

Court of Appeals No. 45275-8-11

---

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

---

ANTHONY J. BUDZIUS and MONICA BUDZIUS,  
Husband and Wife,  
Plaintiff/Appellants

vs.

LESLIE D. MILLER (fka BUDZIUS),  
Respondent

FILED  
2019 FEB - 14 PM 1:10  
COURT OF APPEALS

---

**BRIEF OF RESPONDENT**

---

By:

Geoffrey Cross, WSBA No. 3089  
Attorney for Respondent  
1902 64<sup>th</sup> Ave. W, Ste B  
Tacoma, WA 98466  
(253) 272-8998

**I. TABLE OF CONTENTS**

I. TABLE OF CONTENTS ..... I

II. TABLE OF AUTHORITIES.....ii

III. RESPONDENT'S STATEMENT OF FACTS ..... 1

IV. ARGUMENT AND AUTHORITIES ..... 4

V. ATTORNEY'S FEES .....13

VI. CONCLUSION.....14

VII. APPENDIX.....16

VIII. CERTIFICATE OF MAILING.....17

II. TABLE OF AUTHORITIES

Cases:

Lane v. Brown & Haley,  
81 Wn. App. 102 (1996)..... 4

Estate of Harford,  
86 Wn. App. 259 (1997)..... 5

Christensen v. Grant County Hospital District  
No. 1  
152 Wn.2d 299 (2004)..... 6

Graves v. P. . Taggares Co.,  
94 Wn.2d 298 (1980)..... 6

Nguyen v. Sacred Heart Med Ctr.,  
97 Wn. App. 728 (1999)..... 7

Portion Pack, Inc. v. Bond,  
44 Wn.2d 161 (1954)..... 8

Miller Constr. Co. v. Coltran,  
110 Wn. App. 883 (2002)..... 9

Marriage of Lee,  
176 Wn. App. 68 (2013)..... 11

Wright v. Safeway Stores, Inc.,  
7 Wn.2d 341 (1941)..... 12

Rivers v. Washington State Conference of  
Mason Contractors,  
145 Wn.2nd 674, 41 P.3d 1175 (2002)..... 13

Statutes:

RCW  
2.44.010..... 8

RCW 4.84.185..... 10

RCW 26.09.140..... 13

Other Authorities:

Washington Practice, Evidence, Vol.5..... 12

Court Rules:

RAP 18.1..... 13

### **III. RESPONDENT'S STATEMENT OF FACTS**

The underlying case (dissolution) went to trial in 1992 and a Decree was issued on November 13, 1992 (Appendix 3 to Appellant's Brief). The Decree discussed appellant's pension as having a cash value of \$27,210.00 and provided that a Qualified Domestic Relations Order should be issued such that the petitioner should be receiving 50% of said \$27,210.00 (Appellant's Brief, Appendix 3).

On July 27, 1993, the trial court issued an amendment to the Decree of Dissolution re Division of Retirement Benefits (Appendix 4 to Appellant's Brief). It provided that respondent get 50% of a fraction where the numerator is the one hundred fifteen months the marital community was in existence, and the denominator the number of months of service credit earned by appellant at

the time he retired (Appellant's Brief, Appendix 4). The order was approved by appellant's attorney and signed by the court without argument.

Rather than make a motion to re-open the original case, the appellant brought this as an independent action (CP 2-15). The appellant claims he had no notice of said order.

First he claims he had not due process notice of the second order. His attorney was deposed and appellant admitted that his attorney claimed the privilege (Trans. pg 36, lines 6-13). Appellant never told respondent that he had retired (Trans. pg 36, lines 14-15).

He never paid her \$13,600.00 he claims as the limit of her interest in his pension (Trans. pg 36, lines 16-17).

It was appellant's interpretation that his wife would get \$13,600.00 when he retired (Trans. pg 21, lines 11-13).

Appellant did not change attorneys after the trial. He used the same attorney for post

dissolution hearings with his former wife (Trans. pg 22, lines 10-15).

Mr. Budzius retired in 2008 (Trans. pg 28, line 21). There were COLA increases (Trans. pg 33, line 20). Appellant testified a fair settlement to his wife would be the \$13,600.00 stated in the Findings of November 13, 1992, more than twenty years earlier (Trans. pg 35, lines 22-14). Respondent's attorney was criticized for not advising appellant directly of the presentation of the order. Respondent's attorney testified it would be unethical to directly appellant (Trans. pg 5, lines 19-22).

The appellant never argued negligence by his former attorney (Plaintiff's Trial Brief, pg 7, not lined, CP 251-257)

Respondent's attorney wrote the Department of Retirement Systems on several occasions regarding the pension situation. It was necessary to obtain approval of the Department of Retirement Systems for the pension. It was sent to the Department of

Retirement Systems on July 12, 1993 (Appendix A). The retirement system recorded the pension and acknowledged its approval on July 30, 1993 (Appendix B). The Department of Retirement Systems, on June 9, 1992, replied to counsel's inquiry regarding the division of the pension and described the mechanisms to enter a QDRO, which was followed through (Appendix C).

#### **IV. ARGUMENT AND AUTHORITIES**

With respect to the arguments of appellant that the original Decree was modified without due process there are two lines of cases. First, relief of judgment cases; and secondly, authority of attorney cases. In Lane v. Brown & Haley, 81 Wn. App. 102 (1996), (Appendix D) reviewed denied 129 Wn.2d 1028. Division Two of the Court of Appeals held at page 109:

We follow *Haller* and apply its well-reasoned logic to this case: (1) the law favors finality, 89 Wn.2d at 554; (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; (3) fraud provides the grounds to vacate

nondefault judgments, 89 Wn.2d at 546; (4) attorney mistake or negligence does not provide an equitable basis for relief for the client, 89 Wn.2d at 547; (5) notice to the client of upcoming action in court is not a requirement of court rule, 89 Wn.2d at 547.

In Estate of Harford 86 Wn. App. 259 (1997), (Appendix E) (1998 review denied), the court applied contract law and the Court held at page 265:

[7] Harford also argues that it did not authorize its attorney to draft such a settlement agreement. This argument is without merit. First, "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." Once a party has designated an attorney to represent him or her, the court and the other parties to an action are entitled to rely upon that authority.

Second, although Harford relies on *Graves v. P. J. Taggares Co.* for the proposition that an attorney is without authority to surrender a substantial right of a client unless special authority is granted the attorney, *Graves* is factually distinguishable. It involved an attorney who, inter alia, failed to appear in a summary judgment motion, failed to represent any evidence at trial and failed to advise his clients of a \$131,000 memorandum order against them. No such egregious circumstances are before us here. The uncontroverted facts show that all three of Edith's children, Fred, Louise, and Joy, signed the document. Thus, they are bound by

the terms of the agreement.

In Christensen v. Grant County Hospital District No. 1, 152 Wn.2d 299 (2004), the Court set forth the purposes of collateral estoppel.

The Court held at page 307:

. . . For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger*, 134 Wn.2d at 449; *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997); *Trautman, Claim and Issue Preclusion*, 60 Wash. L. Rev. at 831.

In Graves v. P. J. Taggares Co. 94 Wn.2d 298 (1980), in dealing with costs the Supreme Court held at page 306:

[4] The question then arises as to who should pay the expenses of litigation which have been needlessly incurred. The plaintiff certainly should not suffer as a result of the errors of defendant's attorney. The Court of Appeals therefore directed that terms should be assessed against the defendant to place the plaintiff in the same

1 \*      ) \*

position he would be in had the efforts at litigation which have been nullified never been conducted. We agree. Where a defendant requests vacation of a default judgment, the defendant must show that no hardship will result to the plaintiff, and the defendant is often required to pay the plaintiff's added expenses and attorney's fees. See, e.g., *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). The same approach is appropriate in this type of case.

In *Nguyen v. Sacred Heart Med. Ctr.* 97

Wn.App. 728 (1999), Division Three held at page

734:

The issue is whether the trial court erred by accepting the Nguyens' concession through their trial counsel that their claims were limited to "'A' a worsening of a birth condition, or 'B', loss of chance at a better outcome." See Report of Proceedings at 3. The Nguyens argue their trial counsel lacked authority to make this stipulation.

[6] CR 2A and RCW 2.44.010 grant an attorney authority to bind his client to agreements or stipulations made on behalf of the client but without the client's written agreement or presence in court. *State ex rel. Turner v. Briggs*, 94 Wn.App. 299, 303, 971 P.2d 581 (1999). CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record,

or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

Similarly, RCW 2.44.010 provides:

An attorney and counselor has authority:

(1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk and entered in the minutes by him or signed by the party against whom the same is alleged or his attorney[.]

The conduct of Mr. Budzius in retiring for a number of years without advising his wife or sharing any benefits with her violates the concept of clean hands.

In Portion Pack, Inc. v. Bond, 44 Wn.2d 161 (1954) at page the Court held at 170 citing prior authority:

"Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not

afford him any remedy.”

The Doctrine of Laches should apply in Miller Constr. Co. v. Coltran, 110 Wn. App. 883 (2002), The Court reiterates the Doctrine of Laches at page 893:

[15, 16] Finally, the Hyppas contend that the doctrine of laches bars RMC's second attempt to execute. Laches is an equitable defense that a party may invoke if it can prove that (1) the plaintiff knew or reasonably should have known the facts giving rise to the action, but (2) unreasonably delayed bringing the action, and (3) the delay caused damages to the defendant. . . .

In the instant case the petitioner, who has not availed himself to ask relief under Rule 60 (Appendix F), is trying to re-litigate a constructive trust and modification of a decree entered several decades ago where the plaintiff was represented by competent counsel. The court reserved jurisdiction for a QDRO that was subsequently entered. As a result of the time delay, Mr. Luce and Mr. Lombino have no files, have no meaningful recollection. Fortunately the undersigned had kept computer files and had a recollection. What

is lost is the fact the Mr. Budzius unilaterally denied that Mr. Luce effectively mailed any notice or information regarding the QDRO. With Mr. Budzius working for the Fife Police Department several blocks from Mr. Luce's office it is rather doubtful there would have been a lack of communication on this hotly contested case.

Finely, respondent asks for reasonable attorney's fees and terms pursuant to CR 11, and RCW 4.84.185, which provides:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the

order.

The Supreme Court in the case of Marriage of Lee, 176 Wn.App. 678 (2013), the court held at page 689:

Pension increases attributable to higher wages during continued employment postdissolution are community interests. . . . A spouse is entitled to share in post-dissolution annual adjustments or cost of living increases to pension benefits, but not increases solely to additional years of services.

Respondent request sanctions on the appeal pursuant to RAP 18.9(a) as the appeal is frivolous. In the Lee case, supra, the court held at page 692:

. . . .  
"In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it I

so totally devoid of merit that there was no reasonable possibility of reversal."

The trial Judge commented on the fact that appellant's attorney claimed the privilege and did not testify. Tegland treatise, Washington Practice, Evidence, Volume 5, page 296 ¶402.8 states:

. . .  
In both civil and criminal cases, if a party fails to call a particular witness to testify when it would seem natural to do so a similar inference arises that the witness's testimony would have been unfavorable<sup>3</sup>. The rule is often referred to in a short-hand way as the "missing witness" rule, though the same inference may arise from the failure to produce other forms of evidence as well.<sup>4</sup> Here, the inference is that the witness's testimony or the missing evidence would be unfavorable.<sup>5</sup>

Washington State has not adopted a Washington Pattern Instruction 5.01 on this matter as the courts have been somewhat troubled by the issue. In Wright v. Safeway Stores, Inc., 7 Wn.2d 341 (1941), the Court held at page 352:

[4] In not every case where a party to an action has failed to produce a witness or witnesses under his control, who could have testified to material facts favorable to such

party, and has failed to explain his failure to do so, can it be inferred that the testimony of such witness or witnesses, if produced, would have been unfavorable to such party, but a court or jury may draw such inference only when under all the circumstances of the case the failure to produce such witness or witnesses, unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony.

A trial court's discretionary termination should not be not disturbed on appeal except on a clear showing of abuse of discretion that is manifestly unreasonable or exercised on unacceptable grounds of untenable reasons. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002).

#### **V. ATTORNEY'S FEES**

Pursuant to RAP 18.1, which provides:

(a) **Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RCW 26.09.140 provides:

**Payment of costs, attorneys' fees, etc.** The

court from time to time after considering the financial sources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending an proceeding under this chapter and for reasonable attorney fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name. . .

## **VI. CONCLUSION**

There has been three trial court decisions involved in this case before the appeal. Mrs. Budzius in those decisions got one-half of her husband's pension accrued during the 115 months of the marital community and no more. She did not participate in a future benefits based on his length of on the force, and in fact her pension was reduced. The formulas followed were those suggested by the Department of Retirement Systems

in response to correspondence from respondent's attorney. Respondent's attorney followed the formula suggested by the Department of Retirement Systems and appellant's attorney signed off and approved the Order. Appellant tried to hide his retirement and his attorney claimed privilege when inquiry was made as to the circumstances of the agreed order (Appendix G).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Geoffrey Cross', written over a horizontal line.

Geoffrey Cross, WSBA #3089  
Attorney for Respondent

**VII. APPENDIX**

A. June 12, 1993 letter to Dept. of Retirement Systems

B. July 30, 1993 letter from Dept. of Retirement Systems

C. June 9, 1993 letter from Dept. of Retirement Systems

D. Lane v. Brown & Haley, 81 Wn.App. 102 (1996)

E. Estate of Harford, 86 Wn.App. 259 (1997)

F. CR 60

G. Amendment to Decree

A

LAW OFFICES OF  
GEOFFREY C. CROSS, P.S., INC.  
A PROFESSIONAL SERVICES CORPORATION

6

GEOFFREY CROSS  
THEODORE C. ROGGE

July 12, 1993

252 BROADWAY  
(4TH & BROADWAY)  
TACOMA, WASHINGTON 98402  
(206) 272-8998

Nancy Rushton  
Department of Retirement Systems  
P. O. Box 48380  
Olympia, WA 98504-8380

Re: Anthony J. Budzius, [REDACTED]  
Budzius v. Budzius  
Pierce County Cause Number 91-3-03188-5

Dear Ms. Rushton:

According to the Decree of Dissolution, our client, Leslie Budzius, was awarded 50% of \$27,210.00 of Mr. Budzius' retirement. In order to conform with the statutes, we are enclosing an Amendment to Decree of Dissolution Re Division of Retirement Benefits on the above matter. Prior to having this entered with the Courts, we would appreciate your reviewing this and advising us if this meets your requirements.

For your information, the parties were married in July, 1980 and separated in January, 1990, therefore I calculate that the parties were married for 115 months.

Thank you for your cooperation in this matter.

Sincerely,

Shelley Foster, Secretary

enc.  
cc: Joseph Lombino (w/enc.)  
✓Leslie Budzius (w/enc.)

copy

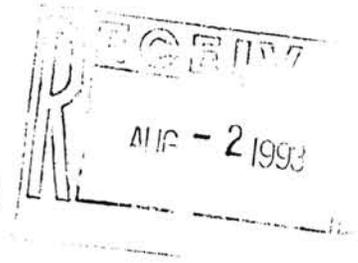
B



STATE OF WASHINGTON  
DEPARTMENT OF RETIREMENT SYSTEMS

P.O. Box 48380 • Olympia, Washington 98504-8380

July 30, 1993



MR GEOFFREY C CROSS PS INC  
ATTORNEY AT LAW  
252 BROADWAY  
TACOMA WA 98402

Dear Mr. Cross:

Re: Anthony J. Budzius, SS# 535-64-9089  
Amendment to Decree of Dissolution RE Division of  
Retirement Benefits No. 91-3-03188-5

This is to acknowledge receipt of the above referenced Order.

The above referenced does contain the required language pursuant to RCW 41.50.670 - Property Division Obligations. Therefore, the Department will accept and comply with the order received.

Please remember that as long as Mr. Budzius is in covered employment, he is not eligible to retire or receive a refund of his accumulated contributions. Therefore, we will not process the above Order until Mr. Budzius either retires, separates from employment and requests a refund of his accumulated contributions, or dies.

The processing fee for administering the split payment at time of retirement is \$75.00 for the first disbursement and \$6.00 for each additional disbursement. The fees will be divided equally between Anthony and Leslie D. Budzius.

The Internal Revenue Service (IRS) has notified retirement plan administrators that under certain circumstances, we must now withhold taxes from any direct payment made to a spouse or ex-spouse. Leslie will be required to complete a W-4P form for federal withholding at the time we process the direct pay order. All payments to Leslie, plus all deductions made for federal withholding, will be reported to the IRS on form 1099R issued under her Social Security number.

It is important that Leslie keep this office notified in writing of her current mailing address at all times. She will need to reference

*Exhibit "D"*

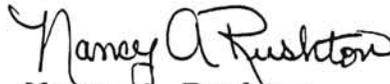


Mr. Geoffrey C. Cross, P.S., Inc.  
Page 2  
July 30, 1993

Anthony's Social Security number any time that she contacts this office.

Should you have any questions, please do not hesitate to contact this office.

Sincerely,



Nancy A. Rushton  
Retirement Benefit Supervisor

jlm

cc: Anthony J. Budzius

**PLEASE REFER TO SS#, RETIREMENT SYSTEM AND PLAN ON ALL CORRESPONDENCE**

.. ..

C



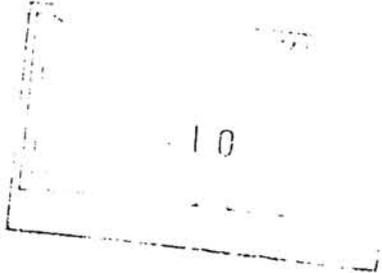
STATE OF WASHINGTON  
DEPARTMENT OF RETIREMENT SYSTEMS

P.O. Box 48380 • Olympia, Washington 98504-8380

June 9, 1992

5

Mr. Geoffrey C. Cross, P.S., Inc.  
Attorney At Law  
252 Broadway  
(4th & Broadway)  
Tacoma, Washington 98402



Dear Mr. Cross:

Re: Anthony J. Budzius, SS# [REDACTED]  
Subpoena Duces Tecum No. 91-3-03188-5

The information that follows is in compliance with the above referenced subpoena and is provided in lieu of appearance.

Our records show that Mr. Budzius was employed as a police officer with the City of Fife on October 6, 1980. By virtue of that employment, he became a contributing member of the Washington Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF) Plan II. For the period of October 6, 1980 through April 30, 1992, Mr. Budzius had 139 months (11 years, 7 months) total credited service with LEOFF.

Contributions are reported to the Department by calendar month only and it is not possible to show a breakdown of a member's accumulated contributions (contributions plus interest) for a portion of any given month. Mr. Budzius' accumulated contributions for the period of October 6, 1980 through April 30, 1992, the date of our latest verified account balance, totaled \$38,739.44 with LEOFF, itemized as follows:

Pre-taxed contributions to LEOFF	\$11,537.46
Tax-deferred contributions	17,731.78
Interest credited	9,470.20
<b>TOTAL</b>	<b><u>\$38,739.44</u></b>

As long as Mr. Budzius is in covered employment, he is not eligible to retire or receive a refund of his accumulated contributions. In no event is he eligible to receive a refund of his employer's contributions. Employer contributions become a part of the Pension Trust Fund and are not part of the member's accumulated contributions. Moreover, neither member nor

Mr. Geoffrey C. Cross  
June 9, 1992  
Page 2

employer contributions are a factor in the computation of a retirement allowance. **Withdrawal of accumulated contributions terminates all rights to any benefits.**

Mr. Budzius' retirement plan is a defined benefit plan. This means that at retirement, he will receive a benefit based on his service credit and final average salary (FAS). RCW 41.26.420 provides that a retirement allowance shall be equal to 2% of the member's FAS for each year of service. The equation is as follows:

$$\text{Total Months Service} \div 12 \times 2\% = \% \times \text{FAS} = \text{Monthly Allowance}$$

Pursuant to RCW 41.26.430, a member of LEOFF Plan II is eligible to retire as follows:

1. **NORMAL RETIREMENT.** Any member with at least five years of service who has attained at least age 58; or
2. **EARLY RETIREMENT.** Any member who has completed at least 20 years of service and has attained age 50. A member retiring under the Early Retirement option shall have his/her retirement allowance actuarially reduced to reflect the difference in the number of years between age at retirement and the attainment of age 58. (Emphasis added.)

Under the provisions of LEOFF Plan II, a member must ~~have a minimum of~~ five years of credited service in order to have a vested right to a service retirement allowance. As a vested member, Mr. Budzius would become eligible to receive a full monthly service retirement allowance effective July 1, 2014, the first of the calendar month following his 58th birthday.

When a member of LEOFF Plan II applies for a service or a disability retirement, he/she must select a benefit option. He/she may choose an option (Option II or Option III) which continues benefits to an eligible survivor. In addition, if the member is married, the law requires that the member obtain the spouse's consent to the benefit option chosen. Under Option II or Option III, the benefit is actuarially reduced to reflect the difference between the retiree's age and the beneficiary's age.

Had Anthony Budzius separated from service on April 30, 1992, he could have requested a refund of his accumulated contributions. As a vested member, however, he could have applied for optional vesting in lieu of a refund.

Mr. Geoffrey C. Cross  
June 9, 1992  
Page 3

As of April 30, 1992, I **estimate** Mr. Budzius' FAS for retirement purposes is \$3,342.12. Therefore, based on his creditable service of 139 months with LEOFF, I **estimate** he would have been entitled to receive a gross monthly service retirement allowance of approximately \$774.27 under Option I, effective July 1, 2014, computed as follows:

$$139 \div 12 \times 2\% = 23.167\% \times \$3,342.12 \text{ (FAS)} = \$774.27$$

After a retirement allowance has been in effect for at least one year, each July 1 the allowance is adjusted to reflect the percentage difference in the CPI (Seattle Area Consumer Price Index for Urban Wage Earners and Clerical Workers) between the year prior to retirement and the year prior to adjustment. Under LEOFF Plan II, this cost of living adjustment is capped at three percent.

Beginning July 27, 1991, a new mechanism became available to divorced spouses to satisfy a court awarded property division obligation. Chapter 365, Laws of 1991, allows the Department to make direct payment of a portion of a member's monthly retirement allowance or lump sum withdrawal to the member's ex-spouse in certain circumstances. The procedure authorized by the new law will replace the Mandatory Benefits Assignment Order (MBAO) for purposes of satisfying property division obligations. Under the new law, the MBAO will still be the enforcement mechanism for spousal maintenance obligations.

I have enclosed information regarding the interaction between the Department of Retirement Systems and marriage dissolutions. Please do not fill in the blanks on the sample forms provided. The forms are to show the wording that is required in the decree to comply with the new law.

I hope the foregoing is a satisfactory response to the subpoena. For additional information, I am also enclosing our LEOFF Member Handbook and publications. Should you need additional assistance, do not hesitate to contact this office.

Sincerely,



Nancy A. Rushton  
Retirement Benefit Specialist

jlm/Enclosures

**PLEASE REFER TO SS#, RETIREMENT SYSTEM AND PLAN ON ALL CORRESPONDENCE**

D

The correct avenue for review of an adverse arbitration award is trial de novo. MAR 7.1. The superior court sitting in its appellate capacity can then review both the question of Selland's duty and its liability to the Cooks. As the court in *Pybas v. Paolino*, 73 Wn. App. 393, 398, 869 P.2d 427 (1994) noted, "the review of an arbitrator's award is carefully circumscribed." Direct appeals from the judgment on the arbitration award are not proper unless the appeal relates to a defect inherent in the judgment or the means by which the judgment was obtained. *Pybas*, 73 Wn. App. at 398-99. Neither is at issue here.

The appeal is dismissed.

SCHULTHEIS and MUNSON, JJ., concur.

[No. 17656-4-II. Division Two. March 29, 1996.]

DAVID W. LANE, ET AL., *Respondents*, v. BROWN & HALEY, *Appellant*.

- [1] **Judgment — Vacation — Review — Standard of Review.** A trial court's decision to vacate a judgment under CR 60(b) is reviewed under the abuse of discretion standard. Discretion is abused if it is exercised on untenable grounds or for untenable reasons.
- [2] **Judgment — Vacation — Review — Judgment on Merits — Strict Standard.** A trial court's decision to vacate a judgment on the merits under CR 60(b) is reviewed more strictly than a decision to vacate a default judgment.
- [3] **Judgment — Summary Judgment — Nature — Judgment on Merits.** A summary judgment is a judgment on the merits.
- [4] **Judgment — Vacation — Irregularity — What Constitutes — Violation of Court Requirement.** For purposes of CR 60(b)(1), which permits relief from a judgment when there is an irregularity in obtaining the judgment, an "irregularity" occurs when there is a failure to adhere to a court rule or procedural requirement.
- [5] **Courts — Rules of Court — Requirements — Notice to Client.**

An attorney's notice to a client of an upcoming motion in court is not a requirement of court rule or procedure.

- [6] **Judgment — Vacation — Reason Not Specified in Rule — Nature.** Relief from judgment under CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule; the "extraordinary circumstances" that would warrant relief from judgment under the rule usually involve irregularities that are extraneous to the action of the court or go to the question of the regularity of the court's proceedings.
- [7] **Judgment — Vacation — Attorney Incompetence or Neglect — Civil Action.** The incompetence or neglect of a party's attorney is not usually a sufficient ground for obtaining relief from judgment in a civil action.
- [8] **Judgment — Vacation — Reason Not Specified in Rule — Attorney Incompetence or Neglect.** An attorney's neglect or refusal to investigate possible sources of evidence, and the attorney's reliance on an erroneous legal theory in adversarial proceedings in which the merits of the case are fully addressed, do not constitute the unauthorized surrender or waiver of the client's substantial legal rights that would warrant relief from judgment under CR 60(b)(11).
- [9] **Attorney and Client — Authority of Attorney — Actions in Court — Effect on Client.** The actions of an attorney authorized to appear for a client are binding on the client, so long as there is no evidence that the attorney misrepresented to the court and the adversary the scope of the attorney's authority.

**Nature of Action:** Action for damages for personal injury from falling down a flight of stairs.

**Superior Court:** After granting a summary judgment dismissing the action with prejudice, the Superior Court for Pierce County, No. 87-2-02623-5, Rosanne Buckner, J., on September 2, 1994, vacated the judgment pursuant to CR 60(b)(11) on the basis that the failure of trial counsel for the plaintiffs to present evidence on a crucial evidentiary issue at summary judgment constituted the unauthorized surrender of a substantial legal right.

**Court of Appeals:** Holding that the incompetence or neglect of plaintiffs' trial counsel is not sufficient grounds for relief from the judgment, the court *reverses* the decision of the trial court vacating the judgment.

*Paul R. Brummett and Malarchick & Associates; and Gary A. Trabolsi and Lee, Smart, Cook, Martin & Patterson, P.S., Inc.*, for appellant.  
*Steven M. McConnell*, for respondents (counsel on appeal).

---

**TOTAL CLIENT-SERVICE LIBRARY® REFERENCES**

Am Jur 2d, Attorneys at Law §§ 129, 130; Judgments §§ 812-21.  
See ALR Index under Attorney or Assistance of Attorney; Vacation and Modification of Judgment or Verdict.

---

BRIDGEWATER, J. — Brown & Haley appeals the vacation of an order of dismissal after a hearing on its motion for summary judgment. We hold that attorney negligence does not provide grounds for vacation of the judgment and reverse.

David W. Lane suffered severe head injuries from falling down a flight of stairs at Brown & Haley's facility in Tacoma in July, 1986. The shortcomings of the Lanes' attorney are as follows: (1) failure to contact witnesses, whose names had been previously supplied and who could have testified that Brown & Haley had notice of the defective condition of the stairs; (2) failure to advise the Lanes of the motion for summary judgment; (3) utilization of an incorrect legal theory at summary judgment; and (4) filing a late notice of appeal.

Brown & Haley moved for summary judgment and offered interrogatory answers and deposition testimony establishing that Lane did not know of anyone with knowledge that would support his claim against Brown & Haley. The Lanes' attorney appeared and argued in opposition to the summary judgment motion. Finding that the Lanes had failed to show that Brown & Haley had notice of the defect, the trial court granted summary judgment to Brown & Haley and dismissed the Lanes' complaint "with prejudice."

Because the Lanes' first attorney filed a late notice of appeal, the matter was not appealable. The Lanes retained a new attorney who filed a timely motion for relief from the judgment. As support, the Lanes offered the affidavits of five witnesses who stated that they had knowledge of the stair's defective condition. Initially, the trial court granted the Lanes' motion and vacated the previous judgment using CR 60(b)(1).<sup>1</sup> After reconsideration, the trial court ruled that vacation was warranted pursuant to CR 60(b)(11),<sup>2</sup> theorizing that failure to present evidence on a crucial evidentiary issue at summary judgment was analogous to the unauthorized surrender of a "substantial right." See *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980).

[1] On review, a trial court's vacation of a judgment under CR 60(b) will be overturned only upon a showing that the court abused its discretion. *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *In re Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

[2] The vacation of a default judgment is distinguishable from the vacation of a judgment on the merits in two ways. First, a court must apply a different set of equitable factors when considering a motion to vacate a default judgment.

---

<sup>1</sup>CR 60(b)(1) provides:

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

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order[.]

<sup>2</sup>CR 60(b)(11) provides:

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

....

(11) Any other reason justifying relief from the operation of the judgment.



298, 616 P.2d 1223 (1980); *Burkey*, 36 Wn. App. at 490 n.2. See also *Morgan v. Burks*, 17 Wn. App. 193, 199-200, 563 P.2d 1260 (1977) (upholding vacation of settlement and order of dismissal entered without client's authorization).

[8] The present case is distinguishable from *Graves* because the Lanes' attorney never entered into a stipulation or compromise with Brown & Haley. Consequently, he cannot be said to have surrendered or waived any of the Lanes' substantial rights. Rather, the Lanes' attorney, acting on behalf of the Lanes, appeared in a fully adversarial setting in which the merits of the case were fully addressed. For whatever reason, he neglected or refused to investigate possible sources of notice evidence, choosing instead to rely on an erroneous legal theory.

[9] The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf. . . . [O]nce a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention, as provided in RCW 2.44.040-.050 . . . .

*Haller*, 89 Wn.2d at 547. There is no evidence that the trial court or counsel for Brown & Haley knew about or colluded to bring about the Lanes' attorney's actions. Brown & Haley should not be penalized for the quality of representation provided by an attorney the Lanes' voluntarily selected as their legal representative.

The Lanes argue that *Graves* stands for the proposition that violation of the Rules of Professional Conduct 1.4 (for lawyers), by failing to keep his client reasonably informed, provides sufficient grounds for vacating a judgment.<sup>3</sup> The *Graves* court, however, discussed an earlier version of this

<sup>3</sup>The *Graves* court cites RPC 1.4's predecessors, 7-7 and 7-8 of the Washington Code of Professional Responsibility, as support for the position that an attorney's unauthorized surrender of a substantial right provides sufficient grounds for vacation of a judgment. *Graves*, 94 Wn.2d at 302-03.

rule within the context of the limited exception that empowers a court to vacate a judgment resulting from the unauthorized surrender of a client's substantial rights. Moreover, the court explicitly recognized that beyond this exception, the general rule — a client is bound by the actions of his attorney — continued to be applicable, noting that the exception applied because the attorney "misrepresent[ed]" his authority to the court and the adversary. *Graves*, 94 Wn.2d at 304. There is no evidence of such misrepresentation here.

We follow *Haller* and apply its well-reasoned logic to this case: (1) the law favors finality, 89 Wn.2d at 544; (2) erroneous advice 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; (3) fraud provides the grounds to vacate nondefault judgments, 89 Wn.2d at 546; (4) attorney mistake or negligence does not provide an equitable basis for relief for the client, 89 Wn.2d at 547; (5) notice to the client of upcoming action in court is not a requirement of court rule, 89 Wn.2d at 547.

Although *Haller* was concerned with a settlement in the personal injury suit of a minor, we apply its logic with equal vigor to decisions based upon motions for summary judgment. The judgment here was entered after full resolution of the controversy on its merits. The trial court erred in vacating its order on summary judgment.

We reverse.

MORGAN and ARMSTRONG, JJ., concur.

Review denied at 129 Wn.2d 1028 (1996).

E

ficer's entry into a home as part of an emergency response team is unreasonable per se. Police presence may not be as crucial as that of the medically-trained personnel, but it certainly can be useful in coping with any circumstances, such as the presence of youngsters, that might otherwise be distracting to the medical technicians. The fact that his services might reasonably be needed inside objectively justifies Officer Isaacson's entry into Angelos home.

[5] The fact that the officer had valid reasons for entering the apartment does not justify his further entry into the bathroom once he found that Angelos was being capably treated by medical personnel. But at this point the officer learned of the presence of the girls. The emergency nature of each situation must be evaluated on its own facts, and in relation to the scene as it reasonably appeared to the officer at the time. *Lynd*, 54 Wn. App. at 22. The entry into the bathroom to search for drugs that might present a safety hazard to the children was objectively reasonable under the circumstances presented in this case.

Angelos nevertheless asks this court to hold the warrantless search unjustified because a quick telephonic warrant would have been available. In *State v. Ringer*, 100 Wn.2d 686, 702, 674 P.2d 1240 (1983), the Supreme Court concluded that the availability of a telephone warrant must be considered in determining whether exigent circumstances exist sufficient to justify a warrantless search. *Ringer* is not on point because the medical emergency exception does not require the presence of probable cause, and is thus distinct from the exception for exigent circumstances. *State v. Swenson*, 59 Wn. App. 586, 588, 799 P.2d 1188 (1990).

Because we affirm on the medical emergency theory, we need not decide whether Angelos' 12-year-old daughter gave valid consent to the search of the bathroom that resulted in the discovery of the cocaine.

Affirmed.

WEBSTER and AGID, JJ., concur.

Review denied at 133 Wn.2d 1034 (1998).

[No. 37585-7-I. Division One. May 5, 1997.]

*In the Matter of the Estate of* EDITH M. HARFORD.

MITCH BIRCHFIELD, ET AL., *Appellants*, v. FRED HARFORD, ET AL., *Respondents*.

- [1] **Compromise and Settlement — Settlement Agreement — Construction — Contractual Status.** Settlement agreements are governed by the general principles of contract law.
- [2] **Compromise and Settlement — Settlement Agreement — Rescission — Mistake — Mutual Mistake — Necessity.** A stipulated settlement agreement may not be rescinded on the basis of a mistake in the making of the agreement unless the mistake was mutual.
- [3] **Appeal — Findings of Fact — Absence of Finding — Effect.** The absence of a finding as to a material fact is equivalent to a finding against the party having the burden of proving the point.
- [4] **Contracts — Mistake — Unilateral Mistake — Scrivener's Error — Mutual Intent — Necessity.** A clause mistakenly placed in a contract by the drafting party does not constitute a scrivener's error unless both parties to the contract intended that the contract not contain the clause.
- [5] **Judgment — Vacation — Irregularity — What Constitutes — Procedural Defect.** For purposes of CR 60(b)(1), which permits relief from judgment on the basis of an irregularity in obtaining the judgment, an "irregularity" does not occur unless there is a procedural defect, such as a failure to follow a procedural rule.
- [6] **Contracts — Mistake — Unilateral Mistake — Knowledge of Other Party — In General.** A party's liability on a contract may be avoided on the basis of a unilateral mistake only if the other party to the contract knows, or is charged with knowledge of, the mistake and acts unfairly by not informing the first party of it.
- [7] **Judgment — Vacation — Attorney Incompetence or Neglect — Civil Action.** The incompetence or neglect of a party's own attorney is not a sufficient ground for obtaining relief from a judgment in a civil action.

**Nature of Action:** Action to enforce an agreement granting a proportionate share of a decedent's estate. Following negotiations, the parties agreed to sign a settlement agreement providing for the administration of the estate and granting the disputed share to the plaintiffs. The agreement was signed by the parties and their attorneys.

**Superior Court:** After entering a stipulated order based on the settlement agreement, the Superior Court for Snohomish County, No. 94-4-00919-8, Richard J. Thorpe, J., on October 6, 1995, vacated the stipulated order and entered a summary judgment dismissing the action.

**Court of Appeals:** Holding that a drafting error made by an attorney for the defendants in preparing the final version of the settlement agreement constituted a unilateral mistake that did not justify rescission of the agreement, the court *reverses* the judgment and *reinstates* the agreement.

*Paul J. Reni and Michael E. Keller, for appellants.*  
*Jerome R. Cronk, for respondents.*

---

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

Am Jur 2d, Compromise and Settlement §§ 32-34.  
ALR Index, Compromise and Settlement.

---

GROSSE, J. — A party to a settlement agreement seeking relief on the basis of mistake must establish the legal basis for that relief under the law of contracts. The mistake must be mutual, not unilateral, as was the case here.

Married in 1955, Edith and Delbert Harford each had children from prior marriages: Edith's children are Fred, Joy, and Louise, and Delbert's child was Opal. In 1972, Delbert executed a will which stated that Edith and Delbert had agreed to leave their property to each other, and then, upon the survivor's death, in equal shares to all four

children. Edith signed Delbert's will indicating her consent to the mutual agreement clause. After Delbert's death in 1974, Edith executed a will that provided only for her three children, Fred Harford, Joy Andreason, and Louise Hill, and not for her step-daughter, Opal Birchfield. Twenty years later, in 1994, Opal died with her two children, Mitch and Karen Birchfield, surviving her. Edith died two months after Opal, leaving her children her entire estate. Edith's children (Harford) filed a probate action. In a separate action, Opal's children (Birchfield) sought to enforce the contract to devise, claiming one-quarter of their step-grandmother's estate, including alleged inter vivos transfers.

The parties started negotiating a settlement and exchanging documents that would give Birchfield one-quarter of the estate and allow for administration of the estate. However, the parties disagreed over whether inter vivos transfers made by Edith were to be included in the agreement. According to Birchfield's version of events, during early 1995, the attorneys were working on an agreement that included Birchfield receiving one-fourth of the estate and the final signed agreement reflected that intent. According to Harford's version of events, because of the impasse over the inter vivos issue, Harford proposed to settle only the administration of the estate and drafted an agreement to do only this. Nevertheless, the eventual agreement drafted by Harford included language giving Birchfield a one-quarter interest in the estate, as well as providing for the administration of the estate. All the attorneys and all of the parties signed this agreement and a stipulated order was entered. Later, Harford claimed that the language granting the one-quarter interest was left in the agreement because of an editing error by its attorney.

Harford moved to have the stipulated order vacated under CR 60(b). The court agreed that a mistake had been made, finding that:

Defendants' attorney mistakenly left language in the third draft, which language had been in each of the two prior

drafts. This language left one quarter of the estate to the plaintiffs. Defendants' attorney did not intend this language to be in the order, but made a mistake in editing the draft on his computer. Defendants and their attorney failed to notice that the language was in the order they had drafted. Upon discovering his mistake, defendants' attorney promptly notified opposing counsel.

Determining that Harford had not authorized its attorney to enter the order as drafted and that Birchfield did not suffer prejudice in reliance on the order, the court vacated the stipulated order. Harford then argued that Birchfield's interest in the estate lapsed because Opal did not survive Edith. Granting summary judgment in favor of Harford, the trial court dismissed Birchfield's claim to the estate as a matter of law. Birchfield appeals both the summary judgment order and the order vacating the settlement agreement.

Our review of the record reveals evidence in support of the court's finding that Harford's attorney made an editing mistake in drafting the final agreement. For example, before the final version was signed, a draft stipulation was exchanged entitled, "Stipulation and Order *Granting Distributive Share of Estate*, Consolidating Cases, and Providing for Further Administration of Estate." (Emphasis added.) In contrast, in the final version, the language regarding the "distributive share" was deleted in the title: "Stipulation and Order Consolidating Cases, and Providing for Further Administration of Estate." Thus, we will accept that Harford did not intend to draft a settlement agreement that granted Birchfield an interest in the estate. The real question is whether this sort of error justifies the vacation of an order based on a settlement agreement.

[1-4] The principles of the law of contracts apply to review of settlement agreements.<sup>1</sup> Under contract prin-

<sup>1</sup>*Morris v. Maks*, 69 Wn. App. 865, 868-69, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993).

ciples, a mutual mistake may justify vacation of a settlement agreement.<sup>2</sup> In *Haller v. Wallis*, a case involving a mistake regarding the extent of injuries, the court found that mutual mistake was necessary to set aside a stipulated agreement:

If [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect. . . . Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.<sup>3</sup>

Here, there was no conclusive evidence of a mutual mistake, rather the evidence was contested. Most significantly, the trial court did not make a finding that Birchfield intended to have a settlement agreement that only addressed the administration of the estate. Such silence must be interpreted as a finding that there was not a mutual mistake since Harford had the burden of proving this point.<sup>4</sup>

Harford argues that the mistake was akin to a "scrivener's error." In contract law, a scrivener's error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error. This permits a court acting in equity to reform an agreement.<sup>5</sup> Here, although the trial court found that Harford intended that the agreement not have the one-quarter language, it did not make the corresponding find-

<sup>2</sup>*Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978).

<sup>3</sup>*Haller*, 89 Wn.2d at 544 (quoting 3 EDWARD WILLIAM TUTTLE, A TREATISE OF THE LAW OF JUDGMENTS § 1352, at 2776-77 (5th ed. rev. 1925)).

<sup>4</sup>*See Golberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982).

<sup>5</sup>*See Berg v. Ting*, 125 Wn.2d 544, 554-55, 886 P.2d 564 (1995); *Snyder v. Peterson*, 62 Wn. App. 522, 526-27, 814 P.2d 1204 (1991).

ing with respect to Birchfield's intentions. Significantly, for the purpose of the scrivener's error analysis, it is not readily apparent whether the one-quarter language was meant to be deleted or included.

[5] Harford also relies on *In re Kramer*, in which an order was amended because the lawyer's secretary made a mistake and the lawyer missed it. That case does not apply here. The rationale of *Kramer* was that the order did not express the court's intent and therefore was properly modified.<sup>6</sup> Because the trial court here did not express any opinion as to its intention other than to ratify what the parties had agreed to, *Kramer* does not apply. For similar reasons, the clerical error rule, CR 60(a), does not apply.<sup>7</sup> Harford also claims unpersuasively that the error was an "irregularity" under CR 60(b)(1). However, irregularities occur when there is a procedural defect, such as failing to follow a prescribed rule.<sup>8</sup>

[6] Harford argues that equitable principles should provide relief on the theory that Birchfield should not be able to benefit from Harford's obvious mistake. Under contract principles, a party may be relieved of a mistake it made, if the other party "knows or is charged with knowing of the mistake"<sup>9</sup> and acts unfairly by not informing the other side of the mistake. For example, in *Snap-On Tools*, one party accidentally overpaid the opposing side due to a mistaken calculation. The party receiving the money was not allowed to retain it because "[n]o party may retain money claiming ignorance of facts which are

<sup>6</sup>*In re Estate of Kramer*, 49 Wn.2d 829, 830, 307 P.2d 274 (1957).

<sup>7</sup>See 4 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE, *Rules Practice*, CR 60, at 714-15 (4th ed. 1992).

<sup>8</sup>E.g., *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989).

<sup>9</sup>*Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983).

reasonably ascertainable and would alert that party to the mistake."<sup>10</sup>

In order to apply this principle, the trial court would have needed to find that Birchfield was aware that Harford's counsel made a mistake and was charged with alerting Harford of that mistake. There is contradictory evidence in the record as to whether the mistake was obvious to Birchfield. Nothing in the court's findings indicates that it decided that Birchfield knew, or should have known, of Harford's intent to have a settlement agreement that addressed only the administration of the estate. Again, applying the principle that the absence of a finding is considered a finding against the party with the burden of proving the issue, we must hold that Harford cannot prevail on this ground.

[7] Harford also argues that it did not authorize its attorney to draft such a settlement agreement. This argument is without merit. First, "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action."<sup>11</sup> Once a party has designated an attorney to represent him or her, the court and the other parties to an action are entitled to rely upon that authority.<sup>12</sup>

Second, although Harford relies on *Graves v. P.J. Taggares Co.*<sup>13</sup> for the proposition that an attorney is without authority to surrender a substantial right of a client unless special authority is granted the attorney, *Graves* is factually distinguishable. It involved an attorney who, inter alia, failed to appear in a summary judgment motion, failed to present any evidence at trial, and failed to advise his clients of a \$131,000 memorandum order

<sup>10</sup>*Snap-On Tools Corp.*, 35 Wn. App. at 35. See also *Basin Paving, Inc. v. Port of Moses Lake*, 48 Wn. App. 180, 186, 737 P.2d 1312 (1987) (quoting *Gammel v. Diethelm*, 59 Wn.2d 504, 507, 368 P.2d 718 (1962)).

<sup>11</sup>*Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040, review denied, 129 Wn.2d 1028 (1996).

<sup>12</sup>*Haller*, 89 Wn.2d at 547.

<sup>13</sup>94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980).

against them.<sup>14</sup> No such egregious circumstances are before us here. The uncontroverted facts show that all three of Edith's children, Fred, Louise, and Joy, signed the document. Thus, they are bound by the terms of the agreement.

In summary, the court found only that a unilateral mistake was made. Thus, we reverse and remand for such further proceedings as are necessary in light of this decision.

BAKER, C.J., and WEBSTER, J., concur.

Reconsideration denied November 5, 1997.

Review denied at 135 Wn.2d 1011 (1998).

[No. 38057-5-I. Division One. May 5, 1997.]

ERNEST WARD, ET AL., *Appellants*, v. THE BOARD OF  
SKAGIT COUNTY COMMISSIONERS, *Respondent*.

- [1] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Exhaustion of Administrative Remedies — Necessity.** Judicial review of a land use decision may not be obtained under RCW 36.70C.060(1) of the Land Use Petition Act unless administrative remedies have been exhausted.
- [2] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — "Land Use Decision" — What Constitutes.** For purposes of RCW 36.70C.020(1) of the Land Use Petition Act, which defines "land use decision" as a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, a hearing examiner's decision on an application for a building permit or zoning variance does not constitute a "land use decision" if the examiner's decision is subject to appellate review by another administrative body.
- [3] **Administrative Law — Judicial Review — Exhaustion of Administrative Remedies — In General.** In general, agency action may not be challenged in court unless all rights of administrative appeal have first been exhausted.

<sup>14</sup>See *Graves*, 94 Wn.2d at 300-01.

- [4] **Statutes — Construction — Common Law — Derogation of Common Law — Clear Intent — Necessity.** A statute will not be interpreted as abrogating an established principle of common law absent a clear expression of legislative intent appearing in the statute or legislative history.
- [5] **Statutes — Construction — Amendment — Legislative Intent — Implied Significant Change.** A court will not assume that the Legislature would attempt to significantly alter the law by implication.
- [6] **Administrative Law — Judicial Review — Exhaustion of Administrative Remedies — Necessity.** A party's failure to exhaust administrative remedies will not be excused unless it is unreasonable or unfair to hold the party to the exhaustion requirement or the party has been denied a fair opportunity to pursue those administrative remedies that may be available.
- [7] **Administrative Law — Judicial Review — Exhaustion of Administrative Remedies — Futile Effort — Validity of Remedy.** The futility exemption to the exhaustion of administrative remedies requirement is intended to apply in situations such as where the validity of the remedy itself is challenged.
- [8] **Administrative Law — Judicial Review — Exhaustion of Administrative Remedies — Futile Effort — Speculation.** A party's failure to exhaust administrative remedies will not be excused on the basis that pursuit of an available administrative remedy would be futile if the assertion of futility is purely speculative and unsupported by the record.
- [9] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Preemption of Prior Law.** The Land Use Petition Act (RCW 36.70C) does not preempt prior statutes, ordinances, regulations, and case law pertaining to statutes of limitations for seeking judicial review of local governmental land use decisions.

**Nature of Action:** Property owners sought judicial review of the administrative denial of a zoning variance and special use permit to operate a business from their residence. Review was sought under the terms of the Land Use Petition Act (RCW 36.70C).

**Superior Court:** The Superior Court for Skagit County, No. 95-2-01214-3, Michael E. Rickert, J., dismissed the action on January 17, 1996.

**Court of Appeals:** Holding that the plaintiffs were required to exhaust their administrative remedies before

F

(5) Damages so excessive or inadequate as unmistakably indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

**(b) Time for Motion; Contents of Motion.** A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

**(c) Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

**(d) On Initiative of Court.** Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

**(e) Hearing on Motion.** When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment;

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

**(f) Statement of Reasons.** In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

**(g) Reopening Judgment.** On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

**(h) Motion to Alter or Amend Judgment.** A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

**(i) Alternative Motions, etc.** Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

**(j) Limit on Motions.** If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

## RULE 60. RELIEF FROM JUDGMENT OR ORDER

**(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion 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. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) **Other Remedies.** This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) **Writs Abolished—Procedure.** Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) **Procedure on Vacation of Judgment.**

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice.* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the

manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) *Statutes.* Except as modified by this rule, RCW 4.72.010–090 shall remain in full force and effect. [Amended effective September 26, 1972; January 1, 1977.]

## **RULE 61. HARMLESS ERROR [RESERVED]**

### **RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT**

(a) **Automatic Stays.** Except as to a judgment of a district court filed with the superior court pursuant to RCW 4.56.200, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment. Unless otherwise ordered by the trial court or appellate court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until appellate review is accepted or during the pendency of appellate review.

(b) **Stay on Motion for New Trial or for Judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to rule 59, or of a motion for relief from a judgment or order made pursuant to rule 60, or of a motion for judgment as a matter of law made pursuant to rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to rule 52(b).

(c) **Injunction Pending Appeal.** [Rescinded.]

(d) **Stay Upon Appeal.** [Rescinded.]

(e) **Stay in Favor of State.** [Rescinded.]

(f) **Other Stays.** This rule does not limit the right of a party to a stay otherwise provided by statute or rule.

(g) **Power of Supreme Court Not Limited.** [Rescinded.]

(h) **Multiple Claims or Multiple Parties.** When a court has ordered a final judgment under the conditions stated in rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [Amended effective July 1, 1976; January 1, 1977; September 1, 1990; September 1, 2005; January 8, 2013.]

## **RULE 63. JUDGES**

(a) **Powers.** See rule 77.

G

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. JUL 27 1993 P.M.  
PIERCE COUNTY, WASHINGTON  
TED RUTTE COUNTY CLERK  
DEPUTY

In re the Marriage of )  
LESLIE D. BUDZIUS, )  
Petitioner, )  
and )  
ANTHONY J. BUDZIUS, )  
Respondent. )

NO. 91-3-03188-5  
AMENDMENT TO DECREE OF  
DISSOLUTION RE DIVISION  
OF RETIREMENT BENEFITS

THIS MATTER coming on the ex-parte application of Geoffrey Cross, attorney for petitioner, the respondent being represented by Joseph Lombino, the Court being advised that the petitioner was awarded 50% of respondent's retirement benefits of \$27,210.00, the Court being otherwise fully advised, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the provisions of the Decree of Dissolution entered on November 13, 1992 with respect to the division of the community interest in the respondent's retirement rights be and is hereby amended as follows:

If Anthony J. Budzius (the obligor) receives periodic retirement payments as defined in RCW 41.50.500, the Department of Retirement Systems shall pay to Leslie D. Budzius (the obligee) \$N/A dollars from such payments or a fraction where the numerator is equal to 115, the number of months the marital community was in existence, and the denominator is equal to the

1 - Amendment to Decree

ORIGINAL

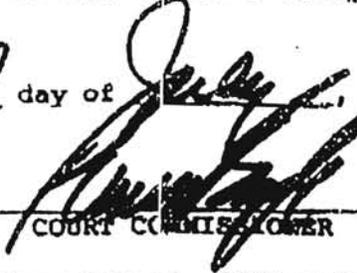
LAW OFFICES OF  
GEOFFREY D. CROSS, P.S., INC.  
222 2ND AVENUE  
TACOMA, WASHINGTON 98402  
253-8800

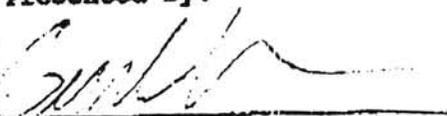
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

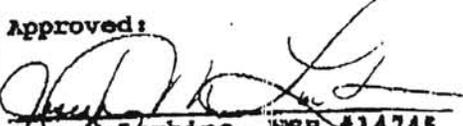
~~number of months of service credit earned by the retiree at the time of his retirement~~ x 50 percent of such payments. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance.

If Anthony J. Budzius (the obligor) requests or has requested a withdrawal of accumulated contributions as defined in RCW 41.50.500, or becomes eligible for a lump sum death benefit, the Department of Retirement Systems shall pay to Leslie D. Budzius (the obligee) \$13,605.00 dollars plus interest at the rate paid by the Department of Retirement Systems on member contributions. Such interest to accrue from the date of this order's entry with the court of record. \*

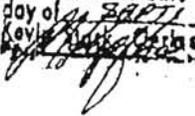
DONE IN OPEN COURT this 27 day of July, 1993.

  
COURT COMMISSIONER

Presented by:  
  
Geoffrey Cross, WSB #3089  
Attorney for Petitioner

Approved:  
  
Joseph Lombino, WSB #14745  
Attorney for Respondent

\* The November 23, 1992 Decree of Dissolution shall remain in full force and effect as to all provisions contained therein except as specifically otherwise set forth herein this Order.

STATE OF WASHINGTON, County of Pierce  
ss: I, Kevin Stock, Clerk of the above  
entitled Court, do hereby certify that this  
foregoing instrument is a true and correct  
copy of the original now on file in my office.  
IN WITNESS WHEREOF, I hereunto set my  
hand and the Seal of said Court this  
14th day of July, 1993.  
  
OFFICES OF  
KEVIN STOCK, CLERK OF COURT  
JEFFREY C. DROSS, P.S., I.N.G.  
1000 BROADWAY  
TACOMA, WASHINGTON 98402  
878-6666

VIII. CERTIFICATE OF MAILING

The undersigned, on the 4th day of February, 2014, deposited in the U.S. Mail, postage pre-paid, a true copy of the Brief of Respondent addressed as follows:

Christopher M. Constantine  
P. O. Box 7125  
Tacoma, WA 98417-0125

Dated this 4<sup>th</sup> day of February, 2014.



By: Geoffrey Cross

2014 FEB -4 PM 1:10  
STATE OF WASHINGTON  
COUNTY OF TACOMA