

No. 41011-7-II

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

---

**DARRELL RODMAN, Appellant,**

and

**DICKSON STEINACKER PS, Respondent.**

BY *[Signature]*  
STATE CLERK  
11 JAN 19 11:21  
COURT OF APPEALS  
DIVISION II

---

**BRIEF OF RESPONDENT**

---

Thomas L. Dickson, WSBA #11802  
Kevin T. Steinacker, WSBA #35475  
DICKSON STEINACKER PS  
1201 Pacific Avenue, Suite 1401  
Tacoma, WA 98409  
Telephone: (253) 572-1000  
Facsimile: (253) 572-1300

Attorneys for Respondent

**ORIGINAL**

## **Table of Contents**

|   |    |
|---|----|
| Table of Contents.....  | i  |
| Table of Authorities.....   | ii |
| Response to Assignments of Error .....  | 1  |
| STATEMENT OF FACTS .....  | 2  |
| ARGUMENT.....   | 6  |
| A. The Motion Was Untimely. ....  | 7  |
| B. The Judgment Was Not Void. ....  | 11 |
| C. The Court’s Decision as to the Parties’ Intent Was Supported by<br>Substantial Evidence..... | 15 |
| D. Respondent Is Entitled to Attorney’s Fees. ....  | 20 |
| E. Rodman’s Request for Fees Must Be Denied.....  | 22 |
| CONCLUSION.....   | 23 |

## Table of Authorities

### Cases

|  |       |
|--|-------|
| <i>Bour v. Johnson</i> , 80 Wn. App. 643, 910 P.2d 548 (1996).....                                   | 12    |
| <i>Brogan &amp; Anensen LLC v. Lamphiear</i> , 165 Wn.2d 773, 202 P.3d 960<br>(2009).....            | 16    |
| <i>Chai v. Kong</i> , 122 Wn. App. 247, 93 P.3d 936 (2004).....                                      | 12    |
| <i>Dike v. Dike</i> , 75 Wn.2d 1, 448 P.2d 490 (1968).....   | 12    |
| <i>Ellison v. Process Systems Inc. Const. Co.</i> , 112 Wn. App. 636, 50 P.3d<br>658 (2002).....     | 8     |
| <i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d<br>799 (1990).....       | 7     |
| <i>Holiday v. City of Moses Lake</i> , 157 Wn. App. 347, 236 P.3d 961<br>(2010).....                 | 21    |
| <i>In re Marriage of Burkey</i> , 36 Wn. App. 489, 675 P.2d 619 (1984) .....                         | 7     |
| <i>In re Marriage of Maxfield</i> , 47 Wn. App. 699, 737 P.2d 671 (1987).....                        | 11    |
| <i>In re Marriage of Ortiz</i> , 108 Wn.2d 643, 740 P.2d 843 (1987) .....                            | 12    |
| <i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003) .....                          | 7     |
| <i>In re Marriage of Wilson</i> , 117 Wn. App. 40, 68 P.23 1121 (2003).....                          | 7, 13 |
| <i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990).....                              | 17    |
| <i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144 (1999) .....                           | 8, 9  |
| <i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 912 P.2d 1052 (1996).....                          | 22    |
| <i>Miller v. City of Tacoma</i> , 138 Wn.2d 318, 979 P.2d 429 (1999) .....                           | 7     |
| <i>Northern Commercial Co. v. E. J. Hermann Co.</i> , 22 Wn. App. 963, 593<br>P.2d 1332 (1979) ..... | 14    |

|  |        |
|--|--------|
| <i>Perez v. Pappas</i> , 98 Wn.2d 835, 659 P.2d 475 (1983).....  | 14     |
| <i>Scanlon v. Witrak</i> , 110 Wn. App. 682, 42 P.3d 447 (2002) .....                                    | 6      |
| <i>Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.</i> , 139 Wn.2d 824,<br>991 P.2d 1126 (2000) ..... | 17     |
| <i>State ex rel. Turner v. Briggs</i> , 94 Wn. App. 299, 971 P.2d 581<br>(1999).....                     | 11, 13 |
| <i>State v. Carson</i> , 128 Wn.2d 805, 912 P.2d 1016 (1996) .....                                       | 13     |
| <i>State v. Wofford</i> , 148 Wn. App. 870, 201 P.3d 389 (2009).....                                     | 13     |
| <i>Stoulil v. Edwin A. Epstein, Jr., Operating Co.</i> , 101 Wn. App. 294, 3<br>P.3d 764 (2000) .....    | 19     |
| <i>Vance v. Offices of Thurston County Comm'rs</i> , 117 Wn. App. 660, 71<br>P.3d 680 (2003) .....       | 6      |
| <i>Westar Funding, Inc. v. Sorrels</i> , 157 Wn. App. 777, 239 P.3d 1109<br>(2010).....                  | 21     |
| <i>Wilson v. Henkle</i> , 45 Wn. App. 162, 724 P.2d 1069 (1986).....                                     | 22, 23 |

## **Rules**

|                   |    |
|-------------------|----|
| CR 60(b) .....    | 8  |
| RAP 18.1(a) ..... | 20 |
| RAP 18.9(a) ..... | 20 |

## **Treatises**

|   |    |
|---|----|
| Tegland, Karl B., 4 Wash. Prac., Rules Practice CR 60 (5 <sup>th</sup> ed.) ..... | 12 |
|---|----|

### **Response to Assignments of Error**

1. The trial court properly exercised its discretion in ruling that a motion to vacate a judgment was not brought within a reasonable time when it was filed 20 months after the judgment debtor should have discovered the grounds for his motion.

2. The trial court properly acted in its role as a fact finder in making a determination as to the parties' intent based on the testimony and evidence available.

### **Issues Pertaining to Assignments of Error**

1. Did the trial court properly exercise its discretion in ruling that a motion to vacate a judgment was not brought within a reasonable time when it was filed 20 months after the judgment debtor should have discovered the grounds for his motion? (Assignment of Error 1)

2. Was the trial court's determination as to the parties' intent supported by substantial evidence? (Assignment of Error 2)

## STATEMENT OF FACTS

In 1998, the City of Gig Harbor brought a condemnation action against certain real property. Darrell Rodman as the trustee of the Helen I. Wilkinson Revocable Trust was the primary defendant in the action. CP 17-18. Rodman retained a number of professionals in the course of the condemnation action, including attorney Thomas Dickson. CP 26. Many of these professionals intervened in the condemnation action as plaintiffs to recover fees that Rodman failed to pay. CP 18, 26. A judgment in favor of the intervenor plaintiffs and against Rodman was entered on December 30, 2004. CP 1. Mr. Dickson's law firm, Dickson Law Offices PLLC, was awarded judgment in the total amount of \$16,919.79. CP 3.

Mr. Dickson also represented Rodman on other matters, including the probate of the estate of Wilma Rodman. CP 26. Rodman failed to pay Mr. Dickson for attorney's fees incurred on the various matters. CP 27. Mr. Dickson filed an attorney's lien in the pending probate matter against Rodman's interest in the estate. CP 28.

In April 2006, Rodman filed a bankruptcy petition. CP 214. His bankruptcy attorney was Noel Shillito. *Id.* As the bankruptcy was being dismissed in March 2007, Mr. Shillito contacted Mr. Dickson to discuss making a payment toward the judgment. *Id.* Mr. Shillito offered a partial payment in full satisfaction of the judgment, which Mr. Dickson refused.

*Id.* Mr. Dickson received a payment of \$15,000 from Mr. Shillito on Rodman's behalf, although he did not intend to fully satisfy the judgment by accepting the payment. *Id.* Mr. Dickson signed a document prepared by Mr. Shillito titled "Partial Satisfaction of Judgment" on March 27, 2007. *Id.* He did not carefully review the language of the document, and did not notice that the body of the document referenced a full satisfaction. *Id.*

In September 2008, the personal representative of the Estate of Wilma Rodman set a show cause hearing to resolve the various attorney's liens that had been filed against Rodman's interest in the estate. CP 215. Mr. Dickson filed a declaration in the estate matter stating the amount he was owed, but because it had been over a year since receiving the \$15,000 payment from Mr. Shillito, Mr. Dickson did not immediately recall the details of that payment. *Id.* Thus, he applied the \$15,000 payment to the other fees owed by Rodman, rather than to the judgment. *Id.* Consequently, Rodman should have known that Mr. Dickson did not consider the judgment to have been fully satisfied. Mr. Shillito appeared at the show cause hearing in the estate action, but Rodman did not file an objection to Mr. Dickson's calculation of the amount owed. CP 215, 226.

In January 2009, another of the intervenor plaintiffs in the condemnation action filed a motion to receive a distribution from funds

held in the registry of the court. CP 22. Mr. Dickson filed an objection, claiming that he should share in the distribution based on his unsatisfied judgment. CP 24. Mr. Dickson included the declaration he had filed in September 2008 in the estate action. CP 26. Both the motion to disburse funds and Mr. Dickson's objection were sent to both Rodman and Mr. Shillito. CP 244, 247. Rodman did not object, and an order to disburse \$13,638.11 to Mr. Dickson was entered on January 23, 2009. CP 81.

In September 2009, Mr. Dickson filed a motion to amend his judgment to include additional attorney's fees. CP 84, 216. The motion sought attorney's fees that had been incurred prior to entry of judgment but were inadvertently left out of the total judgment and fees that had been incurred in trying to collect on the judgment. *Id.* The attorney for the intervenor plaintiffs, Catherine Clark, filed a declaration in support of the motion to amend the judgment, stating "I agree with the factual evidence provided in the Motion to Amend Judgment and further support the effort to amend the judgment based on the items outlined in the Declaration of Thomas L. Dickson in Support of Motion to Amend Judgment." CP 116-17. The motion to amend judgment and the declarations of Mr. Dickson and Ms. Clark were sent to Rodman and Mr. Shillito. CP 249, 251. Rodman did not file any objection, so an amended judgment was entered on September 25, 2009, to award the additional attorney's fees. CP 118.

Also in September 2009, the personal representative of the Estate of Wilma Rodman filed a motion for summary judgment, again seeking to resolve the various attorney's liens. CP 216. Mr. Dickson filed a response, again asserting in his declaration that the judgment had not been fully satisfied. *Id.* The motion and Mr. Dickson's response were both served on Rodman. *Id.* The motion for summary judgment was continued several times to allow Rodman time to respond, then to allow him time to find an attorney, and then to allow his attorney time to prepare a response. *Id.* On February 18, 2010, Rodman finally filed a response to the motion for summary judgment regarding the attorney's liens, where he for the first time asserted that Mr. Dickson's judgment had been fully satisfied. CP 216-17. Even then, he did not file a motion to vacate the judgment. *Id.* Judge Worswick ruled that the attorney's liens were unenforceable on March 4, 2010. *Id.* Finally, on June 1, 2010, Rodman filed a motion to vacate the judgment, without explaining why the motion had not been filed months sooner. CP 128. In response to the motion to vacate, and in light of the court's ruling on the attorney's liens, Mr. Dickson recalculated the amount owed on the judgment and amended judgment. CP 217.

On July 2, 2010, Judge Buckner heard Rodman's motion to vacate the judgment and disgorge fees. She denied the motion, stating:

It's clear in this case that this motion is untimely. We are talking about at least anywhere from eight to 20 months from when it should have been brought, and further, the satisfaction was treated as partial by Mr. Rodman's attorney, at least at the time. For those reasons, I will be denying the motion to disgorge the fund.

VRP 19. After a request for clarification from Rodman's attorney, the court ruled that the satisfaction was partial as intended by Mr. Shillito and Rodman. VRP 20.

An order was entered, CP 235, and Rodman timely appealed, CP 237.

#### ARGUMENT

Rodman has not shown that the trial judge abused her discretion in ruling that the motion to vacate was untimely or that the evidence showed that Rodman and his attorney did not intend a full satisfaction of the judgment in March 2007.

An order on a motion to vacate is generally reviewed for abuse of discretion, and will only be overturned if the exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003); *Scanlon v. Witrak*, 110 Wn. App. 682, 686, 42 P.3d 447 (2002). In other words, an order under CR 60 will be disturbed "only

when no reasonable person would take the position adopted by the trial court.” *In re Marriage of Burkey*, 36 Wn. App. 489, 489, 675 P.2d 619 (1984). Review of a motion under CR 60(b)(5) to vacate a void judgment is de novo. *In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.23 1121 (2003).

With regard to the court’s statement as to the parties’ intent, a trial court’s factual determinations are reviewed for substantial evidence. *E.g. Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990); *see also In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (Applying substantial evidence standard of review where only documentary evidence was presented because “the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith.”).

As discussed below, Rodman has not met his burden to establish that the trial court abused its discretion or that its findings were not supported by substantial evidence. The order should be affirmed.

**A. The Motion Was Untimely.**

The trial court did not abuse its discretion in denying the motion to vacate under CR 60(b)(1), (4), and (6) because the motion was not brought within a reasonable time. Under the terms of the rule, a motion to vacate

“shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.” CR 60(b). The requirement to bring a motion within a reasonable time “is applicable to all subsections of the rule.” *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311, 989 P.2d 1144 (1999); *see also Ellison v. Process Systems Inc. Const. Co.*, 112 Wn. App. 636, 50 P.3d 658 (2002) (reasonable time requirement applies to a motion under CR 60(b)(4), (9), and (11)).

Even a motion filed within one year under CR 60(b)(1) is not automatically timely—the trial court must still determine whether the motion was filed within a reasonable time and has discretion to deny the motion as untimely even if filed within one year. *Luckett*, 98 Wn. App. at 310-13.

What constitutes a reasonable time depends on the facts and circumstances of each case. The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. Major considerations in determining a motion’s timeliness are: (1) the prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner.

*Id.* at 312-13 (citations omitted). Further, prejudice to the nonmoving party is merely a factor to be considered—an untimely motion to vacate

can be denied even without a showing of prejudice. *Id.* at 313. Thus, *Luckett* affirmed denial of motion to vacate despite a lack of prejudice to the nonmoving party where the moving party filed the motion four months after learning of the adverse order and offered no valid reason for the delay. *Id.*

The trial court did not abuse its discretion in ruling that Rodman's motion to vacate was not filed within a reasonable time. At a minimum, Rodman's motion was filed over eight months after the amended judgment was entered. This eight-month delay by itself is sufficient that the court's ruling cannot be considered a manifest abuse of discretion. However, Rodman knew that Dickson did not consider the judgment to be fully satisfied long before the amended judgment. Rodman could have challenged Dickson's position even before the motion to amend the judgment was filed, so the trial court appropriately considered more than just the eight-month period between entry of the amended judgment and the motion to vacate.

Rodman had multiple opportunities to challenge Dickson's position regarding the \$15,000 payment received in March 2007 but unreasonably delayed taking any action. It was clear that Mr. Dickson did not believe the judgment had been satisfied from the declaration filed in the probate matter in September 2008. CP 26. Rodman's attorney, Mr.

Shillito, was present at the show cause hearing scheduled to consider the various attorney's liens that had been filed against Rodman's interest in the estate. CP 226. Rodman's motion to vacate was filed over 20 months after this declaration and show cause hearing.

Again in January 2009, Rodman was made aware of Dickson's belief that the judgment had not been satisfied when another judgment creditor filed a motion to receive funds that were being held in the registry of the court and Dickson asked to share in the disbursement based on the judgment. CP 24. The motion to disburse funds and Mr. Dickson's objection were both sent to Mr. Shillito and to Rodman himself. CP 244, 247. Having no response from Rodman, the court ordered the funds to be disbursed on January 23, 2009. CP 81. Rodman waited over 16 months from entry of this order to file his motion.

Then, in September 2009, Mr. Dickson filed his motion to add additional attorney's fees to the judgment. CP 84. This motion was mailed to Rodman and Mr. Shillito. CP 251. The only response to the motion was a declaration filed by Catherine Clark, the former attorney for the judgment creditors, in which she supported Dickson's request for an amendment. CP 116. Ms. Clark's declaration was also sent to both Rodman and Mr. Shillito. CP 249. Again, Rodman did nothing, so the amended judgment was entered as requested. CP 118.

Finally, over eight months after the amended judgment was entered, Rodman filed his motion to vacate. CP 128. Rodman's motion also sought to vacate the court's order of January 23, 2009 (a necessary element of his request to disgorge funds disbursed from the court registry), but was filed over 16 months after that order. *Id.* He offers no explanation whatsoever to justify the delay. Based on the extended period in which Rodman did nothing to assert his objection together with the lack of any attempt to offer a good reason for his failure to act, a reasonable person could conclude that the motion was not brought within a reasonable time. The trial judge properly exercised her discretion, and the order must be affirmed.

**B. The Judgment Was Not Void.**

The judgment was not void within meaning of CR 60(b)(5), so the motion to vacate on that basis was also properly denied. "A void judgment is a judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved." *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 302-03, 971 P.2d 581 (1999). A judgment can also be vacated as void if the requirements of due process were not satisfied. *E.g. In re Marriage of Maxfield*, 47 Wn. App. 699, 737 P.2d 671 (1987).

“A void judgment should not be confused with a voidable judgment—normally meaning a judgment that is vulnerable to attack under CR 60 for some reason other than being void.” Tegland, Karl B., 4 Wash. Prac., Rules Practice CR 60 (5<sup>th</sup> ed.). Where the court has personal and subject matter jurisdiction, an erroneous judgment or order is not void, but merely voidable:

Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. This is true even if there is a fundamental error of law appearing upon the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided it is regarded as valid.

*In re Marriage of Ortiz*, 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987) (quoting *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968)); *see also Bour v. Johnson*, 80 Wn. App. 643, 649, 910 P.2d 548 (1996) (“When the court otherwise has subject matter jurisdiction and renders a judgment upon a complaint that does not state a cause of action, the judgment is not void but simply erroneous.”). A motion to vacate a judgment that is voidable, rather than void, must be brought within the time limits set by CR 60. *Chai v. Kong*, 122 Wn. App. 247, 254-55, 93 P.3d 936 (2004).

Thus, a stipulated order that was entered by the attorneys without one client's consent was only voidable and not subject to vacation under CR 60(b)(5). *Turner*, 94 Wn. App. at 304. Similarly, failure to comply with the statutory framework for a parenting plan did not render the resulting judgment void, but only voidable. *In re Marriage of Wilson*, 117 Wn. App. at 49. Consequently, because the challenging party had conceded that the court had personal and subject matter jurisdiction, the judgment was not void within the meaning of CR 60(b)(5). *Id.*

Contrary to Rodman's assertion, action on a judgment that has been previously satisfied is not void so long as the court had jurisdiction. In addition to the distinction between void and voidable judgments, a plain reading of the rule shows that CR 60(b)(5) is not intended to apply to judgments that have been satisfied. Court rules are interpreted according to the principles of statutory construction. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). A rule must therefore be interpreted to avoid rendering other provisions meaningless and superfluous. *See State v. Wofford*, 148 Wn. App. 870, 882, 201 P.3d 389 (2009). The void judgment language in CR 60(b)(5) cannot apply to a satisfied judgment because another provision, CR 60(b)(6), explicitly applies to judgments that have been "satisfied, released, or discharged." If satisfied judgments

are considered void within the meaning of CR 60(b)(5), then CR 60(b)(6) is superfluous.

None of the cases cited by Rodman support the conclusion that subsequent actions on a satisfied judgment are void and justify vacation under CR 60(b)(5). The judgment in *Northern Commercial Co. v. E. J. Hermann Co.*, 22 Wn. App. 963, 593 P.2d 1332 (1979), was void as to the former spouse because she had never been served. *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983), discusses the elements of an accord and satisfaction and supports the conclusion that a party cannot collect on a claim after an accord and satisfaction has been reached, but it says nothing about whether collection attempts on a satisfied judgment render the judgment void within the meaning of CR 60(b)(5).

Rodman has cited no authority for the proposition that all court orders subsequent to the satisfaction of judgment in March 2007 were void. Rodman does not dispute that the court had subject matter and personal jurisdiction, and he does not dispute that he had notice of all actions taken. Thus, the subsequent court orders were at best voidable, and the motion to vacate would have to have been brought within a reasonable time. Neither the order disbursing funds nor the amended judgment were void within the meaning of CR 60(b)(5), and the trial court properly denied the motion to vacate.

**C. The Court's Decision as to the Parties' Intent Was Supported by Substantial Evidence.**

The order denying the motion must be affirmed regardless of any findings as to the parties' intent because Rodman's motion to vacate was not timely for the reasons discussed above. However, the order must also be affirmed because trial court's statement as to the intent of Mr. Rodman and Mr. Shillito was supported by substantial evidence.

The record is clear that Mr. Dickson never intended to accept the \$15,000 payment in full satisfy of his claim. CP 214. There was no reason for him to accept the payment in partial satisfaction because Rodman's bankruptcy had been dismissed and he believed he would be paid either through collection on the judgment or based on his attorney's lien against Rodman's interest in the Estate of Wilma Rodman. *Id.* Mr. Dickson's later efforts to collect the full amount owed are consistent with his testimony that he did not intend to fully satisfy the judgment.

Rodman claims that he never authorized a partial payment. CP 181. However, his failure to take any action for over 20 months after first learning that Mr. Dickson did not consider the judgment to be fully satisfied is inconsistent with this testimony. Despite multiple opportunities to assert that the judgment was satisfied in March 2007, Rodman did nothing.

Significantly, only Mr. Dickson and Mr. Shillito were parties to the discussion about whether the \$15,000 payment would be a full or partial satisfaction. CP 214. After that discussion, Mr. Dickson understood that it was only a partial satisfaction. *Id.* Rodman did not submit any testimony from Mr. Shillito as to the content of that discussion. Mr. Shillito's declaration generally describes the negotiations with multiple creditors and the drafting of the document entitled partial satisfaction, but Mr. Shillito never testified that Mr. Dickson specifically agreed to accept the \$15,000 payment in full satisfaction. CP 154. Mr. Shillito was present in court at the show cause hearing on September 23, 2008, but there is no record of him asserting at that time that Mr. Dickson was not entitled to further payment on the judgment. CP 226.

Despite his own apparent acceptance of Dickson's position by failing to object for over a year, Rodman suggests that Dickson's position is untenable based on the language in the body of the satisfaction. But the court did not err in considering Dickson's declaration: "[A] party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous." *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009).

At least on its face, the title of the satisfaction appears to conflict with the text. Dickson presented extrinsic evidence of his discussions with Mr. Shillito and his intent in signing the document. Based on Dickson's testimony, the text in the body of the partial satisfaction is subject to reformation based on the doctrine of mutual mistake. *E.g. Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 832, 991 P.2d 1126 (2000). In contrast, Rodman presented an explanation to reconcile the title and text of the satisfaction. The evidence and arguments were properly considered by the trial court, and the court ruled in Mr. Dickson's favor. There was no abuse of discretion.

Even setting aside any credibility determination made by the trial court, the judgment must be affirmed because Rodman did not present sufficient evidence from which a reasonable person could find fraud. The party seeking to vacate a judgment bears the burden to establish fraud by clear, cogent, and convincing evidence. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (Also holding that "the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense."). Rodman claims that Dickson committed fraud by accepting a full satisfaction of the judgment and then intentionally and knowingly telling the Court that the judgment was not satisfied. However, the

evidence before the lower court, in the form of Mr. Dickson's sworn declaration, was that he never intended to accept the March 2007 payment in full satisfaction of the judgment and that he never intended to mislead the court. CP 214-15.

Rodman presented no evidence to directly contradict Mr. Dickson's declaration that he did not intend to fully satisfy the judgment. Rodman presented a declaration from Noel Shillito which explains, in Mr. Shillito's mind, why it may have been proper for the document to be titled "partial satisfaction" and for the body to contain language regarding a full satisfaction. CP 155-56. But his declaration does not explicitly claim that Mr. Dickson agreed to take a reduced payment in full satisfaction of the judgment.

Rodman also submitted the declaration of Catherine Clark, in which she explains that she understood that her judgment was fully satisfied. CP 167. But Ms. Clark's testimony regarding what she was willing to accept has no bearing on whether Mr. Dickson agreed to accept a partial payment as full satisfaction. In addition, the record before Judge Buckner demonstrated that Ms. Clark submitted an unsolicited declaration in support of Mr. Dickson's September 2009 motion to amend the judgment, in which she stated: "I agree with the factual evidence provided in the Motion to Amend Judgment and further support the effort to amend

the judgment based on the items outlined in the Declaration of Thomas L. Dickson in Support of Motion to Amend Judgment.” CP 117.

Not every discrepancy amounts to fraud justifying vacation of a judgment. In *Stoulil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 3 P.3d 764 (2000), the parties disputed whether a payment of \$175,000 was payment toward the defendant’s liability on a promissory note or whether it was payment for other consideration. The trial court entered judgment against the defendant without crediting the payment. *Id.* at 296. After judgment was entered, the defendant moved to vacate the judgment for fraud, claiming that the plaintiff’s tax returns did not support the plaintiff’s characterization of the payment, but rather showed that it was payment on the note. *Id.* at 297. However, the tax returns had been produced to the defendant, but simply not examined until after trial. *Id.* Further, the court noted that “[a]n omission on an income tax return may well result from mistake, inadvertence, oversight, or reliance on poor accounting advice,” and not from fraud. *Id.* at 299. The trial court’s denial of the motion to vacate was affirmed. *Id.*

Similarly, the discrepancy between Mr. Dickson’s calculations and the partial satisfaction of judgment amounts to an oversight, at most, but not fraud. Mr. Dickson acknowledges that prior declarations calculating the amount Rodman owed should have applied the \$15,000 payment

entirely toward the judgment. However, the failure to do so was not an attempt to perpetrate a fraud. Mr. Dickson explains that the calculations were done that way because it was easier and because he did not remember signing the partial satisfaction of judgment. CP 215.

Rodman's motion did not provide clear, cogent, and convincing evidence of the elements of fraud, and Judge Buckner's decision to deny the motion was supported by substantial evidence. Based on the record presented, whether the parties intended the \$15,000 payment as full satisfaction of the judgment was a factual determination that inherently required evaluation of the witnesses' credibility. The trial court's finding was supported by substantial evidence and should not be disturbed on appeal.

**D. Respondent Is Entitled to Attorney's Fees.**

Dickson should recover attorney's fees incurred in defending this appeal. RAP 18.1(a) provides that a party may recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court if the laws grants a party that right and the request is made as provided by the rule. Further, attorney's fees may be awarded under RAP 18.9(a) against a party who files a frivolous appeal.

Dickson is entitled to attorney's fees pursuant to the amended judgment entered in its favor on September 25, 2009, which provides that,

“the judgment creditor shall be entitled to any additional fees incurred to collect on the judgment.” CP 120. In addition, Rodman signed a fee agreement which provided that the firm would be entitled to recover any fees incurred in efforts to collect unpaid amounts, and that the prevailing party in any action would recover attorney’s fees incurred. CP 89. Rodman’s motion to amend was not filed until after Dickson attempted to collect on the judgment by garnishing Rodman’s interest in the Estate of Wilma Rodman. CP 121-26. Dickson should be awarded the fees incurred in defending and enforcing the judgment.

Dickson is also entitled to attorney’s fees because Rodman’s appeal is frivolous. Fees can be awarded when an appeal “presents no debatable issues or legitimate arguments for an extension of the law.” *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010). “An appeal is frivolous if, considering the entire record, the court is convinced the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 356, 236 P.3d 961 (2010) (quotations omitted).

The decision to deny the motion to vacate as untimely was entirely a matter of discretion. Rodman never clearly articulates a reason why the court’s ruling on the untimeliness of the motion can be construed as

manifestly unreasonable or untenable. Similarly, Rodman's other arguments do not present any fairly debatable issues. Dickson should be awarded the fees incurred in responding to Rodman's appeal.

**E. Rodman's Request for Fees Must Be Denied.**

Even if Rodman prevails on the merits of this appeal despite the fact that the ruling below was clearly within the discretion of the court, Rodman is not entitled to an award of fees incurred. Rodman relies only on CR 11 and RCW 2.28.010 as grounds for an award of fees. Although CR 11 does provide for an award of fees as a possible sanction for filing a frivolous motion or pleading, because only baseless pleadings are in violation of the rule, a court "should impose sanctions only when it is patently clear that a claim has absolutely no chance of success." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (internal quotations and citations omitted).

It is somewhat absurd to argue that Dickson's position is frivolous and has no chance of success when Dickson prevailed before the trial court. Rodman relies upon *Wilson v. Henkle*, 45 Wn. App. 162, 174-75, 724 P.2d 1069 (1986), which affirmed an award of sanctions based on specific findings of the trial court that the attorney's conduct was improper. Judge Buckner made no such findings with regard to Mr. Dickson. Even after affirming the sanctions below, *Wilson* denied

attorney fees on appeal. *Id.* at 175. Rodman asks this Court to impose sanctions based on alleged wrongdoing before another court, but that court has already considered and denied the request for sanctions. Rodman's request should be summarily denied.

### CONCLUSION

The trial court did not abuse its discretion in ruling that the motion to vacate was not brought within a reasonable time. Further, the order disbursing funds and the amended judgment were not void, so the motion was properly denied on those grounds as well. Finally, the court's finding as to the parties' intent was supported by substantial evidence. There is nothing to support a conclusion that the trial court abused its discretion in any way. The judgment must be affirmed.

Respectfully submitted this 18<sup>th</sup> day of January, 2011.

DICKSON STEINACKER PS



---

KEVIN T. STEINACKER, WSBA #35475  
Attorneys for Respondent

**Certificate of Service**

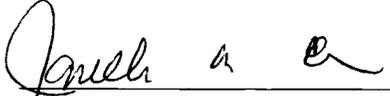
I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that on the date below I caused the Brief of Respondent to be filed with the Court of Appeals and to be served upon:

Philip B. Wade  
PO Box 5714  
Bremerton, WA 98312

Service was accomplished by:

Hand delivery  
 First class mail  
 Facsimile

DATED this \_\_\_ day of January, 2011 at Tacoma, Washington.

  
\_\_\_\_\_  
Janelle Elrod  
Legal Assistant

11 JAN 19 PM 1:21  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
Clerk of Court