

FILED
COURT OF APPEALS
DIVISION II
COCKEY II PM 2:12
STATE OF WASHINGTON
BY: 

~~RECEIVED~~
MAY 11 2009
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 38457-4-II

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

KITSAP COUNTY,

Appellant,

v.

M.B. DIDDY CONSTRUCTION, INC. AND SWINERTON BUILDERS
NORTHWEST, ET.AL.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-2-00045-3

REPLY BRIEF OF APPELLANT

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

614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

 ORIGINAL

TABLE OF CONTENTS

I. ISSUES RAISED BY RESPONDENTS 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 3

 A. Respondents’ argument that the trial court did not abuse its discretion is without merit because washington courts have consistently held that the incompetence or neglect of a party's own attorney, without more, is not a sufficient ground for vacation under CR 60. 3

 B. The respondents’ claim that the county’s arguments regarding CR 60 are “dated” is without merit because recent decisions from this court and from the washington state supreme court have reiterated the long held principal that error of counsel and excusable neglect are not grounds to vacate a settlement under CR 60..... 6

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Burlingame v. Consolidated Mines and Smelting Co., Ltd.</i> , 106 Wn.2d 328, 336, 722 P.2d 67 (1986).....	3
<i>Ebsary v. Pioneer Human Services</i> , 59 Wn. App. 218 (1990)	passim
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978)	4, 5, 10
<i>Handley v. Mortland</i> , 54 Wn.2d 489, 493, 342 P.2d 612 (1959)	6
<i>In re Marriage of Burkey</i> , 36 Wn. App. 487, 490, 675 P.2d 619 (1984)....	5
<i>Lane v. Brown & Haley</i> , 81 Wn. App. 102, 912 P.2d 1040 (1996) ...	passim
<i>Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.</i> , 68 Wn.2d 756, 415 P.2d 501 (1966).....	3
<i>Pioneer Inv. Servs. Co. v. Brunswick Assocs.</i> , 507 U.S. 380 (1993)	11
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 679, 41 P.3d 1175 (2002).....	11
<i>Winstone v. Winstone</i> , 40 Wash. 272, 274, 82 P. 268 (1905)	5

Rules

Superior Court Civil Rule 60	passim
------------------------------------	--------

Treatises

3 E. Tuttle, <i>A Treatise of the Law of Judgments</i> § 1252 (5th ed. rev. 1925).....	5
--	---

I. ISSUES RAISED BY RESPONDENTS

1. Whether the Respondents' argument that the trial court did not abuse its discretion is without merit when Washington courts have consistently held that the incompetence or neglect of a party's own attorney, without more, is not a sufficient ground for vacation under CR 60?

2. Whether the Respondents' claim that the County's arguments regarding CR 60 are "dated" is without merit when recent decisions from this Court and the Washington State Supreme Court have reiterated the long held principal that error of counsel and excusable neglect are not grounds to vacate a settlement under CR 60?

II. STATEMENT OF THE CASE

Kitsap County relies upon the statement of the case set forth in its Brief of Appellant. The Respondents, however make one factual assertion that must be addressed.

Although the Respondents never mention the actual language of the stipulated dismissal in the present case, Respondents assert that the stipulation "potentially contained language that could be construed as waiving unasserted claims between the County and Swinerton." Respondents' Brief at 6. The actual language of the stipulation, however, cannot fairly be characterized as language that could "potentially" be

“construed” as constituting a waiver. Rather, the language was clear and contained an actual an undeniable waiver,

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). As the Respondents admit, the County was a party to the suit and M.B. Diddy and Swinerton prepared the stipulated dismissal. Respondents’ Brief at 5. The County had no role in drafting the language, but did sign the stipulation as requested by Respondent since the County was a party to the action. The fact that the County signed the stipulated dismissal, however, was not a mere formality because in signing the release the County gave up its right to pursue its \$49,500 liquidated damages claim against Swinerton. RP 8-9. In addition, the County also released Swinerton & M.B. Diddy from all claims “known or unknown” arising from the Project in any manner. CP 19. This release was not insignificant given that it is the County who retains possession of the building and is, therefore, the one party that is most likely to discover currently “unknown” claims in the future.

III. ARGUMENT

A. RESPONDENTS' ARGUMENT THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IS WITHOUT MERIT BECAUSE WASHINGTON COURTS HAVE CONSISTENTLY HELD THAT THE INCOMPETENCE OR NEGLIGENCE OF A PARTY'S OWN ATTORNEY, WITHOUT MORE, IS NOT A SUFFICIENT GROUND FOR VACATION UNDER CR 60.

The Respondents argue that Washington recognizes that CR 60(b)(1) provides a ground for vacating stipulations that are excessively broad. Respondents' Brief at 1, 9. This argument is without merit because under both Washington and Federal law "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.

As the Washington Supreme Court has long stated, Civil Rule 60(b) does not authorize vacation except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986), citing Marie's *Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966).

Furthermore, under Washington law, incompetence or neglect of an attorney 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* (a 1996 opinion), this Court overturned a trial court's vacation of an order of dismissal and rejected the claim that an attorney's failure to inform their client of a pending summary judgment proceeding represented a mistake or irregularity in obtaining the judgment that warranted the vacation of the dismissal. *Lane*, 81 Wn. App. at 106. This Court held that relief pursuant to CR 60(b)(1) was "not available here," citing the following "well-reasoned logic" of the Washington Supreme Court:

- (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).

Similarly, in Haller the Supreme Court stated 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 addition, the Court in *Haller* stated plainly that “the law favors settlements, and consequently it must also favor their finality.” *Haller*, 89 Wn.2d at 544.

In short, for over a century Washington courts have consistently held the incompetence or neglect of a party's own attorney, without more, is not a sufficient ground for vacation in a civil case. See, e.g., *Lane*, 81 Wn. App. at 107; *Haller*, 89 Wn.2d at 547; *see also Winstone v. Winstone*, 40 Wash. 272, 274, 82 P. 268 (1905)(absent fraud or collusion, neglect on the part of the attorney is generally insufficient to warrant vacation as an omission of the attorney is the act or omission of the client and no negligence will be excusable in the former which would not be excusable in the latter); *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).

B. THE RESPONDENTS' CLAIM THAT THE COUNTY'S ARGUMENTS REGARDING CR 60 ARE "DATED" IS WITHOUT MERIT BECAUSE RECENT DECISIONS FROM THIS COURT AND FROM THE WASHINGTON STATE SUPREME COURT HAVE REITERATED THE LONG HELD PRINCIPAL THAT ERROR OF COUNSEL AND EXCUSABLE NEGLIGENCE ARE NOT GROUNDS TO VACATE A SETTLEMENT UNDER CR 60.

Rather than attempt to distinguish or address this long line of Washington cases, the Respondent claims that "Washington" now recognizes that CR 60 provides relief when a party signs a release that is broader than was intended and that the County's position is "dated." Respondents' Brief at 9, 12. In support of this claim, the Respondents cite one case: *Ebsary v. Pioneer Human Services*, 59 Wn. App. 218 (1990). That case, however, is readily distinguishable from the present case and does not contradict nor overrule the long line of cases cited above.

In *Ebsary*, a pharmacist had been robbed and fatally wounded by a work release inmate, and because he had died in the course of his employment his surviving wife was entitled to receive worker's compensation benefits from the Department of Labor & Industries (DLI). *Ebsary*, 59 Wn. App. at 220-21. The decedent also had two adult children, but they never received DLI benefits. *Ebsary*, 59 Wn. App. at 222.

A wrongful death and survival action was eventually filed by DLI (through the surviving wife) and by the adult children (as additional plaintiffs

who were separately represented¹) against DOC and the work release facility. *Ebsary*, 59 Wn. App. at 222. After repeated failed attempts to settle the case, DLI met alone with the defendants to discuss settlement of its claim, and an agreement was eventually reached between DLI and the defendants. *Ebsary*, 59 Wn. App. at 223. The adult children did not participate in this negotiation and their claims were not discussed. *Ebsary*, 59 Wn. App. at 223. Counsel for DOC then drafted and filed settlement papers that included a judgment, release, and stipulation, and it later became clear that the defendants planned to use this settlement with DLI to extinguish, to whatever extent possible, any claims of the adult children who were not a party to the settlement. *Ebsary*, 59 Wn. App. at 223. A motion to vacate the settlement was then filed, and the trial court granted the motion finding that DLI and the defendants had no right or authority to affect the claims of the adult children. *Ebsary*, 59 Wn. App. at 223-24.

On appeal, the Court of Appeals affirmed the granting of the motion to vacate, noting that DLI did not have the authority to settle the claims of the adult children nor did it have the authority to do anything adversely affecting

¹ DLI and the adult children eventually agreed to equally contribute legal services to the case and DLI committed in writing that it would not enter into settlement negotiations without discussing it with all the plaintiffs nor would it attempt to settle the children's separate claims without their consent. *Ebsary*, 59 Wn.App. at 222. The plaintiffs also agreed at a later time that DLI's claims and the children's claims could be independently settled. *Ebsary*, 59 Wn.App. at 223.

the children's claims. *Ebsary*, 59 Wn. App. at 225-36.² The court thus held that the release was a "mistake" under CR 60 to the extent that it included language that could have released the children's claims. *Ebsary*, 59 Wn. App. at 226.

In the present case, the Respondent argues that *Ebsary* is "virtually indistinguishable" from the present case. Respondents' Brief at 11. *Ebsary* however, is readily distinguishable from the facts of the present case. For instance, if M.B. Diddy and the County had entered into a stipulation without involving Swinerton or its counsel and had thereafter entered a release which purported to extinguish Swinerton's claims without its knowledge or consent, then *Ebsary* would be relevant to the present case. This would be the case because M.B. Diddy obviously would have had no right or authority to settle another party's claims.

This scenario, however, was not what occurred in the present case. Rather, in the present case each party to the Stipulation and Order of Dismissal was represented by counsel. Each party's counsel had an opportunity to examine the contract in as great a detail as he or she cared, and no party to this settlement agreement can claim lack of authority, lack of knowledge or of consent. As such, *Ebsary* does not speak to the facts of this

² In addition, the court noted that DLI had not even attempted to settle the children's claims, and there was no participation in the negotiations by the children or their counsel. *Ebsary*, 59 Wn.App. at 225-26.

case. In addition, Respondent's own counsel drafted the stipulation in which both Respondents and the County stipulated to dismiss with prejudice all asserted claims and those "which could have been asserted" and agreed to release and discharge each other from any and all claims "known or unknown, asserted or unasserted" arising from the project in any manner. CP 19. Unlike the adult children in *Ebsary* who were not a party to the settlement and who had no notice of it, the Respondents in the present case actually drafted the stipulation. *Ebsary*, therefore, is readily distinguishable.

The *Ebsary* decision also contains no mention of the nearly century old line of cases explaining that the incompetence or neglect of a party's own attorney, without more, is not a sufficient ground for vacation in a civil case. This, of course, is not unexpected since the adult children in *Ebsary* had nothing to do with, nor had any knowledge of, the settlement in that case. If the adult children had signed off on the settlement, then the *Ebsary* court would have had a reason to address the issue of attorney neglect, but since the settlement was entered only by parties who had no authority to settle the claims of the adult children, the court simply never had reason to address this issue. *Ebsary*, therefore, does nothing to overrule the well-settled principal that the incompetence or neglect of a party's own attorney, without more, is not a sufficient ground for vacation in a civil case. Furthermore, the result in *Ebsary* is not inconsistent with this well settled principal nor does it stand for the proposition that any stipulation that might be overbroad can be vacated

pursuant to CR 60. Rather, *Ebsary* simply stands for the common-sense proposition that a party who has no authority to bind or act on the behalf of another party cannot, in fact, act on behalf of or bind another party who is not privy to (nor has any knowledge of) the agreement.

Even if there could be any doubt after the 1990 *Ebsary* opinion regarding the continuing vitality of the principal that the incompetence or neglect of a party's own attorney (without more) is not a sufficient ground for vacation, that question was resolved by this Court's 1996 opinion in *Lane*.

As outlined above, this Court held in *Lane* that the law favors finality and that "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)." *Lane* 81 Wn. App. at 109, citing *Haller*, 89 Wn.2d at 544. In addition, this Court similarly stated that generally, "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." *Lane* 81 Wn. App. at 107 (emphasis added and citations omitted). The Court also noted that there was no evidence that counsel for Brown & Haley had colluded to bring about the Lanes' attorneys actions and, therefore, "Brown & Haley should not be penalized for the quality of representation provided by an attorney the Lanes' voluntarily selected as their legal representative." *Lane* 81 Wn. App. at 108.³

³ Without citation to a single Washington case to support its claim, the Respondents assert that the County's argument regarding CR 60 and contract law, as well as its claims that

In *Lane*, this Court ultimately held that the trial court had abused its discretion in vacating the judgment since the error, mistake, negligence or neglect of the party's own attorney were insufficient under Washington law to set aside a settlement approved in court. *Lane* 81 Wn. App. at 109.

The same result should apply in the present case because Respondents' argument that the stipulated dismissal its own counsel had drafted was "poorly drafted" was an untenable ground for vacation given the well settled principal (and this Court's specific holding in *Lane*), that the law favors finality and that error of counsel or excusable neglect are not grounds

Swinerton should be held to pay for the "sins of its lawyer," are both "dated" and "draconian." Respondents' Brief at 12. The Respondents' argument in this regard is without merit because (in addition to this Court's decision in *Lane*) the Washington Supreme Court has reiterated as recently as 2002 that,

"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, 679, 41 P.3d 1175 (2002). The Respondents fail to acknowledge or address this clear language from the Washington Supreme Court or the similar holding from *Lane*. The Respondents' arguments, therefore, must be rejected.

The Respondents also cite *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993) and claim that this opinion somehow changed the relevant analysis under Washington's CR 60. See Respondents' Brief at 12. *Pioneer*, however, did not involve CR 60 or its federal counterpart. Rather, that case dealt with a Bankruptcy Rule 9006(b)(1) which deals with filing deadlines. The Respondents fail to demonstrate what relevance this case has to the case at bar, especially in light of more recent Washington cases dealing directly with CR 60. In addition, the Respondents' claim that "*Pioneer* allows an attorney's carelessness to constitute excusable neglect" as long as there is no showing of bad faith is simply incorrect. Rather, the *Pioneer* court focused on the fact that a deadline in the bankruptcy case was missed in part because Bankruptcy Court had given notice of the deadline in an unusual manner and in a way that was "peculiar and inconspicuous." *Pioneer*, 507 U.S. at 398. The Court, therefore, found that the unusual form of notice made the neglect "excusable." *Id.* In the present cast, however, the Respondents fail to demonstrate any fact that made their neglect excusable, even under the analysis in *Pioneer*. *Pioneer*, therefore, is inapplicable to the present case.

to set aside a settlement approved in court.⁴ Absent a tenable ground for vacation under CR 60, the trial court abused its discretion in vacating the stipulation and order of dismissal.

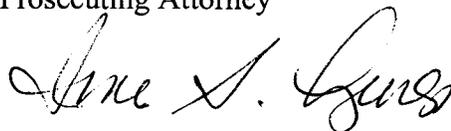
IV. CONCLUSION

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 May 8, 2009

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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

⁴ The Respondents' also claim that "the County does not attempt to demonstrate how judge Costello abused his discretion in the present case." Respondents' Brief at 1. The County, however, clearly acknowledged the relevant standard of review in its opening brief (See App.'s Br. at 6) and then went on to explain in great detail how the trial court's vacation order was made in error because there were no sufficient grounds under CR 60 to warrant vacation under Washington and Federal law. See Appellant's Brief at 6-15. The Respondent's contention, therefore, is without merit.

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 (Reply Brief of Appellant) in the manner noted upon the following:

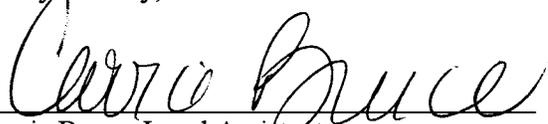
Christopher A. Wright
Stanislaw Ashbaugh
701 Fifth Ave., Ste. 4400
Seattle, WA 98104

Jami K. Elison
Marston Elison, PLLC
16880 NE 79th 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 8th day of May, 2009.



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

STATE OF WASHINGTON
COUNTY OF KITSAP
MAY 11 PM 2:12
BY [Signature]
DEPUTY