of the judgment, and thus vendors were precluded from contending that there was error in allowing interest from date of oral opinion which was rendered in 1970, more than eight years prior to entry of judgment.

Affirmed.

West Headnotes

[1] Judgment 228 ↪377

228 Judgment

228IX Opening or Vacating

228k377 k. Matters Available and Questions Presented Before Judgment. Most Cited Cases

Where purchaser brought action against vendors, alleging that vendors conveyed real property by warranty deed to purchaser for \$40,000 but that vendors had falsely represented that they owned land free and clear when in fact they had no interest in property, where purchaser obtained favorable oral opinion on October 8, 1970 and judgment was entered in favor of purchaser on December 21, 1978, but judgment was not appealed nor did vendors seek extension of time within which to appeal, vendors were precluded from arguing, on motion to vacate judgment, that judgment was improper due to eight-year delay in entry of judgment. CR 60(b); West's RCWA 4.16.020(2), 4.16.040.

[2] Appeal and Error 30 ↪876

30 Appeal and Error

30XVI Review

30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions

30k876 k. On Appeal from Order Enforcing, Vacating, or Modifying, or Refusing to Enforce, Vacate, or Modify Previous Judgment or Order. Most Cited Cases

An appeal from denial of motion to vacate judgment is limited to propriety of denial, not impropriety of the underlying judgment, as the exclusive procedure to attack allegedly defective judgment is by appeal from the judgment, not by appeal from denial of motion to vacate judgment. CR 60(b), (b)(1).

[3] Judgment 228 ↪355

228 Judgment

228IX Opening or Vacating

228k353 Errors and Irregularities

228k355 k. Errors of Law. Most Cited Cases

Mistake of law will not support vacation of judgment. CR 60(b), (b)(1).

[4] Judgment 228 ↪393

228 Judgment

228IX Opening or Vacating

228k393 k. Hearing and Determination. Most Cited Cases

Where purchaser brought action alleging that vendors had conveyed real property by warranty deed to purchaser for \$40,000 but that purchasers had falsely represented that they owned the land free and clear when in fact they had no interest in the property, where purchaser obtained favorable oral opinion on October 8, 1970 and judgment was entered in favor of purchaser on August 10, 1979, and where vendors failed to appeal or to seek extension of time within which to appeal, vendors were precluded from contending, on motion to vacate judgment, that there was an error in allowing interest from date of oral opinion in 1970, as interest constituted part of the judgment and interest portion of judgment embodied that which court

intended. CR 60(b), (b)(1); West's RCWA 4.56.110(2).

*450 **534 Howard K. Michaelsen, Spokane, for appellants.

Thomas H. Brown, Clausen & Brown, Spokane, for respondent.

McINTURFF, Judge.

Mr. and Mrs. Campbell appeal a denial of their CR 60(b)(1) [FN1] motion seeking relief from enforcement of a judgment entered December 21, 1978.

FN1. CR 60(b)(1) provides, in part:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

“(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;”

On March 10, 1969, the Campbells conveyed real property by warranty deed to Mr. Bjurstrom for \$40,000. The Campbells falsely represented they owned the land free and clear. In fact, they had no interest in the property and it was encumbered with liens and obligations.

Mr. Bjurstrom brought an action based upon the fraudulent conveyance and obtained a favorable oral opinion on October 8, 1970. Subsequent to the trial, efforts by the parties to negotiate a settlement were fruitless; but on December 21, 1978, findings of fact, conclusions of law, and judgment were entered. This judgment was not appealed; however, on August 10, 1979, the Campbells filed a CR 60(b)(1) motion to vacate the judgment; it was denied. The Campbells have appealed the denial of this motion.

(1)(2) The threshold issue is whether the Campbells' appeal from probable judicial error is properly taken. An appeal from denial of a CR 60(b) motion is limited to the *451 propriety of the denial not the impropriety of the underlying judgment.[FN2] The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion. De Filippis v. United States, 567 F.2d 341, 342 (7th Cir. 1977).

FN2. Recently in Browder v. Director, Dept. of Corrections, 434 U.S. 257, 263, 98 S.Ct. 556, 560, 54 L.Ed.2d 521, 530, n. 7 (1978), the Supreme Court stated that an appeal from an order denying a Rule 60(b) motion brings up for review only the correctness of that denial and does not bring up for review the final judgment.

(3) Washington has long recognized the principle that a mistake of law will not support vacation of a judgment. In re Estate of LeRoux, 55 Wash.2d 889, 890, 350 P.2d 1001 (1960). In State ex rel. Green v. Superior Court, 58 Wash.2d 162, 164-65, 361 P.2d 643 (1961), the court stated:

If ... the court decided the issue wrongly, the error, if any, may be corrected by that court itself ... or by this court on appeal, but the motion to vacate the judgment is not a substitute.

Very early in the history of this court in Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182, it was decided that errors of law could not be corrected on a motion to vacate a judgment.... More recently, in Kern v. Kern, 28 Wn.(2d) 617, 183 P. (2d) 811, the following statement of the rule in 1 Black on Judgments (2d ed.) 506, s 329, was approved:

“ ‘The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the ****535** case, but it is no ground for setting aside the judgment on motion.’ ” ([FN3])

FN3. Accord, In re Ellern, 23 Wash.2d 219, 222, 160 P.2d 639 (1945); In re Estate of Jones, 116 Wash. 424, 428, 199 P. 734 (1921); McInnes v. Sutton, 35 Wash. 384, 390, 77 P. 736 (1904); Kuhn v. Mason, *supra* 24 Wash. at 100-01, 64 P. 182; Swartz & Assoc. v. Logan, 12 Wash.App. 360, 363, 529 P.2d 1121 (1974).

***452** Federal cases have also dealt with the issue of whether relief from judicial error is within the scope or purview of Fed.R.Civ.P. 60(b)(1). In Silk v. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir. 1971), cert. denied 402 U.S. 1012, 91 S.Ct. 2189, 29 L.Ed.2d 435 (1971), the court stated:

If the court merely wrongly decides a point of law, that is not “inadvertence, surprise, or excusable neglect.” Moreover, these words, in the context of the rule, seem addressed to some special situations justifying extraordinary relief. Plaintiff’s motion is based on the broad ground that the court made an erroneous ruling, not that mistake was attributable to special circumstances. ([FN4])

FN4. See also Chicago & E. Ill. R.R. v. Illinois Cent. R.R., 261 F.Supp. 289 (N.D.Ill.1966); Swam v. United States, 327 F.2d 431 (7th Cir. 1964), cert. denied 379 U.S. 852, 85 S.Ct. 98, 13 L.Ed.2d 55 (1964); Hartman v. Lauchli, 304 F.2d 431 (8th Cir. 1962); cf. Oliver v. Home Indem. Co., 470 F.2d 329 (5th Cir. 1972); Rocky Mountain Tool & Mach. Co. v. Tecon Corp., 371 F.2d 589 (10th Cir. 1966); Gila River Ranch, Inc. v. United States, 368 F.2d 354 (9th Cir. 1966).

Essentially, the Campbells contend the judgment was improperly entered due to a lapse of 8 years; however, they did not seek timely review of that judgment.RAP 5.2(a).CR 60(b) is not a substitute for appeal. Martella v. Marine Cooks & Stewards Union, 448 F.2d 729 (9th Cir. 1971).

Additionally, the Campbells, by motion under RAP 18.8(b) have neither sought extension of the time period for filing a notice of appeal from the original judgment, nor shown extraordinary circumstances to warrant favorable disposition of such motion, should one have been made. See Jones v. Canyon Ranch Assoc., 19 Wash.App. 271, 274, 574 P.2d 1216 (1978). Since the Campbells failed to timely appeal the judgment or to proceed under RAP 18.8(b) for an extension of time within which to

appeal, the judgment must stand.

(4) The Campbells also contend there was an error in allowing interest from the date of the oral opinion in 1970. Based upon the foregoing rationale we find the contention is not well taken. The interest constituted part of the judgment.*453 That a judgment is erroneous as a matter of law [FN5] is ground for appeal, but not ground for setting aside a judgment on motion.

FN5. We note that RCW 4.56.110(2) states in part that “judgments shall bear ... interest ... from the date of entry thereof ...”

In Morgan Guaranty Trust Co. v. Third Nat'l Bank, 545 F.2d 758 (1st Cir. 1976), the court was faced with a situation similar to the instant case. There an appeal was taken from a denial of a Fed.R.Civ.P. 60(a) motion which contested the calculation of interest in a judgment. The court discussed the limitations of Fed.R.Civ.P. 60(a) to correcting clerical mistakes and determined the court's calculations were the result of deliberate choice, not oversight, therefore beyond the purview of Rule 60(a). [FN6] Additionally, the court noted that Rule 60(b) was not applicable since “the court merely wrongly decided a point of law ...” Morgan Guaranty Trust Co., supra at 760.

FN6. CR 60(a) and (b)(1) are similar in wording to Fed.R.Civ.P. 60(a) and (b) (1).

In Marchel v. Bunger, 13 Wash.App. 81, 84, 533 P.2d 406 (1975), we stated a judicial error involves an issue of substance; whereas, a clerical error involves a mere technical mistake. In the present case, the Campbells request relief involving an issue of substance before the court. The judgment stated in part:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff is awarded judgment against William Campbell Jr. in the amount of \$40,000.00 plus statutory interest from October 8, 1970.

DONE IN OPEN COURT this 21 day of December 1978.

****536** The trial judge in his own hand purposefully changed the interest accrual date from August 10 to October 8 (the date of the oral judgment). We find no oversight and must assume the court intended that to be the judgment. Hence, we find the judgment embodies that which the court intended and the proper procedure for relief is through ***454** appeal. [FN7] CR 60(b) provides extraordinary relief only on a showing of exceptional circumstances. None was shown here. [FN8]

FN7. Although we do not consider it material to the decision in this case, the Campbells contend the 8-year delay in entry of judgment is in derogation of the 6-year limitation on enforcement of judgments under RCW 4.16.040. Although conceding the 6-year limitation commences to run upon entry of final judgment, the Campbells argue, under public policy, a party should not have a judgment “hanging over his head” indefinitely. We answer this contention by noting recent legislative action which has extended the period for commencement of an action upon a judgment from 6 years to 10 years. See RCW 4.16.020(2). (1980 legislative session c.105 s 1) Thus, the public policy, as declared by this new enactment, would have encompassed the 8-year delay in the present case.

FN8. Even if CR 60(b) is applicable, a serious issue would arise whether the present motion was made within a

“reasonable time” as contemplated by the rule. If the rule is not intended as a substitute for a timely appeal from judgment, the time for filing the motion should not exceed the time allowed to appeal. Several federal courts have decided, pursuant to Rule 60(b)(1) that a “reasonable time” is that time not exceeding the time for appeal. Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969); Hoffman v. Celebrezze, 405 F.2d 833, 836 (8th Cir. 1969); Gila River Ranch v. United States, 368 F.2d 354 (9th Cir. 1966); Stewart Securities Corp. v. Guaranty Trust Co., 71 F.R.D. 32 (W.D.Okl.1976); Weiner v. Sherburne, 57 F.R.D. 636 (D.Vt.1972). See also 7 J. Moore's Fed.Prac. s 60.22 (2d ed. 1980).

The judgment of the superior court is affirmed.

GREEN, C. J., and ROE, J., concur.

Wash.App., 1980.

Bjurstrom v. Campbell

27 Wash.App. 449, 618 P.2d 533

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88 Wash.App. 728, 946 P.2d 800

(Cite as: **88 Wash.App. 728, 946 P.2d 800**)

H

Court of Appeals of Washington,
Division 3.

Frank THOMAS and Dorothy Thomas, husband and wife, Appellants,

v.

G.A. BREMER and Elva Bremer, husband and wife, and County of Chelan, a
municipality, Respondents.

No. 14974-9-III.

Nov. 13, 1997.

Reconsideration Denied Dec. 18, 1997.

Purported owner of land sued second purported owner, to quiet title. The Superior Court, Chelan County, John E. Bridges, J., quieted title in second purported owner, and dismissed first purported owner's adverse possession claim. First purported owner appealed. The Court of Appeals, Schultheis, J., held that: (1) action which quieted title to quarter section underlying disputed nine acres, quieted title to the nine acres, and (2) purported owner did not establish ownership by adverse possession.

Affirmed.

West Headnotes

[1] Quieting Title 52

318k52 Most Cited Cases

Action which quieted title to quarter section underlying disputed nine acres, quieted title to the nine acres.

[2] Judgment  **382**

228k382 Most Cited Cases

Stranger to proceeding cannot ask court to vacate its final judgment. CR 60(b).

[3] Judgment  **340**

228k340 Most Cited Cases

Superior court no longer has jurisdiction to consider motion to vacate its own judgment, after judgment has been affirmed on appeal. CR 60.

[4] Adverse Possession  **36**

20k36 Most Cited Cases

[4] Adverse Possession  **46.1**

20k46.1 Most Cited Cases

[4] Adverse Possession  **86**

20k86 Most Cited Cases

Purported owners of property did not establish ownership by adverse possession, where they did not pay taxes on property for seven years, and could not establish exclusive and uninterrupted possession, given criminal and civil trespass complaints brought against them, destruction of every fence they erected, and second purported owner's assertion of ownership rights. West's RCWA 7.28.070.

****800 *729** John F. Bury, Steven Schneider, Murphy Bantz & Bury, Spokane, for Appellants.

Steven C. Lacy, Lacy & Kane PS, Peter D. Poulson, East Wenatchee, for Respondents Bremer.

Gary A. Riesen, Prosecuting Attorney, Wenatchee, for Respondent Chelan County.

SCHULTHEIS, Judge.

In this 30-year-old dispute over title to nine acres in the Entiat Valley, the court ruled on cross motions for summary judgment that title to the strip had been quieted in G.A. and Elva Bremer by the judgment entered in *Cascade Inv. & Dev. Co. v. Bremer*, Chelan County Cause 26814, affirmed by unpublished opinion, 11 Wash.App. 1009, review denied, 84 Wash.2d 1013 (1974). The court also dismissed Frank and Dorothy Thomas's adverse possession claim on summary judgment. The Thomases challenge both decisions. They contend the court should have vacated *Cascade v. Bremer* because a federal district court judge subsequently ruled in the consolidated cases of *Harlow v. United States*, No. C-83-388 (E.D.Wash. Jan. 15, 1988) and *United States v. Bremer*, No. C-86-069 (E.D.Wash. Jan. 15, 1988) that the decision in *Cascade v. Bremer* was based on erroneous evidence presented to the court. They also contend the court should not have dismissed their adverse possession claim. The facts and law of the case compelled the superior court's decisions as they compel ours; we affirm.

730** At issue is title to a nine-acre parcel of land located in Township 27 North, Range 19 East of the Willamette Meridian, Washington. The original survey of the area was approved in 1883. In 1901 the Northern Pacific Railway Company (N.P.R.) acquired all unpatented and unreserved land in oddnumbered sections in the township by railroad land grant. In 1903 N.P.R. deeded to James W. Bonar the SW3 of the SE3 of section 15. In 1908 the United States issued a patent to Gus A. Bremer conveying to him the E2 of the SW3 and the SW3 of the SW3 of section 14. The SE3 of the SE3 of section *801** 15, which lies between the Bonar and Bremer lands, was originally patented to David M. Farris together with the NE3 of the SE3 and the SE3 of the NE3 of section 15 and the NW3 of the SW3 of section 14. Thus, there was no overlap between these parcels as they were originally settled, described, and conveyed.

The 1883 survey was seriously defective, however, because the surveyors set only two exterior corners one on the north township boundary and one on the south township boundary which were not in alignment, and apparently set no interior corners. The lack of corners and monuments made locating claims very difficult. Because of complaints from those who had settled the area, including Gus A. Bremer, the federal government in 1916 authorized a resurvey of the township and adjoining townships under the 1909 Resurvey Act. Resurveys are authorized "Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." 43 U.S.C. § 772 (1995).

The resurvey, conducted for the purpose of retracing and restoring the original survey and approved in 1923, revealed a discrepancy between the paper locations of several settled claims and their actual location on the ground. To protect the bona fide claims of the owners, the government surveyor identified the property they actually settled ***731** by tract numbers and described them by metes and bounds descriptions. The land granted to N.P.R. as part of section 15 was designated Tract 41, the land patented to D.M. Farris as parts of sections 14 and 15 was designated Tract 42, and the land patented to Gus Bremer as part of section 14 was designated Tract 43. The tracts do not overlap, but to a large extent they overlie different sections than those named in the patents. Unfortunately, none of the property was re-patented. Nor was any other action taken to correct the record title of these lands.

George B. Brown acquired the Bonar parcel described in the N.P.R. deed and the Farris parcel described in the original patent. When he died, hose parcels (and others) passed through his will in 1941 to his son John B. Brown. Gus A. Bremer died in 1942 and his land passed to his son G.A. Bremer in 1950 by inheritance and quitclaim deed from the elder Bremer's other heirs.

In July 1965 John B. Brown agreed to sell his ranch to Frank M. and Dorothy H. Thomas. The earnest money receipt/purchase and sale agreement describes the property by quarter sections, including those once owned by Mr. Bonar and Mr. Farris, but the June 1967 quitclaim deed from Mr. Brown to the Thomases describes the property by reference to the resurvey tracts as well as the section descriptions. The quitclaim deed purports to convey as Parcel "E":

That portion of Tract 41, according to the dependent resurvey of Township 27 North, Range 19, E.W. M., dated January 27, 1923, which was conveyed by the Northern Pacific Railway Company to James W. Bonar, by deed dated December 31, 1903; recorded February 26, 1904 in volume 54, page 600, wherein the property was described as the Southwest quarter of the Southeast quarter of Section 15, Township 27 North, Range 19, E.W. M., records of said County. and as Parcel "I":

Tract 42, according to the dependent resurvey of Township 27 North, Range 19 E.W. M., dated January 27, 1923, EXCEPT ***732** that portion thereof conveyed to Chelan County, Washington for road

....

In December 1969 the Bremers moved onto the 120 acres they claimed under the original patent to his father, Gus A. Bremer. In April 1970 the Thomases sold Tract 42 to Cascade Investment and Development Company. Tract 42 overlies much of the land described in the Bremer patent. The Bremers refused to vacate, so Cascade and the executor of John B. Brown's estate brought suit against the Bremers to quiet title in Tract 42. [FN1]

[FN1] Mr. Thomas claims he sold Tract 42 to Cascade, but neither he nor anyone else explains why Mr. Brown's executor was a plaintiff while the Thomases were not a party to the quiet title suit.

****802** On the evidence before it, the Chelan County Superior Court ruled in favor of the Bremers. The oral opinion of Judge Leahy, which this court incorporated in its unpublished opinion, explains the rationale and the law that led to his decision. Essentially, federal law protected the rights of entrymen who perfected their claim before the resurvey, so the Bremers owned the lands described on their patent. Moreover, there was apparently testimony before the court that John B. Brown treated the land at issue as belonging to the Bremers. Finally, Mr. Brown's quitclaim deed could convey only what he owned and "Tract 42" had never been conveyed to him. The court entered judgment decreeing the Bremers to be the owners of the following described real property located in Chelan County, Washington according to the 1883 survey as reestablished by the 1916 dependent resurvey:

Southwest quarter of the southwest quarter and the east half of the southwest quarter of section 14, township 27 north, range 19, east of the Willamette Meridian, and plaintiffs, Cascade Investment & Development Co. and Clarence L. Haynes, as Executor of the Estate of John B. Brown, deceased, and their predecessors, be and they are hereby adjudged to have no right, title or interest in said real property described above or any portion thereof.

***733** In the 1980s the dispute regarding the location of the Bremer lands was again the central focus of litigation, this time in federal district court. In consolidated cross-quiet title actions between the Bremers and the United States, and the Harlows and the United States, the federal court had before it evidence that was not before the Chelan County court including field survey notes, correspondence between participants in the resurvey and government officials who authorized it, and documents from early settlers. The court held the acreage conveyed by the patents issued to the Bremers' and Harlows' predecessors-in-interest is located on the ground as Tracts 43 and 46 of the resurvey. In other words, the survey protected the bona fide claims and rights of the early settlers by establishing and describing what was actually possessed and developed by them. The district court rejected *Cascade v. Bremer* as based on erroneous evidence before the court; it was not binding against the United States, which was not a party to it, nor was it binding on the federal court. The oral opinion of Judge Alan McDonald is every bit as well reasoned as that of Judge Leahy.

In February 1992 the Thomases commenced this suit to quiet title to the nine acres of Tract 41 located in the SW3 of the SW3 of section 14. In their complaint, the Thomases claim title by conveyance from Mr. Brown or by adverse possession, and seek vacation of Judge Leahy's decision in *Cascade v. Bremer* under CR 60(b)(4), (6) and/or (11) to the extent it is found to cover the nine acres at issue. [FN2] The Bremers counterclaimed for quiet title, and compensatory damages for the value of hay removed from the nine acres and emotional distress.

[FN2] The claim against the County is only for appropriate adjustment of County records to show the Thomases' exclusive ownership of the nine acres.

In July 1993, on cross-motions for summary judgment, the court found the 1973 judgment in *Cascade v. Bremer* encompassed the nine acres at issue in this case, but neither facts nor law warranted vacating the judgment. The ***734** court denied the Thomases' CR 60(b) motion. The court denied both parties' motions for partial summary judgment on the adverse possession claim. The parties submitted additional documents and in June 1995 the court granted the Bremers' motion for partial

summary judgment and dismissed the adverse possession claim. The court entered findings of fact and conclusions of law, ruled *Cascade v. Bremer* quieted title to the disputed nine acres in the Bremers and that the Thomases had not acquired the property by adverse possession, and entered final judgment dismissing the Thomases' claims in their entirety with prejudice. The Thomases appeal. The Thomases' many assignments of error raise only two issues: (1) whether *Cascade v. Bremer* quieted title to these nine acres in the Bremers, and if so, whether that decision should be vacated on the Thomases' motion; and (2) whether the Thomases' pleadings and affidavits **803 raise a genuine issue of material fact on their adverse possession claim.

[1][2][3] We first consider whether *Cascade v. Bremer* mandates dismissal of the Thomases' claim of ownership by record title. We conclude it does. *Cascade v. Bremer* quieted title in the Bremers to the quarter section underlying the nine acres, and, therefore, to the nine acres. The Thomases argue the trial court should have vacated the final judgment in *Cascade v. Bremer* under CR 60(b). But the Thomases cannot make use of CR 60(b) because it only authorizes the court to relieve a party or its legal representative from a final judgment on motion. A stranger to the proceeding cannot ask the court to vacate its final judgment. *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 582-83, 109 P. 57 (1910). As the Thomases emphasize, they were not a party to *Cascade v. Bremer*. In addition, after a judgment has been affirmed on appeal, the superior court no longer has jurisdiction to consider a CR 60 motion to vacate its own judgment. See *Kath v. Brown*, 53 Wash. 480, 482-83, 102 P. 424 (1909).

Although the Thomases cannot attack the *Cascade v. Bremer* decision through use of the CR 60(b) motion, they arguably also are not bound by it. *State ex rel. McConihe*, 58 Wash. at 584, 109 P. 57. In this case, however, it makes no difference. *Cascade v. Bremer* quieted title to the SW3 of the SW3 of section 14 in the Bremers. The Thomases cannot establish record ownership of the nine acres at issue, which are the part of Tract 41 that overlies the SW3 of the SW3 of section 14. Mr. Brown did not hold title to any property in section 14, so he could not convey the nine acres to the Thomases in the quitclaim deed by quarter section description. And he did not hold title to Tract 41, so he could not convey the nine acres of Tract 41 that overlies section 14 by reference to a part of Tract 41, or by metes and bounds description, either. [FN3] The only way the Thomases could have acquired title to the property at issue would have been through adverse possession.

FN3. The Thomases' assertion in their briefs that the nine acres are actually in section 15 is not supported by the record.

[4] We next consider whether there are genuine issues of fact preventing summary dismissal of the Thomases' adverse possession claim. There are not. When a party moving for summary judgment meets its initial burden of showing there is no dispute as to any issue of material fact, the burden shifts to the nonmoving party. If the nonmoving party then "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion.... "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Hiatt v. Walker Chevrolet Co., 120 Wash.2d 57, 66, 837 P.2d 618 (1992) (quoting *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986)).

*736 Because the Thomases' property tax receipts cover property in sections 15 and 23, whereas the Bremers' receipts cover the SW3 of the SW3 of section 14, the Thomases cannot establish an adverse possession claim to the nine acres at issue under

the seven-year rule of RCW 7.28.070. They also cannot establish exclusive and uninterrupted possession of the nine acres given the multiple criminal and civil trespass complaints brought by the Bremers against them, the destruction of every fence they put up and the Bremers' assertion of their ownership rights in the property for more than 20 years. Summary dismissal is appropriate because the Thomases cannot prove an essential element of their claim.

The piecemeal adjudication of the property disputes in the Entiat Valley is unfortunate. The original settlers' claims did not overlap, and their actual claims, as they existed on the ground, were apparently preserved by ****804** the resurvey tract designations. But because the title documents were never corrected, any successor could assert a claim based on the original patent description if it encompassed choicer property. The Bremers have done exactly that, with foreseeably disastrous results. The state and federal decisions may each be correct based on the evidence presented in those courts, but together they create chaos. However unfair it must seem to the Thomases, the procedural posture of this case forces us to affirm the judgment of the trial court. We deny both parties' requests for attorney fees because neither party provides any basis for awarding fees.

Affirmed.

SWEENEY, C.J., and THOMPSON, J. Pro Tem., concur.

88 Wash.App. 728, 946 P.2d 800

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JAMES and DEBORAH SHARBONO,
individually and the marital community
comprised thereof, CASSANDRA
SHARBONO,

Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and
"JANE DOE" VAN DE WEGE,
husband and wife and the marital
community composed thereof,

Appellant,

CLINTON L. TOMYN, individually
and as Personal Representative of the
Estate of CYNTHIA L. TOMYN,
deceased; and as Parent/Guardian of
NATHAN TOMYN, AARON
TOMYN, and CHRISTIAN TOMYN,
minor children,

Respondents/Intervenors.

No: 38425-6-II

**DECLARATION OF
SERVICE**

COURT OF APPEALS
STATE OF WASHINGTON
MAY 27 PM 1:53
BY _____
DEPUTY

On May 27, 2009, a true and correct copy of Intervenor Tomyns'
Supplemental Authority Pursuant to RAP 10.8, was served on the following
by ___ Fax ___ Email ___ depositing in the U.S. Mail X delivery:

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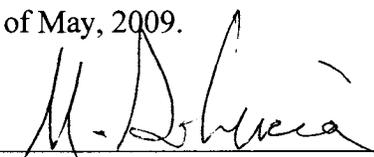
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 27th day of May, 2009.



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