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Division II  
State of Washington  
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No. 51516-4-II

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

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TODD GAMACHE,  
Appellant,

v.

DARICE GAMACHE,  
Respondent.

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BRIEF OF RESPONDENT

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**I. STATEMENT OF THE CASE**

The trial court's proper denial of the Appellant's CR 60(b) motion, denial of Appellant's Motion for Reconsideration of denial of CR 60(b) motion, and Order Enforcing Decree and Granting Other Relief underline this appeal. CP 180-182, 255-259, 298.

**BACKGROUND**

The Appellant is Todd Gamache. The Respondent is Darice Gamache. Todd and Darice<sup>1</sup> were married on April 11, 1992. CP 72. The parties separated on October 3, 2016, the same day that Darice filed for divorce. CP 72. They have no minor children. CP 74.

During their marriage, the parties started Todd Gamache, Inc. CP\_\_ (see Declaration of Darice filed 10/03/16). Todd Gamache Inc owned and operated a number of Federal Express delivery routes while Darice was a homemaker and raised the parties' children. CP \_\_ (See Declaration of Darice filed 10/03/16).

Unfortunately, Todd became heavily addicted to drugs and gambling. CP 53. Todd's actions resulted in the marital community losing approximately \$185,000. CP 89. As a result of Todd's wasteful

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<sup>1</sup> The parties are referred to in this brief by their first names for ease of reference only. No disrespect whatsoever is intended by these designations.

actions, the court place Darice in charge of running Todd Gamache Inc. CP\_\_ (See Restraining Order entered on 10/4/16).

On July 17, 2017 Todd and Darice, both represented by counsel, engaged in mediation with attorney Daniel Smith. CP 1-7. As a result of the mediation efforts, the parties entered into a CR 2A agreement. CP 1-7. The CR 2A provided that Darice was to receive the family home and that the community business, Todd Gamache Inc., would be sold. CP 2. The parties agreed that numerous debts would be paid from the business proceeds. CP 4. After payment of the debts, it was anticipated that there would be approximately \$132,750 remaining that would be divided with Darice receiving \$32,750 and Todd receiving \$100,000. CP 7. If less than \$132,750 remained the respective amounts were to be reduced pro rata. CP 7, 81-82. If more than \$132,750 resulted from the sale then the amounts would be split 59/41 with Darice receiving 59%. CP 7, 81-82.

On October 26, 2017 Darice was forced to file a motion for presentation of final orders due to Todd failing to draft the orders despite the CR 2A directing him to do so. CP 3, 22-23. On November 3, 2017 the trial court continued Darice's motion for presentation for a period of two weeks at the request of Todd's attorney due to Todd

allegedly being in rehab for continued drug abuse. CP 51-52, 175. On November 17, 2017 the motion for presentation came before the trial court. Todd did not seek any additional continuances. Todd's primary argument seems to be that he believes he was supposed to receive 41% of the total community assets and that he did not believe that the decree as written provided that. CP 113; December 8, 2017 Verbatim Report of Proceeding (12/8/17 VRP) 5. The trial court entered Darice's proposed final divorce orders. CP 77-83.

After the hearing on November 17, 2017, Darice learned that despite representing to the court that the funds were secured in escrow at the hearing on November 3, 2017, Todd had actually taken all of the funds, approximately \$305,000, from the sale of the community business out of escrow and deposited them into his own personal account. CP 89-90. On November 21, 2017 Darice was forced to seek an ex parte restraining order freezing Todd's Bank accounts. CP 84-88. Luckily, Todd was in jail at the time Darice's motion was filed and as such he did not have an opportunity to move the funds. CP 129.

On November 21, 2017 Darice filed a motion to enforce the decree. CP 93-94. On November 30, 2017 Todd filed a motion for

relief from the decree pursuant to CR 60(b)(1), (9), and (11). CP 107-110.

On December 8, 2017 the court heard argument on both Darice's motion to enforce the divorce decree and Todd's motion to vacate based upon CR 60(b). See 12/8/17 VRP. The court granted Darice's motion and ordered that Todd place all of the funds into the court registry and that the parties comply with the divorce decree. CP 180-182. The court awarded Darice \$5,000 in attorney fees based upon Todd's actions. CP 183-184; 12/8/17 VRP 26. The court found that there was no mistake, there was a meeting of the minds, there was no dispute over a material term, and that there was actual performance on the CR 2A. 12/8/17 VRP 15-17. As such, the court denied Todd's CR 60(b) motion. 12/8/17 VRP 17. The written order denying the CR 60(b) was entered by the court on January 26, 2018. Todd sought reconsideration of this ruling which was denied by order entered on February 22, 2018.

On January 10, 2018 Darice was forced to file a motion to enforce the final orders and direct that debts be paid from the proceeds held by the registry of the court and to address accounting of funds that were released to Todd. CP 185-203. Todd received

\$25,000 from the sale of the business in September 2017 and an additional \$50,000 in December 2017. CP 214. Darice was forced to continue to pay the business expenses and even had to put \$5,500 of her own funds into the business to be able to pay payroll. CP 228.

On January 26, 2018 the trial court heard the Motion to Enforce the Divorce Decree. CP 257-259. The trial court directed that the \$25,000 previously provided to Todd be treated as a property distribution to him. CP 257-259. The court further ordered that the previously agreed debts be paid from the court registry. CP 258. The trial court ordered that Todd pay \$40,000 of the \$50,000 he received in December 2017 into the court registry. CP 258. The remaining \$10,000 was again given to him as a property distribution. CP 258. In addition, the trial court ordered that the \$5,000 in attorney fees owed from Todd to Darice be paid from the funds and attributed as a distribution to Todd. CP 259. The trial court authorized Darice to have \$32,750 of the funds and that she hold any remaining funds to pay obligations or be distributed per the divorce decree. CP 259. As of the January 26, 2018 court order, Todd received a total of \$40,000 from the sale of the business and Darice received \$32,750. CP 258.

Todd now appeals.

## II. ARGUMENT

### A. STANDARD OF REVIEW

#### *CR 60(b) Relief from Judgment*

The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Therefore, CR 60(b) orders for abuse of discretion. *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn.App. 241, 254, 327 P.3d 1309 (2014). A trial court abuses its discretion if its decision is based on untenable grounds or reasons. *Id.* Review of a CR 60(b) ruling is limited to the propriety of the denial of relief from judgment, not of the underlying judgment the party sought to vacate. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

#### *CR 59(a) Grounds for Reconsideration*

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d

729 (2005); *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons, when no reasonable person would have taken the view adopted by the trial court, or when the trial court applied the wrong legal standard or relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45, *review denied*, 178 Wn.2d 1020 (2013); *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987).

**B. THE TRIAL COURT DID NOT ERR IN DENYING TODD'S MOTION UNDER CR 60(b)(1)**

Todd argues that the trial court erred in denying his motion to vacate the final divorce orders based upon CR 60(b)(1). Br. of App. 6. Under CR 60(b)(1), a trial court may grant relief for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order."

Irregularities are usually procedural mistakes that call into question the validity of the judgment-e.g., insufficient notice, problems with service of process, and facial errors that go to the trial court's power to enter the judgment. See *Trautman, Vacation and Correction of Judgments in Washington*, 35 Wash.L.Rev. at 513-14, 522; see, e.g., *In re Wise's Estate*, 71 Wn.2d 734, 737, 430 P.2d 969 (1967). In the present case there were no irregularities. Todd sought a continuance prior to the entry of the final orders, which was granted by the court. CP 59. Todd did not seek any additional continuances and Todd does not specifically address what irregularities allegedly occurred.

Todd argues that there was a “mutual mistake” with the CR 2A. Br. of App. 6. Oddly, Todd never moved to set aside the CR 2A or challenge it in any manner prior to entry of the final divorce orders. Todd now tries to challenge the CR 2A through a motion to vacate the final orders.

A “mutual mistake” occurs if the parties had the same intention but their written agreement does not accurately express their intentions. *Snyder v. Peterson*, 62 Wash.App. 522, 527, 814 P.2d 1204 (1991). In the present case there was no mutual mistake. Darice

entered into a CR 2A that provided her with certain assets and debts as well as divided up the community business. Todd seems to continue to improperly argue that the CR 2A should have provided him 41% of the total marital assets; however, Todd fails to point to any provision of the CR 2A which provides for such a distribution of the entire marital community. The 41% figure that Todd repeatedly references only appears in exhibit "C" which specifically deals with the sale of the community business. CP 7. The parties knowingly entered into a CR 2A that they both believed fairly and equitably divided their marital community. Todd's assertion that there is a "mutual mistake" is misplaced.

The parties performed under the conditions of the CR 2A. The parties sold the family business and escrow initially distributed \$25,000 to Todd and funds to Darice. CP 129. Both of the parties used these funds to pay debts to third parties, including Todd's friend, under the terms of the CR 2A. Oddly, Todd did not claim that there was any mistake until November 30, 2017 well after the closing of the sale of the business in September 2017 and after partial funds were distributed and both parties performed under the terms of the CR 2A. The parties had multiple offers on the business yet mutually decided

to accept an offer that resulted in the sale closing in September 2017.  
CP 131. If Todd believed that the sale was not going to generate the funds that he believed were necessary he should have never agreed to close the sale.

Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Todd is now taking a position that is inconsistent with his previous stance on this matter and should be estopped from doing so.

Todd further argues that the CR 2A is ambiguous. Br. of App. 9. When the parties to a separation agreement dispute its meaning, the court must ascertain and effectuate their intent at the time they formed the agreement. Generally, this is true even when the separation agreement has been incorporated in a dissolution decree, because the parties' intent will be the court's intent." *In re Marriage of Boisen*, 87 Wn.App. 912, 920, 943 P.2d 682 (1997). To determine the parties' intent, we examine their objective manifestations, including the written agreement and the context within which it was executed.

*Boisen*, at 920. "If the agreement has two or more reasonable meanings when viewed in context, the court must identify and adopt that which reflects the parties' intent. In [that] situation, a question of fact is presented, and an appellate court reviews the trial court's determination only for substantial evidence." *Boisen*, at 920-21. Evidence is substantial if it is sufficient to persuade a fair-minded person of its truth. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Todd does not allege that the final divorce orders are ambiguous in any manner. Todd never sought to set aside the CR 2A for any reason and only now appears to attempt to challenge through his CR 60(b) motion. The CR 2A is not ambiguous. There is substantial evidence to support the court's interpretation of the agreement that underlies the Divorce Decree.

RCW 26.09.070(3) provides in part: "If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage or domestic partnership, of a decree of legal separation, or for a declaration of invalidity of their marriage or domestic partnership, the contract, except for those terms providing for a parenting plan for their children, shall be binding on the court

unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution." Todd failed to present to the court any evidence that the CR 2A was unfair at the time of execution. In fact, the parties relied on the CR 2A and sold the business and took steps to pay obligations per the CR 2A.

There is no need for an evidentiary hearing or arbitration in this matter. Todd could have filed a motion requesting arbitration or an evidentiary hearing if he believed that it was necessary in this matter. Generally, the court does not consider issues raised for the first time on appeal. *In re Marriage of Knutson*, 114 Wn.App. 866, 870-71, 60 P.3d 681 (2003); RAP 2.5(a). Under RAP 2.5(a), however, issues raised for the first time on appeal may be considered if it is a "manifest error affecting a constitutional right." Todd made a tactical decision to not file a motion requesting further arbitration or mediation nor did he file a motion seeking an evidentiary hearing and as such it should be considered that Todd is raising these requests for the first time through this appeal. The request Todd makes do not

constitute a manifest error affecting a constitutional right and as such should not be considered.

A CR 2A that is not genuinely disputed should be enforced. It is not served by barring enforcement of an alleged settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, and should be, summarily resolved without trial. *In re Patterson*, 93 Wn.App. 579, 969 P.2d 1106, (1999). Darice proved the existence of a valid CR 2A and that no genuine issues of dispute were present. If the moving party produces evidence that shows the absence of any genuine disputes, the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact. See *Patterson*. Todd did not meet his burden to show that a genuine dispute existed. Todd's continued claim is that he was to receive 41% of the marital assets. CP 112. This position is not supported in the CR 2A and the court properly summarily resolved the issue.

The CR 2A and the final divorce order are consistent. Todd continues to argue that he is to receive 41% of the entire community estate. Br. of App. 12. This argument is misplaced. The only area of the CR 2A that provides for 41% is exhibit "C" which deals specifically

with the sale of community business. Todd attempts to rewrite the CR 2A to add language that simply does not exist. Todd has received \$40,000 from the sale of the community business in comparison to Darice's \$32,750. CP 257-259. Todd has not received "nothing" from the divorce as he claims.

**C. THE TRIAL COURT DID NOT ERR IN DENYING TODD'S MOTION UNDER CR 60(b)(9)**

Todd argues that he was the victim of "unavoidable casualty or misfortune preventing the party from prosecuting or defending." CR 60(b)(9). Relief under Cr 60(b)(9) is justified if "events beyond a party's control – such as a serious illness, accident, natural disaster, or similar event – prevent the party from taking actions to pursue or defend the case. *Stanley v. Cole*, 157 Wn.App. 873, 882, 239 P.3d 611 (2010). Todd argues that his inpatient rehab treatment and subsequent arrest resulted in unavoidable casualty. Todd created the situation that he is now trying to benefit from. Todd's situation is not like a car accident or natural disaster, Todd's situation was avoidable.

Even if Todd's situation qualified as an unavoidable causality it did not prevent him from defending the matter. Todd was represented by counsel at the time of his alleged unavoidable

causality. Todd took no action through his attorney to continue the hearing or otherwise address the situation. Todd presents no evidence that he was unable to defend the action.

**D. THE TRIAL COURT DID NOT ERR IN DENYING TODD'S MOTION UNDER CR 60(b)(11).**

Todd argues that the trial court erred by not vacating the final divorce order under CR 60(b)(11). Br. of App. 15. The use of CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *State v. Keller*, 32 Wash.App. 135, 140, 647 P.2d 35 (1982). Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. *Keller*, at 141. The courts have stressed the need for the presence of "unusual circumstances" Before CR 60(b)(11) will be applied. *In Re the Adoption of Henderson*, 97 Wash.2d 356, 360, 644 P.2d 1178 (1982). In the present case, Todd argues that the decree is unfair. Unfairness in the original decree does not constitute extraordinary circumstances that would justify relief under CR 60(b)(11). See *Yearout v. Yearout*, 41 Wn.App. 897, 707 P.2d 1367, (1985).

Todd has failed to set forth any “unusual circumstances” that would invoke CR 60(b)(11). Todd argues that spouses owe each other a fiduciary duty yet presents no argument or fact to indicate that any fiduciary duty has been violated in this action. Todd has not put forth any evidence to indicate that the CR 2A was unfair at execution.

**E. THE TRIAL COURT DID NOT ERR IN ENFORCING THE DECREE.**

Todd’s assertion that the court erred in enforcing the decree is misplaced. Todd received \$40,000 through the order enforcing the decree. He received more funds than Darice received. The order entered on January 26, 2018 provides in part “Remaining funds shall be released by the registry to Darcie Gamache on 2-5-2018 so she can pay remaining bills including 2016 tax debt and allocate leftover funds pursuant to the final order of dissolution. An accounting shall be provided to counsel for Todd Gamache.” CP 259.

Todd appears to read the January 26, 2018 order as a final distribution of funds. The order clearly states “pre-distribution” for the funds paid to the parties. Clearly, the amounts paid to the parties may be adjusted based upon what is left after all obligations are paid. Todd’s argument that he receives nothing is premature as no final

accounting has been completed by the parties. Todd argues that “Judge Whitener ordered that Darice be paid \$32,750 while Todd would not be paid anything.” Br. of App. 17. This is not correct by plain reading of the order. Todd received \$40,000 in comparison to the \$32,750 that Darice received as pre-distribution. The trial court properly enforced the decree of dissolution.

**F. DARICE SHOULD BE AWARDED HER ATTORNEY’S FEES FOR THE NECESSITY OF RESPONDING TO THIS APPEAL**

This appeal is frivolous.

RCW 26.09.140 provides that

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.

RAP 18.9 provides, in pertinent part: “The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by . . . the failure to comply or to pay sanctions to the court.”

“An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

In his brief, Todd urges an erroneous construction of well-settled statutes, Court Rules and case law. He has raised no issues subject to any debate, because each of the applicable statutes and court rules are clear. No reasonable minds can differ as to their meaning and application. There is no merit to any of the issues raised in his opening brief. Darice should be awarded her reasonable attorney’s fees for the necessity of having to respond.

### **III. CONCLUSION**

Judge Whitener was vested with discretion in granting or denying a CR 60(b) motion. Todd fails to demonstrate that there was abuse of discretion. Todd failed to timely address any perceived issues he had with the CR 2A agreement when he declined to attempt to set aside the agreement and filed no motions asking for arbitration or other remedies at the time of presentation. The parties complied with the terms of the CR 2A for months and Todd only sought to

challenge the decree when he felt that it was no longer a good deal for him.

Todd received the benefit of his bargain and that agreement should not be disturbed on appeal after both parties have relied upon it. Judge Whitener's rulings should be affirmed, and Darice should be awarded attorney's fees for having to prepare this response.

DATED this 6<sup>th</sup> day of December, 2018.

RESPECTFULLY SUBMITTED,



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Andrew Helland, WSBA #43181  
Attorney for Darice Gamache

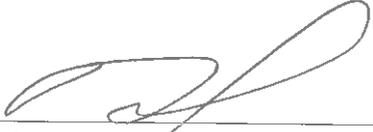
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Signed at Tacoma, Washington on this 6<sup>th</sup> day of December, 2018.

  
\_\_\_\_\_  
Andrew Helland

# HELLAND LAW GROUP

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## Transmittal Information

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