

FILED
Court of Appeals
Division II
State of Washington
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No. 51882-1

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

MICHAEL SMITH, Respondent, for
GREGORY MYRON TIMS, Deceased v.
DONNA L. TIMS, Appellant

APPELLANT REPLY BRIEF

Donna Tims, pro se
for Appellant
5810 Wollochet Dr NW
Gig Harbor, WA 98335

Cases

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STATEMENT OF THE CASE by Respondent

1). Respondent's Opening Brief Pg. 4 Paragraph 3. Respondent Mr. Smith writes, " On December 2, 2015, attorney Tammi F. Greene, representing Donna, presented final pleadings in the Dissolution Marriage without Children, including Findings of Facts and Conclusions of Law, Decree of Dissolution, and a sealed Property Settlement Agreement. " CP 1-15.

Appellant Donna Tims counters

The Court file discloses that the DCD and Property Agreement was presented Ex Parte to a Commissioner by Ms. Greene without either party present.

2). Respondent's Opening Brief Pg. 4 Paragraph 5. Mr. Smith writes, "Greg participated in the dissolution proceedings pro se. CP 80".

Appellant Donna Tims counters

THE repeated ASSUMPTION THAT MR. GREG TIMS

PARTICIPATED IN THE PROCEEDINGS IS FALSE RP 114-121

May the Court take judicial notice that THE RECORD SHOWS NO DISTINGUISHABLE RELIANCE THAT GREG TIMS PARTICIPATED AS A PRO SE.

From the first visit with Ms. Greene, Mrs. Tims was under a false pretense that the divorce was collaborative. CP 54-62. RP 114-121 pg. 4.

There are no papers filed with the Court anywhere that identify Mr. Tims as representing himself pro se. CP 105-108.

Mr. Tims did not participate in the proceedings, nor ever make an appearance anywhere. CP 105-108.

Mr. Greg Tims never spoke to or met Ms. Greene. CP 105-108.

i. CR 60(b)(5) permits vacation of a judgement which is void.

“A judgement entered without jurisdiction over the parties is void.”

In Beckwith v. Revels, Wash: Court of Appeals, 1st Div. 2014. The Appellant believes she has provided tangible convincing evidence supporting Insufficient Service of Process.

“CR 60(b) allows the trial Court to award terms that it considers just to either a moving party or opposing party in a motion to vacate default judgment: "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment."

also *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001)B1 ARGUMENT

In Respondent's Opening Brief Respondent Mr. Smith writes THE COMMENCEMENT OF THE APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.

Appellant Donna Tims counters

THE APPEAL SHOULD NOT BE DISMISSED

Late filing of appeal was not caused by a failure of diligence

Authorization by the Washington Rules for the Court of Appeals is provided in RAP 1.2(c), RAP 2.1(a) (1)(2), RAP 7.3. and RAP 18.8(b). *Under Kruse v. Hemp*, 853 P. 2d 1373 - Wash: Supreme Court 1993.

'The Court has "the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate

to secure the fair and orderly review of a case." RAP 7.3. In addition, the Court may waive the Rules of Appellate Procedure when necessary to "serve the ends of justice". RAP 1.2(c).

RAP 2.1(a)(1)(2) Provide for two methods of review; (1) Review as a matter of right, called "appeal" and (2) Review by permission of the reviewing Court, called discretionary review.

In State v. Adams, 76 Wn.2d 650, 458 P.2d 558 (1969), the Supreme Court stated the right to appeal and to a jury trial are Constitutional. The Supreme Court also added that the judicial opinion that a case is frivolous should be resolved in favor of the Appellant . From Streater v. White, 26 Wn. App. 430, 434-35, 613 and in Goad v. Hambridge, 931 P. 2d 200 – Wash: Court of Appeals, 3rd Div. 1997.

. "The decision to impose terms as a condition on an order setting aside a judgment lies within the discretion of the Court." *Knapp v. S.L. Savidge, Inc., 32 Wn. App. 754, 756, 649 P.2d 175 (1982).* The rule is equitable in nature. *Newbigging, 105 Wn. App. at 192.* The trial Court has liberal discretion to preserve substantial rights and do justice between the parties in awarding terms.

B ii. In Respondent's Opening Brief Respondent Mr. Smith writes,
REASONS FOR UNTIMELY APPEAL ARE NOT DUE
TO EXTRAORDINARY CIRCUMSTANCES

Appellant Donna Tims counters

REASONS FOR UNTIMELY APPEAL ARE *ENTIRELY* DUE
TO EXTRAORDINARY CIRCUMSTANCES • Ms. Tims obtained
a loan and offered to buy out the probates claim for 50% of the
family home that Mr. and Mrs. Tims' both hold title to jointly. Ms.
Tims wanted to quiet the title and refinance to further support vital
maintenance issues on the house. While securing the loan, the
equity of the property was not calculated correctly as part of the
loan. The 50 percent equity is \$35,000 extra profit for the estate at
Ms. Tims expense. No other expenses were factored in. Nor was
Ms. Tims substantial paydown of the principal, or continued
maintenance that has been done since the original creditor claim.
Additional issues precluding a successful conclusion to the buyout
included using specific agents and appraisers selected by Mr.
Smith. Ms. Tims already had these people in place so the efforts
both attorneys made in 'prepping' Mr. Smith's 'people', seemed

suspicious to Ms. Tims. Furthermore, Mr. Smith stated the buyout could not continue if it did not meet RCW 11.56.090.

- Coincidentally, a tree had fallen on the house and work was being done for that at this time. A question posed by Ms. Tims to her lawyer regarding unexpected issues after those repairs was answered with the instructions... “ **don’t report it**”.

This was enough to impel her to part ways with Mr. Davies. By her own assessment, each and every attorney hired by Ms. Tims displayed a drastic change in attitude after speaking to Mr. Smith.

Per RAP 2.2;

Doubts as to frivolity are resolved in favor of the Appellant ;

The record is considered as a whole;

An appeal is not frivolous merely because the Appellant 's arguments are rejected, and the judgment is affirmed; and

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Attorney fees may be awarded on appeal under RAP 18.9 and CR 11 if the Appellant 's brief does not cite to any judicial authority,

does not cite to any authority for reversal based on existing law, and does not make a rational good faith argument for the modification of existing law.

Cited from *Delany v. Canning* 499 84 Wn. App. 498, 929

P.2d 475 1997

B. Respondent Mr. Smith writes THE TRIAL COURT APPROPRIATELY DENIED DONNA'S MOTION TO REVISE.

Appellant Donna Tims counters

“THE TRIAL COURT DENIAL OF THE MOTION TO VACATE WAS AN ERROR OF LAW AND AN ABUSE OF DISCRETION.”

i. •The Reviews Of CR 60 Motions are specific to the appellate Court according to RAP 2.2(10).

- **Error! Bookmark not defined.**In *Franklin County v. Sellers*, 27 Wn. App. 797, 799, 621

P. 2d 751 - Wash: Court of Appeals, 3rd Div. 1980

- The Court of Appeals viewed the issues resolved by the tribunal as mixed questions of law and fact and determined that it should exercise its

- "inherent and statutory authority to make a de novo review of the record independent of the Commission's decision."
- Two years later, the Washington Supreme Court provided guidelines under RCW 34.04.130(6) which has significant influence.
- Our review, like that of the Superior Court and the Court of Appeals, is under RCW 34.04.130(6) which provides:
- The Court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
 - (a) in violation of constitutional provisions; or
 - (b) in excess of the statutory authority or jurisdiction of the agency; or
 - (c) made upon unlawful procedure; or
 - (d) affected by other error of law; or
 - (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

- (f) arbitrary or capricious.
- Above citation by the Supreme Court and the Appellate Court is from *WASHINGTON MOTORSPORTS v. SPOKANE RACEWAY*, 282 P. 3d 1107 - Wash: Court of Appeals, 3rd Div. 2012.

The following case from the Washington Court of Appeals explains how the Commissioner's hearing continues to have bearing on the appeal since the motion for revision was denied by the trial Court on March 30, 2018. RP Motion for Revision CP 109. In the following case...*In State ex rel. JVG v. Van Guilders*, 154 P. 3d 243 - Wash: Court of Appeals, 1st Div. 2007.

- “Generally, we review the superior Court's ruling, not the commissioners. But when the superior Court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own.”

B2 i. Respondent Mr. Smith writes THE STANDARD OF REVIEW FOR DENIAL OF CR 60 MOTION IS ABUSE OF DISCRETION.

Appellant Donna Tims counters

- “THE TRIAL COURT NECESSARILY ABUSES ITS DISCRETION IF ITS RULING IS BASED ON AN ERRONEOUS

VIEW OF THE LAW.” Abuse of discretion has been applied to CR60(b) motions.

- Cited from *Atwood v. Shanks*, 958 P. 2d 332 - Wash: Court of Appeals, 1st Div. 1998.

- In the hearing on March 7, 2018, the Commissioner’s wrote her order with specific reference to law. CP 103,

“ there is no basis under the law to vacate the Decree, dated 12/2/2015. Ms. Tims was represented by counsel at the time of the decree and that counsel prepared the paperwork. The motion to vacate the Decree of Dissolution is denied.”

The Appellant pleadings that were properly in front of the Court as Ms. Donna Tims made a motion in the Pierce County Superior Court to Vacate the DCD based on CR 60 with a cause of action for fraud and damages in the amount of \$345,375.00. CP 40-53, attachments 8a, 8b, 8c and 8d(1)and 8d(2).

In addition, if “that’s not really how it works”, applies to the substitute party, then why did the case move forward? It is the duty of the Superior Court to appoint a substitute, and the Commissioner did not make any effort to do so, or to explain her statement.

B2 ii. Respondent Mr. Smith writes THE RECORD ON APPEAL IS NOT ADEQUATE FOR REVIEW.

Appellant Donna Tims counters

THE RECORD ON APPEAL IS ADEQUATE FOR REVIEW

Mr. Smith contends that the transcript of the March 30th motion with Pierce County Superior Court Judge Ashcroft was missing.

- The report of proceedings from the hearing with Judge Ashcroft on March 30, 2018 was transmitted electronically to the appeals Court was served to Mr. Smith at his personal e-mail address and served to the Appellant to her personal e-mail address by Kellie Smith from Pierce County Superior Court on June 12, 2018. The filing Id is 20180612125009D2583939. It was served again by the Clerk of the Superior Court with a link on June 14, 2018.

- Mr. Smith was served with the verbatim report of proceedings and a searchable link to the PDF electronic copy of the verbatim report of proceedings. Mr. Smith was served by the Appellant multiple times with updates to the CP, which included the RP file number 518821, with Judge Timothy Ashcroft. Those dates are

June 11, 2018 51437896, 51437899 (certificate of service); June 12, 2018 51452771 and June 14 2018 51466912.

- Mr. Smith should have made an objection at the time. Per RAP 9.5 (c), Objections to the report of proceedings. In part...A party may file an objection to the report of proceedings within 10 days.
- General Orders of Division II 2015-1 to modify filing procedures for reports of proceedings for Court reporters and transcribers.

B2 iii. Respondent Mr. Smith writes FINALITY IN FAMILY LAW CASES.

Appellant Donna Tims counters

iii. • FAMILY LAW CASES OFTEN CONTINUE

- Family Law Cases are in a special category of cases.

Those that include frequent updates, modifications and motions belong to the family Court. These cases are extremely sensitive and important. Family Law cases control the most significant outcomes to every person in the family unit. Without a mechanism for modifications and appeals, the constitutional rights of citizens would be breached.

- The lack of finality of this case is injurious to the Appellant , not the Respondent. The ability for the Appellant to have closure within her most significant relationship of her life should be obvious to all. The Appellant s closure will not occur unless a Court of law intervenes.

B2 iv. Respondent Mr. Smith writes PRO SE LITIGANTS ARE HELD TO THE SAME STANDARDS AS ATTORNEYS.

Appellant Donna Tims Counters:

- PRO SE LITIGANTS CANNOT BE REASONABLY HELD TO SAME STANDARD OF ATTORNEY'S
- Although Pro Se Litigants do have to comply with Court rules and decorum just like Attorney's it does often not result in equality of justice.
- ... "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Equally applicable here is the admonition that pro se complaints, due to the lack of legal expertise that

accompanies their preparation, are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

Evidentiary matters need not be pleaded (*Rohler v. TRW, Inc.*, 576 F.2d 1260, 1264 (7th Cir. 1978)) and it is a truism that *pro se* complaints are held to less stringent standards than those prepared by counsel. *French v. Heyne*, 547 F.2d 994, 996 (7th Cir. 1976).

This small excerpt from a current article in the Wisconsin Law Review illustrates just one way, and there are many, in which the *pro se* litigant is at a great disadvantage to their Adversary:

- “A simple example illustrates the difference: in federal Court, a lawyer may request a rescheduled hearing date because the party has a medical condition. Even if that request is denied, the party has not lost her chance to pursue her case. Rather, the attorney would go without the party, or the attorney would file a motion for summary judgment that resolves the case, or any other collection of procedural adjustments. A default ruling against the party would be highly unusual. Without this representation or procedure in state civil Courts, both the context and the judicial role are different: if the

request for continuance is denied, the party is without recourse in practice and her case would end.”

According to 28 U.S.C. § 1654 - U.S. Code Appearance personally or by counsel.

“In all Courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such Courts, respectively, are permitted to manage and conduct causes therein.”

However, Pierce County Superior Court Rules dictate that a litigant should obtain legal advice from an attorney and that the Clerk of Court is not allowed by law to provide any legal advice.

From a Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), 10-11:

"The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of

accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.”

B3 . Respondent Mr. Smith writes COSTS AND ATTORNEY FEES.

Request for Costs on Appeal by Respondent.

Appellant Donna Tims counters

- *In Mancini v. City of Tacoma, Wash: Court of Appeals, 1st Div. 2015***Error! Bookmark not defined..**

Attorney fees and costs denied where the requesting party devotes to the issue only one sentence in its brief's concluding paragraph.

See Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 710- 11 n.4, 952 P.2d 590 (1998)

REQUESTED COSTS ON APPEAL BY APPELLANT

Pat Chalpin should pay the attorney fees of the Respondent and the Appellant's damages she is liable for.

ii. BREAKDOWN OF APPELLATE DAMAGES

of \$353,185.00.

\$345,375.00 in total damages outlined in detail in CP 23- 35 as a result of fraud.

\$1000.00 of Greg and Donna's shared bank account (non-probate item).

2004 Nissan GIFTED TO THE APARTMENT MANAGER CP 23- 35.

Appx. \$3,000.00 in both personal and quasi property.

\$640.00 attorney fees for Mr. Davies.

The Personal Representative and Mr. Smith should provide a complete inventory of the estate. Real property and the couples shared bank account are non probate entities according to RCW

11.11.010 under the control of the Appellant as a third party as referenced in RCW 11.11.010.

The Appellant requests that The Final Disposition and Resting Place Of Greg Tims should be disclosed to Donna Tims.

A quit claim deed for the 50% joint property held in title by Mr. Greg and Donna Tims.

CONCLUSION:

The proceedings were irregular.

There was an insufficient service of process.

Subject matter jurisdiction was not obtained properly.

Fraud has been pleaded and proven by the Appellant .

Undue influence has been pleaded and proven by the Appellant .

The Respondent has failed to disprove these facts with any depth.

Therefore,

1) This Court is respectfully requested to make allowance for late appeal due to extraordinary circumstances.

2) This Court is respectfully requested to review the trial Court's decision based on BOTH abuse of discretion and LAW.

3) This Court is respectfully requested to consider the damages already incurred by the Appellant when contemplating sanctions.

4) This Court is respectfully requested to either hold the personal representative accountable for breaking the law, or .

5) This Court is respectfully requested to dismiss the probate with prejudice.

6) This Court is respectfully requested to return the Appellant to status quo ante.

CERTIFICATION

REPLY BRIEF OF APPELLANT

Respectfully Submitted;

Donna Lynne Tims

Donna L. Tims Pro Se On Behalf Of Self For Appellant

Signed On The Third Day Of The Month Of October In The Year

Two Thousand And Eighteen In Gig Harbor, Washington

DONNA TIMS - FILING PRO SE

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Comments:

Amended from Sept 25th 2018

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