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## **I. ASSIGNMENTS OF ERROR**

- A. The trial court erred in vacating the Stipulation and Order of Dismissal.
- B. The trial court erred in vacating the Stipulation and Order of Dismissal when there was not a sufficient basis under CR 60(a) or 60(b) to vacate the stipulation and order.
- C. The trial court erred in findings that stipulation and order of dismissal that released all claims was a mistake.
- D. The trial court erred in entering a revised order of dismissal.

## **II. STATEMENT OF ISSUES**

- 1. Whether Trial Court erred in vacating the Stipulation and Order of Dismissal, because M.B. Diddy and Swinerton failed to provide a sufficient basis for Vacation under CR 60(b).
- 2. Whether Trial Court erred in vacating the Stipulation and Order of Dismissal, because M.B. Diddy and Swinerton failed to provide a sufficient basis for Vacation under contract law.

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

M.B. Diddy Construction filed suit against Kitsap County and Swinerton Builders Northwest. All parties signed a stipulation and release of

all claims, and an agreed Order of Dismissal was entered. M.B Diddy and Swinerton Builders later sought to vacate the stipulation and order of dismissal and the County opposed the motion. The Trial Court granted the Motion to Vacate the Stipulation and Order of Dismissal, and entered a revised Order of Dismissal. This appeal followed.

## **B. FACTS**

Kitsap County contracted with Swinerton Builders Northwest (hereinafter "Swinerton") to construct the Kitsap County Administration Building (the "Project"). CP 13. Swinerton entered into a subcontract agreement with M.B. Diddy Construction, Inc. (hereinafter "M.B. Diddy") for earthwork services on the Project. CP 19.

M. B. Diddy later filed suit under Kitsap County Superior Court Cause No. 06-2-01941-7, against both Swinerton and Kitsap County, alleging that Swinerton had misrepresented facts and failed to disclose information during negotiation of the contract, and had breached its contractual agreement with M.B. Diddy. CP 1-7. M.B. Diddy sought judgment against Swinerton for breach of contract and unjust enrichment, and sought judgment against Kitsap County, as holder of the retained percentage trust fund suit, for payment of M.B. Diddy's principal judgment amount, pre-judgment interest, attorneys fees and costs. CP 11-12.

The suit was resolved by stipulation of the parties. CP 18-23. The stipulation, which was drafted by M.B. Diddy and Swinerton, read:

COMES NOW, Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest . . . and Kitsap County Administration, by and through their undersigned attorneys of record, and stipulate that all claims asserted herein, or which could have been asserted herein, by and between them, shall be dismissed with prejudice . . .

*The parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns and sureties from any all [sic] claims, demands, causes of action and liabilities . . . known or unknown, asserted or unasserted . . . arising from the Project in any manner . . .*

CP 19 (emphasis added).

The Stipulation was then presented to Kitsap County for signature. RP, p. 5, lines 1-2; p. 7, lines 6-11. By signing, and entering into the agreement, Kitsap County waived it's right to pursue liquidated damages against Swinerton (or any other future claims, known or unknown, arising from the project), thus providing consideration for the contractual agreement. RP, p. 9, lines 2-5. Once executed by all parties, the Stipulation was forwarded to the court with a proposed Order of Dismissal. CP 18-23. On December 15, 2007, Kitsap County Superior Court Judge Karlynn Haberly signed the Order, and the case was dismissed with prejudice:

[A]ll claims asserted herein, or which could have been asserted herein, by and between Plaintiff M. B. Diddy

Construction, Inc. and Defendants Swinerton Builders Northwest . . . and Kitsap County Administration, are hereby dismissed with prejudice, without admission of liability, and without costs to any party.

CP 20-22.

Approximately one month later, Swinerton Builders served Kitsap County with a new Complaint under Kitsap County Superior Court Cause No. 08-2-0045-3 ('08 cause). CP 76. The Complaint claimed violations of the contractual agreement between the parties for construction of the Kitsap County Administration Building. CP 76-77

After the County indicated that it would be filing a motion for summary judgment in the second suit based on the release of claims granted in the original cause, M.B. Diddy and Swinerton filed a Joint Motion to Vacate Stipulation and Order of Dismissal. CP 77. The purported basis of the Motion to Vacate was “because the January 15, 2008 Stipulation and Order of Dismissal includes poorly drafted language. . . that could be argued to address the resolution of claims between Swinerton and co-defendant Kitsap County . . .” CP 25. The entirety of the moving parties’ legal argument was premised upon CR 60(b) and the discretionary authority of the court under CR 2(a). CP 19

Because the language of the Stipulation was clear, and because the County had provided consideration for the agreement, the County objected on

the basis that there were no legal grounds to vacate the contractual agreement between the parties. RP p. 8, line 24 – p. 9, line 5. CP 68-74.

The trial court granted the Motion to Vacate the Stipulation and Order of Dismissal and entered a Revised Order of Dismissal. The court articulated its decision as follows:

It appears to me under Rule 60 that a mistake was made in the drafting of the stipulation and order of dismissal. It was either inadvertent or however you want to characterize it, but it appears to me there was a mistake in the language that was drafted.

RP p. 10, line 23 – p. 11, line 2.

#### IV. ARGUMENT

##### **TRIAL COURT ERRED IN VACATING THE STIPULATION AND DISMISSAL BECAUSE M.B. DIDDY AND SWINERTON FAILED TO PROVIDE A SUFFICIENT BASIS FOR VACATION UNDER CR 60(b)**

In the present case, the trial court granted vacation of a clearly worded stipulation and order of dismissal. Through the stipulation, the parties had released one another from all claims. Kitsap County provided consideration for this agreement. However, M.B. Diddy and Swinerton, who drafted the agreement, argued and the Trial Court agreed, that vacation was appropriate because the stipulation was poorly drafted and therefore constituted a mistake under CR 60(b). Under both Washington and Federal law, however, “poorly drafted language” or other errors by counsel regarding the breadth of a

stipulated dismissal does not constitute sufficient grounds to vacate a judgment and is insufficient to justify the finding of mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.

An appellate court reviews a trial court's decision on a motion to vacate for an abuse of discretion. *DeYoung v. Cenex*, 100 Wn. App. 885, 894, 1 P.3d 587 (2000), *review denied*, 146 Wn.2d 1016, 51 P.3d 87 (2002). “A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons.” *Id.* (citing *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 766, 938 P.2d 345 (1997)).

#### CR 60(b)

Relief from judgments and orders in civil cases is governed by CR 60. *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986), *citing State v. Scott*, 92 Wn.2d 209, 595 P.2d 549 (1979); *State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973). Civil Rule 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Burlingame*, 106 Wn.2d at 336, *citing Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966).

As a general rule, under Washington law, incompetence or neglect of an attorney (such as here, in the claimed ‘poorly drafted language’) does not constitute sufficient grounds to vacate a judgment. *Lane v. Brown & Haley*, 81 Wn.App. 102, 912 P.2d 1040 (1996)

For instance, in *Lane v. Brown & Haley*, 81 Wn. App. 102, 104, 912 P.2d 1040 (1996), the court of appeals overturned a trial court’s vacation of an order of dismissal. On appeal, the Lanes argued that their attorney’s failure to inform them of the pending summary judgment proceeding represents a mistake or irregularity in obtaining the judgment that warranted the vacation of the dismissal. *Lane*, 81 Wn. App. at 106. The Court of appeals, however, held that relief pursuant to CR 60(b)(1) was “not available here,” and stated that was following the “well-reasoned logic” of a previous Washington Supreme Court case to the effect that:

- (1) the law favors finality, 89 Wn.2d at 544, 573 P.2d 1302;
- (2) erroneous advise of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment (a settlement approved in court), 89 Wn.2d at 544, 573 P.2d 1302;
- (3) fraud provides the grounds to vacate non-default judgments, 89 Wn.2d at 546, 573 P.2d 1302;
- (4) attorney mistake or negligence does not provide an equitable basis for relief for the client, 89 Wn.2d at 547, 573 P.2d 1302;
- (5) notice to the client of upcoming action in court is not a requirement of court rule, 89 Wn.2d at 547, 573 P.2d 1302.

*Lane*, 81 Wn. App. at 106, 109, citing *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978).

In *Haller*, a party had attempted to vacate a dismissal that was entered after the court had accepted a settlement of the suit. *Haller*, 89 Wn.2d at 540-42. The Supreme Court however, held that vacation pursuant to CR 60(b)(1) was not appropriate, noting,

If the judgment conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect. Neither is an error or misapprehension of the parties, nor of their counsel, any justification for vacating the judgment, although the counsel consented to it because deceived by fraudulent misrepresentations of third parties that his client was willing to pay the judgment. Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.

*Haller* 89 Wn.2d at 544, citing 3 E. Tuttle, A Treatise of the Law of Judgments § 1252 (5th ed. rev. 1925) at 2776-77. The *Haller* court went on to note that,

The basic principles stated in the treatise are reflected in our case of *Handley v. Mortland*, 54 Wn.2d 489, 342 P.2d 612 (1959). That case was a proceeding to vacate a judgment which was entered during the petitioner's minority, authorizing his then guardian ad litem to compromise and settle an action for personal injuries. He contended, upon reaching his majority, that the settlement was founded upon a mistaken appraisal of his injuries, that he was not properly represented by counsel, and that the amount of the settlement (which was the exact amount of his medical expenses) was grossly inadequate. This court held that none of these was a proper ground upon which to set aside the judgment approving the settlement.

*Haller*, 89 Wn.2d at 545.

The court went on to note that the motion to vacate was devoid of any allegation of fraud or collusion upon the part of the other party, and there was not sufficient grounds to warrant setting aside the judgment. *Haller*, 89 Wn.2d at 546. Rather, the court noted that,

If an attorney is authorized to appear, the jurisdiction over the defendant is perfect, and the subsequent action of the attorney, not induced by the fraud of the adverse party, is binding on the client at law and in equity. According to Lord Hardwicke, “when a decree is made by consent of counsel, there lies not an appeal or rehearing, though a party did not really give his consent, but his remedy is against his counsel; but if such decree was by fraud and covin, it may be relieved against, not by rehearing or appeal, but by original bill,” and such beyond doubt is still the rule. The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.

*Haller*, 89 Wn.2d at 547, *citing* 3 E. Tuttle, A Treatise of the Law of Judgments § 1252 (5th ed. rev. 1925) at 2608.

In short, Washington courts have consistently held, “Generally, the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil case.” *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) *see also* *Winstone v. Winstone*, 40 Wash. 272, 274, 82 P.

268 (1905); *In re Marriage of Burkey*, 36 Wn. App. 487, 490, 675 P.2d 619 (1984); *Handley v. Mortland*, 54 Wn.2d 489, 493, 342 P.2d 612 (1959)(Mistake of fact is not a statutory ground that supports a vacation of judgment).

“Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The sins of the lawyer are visited upon the client.” *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002).

Furthermore, the grounds for vacation listed in CR 60(b) are a combination of those listed in Federal Rule of Civil Procedure 60(b) and those contained in a number of pre-existing statutes, and CR 60(b)(1) was taken from the federal rule. *Gustafson v. Gustafson*, 54 Wn. App. 66, 70, 772 P.2d 1031 (1989). Because the Federal Rule and the State Rule are essentially the same, Washington Courts frequently turn to Federal cases for guidance, and the courts have specifically stated that “When Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to aid us in reaching the appropriate construction.” *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989)(discussing CR 60(b) and FRCP 60(b)), *citing Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980); *See also, Little v. King*, 160 Wn.2d 696, 709 161 P.3d 345 (2007); *Luckett v.*

*Boeing Co.*, 98 Wn. App. 307, 311, 989 P.2d 1144 (1999)(finding guidance in federal rules for vacating judgments that are parallel to state rules).

Federal courts have held that, “Mere dissatisfaction in hindsight with choices deliberately made by counsel in breadth of stipulated dismissal is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.” *Nemaizer v. Baker*, 793 F.2d 58, 62 (2nd Cir.1986). Furthermore, in *TCBY Systems, Inc. v. EGB Assoc., Inc.*, 2 F.3d 288, 290 (8th Cir.1993) a party argued that at the time it agreed to a dismissal with prejudice it did not understand the preclusive effect of a dismissal with prejudice and only intended to dismiss the complaint. The 8<sup>th</sup> Circuit rejected this claim, stating,

This case is similar to *Nemaizer v. Baker*, 793 F.2d at 63. In *Nemaizer*, the parties agreed to dismiss a pending suit with prejudice. Six months later the plaintiff filed a second suit. The district court indicated that the suit was subject to dismissal on res judicata grounds. The plaintiff filed for relief from the dismissal under Fed.R.Civ.P. 60(b), arguing that counsel in the original action did not understand the res judicata effect of the dismissal. The district court granted the motion, finding "a genuine misunderstanding had occurred concerning the stipulation's scope." *Id.* at 60. The Second Circuit reversed. The court found that counsel's misunderstanding could not void the agreement, even though "the consequences of entering into [the] agreement were not fully weighed" and "the choice was poor." *Id.* at 62. The court held that the dismissal with prejudice "served notice that basic res judicata principles would bar future actions." *Id.* See also *Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 837 (2d Cir.1991) ("res judicata may not be avoided on the basis of ... an attorney's ill-considered decision to enter into an all-

encompassing stipulation of withdrawal with prejudice"); *Citibank v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1504 (2d Cir.1990) ("it is clear that Data Lease did not intend that the stipulated dismissal with prejudice would constitute a final judgment of a particular issue ... [but] that intent does not eliminate the res judicata or claim preclusion effect ... of the final judgment").

The 8<sup>th</sup> Circuit, therefore, held the party to its previous agreement to settle "all issues" for \$28,000.00 and to dismiss the lawsuit with prejudice, and rejected the plaintiff's claim that it had understood the settlement was to "encompass only the existing claim and at no time envisioned a release of all claims." *TCBY Systems*, 2 F.3d at 289, 291. *See also, Andrulonis v. U.S.*, 26 F.3d 1224, 1234 (2d Cir.1994) (Noting that Rule 60(b) does not allow courts to "indulge a party's discontent over the effects of its bargain," and thus "when a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect.") *citing Kozlowski v. Coughlin*, 871 F.2d 241, 246 (2d Cir.1989), *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir.1994).

Thus under both Washington law regarding CR 60(b)(1) and Federal law regarding FRCP 60, "poorly drafted language" or other errors by counsel regarding the breadth of stipulated dismissal is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to

justify Rule 60(b)(1) relief nor does it otherwise constitute sufficient grounds to vacate a stipulation and order of dismissal.

Although MB Diddy and Swinerton argued to the trial court that the language was poorly drafted, the actual language of the stipulation could not be more clear. The language called for a release of all present and future claims. Thus, this was not a case where the language could even be interpreted in two different ways. Rather, the language of the stipulation called for a release from all present and future claims. All M.B. Diddy and Swinerton showed from their argument, was that they signed their own stipulation, but later regretted that the release was as broad as it was. As outlined above, even if counsel misunderstood the stipulation's scope, or if the "the consequences of entering into [the] agreement were not fully weighed" and "the choice was poor," such facts are insufficient to justify vacation of the stipulation and order of dismissal. The trial court in the present case, therefore, erred in granting the order vacating the stipulation and dismissal.

#### Contract Law.

Further evidence that the vacation in the present case was inappropriate can be found in Washington contract law. "The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs." *National Bank of Washington v. Equity*

*Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). In moving for vacation of the Stipulation and Order of Dismissal, Swinerton and M.B. Diddy did not allege that they involuntarily or unknowingly signed the settlement agreement. Neither did they claim that they had been drawn into the agreement through fraud, deceit or coercion. Instead, they assert only that the document (stipulation) included “poorly drafted language.” This poorly drafted language, they claimed, could curtail the interests of Swinerton Builders, and thus they asked the Court to vacate the settlement agreement they had entered into.

Though an argument such as this may engender sympathy from a court, it does not provide a legal basis for the remedy that was sought and given. As per our Washington Supreme Court, “[o]ne cannot, in the absence of fraud, deceit or coercion, be heard to repudiate his own signature voluntarily and knowingly affixed to an instrument whose contents he was in law bound to understand.” *Pierce v. Lake Stevens School Dist. No. 4, Snohomish County*, 84 Wn.2d 772, 788, 529 P.2d 810 (1974). Our State’s Supreme Court has “always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or *to be ignorant of what is provided therein.*” *National Bank of Washington v. Equity Investors*, 81 Wn.2d at 913 (emphasis

added).

More simply put, “one is bound by the contract which he voluntarily and knowingly signs.” *Id.* at 912-13M.B. The parties moving for vacation of the Stipulation and Order made no claim that they entered the agreement involuntarily, that they were coerced or deceived, that they had no opportunity to read the instrument or that the language was anything but plain and unambiguous.

As such, Swinerton and M.B. Diddy failed to provide the trial court with any legal basis to avoid or vacate the contract that they entered into with Kitsap; and thus the court erred in granting the motion to vacate the agreement.

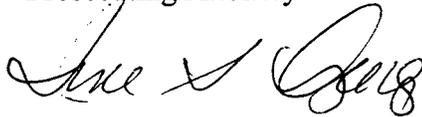
## V. CONCLUSION

For the foregoing reasons, Kitsap County urges this Court to reverse the trial court’s order granting M.B. Diddy and Swinerton’s motion to vacate. The remedy is to reverse the trial court and remand for enforcement of the original stipulation and order of dismissal.

Dated March 9, 2009

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



IONE S. GEORGE, WSBA No. 18236  
Senior Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Carrie Bruce, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document (Brief of Appellant) in the manner noted upon the following:

Christopher A. Wright  
Stanislaw Ashbaugh  
701 Fifth Ave., Ste. 4400  
Seattle, WA 98104

Jami K. Elison  
Marston Elison, PLLC  
16880 NE 79<sup>th</sup> St.  
Redmond, WA 98052

- Via U.S. Mail
- Via Fax: (206) 344-7400
- Via Hand Delivery by ABC Legal Services
- Via E-mail:

- Via U.S. Mail
- Via Fax: (425) 861-6969
- Via Hand Delivery by ABC Legal Services
- Via E-mail:

SIGNED in Port Orchard, Washington this 9th day of March, 2009.

*Carrie Bruce*

Carrie Bruce, Legal Assistant  
Kitsap County Prosecutor's Office  
614 Division Street, MS-35A  
Port Orchard WA 98366  
Phone: 360-337-4814  
Fax: 360-337-7083  
E-mail: cbruce@co.kitsap.wa.us

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