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STATE OF WASHINGTON  
BY: *Ch*

No. 41186-5

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

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*In Re:*

ROBERT TURK, an individual, Appellant

vs.

VALERIE KTENAS, an individual, Respondent

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**RESPONDENT'S OPENING BRIEF**

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## **I. INTRODUCTION**

VALERIE KTENAS, Respondent, respectfully submits this Opening Brief in response to the Appellant's Brief. The Appellant's appeal for review as to the judgment of the trial court, the Findings of Fact and Conclusions of Law and the granting of an Anti-Harassment Order is untimely. The Appellant's Notice of Appeal is timely only as to an appeal of the trial court's denial of the Motion to Vacate. The appropriate standard is abuse of discretion. Accordingly, the Respondent requests that this Court find that there was no abuse of discretion by the trial court and affirm the trial court's decision with regard to the denial of the Motion to Vacate.

If the Court reviews any alleged error regarding the underlying trial or judgment, the Respondent requests that this Court find that there was no error by the trial court and affirm the trial court's decision with regard to the judgment, the Findings of Fact and Conclusions of Law, and the issuance of an Anti-Harassment Order.

## **II. ASSIGNMENTS OF ERROR**

As discussed more fully below, the Appellant failed to file a timely notice of appeal with regard to the trial court's judgment, the Findings of Fact and Conclusions of Law, and the issuance of an Anti-Harassment

Order. An unappealed final judgment cannot be restored to an appellate track by moving to vacate and appealing the denial of that motion.

In addition, the Appellant failed to preserve any issues for appeal since the Appellant made no objections whatsoever at the time of trial. Accordingly, the Respondent asserts the following with regard to the Appellant's Assignments of Error:

(1) The Appellant's assertion of error regarding the trial court's failure to grant a continuance of the trial date to the Appellant has been waived by and is time-barred because of the failure by the Appellant to preserve the issue for appeal and to file a timely appeal.

(2) The Appellant's assertion of error regarding the trial court's failure to rule upon the Appellant's Counterclaim and Affirmative Defenses has been waived by and is time-barred because of the failure by the Appellant to preserve the issue for appeal and to file a timely appeal. The Appellant's assertion of error regarding the trial court's denial of the motion to vacate pursuant to CR 60(b) is the only assignment of error in the Appellant's brief that has not been waived and, accordingly, the only one that should be considered by this Court.<sup>1</sup>

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<sup>1</sup> The Appellant's Assignment of Error (5) also appears to be pursuant to the trial court's failure to vacate the judgment, pursuant to CR 60(b). These are the only two Assignments of Error that should be considered by the Court as the others have been waived by failure to file a timely appeal.

(3) The Appellant's assertion of error regarding the granting of an Anti-Harassment Order against the Appellant has been waived by and is time-barred because of the failure of the Appellant to preserve the issue for appeal and to file a timely appeal.

(4) The Appellant's assertion of error regarding the entering of Findings of Fact and Conclusions of Law has been waived by and is time-barred because of the failure of the Appellant to preserve the issue for appeal and to file a timely appeal.

(5) The Appellant's assertion of error regarding the failure to properly consider that the Respondent allegedly made several "material misrepresentations" to the Court when it did not vacate the judgment pursuant to CR 60(b) appears to be a reference to CR 60(b)(4). However, the Appellant has not preserved this issue for appeal by making timely objections. Furthermore, the rule does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. 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. The elements must be established by clear and convincing evidence. The Appellant failed to object at the time of trial or offer any evidence or testimony refuting the

representations offered by the Respondent. Accordingly, these issues are not preserved for appeal.

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

#### **1. RELEVANT FACTS.**

This case involves two adjacent residential properties in Tacoma, Washington and a 15-foot wide driveway easement burdening each property and benefiting the other property. After years of confrontation from the Appellant regarding the easement, the Respondent commenced this civil action after the Appellant erected a tall fence in the center of the easement. (CP 3-13).

The Respondent and her former spouse purchased the property at 3515 East 112<sup>th</sup> Street, Tacoma, approximately 20 years ago with the driveway easement, which had been granted and recorded in October 1957, already in place.<sup>2</sup> (CP 3-13) (VR p.9 lns 15-25; p. 10 lns 1-11, Judge Katherine Stoltz, May 12, 2010). The Respondent has never changed the outside boundaries of the structures on her property or added new structures. *Id.*

The Appellant purchased the adjacent property, 3519 East 112<sup>th</sup> Street, Tacoma, approximately 16 years ago (subject to the easement). (CP 3-13). When the Appellant attempted to develop a mobile home park

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<sup>2</sup> The Respondent later acquired sole ownership of the property from the property settlement in the 1993 dissolution of her marriage.

on his property, he decided to use the easement as the ingress/egress to the back of his property. *Id.* The Appellant then started taking steps to block the Respondent's access to the easement. *Id.*

In May 2002, the Respondent had her property surveyed and erected a fence on her prescribed boundary. (VR p. 21 lns 22-25; p. 22 lns 1-14, Judge Katherine Stoltz, May 12, 2010).

The Appellant set about to harass the Respondent and to obstruct her use of the easement. (CP 3-13.) The Respondent twice (September 2002 and July 2008) had to obtain an anti-harassment order from the court to prevent harassment from the Appellant. (VR p. 27, lns 5-25; p. 28, ln 1, Judge Katherine Stoltz, May 12, 2010).

The second anti-harassment order, obtained on July 22, 2008, ordered the Appellant to refrain from blocking or impeding the Respondent's use of the easement and restrained him from entering or being on the Respondent's property. (VR p. 27, lns 5-25; p. 28, ln 1, Judge Katherine Stoltz, May 12, 2010). With the order restraining him in force, the Appellant nevertheless erected a tall fence near the middle of the easement. (VR p. 14, lns 19-25, Judge Katherine Stoltz, May 12, 2010).

He did so without permission or authorization, in order to "prevent [the Respondent], her roommate, and her guests from driving across my yard . . . .", as he stated under oath in response to the Respondent's

interrogatory on June 24, 2009. *Id.* The fence erected by the Appellant effectively blocked the Respondent's use and enjoyment of the easement to reach her side and back yards. (VR p. 15, Ins 3-6, Judge Katherine Stoltz, May 12, 2010).

**2. PROCEDURAL HISTORY.**

The trial for this case was originally scheduled for December 17, 2010. The Respondent appeared, prepared to go to trial; however, the Appellant appeared *pro se* and made a motion to continue the trial to enable him to retain counsel. (VR p.2 Ins 1-15, Judge Linda CJ Lee, December 17, 2010). The trial judge agreed to a continuance to May 12, 2010, but strongly urged the Appellant to obtain counsel. (VR p.15 Ins 8-10, Judge Linda CJ Lee, December 17, 2010).

On May 12, 2010, the Respondent appeared again before Judge Lee, ready for trial. However, the Appellant made yet another motion for continuance. (VR p. 2 Ins 11-14, Judge Linda CJ Lee, May 12, 2011). The Appellant alleged that he had retained counsel but that his attorney had a scheduling conflict and could not appear on that day. (VR p. 4 Ins 1-9, Judge Linda CJ Lee, May 12, 2011). The trial judge noticed, however, that no attorney had filed a Notice of Appearance. (VR p. 2 Ins 18-21, Judge Linda CJ Lee, May 12, 2011). The trial judge then offered the Appellant a short continuance:

THE COURT: So I am going to give the parties two options. One, we send you out for trial today, which means I send you to administration and you will trail in administration for a three-day period to wait for a courtroom to open up so that this case can be tried. That's the first option. The second option is I grant Mr. Turk a very short continuance. The case that I'm currently in is scheduled to be completed on May 20<sup>th</sup>, next Thursday. So I can grant a very short continuance to May 24<sup>th</sup>, the Monday after that. I'd like to hear both sides' thoughts on that. I'll start with the petitioner in this matter. Mr. Riggio?

MR. RIGGIO: May I have a moment, Your Honor?

THE COURT: Indeed.

MR. RIGGIO: As much as we'd like to try the case in front of you because of your history with the case, we'd opt for being sent over to court administration for trailing and hopefully getting out within the next couple of days.

THE COURT: Mr. Turk, your thoughts on that?

MR. TURK: Your Honor, I'll do what the Court tells me to do.

(VR p. 6 ln 25; p. 7 lns 1-21, Judge Linda CJ Lee, May 12, 2011).

Accordingly, the Court offered the Appellant a short continuance, which he chose not to take advantage of. The trial took place on May 12, 2010 before Judge Katherine Stolz. The Respondent testified as to the Appellant's interference with her use of the easement, and with regard to the anti-harassment orders received against the Appellant. Other than an opening statement and closing statement, the Appellant offered no

testimony and no evidence to refute the Respondent's claims or to advance his counterclaims and affirmative defenses. He made no objections on the record to evidence offered. The Respondent testified that she had done nothing to encroach upon the easement. (VR p. 11 lns 18-22, Judge Katherine Stolz, May 12, 2011). With regard to the anti-harassment orders, the Respondent described the threatening behavior that she had experienced with regard to the Appellant. (VR p. 27 lns 13-21; p. 27 lns 24-25; p. 28 ln 1, Judge Katherine Stolz, May 12, 2011).

Upon conclusion of the direct examination of the Respondent, the trial judge offered the Appellant the opportunity to cross examine, which he declined. (VR p. 28 ln 25; p. 29 ln 1, Judge Katherine Stolz, May 12, 2011). The Respondent presented testimony from a witness who testified as to her observations with regard to the Appellant's behavior and with regard to the construction by the Appellant of a fence in the easement. (VR p. 29 lns 12-25; p. 30 lns 1-25; p. 31 lns 1-25; p. 32 lns 25; p. 33 lns 1-5, Judge Katherine Stolz, May 12, 2011). The trial judge gave the Appellant the opportunity to cross examine the witness, which he declined. (VR p. 33 lns 6-7, Judge Katherine Stolz, May 12, 2011).

After the Respondent rested, the Court prepared for testimony to be offered by the Appellant:

THE COURT: Mr. Turk, you, I assume, wish to testify?

MR. TURK: No. I got nothing to say.

THE COURT: Closing argument then.

(VR p. 33 lns 11-13, Judge Katherine Stolz, May 12, 2011).

On May 21, 2010, the trial court entered a judgment against the Appellant, requiring him to remove the fence within thirty days and ordering that an Anti-Harassment Order to expire one year from that date, be signed. (CP 132-134). An Order for Protection-Harassment was entered on that date. (CP 135-136). Also entered on that date was the trial court's Findings of Fact and Conclusions of Law. (CP 127-131). Among the Findings of Fact made by the trial judge were the following:

6. Following purchase of the property at 3519 East 112<sup>th</sup> Street, Defendants began to take steps to block Plaintiff's access to the Driveway Easement.

.....

8. Thereafter, Defendant began to harass Plaintiff and to obstruct Plaintiff's use of the Driveway Easement based upon the fact that Plaintiff did not remove the portion of the carport roof which minimally encroached upon the eastern 7-1/2 foot portion of the driveway between their two properties.

9. In August 2002 Plaintiff obtained an anti-harassment order from the Pierce County Court against the Defendant in an attempt to prevent Defendant's offensive and harassing actions.

10. In May 2008, Defendant once again began committing acts of unlawful harassment against Plaintiff and a second anti-harassment order was issued specifically

ordering Defendant to refrain from blocking Plaintiff's use of the Driveway Easement and further restraining him from entering upon Plaintiff's property.

11. Nevertheless, Defendant erected a tall fence that remains to this date in the middle of the Driveway Easement without permission or authorization. The fence effectively blocks Plaintiff's use of the Driveway Easement to reach her side and back yard.

12. Plaintiff's exhibits admitted as Exhibits 1 through 10 reveal the encroaching fence, evidence of acts by Defendant to obstruct the Driveway Easement, and documents establishing the Driveway Easement and a survey of the Driveway Easement.

13. Plaintiff is entitled to have Defendant's fence removed which is causing impediment to Plaintiff's use of the Driveway Easement.

(CP 127-131).

Among the Conclusions of Law made by the trial judge were the following:

1. Defendant has routinely obstructed the Driveway Easement executed and recorded in 1957.

....

3. The Defendant improperly placed a fence in the middle of the Driveway Easement which severely obstructs Plaintiff's ability to use the Driveway Easement.

4. The Defendant is ordered to remove the fence within thirty (30) days of entry of these Findings of Fact and Conclusions of Law, or a fine of \$50.00 per day will be assessed against Defendant for each day the fence remains on the Driveway Easement.

5. In the event Plaintiff is required to remove the fence, she shall be entitled to Judgment against Defendant for her costs of removal of the fence.

6. An Anti-Harassment Order citing Defendant, to expire one year from this date, is signed today.

(CP 127-131).

A Motion to Vacate Judgment was filed by the Appellant. (CP 137-147). An Order Denying Defendant's Motion to Vacate Judgment was entered by the trial court on August 26, 2010. (CP 231-234).

On September 14, 2010 the Appellant filed a Notice of Appeal. (CP 237-242).

#### IV. ARGUMENT

##### **1. THE APPELLANT FAILED TO TIMELY PRESERVE ANY ISSUE FOR APPEAL.**

A party seeking review before the Court of Appeals must timely preserve the issue for appeal. An appellate court may refuse to review any claim of error which was not raised at the trial court level. RAP 2.5(a); *Postema v. Postema Enterprises, Inc.*, 118 Wn.App. 185, 72 P.3d 1122 (2003). The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 527, 20 P.3d 447, *review denied*, 145 Wn.2d 1004, 35 P.3d 380 (2001). A court normally will not vacate a

verdict and grant a new trial for errors of law if the party seeking a new trial failed to object to or invited the error. *In re K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

The Court should not reverse a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Appellate review of the admission of evidence is limited to the grounds for the objection specifically raised at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 338, 54 P.3d 665 (2002) (sweeping objections to evidence without explanation or specific objection insufficient). An objection that does not contain a specific valid reason for the exclusion of evidence is inadequate to preserve error. *Seattle v. Carnell*, 79 Wn.App. 400, 403, 902 P.2d 186 (1995). It is inadequate unless it calls attention to the specific reason for the impropriety, otherwise the trial court does not have the opportunity to correct the error. *State v. Suarez-Bravo*, 72 Wn.App. 359, 365, 864 P.2d 426 (1994).

Here, the Appellant failed to give the trial court a specific reason to fully apprise it of the issues now raised on appeal and this argument is not properly preserved and is therefore waived. At trial the Appellant failed to make a single objection with regard to the evidence or testimony presented by the Respondent.

**2. THE APPELLANT FAILED TO FILE A TIMELY NOTICE OF APPEAL WITH REGARD TO THE TRIAL COURT'S JUDGMENT AND THEREFORE THE APPELLANT IS LIMITED TO AN APPEAL OF THE TRIAL COURT'S DENIAL OF THE APPELLANT'S MOTION TO VACATE ONLY AND HAS WAIVED ANY APPEAL OF THE UNDERLYING JUDGMENT.**

A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal. RAP 5.1(a). Each notice must be filed within the time provided by Rule 5.2. RAP 5.1(a). Pursuant to Rule 5.2(a), a notice of appeal must be filed within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. RAP 5.2(a). On May 21, 2010, the trial court rendered its judgment in the underlying case. (CP 132-134). Accordingly, a timely notice of appeal of the trial court's determination would have to be filed no later than June 20, 2010. The Appellant's Notice of Appeal was filed

on September 14, 2010, after the period for appealing the judgment had expired.<sup>3</sup> (CP 237-242).

The Appellant failed to file a timely Notice of Appeal with regard to the trial court's judgment. Accordingly, the Appellant has waived the right to seek review of the judgment and is limited solely to an appellate review of the trial court's denial of the Appellant's motion to vacate pursuant to CR 60(b). An appeal from the denial of a CR 60(b) motion is limited to the propriety of the denial and not the impropriety of the underlying judgment. *Bjurstrom v. Campbell*, 27 Wn.App. 449, 450-51, 618 P.2d 533 (1980). 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 (7<sup>th</sup> Cir. 1977). 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 U.S. 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.

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<sup>3</sup> The Appellate Court will review a final judgment not designated in the notice of appeal only if the notice designates an order deciding a timely posttrial motion based on CR 50(b) (judgment as a matter of law), CR 52(b) (amendment of findings), CR 59 (reconsideration, new trial, and amendment of judgments), CrR 7.4 (arrest of judgment), or CrR 7.5 (new trial). RAP 2.4(c). None of these apply in this instance.

In *State ex rel. Green v. Superior Court*, 58 Wn.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.

Errors of law by the trial court cannot be corrected on a motion to vacate a judgment. *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182 (1901). 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 the trial court may have fallen. Whether a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is not ground for setting aside the judgment on a motion. *See, e.g., In re Ellern*, 23 Wn.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); *Swartz & Assoc. v. Logan*, 12 Wn.App. 360, 363, 529 P.2d 1121 (1974).

Additionally, the Appellant, by motion under RAP 18.8(b), has 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. *Jones v. Canyon Ranch Assoc.*, 19 Wn.App. 271, 274, 574 P.2d 1216 (1978). Since the Appellant 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. *State v. Gaut*, 111 Wn.App. 875, 881, 46 P.3d 832 (2002). An unappealed final judgment cannot be restored to an appellate track by moving to vacate and appealing the denial of that motion. *Gaut*, 111 Wn.App. at 881, 46 P.3d 832.

**3. THE STANDARD FOR REVIEW REGARDING A MOTION TO VACATE PURSUANT TO CR 60(B) IS THAT OF A MANIFEST ABUSE OF DISCRETION.**

A trial court's decision with regard to a motion to vacate a judgment or order under CR 60(b) is reviewed by this Court for abuse of discretion. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985); *Lane v. Brown & Haley*, 81 Wn.App. 102, 105, 912 P.2d 1040 (1996). Accordingly, this Court must not reverse a trial court's denial of a motion to vacate under CR 60(b) absent a showing that the trial court manifestly abused its discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Lane*, 81 Wn.App. at 105, 912 P.2d

1040. See also *Pybas v. Paolino*, 73 Wn.App. 393, 399, 869 P.2d 427 (1994).

**4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO VACATE PURSUANT TO CR 60(B).**

CR 60(b) provides several bases for vacating a final judgment. In the Appellant's original motion to vacate, he cited to and addressed CR 60(b)(1), (4) and (11). However, on appeal, the Appellant only refers to CR 60(b)(4) when, in Assignment of Error No.5, the Appellant asserts that the "trial court erred in failing to properly consider that Respondent made several material misrepresentations to the Court when it did not vacate the judgment pursuant to CR60(b)". This statement appears to reference CR60(b)(4), which allows the trial court to relieve a party from a final judgment on the basis of fraud or misrepresentation. Accordingly, the Court, which will not consider issues abandoned on appeal or raised for the first time on appeal, should consider only whether the trial court erred by failing to vacate the judgment on the basis of CR 60(b)(4). *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978); *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn.App. 280, 284, 673 P.2d 634 (1983). However, in an abundance of caution, the Respondent will address each basis cited in the Appellant's original motion to vacate, CR 60(b)(1), (4), and (11).

A motion to vacate must meet evidentiary requirements. CR 60 requires a party to show the facts or errors upon which the motion to vacate is based, and if he is the defendant, “the facts constituting a defense to the action[.]” CR 60(e)(1). After one party has obtained a judgment, it is assumed that he or she has substantial evidence to support his or her claim, and if a CR 60 moving party cannot produce substantial evidence to oppose the claim, there is no point in setting aside the judgment and conducting further proceedings. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn.App. 829, 834, 14 P.3d 837 (2000). Accordingly, the Appellant would have had to demonstrate sufficient facts constituting a defense when seeking an order vacating the judgment.

**A. CR 60(b)(1).**

Although this basis was not identified in the Appellant’s Assignments of Error, it was identified in the Appellant’s Motion to Vacate and presumably rejected by the trial court. Under CR 60(b)(1), the court may relieve a party from a final judgment for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” CR 60(b)(1). The moving party must establish that the complained of conduct prevented the losing party “from fully and fairly presenting its case or defense” and led to the entry of judgment. *Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990).

The Appellant argued in the underlying Motion that his actions leading to the judgment against him were occasioned by mistake and excusable neglect, including his failure to have counsel at trial. However, the trial court granted the Appellant a five-month continuance from the December 2009 trial date to allow the Appellant to obtain counsel. (VR p. 14, lns 22-23, Judge Linda CJ Lee, December 17, 2009). Instead of using the five-month period to obtain counsel and have a notice of appearance entered, the Appellant appeared before the trial court on the trial date once again without counsel. (VR p. 2, lns 11-17, Judge Linda CJ Lee, May 12, 2010). The trial court offered the Appellant another short continuance to allow his attorney to appear; however, the Appellant did not take advantage of that opportunity. (VR p. 6, lns 21-25; p. 7, lns 1-21, Judge Linda CJ Lee, May 12, 2010). There was no abuse of discretion in the trial court's determination that CR 60(b)(1) did not serve as a basis for vacating the judgment in this instance. Although failing to obtain counsel by the trial date might be considered a mistake or excusable neglect the first time it occurs, when it occurs a second time, it is not mistake or excusable.

**B. CR 60(b)(4).**

Although this basis was not identified in the Appellant's Assignments of Error, it was identified in the Appellant's Motion to

Vacate and presumably rejected by the trial court. Under CR 60(b)(4), the court may relieve a party from a final judgment for “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” CR 60(b)(4). The rule does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. *Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). 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. *Lindgren*, 58 Wn.App. at 596, 794 P.2d 526.

The party attacking a judgment under CR 60(b)(4) must establish the elements of fraud by clear and convincing evidence. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828, 959 P.2d 651 (1998). The Appellant must show that the Respondent made a knowing and false representation of material fact; that the Appellant was ignorant of that falsity; that the Appellant reasonably relied upon that representation; and that he suffered damage. *N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn.App. 228, 232, 628 P.2d 482 (1981).

The Appellant acknowledges that it is his burden to provide evidence to support the contention that the judgment was obtained by misrepresentation of misconduct and that the standard is abuse of

discretion, yet he failed to meet this burden. The only evidence the Appellant points to with regard to alleged fraud or misrepresentation is specific testimony by the Respondent regarding whether the Respondent impeded the Appellant's use of the easement. Appellant's Opening Brief, pages 24-27. However, the Appellant failed to cross-examine the Respondent at trial or challenge the testimony in any other manner. The Respondent chose neither to testify himself at trial nor present any witnesses or evidence whatsoever that would contradict the Respondent's testimony. The trial judge offered the Appellant the opportunity to cross-examine the Respondent and to testify, and he refused to do so. (VR p. 28, Ins 24-25; p. 29, Ins 1-3, Judge Katherine Stoltz, May 12, 2010). Accordingly, the trial judge had discretion to accept the unchallenged testimony of the Respondent as credible, including the exhibits offered to support that testimony.

In his Opening Brief, the Appellant makes statements that the evidence and representation by the Respondent was "patently false," but fails to show in any way that the testimony was not credible or that the trial court abused its discretion in accepting the testimony as credible. The Appellant states that he provided photographs and letters in his Motion to Vacate; however, none of this evidence was provided at trial by the Appellant, even though the Appellant was present and was offered the

opportunity to present evidence. Furthermore, none of this testimony established that the Appellant had a defense to the claims, as is required by the standard.

The Appellant states that “[i]t is probable that if Judge Stolz knew that Respondent herself was herself impeding the easement, she would either have denied the restraining order or would have made a different ruling, or at a minimum a mutual restriction on blocking the easement.” Appellant’s Opening Brief, p. 27. However, the only reason Judge Stolz did not know that the Respondent was allegedly “impeding” the easement was because the Appellant, who was present at trial, failed to present any evidence to suggest that such was the case, or make any objection on the record. The Appellant made no objections on the record with regard to the admittance of any evidence or testimony, and refused to cross-examine witnesses or testify himself. Although he was acting *pro se* during the trial, that was only because he had declined the trial court’s offer to grant another short continuance to allow him to be represented. (VR p. 6, lns 21-22; p. 7, lns 1-21, Judge Linda CJ Lee, May 12, 2010). Accordingly, with regard to CR 60(b)(4), the trial court did not abuse its discretion in refusing to vacate the judgment.

**C. CR 60(b)(11).**

Although this basis was not identified in the Appellant's Assignments of Error, it was identified in the Appellant's Motion to Vacate and presumably rejected by the trial court. Under CR 60(b)(11), the trial court may relieve a party from a final judgment for "[any] other reason justifying relief from the operation of judgment." CR 60(b)(11). The Court should use this catchall provision only in extraordinary circumstances not covered by other subsections of CR 60(b). *In re Marriage of Flannagan*, 42 Wn.App. 214, 221, 709 P.2d 1247 (1985). The circumstances must involve "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *Flannagan*, 42 Wn.App. at 221 (quoting *State v. Keller*, 32 Wn.App. 135, 141, 647 P.2d 35 (1982)). Washington courts have invoked the rule in situations involving reliance on mistaken information. *In re Marriage of Tang*, 57 Wn.App. 648, 656, 789 P.2d 118 (1990).

The Appellant argued in his Motion that he was in a situation involving extraordinary circumstances because his attorney had not properly communicated or advised him. This neither constitutes an extraordinary circumstance nor involve an irregularity which is extraneous to the action of the court. The Appellant was given multiple opportunities by the trial court to obtain counsel prior to trial, including the opportunity

to take another short continuance on the day of trial, which the Appellant declined. (VR p. 6, lns 21-22; p. 7, lns 1-21, Judge Linda CJ Lee, May 12, 2010). Accordingly, with regard to CR 60(b)(11), the trial court did not abuse its discretion in refusing to vacate the judgment.

**5. THE APPELLANT'S ARGUMENTS CONCERNING THE JUDGMENT, COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, THE ANTI-HARASSMENT ORDER AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE TIME-BARRED.**

As discussed in Section 1. Assignments of Errors above, the Appellant failed to file a timely Notice of Appeal with regard to the trial itself and the judgment issued by the trial court. The Appellant is precluded from seeking appellate review. The Respondent maintains that the Appellant cannot seek relief from the appellate court with regard to the trial, the judgment, or anything other than the denial of the Motion to Vacate. Nonetheless, in an abundance of caution, the Respondent responds to the Appellant's arguments, below.

**A. THE TRIAL COURT GAVE THE APPELLANT MULTIPLE CONTINUANCES.**

The Appellant alleges that the trial court erred in not granting a continuance sought by the Appellant on May 12, 2010, the second trial date; however, the record shows that the Appellant was granted at least one continuance and turned down a short continuance offered on the May

12, 2010 trial date. (VR p. 6, lns 21-22; p. 7, lns 1-21, Judge Linda CJ Lee, May 12, 2010). On the original trial date, December 17, 2009, the trial judge gave the Appellant a continuance to allow him to retain counsel. That continuance was nearly five months in length. Despite the continuance, the Appellant appeared before the trial court on May 12, 2010 without a counsel of record.

Despite the fact that the Appellant had obviously failed to take the trial judge's advice to promptly obtain counsel, the trial judge did offer the Appellant another short continuance of the trial to May 24, 2010. (VR p. 6, lns 21-22; p. 7, lns 1-21, Judge Linda CJ Lee, May 12, 2010). If the Appellant had, in fact, retained counsel, as he represented to the trial court on the date of trial, and if that counsel had a conflict with the May 12, 2010 trial date, the Appellant would have taken the short continuance to allow his counsel to appear. He indicated to the trial judge that the only reason his counsel could not appear on May 12, 2010 was that he had a conflict on that date. However, the Appellant chose not to accept the continuance offered.

The trial court not only did not err in failing to grant a continuance, the trial court did grant a continuance of which the Appellant failed to avail himself.

**B. THE TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER THE APPELLANT'S COUNTERCLAIM AND AFFIRMATIVE DEFENSES BECAUSE THE APPELLANT FAILED TO PROSECUTE HIS COUNTERCLAIMS AND AFFIRMATIVE DEFENSES.**

The Appellant argues that the trial court never ruled upon or addressed his counterclaim or affirmative defenses at trial and that this is an error committed by the trial court. As a threshold matter, and as discussed above, this error has not been preserved for appeal by the Appellant. In addition, the Appellant failed to offer any testimony or evidence at trial with regard to any counterclaims or affirmative defenses. The trial court afforded the Appellant ample opportunity to put on his case; however, he declined to provide any evidence or testimony which would either refute the Respondent's testimony and evidence or would prosecute his alleged counterclaims. He cannot, now, claim error by the trial court for his own omissions at the time of trial. Accordingly, the trial court committed no error.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING AN ANTI-HARASSMENT ORDER.**

The Appellant alleges that the trial court abused its discretion when it granted an Anti-Harassment Order, and supports this statement by saying that there was no evidence provided to support ongoing harassment. In fact, there was evidence presented to support the Anti-Harassment Order issued by the trial judge, in addition to the fact that past

harassment by the Appellant had been sufficient for a court to issue two Anti-Harassment Orders. The Respondent testified credibly that she had reason to be concerned about further harassment:

MR. RIGGIO: Do you still have an [Anti-Harassment] order in existence?

RESPONDENT: No, I don't, but I would like one.

MR. RIGGIO: Why is that?

RESPONDENT: Because I'm afraid if he gets that fence – if he has to take the fence down, that there's going to be serious problems.

(VR p. 28, lns 2-7, Judge Katherine Stoltz, May 12, 2010).

The Respondent's testimony with regard to harassment was supported by the testimony of witness Amy Mennegar:

MR. RIGGIO: Have you ever – were you ever present when he was harassing your daughter and her roommate or either of them?

MENNEGAR: Yes, I was.

MR. RIGGIO: What did you observe?

MENNEGAR: Flicking my daughter, granddaughter off.

MR. RIGGIO: What do you mean by that?

MENNEGAR: Giving her the finger.

(VR p. 32, lns 21-25, Judge Katherine Stoltz, May 12, 2010).

In addition, the trial judge determined that the sole reason for constructing a fence down the center of an easement would be to harass a neighbor. (VR p. 36, lns 12-14, Judge Katherine Stoltz, May 12, 2010). Accordingly, the trial judge determined that the existence of the fence itself was ongoing harassment against the Respondent by the Appellant that would warrant an Anti-Harassment Order.

**D. THE TRIAL COURT DID NOT ERR IN ENTERING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED UPON THE EVIDENCE OFFERED AT TRIAL.**

The Appellant argues that there was no evidence on record to support the Findings of Fact and Conclusions of Law entered by the trial judge. Specifically, the Appellant identifies the following Findings of Fact and Conclusions of Law as not being supported by evidence:

Findings of Fact:

6. Following purchase of the property at 3519 East 112<sup>th</sup> Street, Defendant began to take steps to block Plaintiff's access to the Driveway Easement.

8. Thereafter, [in May 2002] Defendant began to harass Plaintiff and to obstruct Plaintiff's use of the Driveway Easement based upon the fact that Plaintiff did not remove the portion of the carport roof which minimally encroached upon the eastern 7-1/2 foot portion of the driveway between their two properties.<sup>4</sup>

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<sup>4</sup> Although the Appellant lists Findings of Fact No. 8 initially, the Appellant fails to discuss or identify any alleged error with regard to this specific Findings of Fact in his Opening Brief.

9. In August, 2002 Plaintiff obtained an anti-harassment order from the Pierce County court against the Defendant in an attempt to prevent Defendant's offensive and harassing actions.

10. In May, 2008, Defendant once again began committing acts of unlawful harassment against Plaintiff and a second anti-harassment order was issued specifically ordering Defendant to refrain from blocking Plaintiff's use of the Driveway Easement and further restraining him from entering upon Plaintiff's property.

Conclusions of Law:

1. Defendant has routinely obstructed the Driveway Easement executed and recorded in 1957.

6. An Anti-Harassment Order citing Defendant, to expire on year from this date, is signed today.

Findings of Fact No. 6 was supported by the Repondent's testimony. She testified that the fence installed by the Appellant restricted her access to her side and back yard. (VR p. 15, lns 3-6; p. 16, lns 5-18 Judge Katherine Stoltz, May 12, 2010). The Respondent testified that the dispute over the easement at least predated 2002, when she felt that she had to obtain a survey. (VR p. 21, lns 22-25; p. 22, lns 1-9, Judge Katherine Stoltz, May 12, 2010). This Finding was also supported by the testimony of witness Amy Mennegar:

MR. RIGGIO: You heard your daughter mention that at times he had stuff on the easement that obstructed it. Are you aware of any of those?

MENNEGAR: Yes, I am.

MR. RIGGIO: Like what kinds of things would he place on the easement that would obstruct its use?

MENNEGAR: Very small, fence, like so-called fence, and then just garbage-type stuff.

MR. RIGGIO: Like what?

MENNEGAR: Hunks of metal and that kind of stuff.

MR. RIGGIO: And where would he place it?

MENNEGAR: Pardon.

MR. RIGGIO: Where would he place it on the easement?

MENNEGAR: At the end, by Valerie's backyard.

MR. RIGGIO: How did that impact Valerie's use of the easement?

MENNEGAR: She couldn't get into her backyard.

(VR p. 32, Ins 5-20, Judge Katherine Stoltz, May 12, 2010).

Findings of Fact Nos. 9 and 10 were supported by the Respondent's testimony. She testified that she had received prior Anti-Harassment orders from Pierce County. (VR p. 27, Ins 5-25; p. 28, ln 1, Judge Katherine Stoltz, May 12, 2010). The Anti-Harassment orders issued by Pierce County are a matter of public record. The trial court may take judicial notice of such a record, pursuant to ER 201. A judge may take judicial notice of any fact that is not subject to reasonable dispute in

that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b).

Conclusion of Law No. 1 does not suggest that the Appellant has been infringing on the easement since 1957, as alleged by the Appellant. The phrase “executed and recorded in 1957” simply serves to modify the noun “Driveway Easement.” This Conclusion of Law does state that the Appellant “routinely obstructed” the easement, as was established by the evidence offered by the Respondent, as outlined above.

Conclusion of Law No. 6 was supported by the evidence and testimony, as well as by the fact that at the time of trial, the Appellant’s fence, built in the middle of the easement, was determined to be a continuing harassment by the trial judge.

## V. CONCLUSION

The Respondent Valerie Ktenas respectfully requests that this Court AFFIRM the trial court’s decision.

RESPECTFULLY SUBMITTED THIS 27th DAY OF <sup>May</sup>~~JUNE~~, 2011.

LUCE LINEBERRY & KENNEY, P.S.

  
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No. 41186-5

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

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**In Re:**

**ROBERT TURK, an individual, Appellant**

**vs.**

**VALERIE KTENAS, an individual, Respondent**

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**CERTIFICATE OF DELIVERY**

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date she delivered via U.S. Mail postage prepaid and via ABC Legal Messengers (Acebedo & Johnson) and via hand delivery (Court of Appeals) the following document:

**RESPONDENT'S OPENING BRIEF**

To the following parties:

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Court of Appeals, Division 2  
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DATED May 27, 2011, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read "Elizabeth Thompson", written over a horizontal line.

Elizabeth Thompson  
Attorney, Luce Linberry & Kenney,  
P.S.