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**Court of Appeals**  
**Division II**  
**State of Washington**  
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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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**DIMENSION TOWNHOUSES LLC,**

Appellant,

v.

**JAILE MONTALVO**  
and All Other Occupants at  
5634 Boston Ave SW, #30  
Lakewood, Washington,

Respondents.

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**BRIEF OF APPELLANT**

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## **I. ASSIGNMENTS OF ERROR**

A. The trial court erred in granting Defendant Jaile Montalvo's ("Montalvo") Order Granting CR 60 Relief because Montalvo did not comply with the December 3, 2018 Agreed Stipulation & Order, so Plaintiff, Dimension Townhouses LLC ("Dimension") was entitled to enforce the December 3, 2018 Agreed Stipulation & Order against Montalvo without notice to Montalvo, pursuant to the terms of the December 3, 2018 Agreed Stipulation & Order.

B. The trial court erred in granting Defendant Montalvo's Order of Limited Dissemination because

1. The Trial Court incorrectly found that Plaintiff's unlawful detainer action was without basis in fact or law by ignoring the fact that Montalvo breached a condition of the December 3, 2018 Agreed Stipulation & Order by failing to pay Dimension as agreed; and
2. The Trial Court incorrectly granted the Order for Limited Dissemination upon finding that the unlawful detainer action was without basis in fact or law.

## **II. ISSUES PRESENTED**

- A. Whether a party is entitled to relief under CR 60 despite having breached a term of the stipulation that entitled the other party to the relief obtained.

- B. Whether a party is entitled to an order for limited dissemination upon the trial court's conclusion of law based supported by an erroneous finding of fact.

### **III. STATEMENT OF FACTS**

#### **A. Factual and Procedural Background.**

Montalvo was a tenant at a property managed by Dimension, located at 5634 Boston Ave SW, #30, Lakewood, Washington (the "Residence".) CP 1-5. Dimension brought an unlawful detainer action against Montalvo for failing to remove an unauthorized pet from the Residence. CP 1-5. Montalvo answered, and claimed that her pet was an emotional support animal, not a pet. CP 9-11. A hearing was held on November 20, 2018 for Montalvo to show cause why she should not be evicted for having an unauthorized pet. CP 47-53. Ms. Montalvo did not appear, and a judgment was entered against her.

Thereafter, on November 26, 2018 Montalvo appeared *ex parte* with the assistance of volunteer attorneys at Housing Justice Project to vacate the judgment, setting a new hearing for December 3, 2019. CP 15-18. At the hearing set by Montalvo, she, with the aid of counsel, entered into an agreement entitled "Agreed Stipulation & Order" (hereinafter "the Agreement") with the Dimension whereby Montalvo agreed (1) to provide her support animal's Pierce County animal license number within 14 days of December 3, 2018, (2) to vacate on

or before 1/31/2019, and (3) to pay rent and usual assessments until she vacates as agreed. CP 20-22. Failure to comply with any of the expressed conditions entitled the Insureds to move the Court for an Order of Writ of Restitution (eviction order) without notice to Montalvo. CP 20-22.

On December 5, 2018, Montalvo paid assessments totaling \$78.00 with a money order dated November 7, 2018<sup>1</sup>. CP 85-93 (Exhibit B.) Montalvo falsely testified in her declaration that she obtained the \$78.00 money order on December 5, 2018 after determining what she owed in utilities. CP 85-93. On December 5, 2018, Montalvo owed \$241.85 in utilities; (\$2.74 remaining from an assessment on 10/28/18 “Electricity – Lakeview Light and Power (09/24/2018-10/24/18)” in the original assessed amount of 66.99, \$75.00 for an assessment on 11/01/2018 for “Utilities Collected – November 2018 – Water \$9.50/Sewer \$47.50/Garbage \$18.00”, \$89.11 for an assessment on 11/28/2018 for “Electricity – Lakeview Light & Power 10/24/18-11/24/2018 - Lakeview Light & Power 10/24/18-11/24/2018”, and \$75.00 for an assessment on 12/01/2018 for “Utilities Collected – December 2018 – Water \$9.50/Sewer \$47.50/Garbage \$18.00”.) CP

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<sup>1</sup> Exhibit B contains evidence of a money order, which bears the date stamp of “110718” directly before indicating the amount of the money order.

72-77. Montalvo has produced no evidence of a December 5, 2018 money order she claimed to have obtained.

On December 27, 2018, more than three weeks after the Agreement was entered, Dimension held Montalvo in default of the agreement for failing to abide the agreement. CP 23-28. Dimension's agent stated that Montalvo had (1) "failed to identify her dog as agreed, and" (2) "she has failed to pay rent as agreed; so she has completely ignored the agreement." CP 23-28.

Pierce County Housing Authority paid Montalvo's rent to Dimension. CP 72-77. Montalvo did not produce a license within 14 days, but allegedly, this was due, in part, to Montalvo losing her mailbox key, and a (now-former) Dimension employee's alleged reluctance to access the mailbox for Montalvo. CP 32-43. Objectively, Montalvo did not pay assessments that were due and owing to Dimension during the Agreement.<sup>2</sup>

Based upon Dimension's motion and supporting declaration, Dimension obtained an Order for Writ of Restitution against Montalvo. CP 80-84. The writ of restitution was issued December 31, 2018, served upon Montalvo by the sheriff on January 2, 2019, and

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<sup>2</sup> Since Pierce County Housing Authority paid 100% of Montalvo's base rent, the only financial component for which Montalvo was required to pay was assessments.

enforced on January 25, 2019. CP 32-43. At the time Dimension obtained the December 27, 2018 Order for Writ of Restitution, Montalvo had not complied with the Agreement because she did not pay Dimension as agreed. CP 72-77.

On June 12, 2019, Montalvo filed a motion to vacate the Order for Writ of Restitution Under Wash. CR 60(1) “excusable neglect”, and (4), “misrepresentations”; and Montalvo also filed for a motion for an Order of Limited Dissemination. Montalvo’s motion to vacate the Order for Writ of Restitution falsely claimed that “Dimension had no grounds for filing the Motion” [Motion for Order for Writ of Restitution], and that Montalvo “did not breach the settlement agreement.” CP 47-53. Dimension opposed Montalvo’s motions, and upon Montalvo filing respective replies to Dimension’s opposition, on September 6, 2019, the Pierce County Superior Court granted an Order Granting CR 60 Relief from 12/27/18 Order and 12/21/18 Writ; and an Order of Limited Dissemination. CP 94-97.

Within the Order Granting CR 60 Relief from 12/27/18 Order and 12/21/18 Writ, the Court Ordered that (1) “Defendant’s motion is GRANTED in its entirety,” and that (2) “the Order for Writ of Restitution dated December 27, 2018 and the Writ of Restitution dated December 31, 2018, is” quashed. CP 96-97. Upon granting

Montalvo's Motion for an Order of Limited Dissemination, the Court made a finding of fact that "[p]laintiff's unlawful detainer action was without basis in fact or law", and should be granted on that basis. CP 94-95. Dimension filed a timely Notice of Appeal.

#### **IV. ARGUMENT**

##### **A. Standard of Review for Motion to Vacate.**

Under CR 60(b) a party to seek relief from an order for a variety of reasons, including for excusable neglect, and for misrepresentation; the two basis asserted by Montalvo. *See* CR 60(b)(1)&(4). On review of a CR 60 motion for order to vacate, the appellate court reviews the trial court's order for abuse of discretion. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 708, 934 P.2d 715, 722, (1997) (citing *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 454, 922 P.2d 126 (1996).) Upon undertaking such an inquiry, the appellate court considers whether "it can be said no reasonable [person] would take the view adopted by the trial court." *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. at 709 (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).) Where a party's motion to vacate an order is based upon CR 60(b), the Court relief is based upon excusable neglect, the Court considers the following factors:

(1) there is substantial evidence to support, at least prima facie, a defense to the opposing party's claim; (2) the moving party's failure to timely appear in the action, and answer the opponent's claim was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) vacating the default judgment would result in a substantial hardship to the opposing party.

*Hardesty v. Stenchever*, 82 Wn. App. 253, 263, 917 P.2d 577, 582, (1996)

(citing *White v. Holm*, 73 Wash. 2d 348, 351, 438 P.2d 581 (1968).)

Furthermore, where a party alleges the basis for an Order to Vacate is based upon a misrepresentation the party seeking CR 60 relief must demonstrate that the misrepresentation was made with specific knowledge and intent to misrepresent a consequential fact. *Sarvis v. Land Res.*, 62 Wn. App. 888, 893, 815 P.2d 840, 842, (1991).

Here, the trial court erred in granting Montalvo's motion seeking CR 60 relief because there is no evidence to support, at least prima facie, a defense to Dimension's claim that she had breached the Agreement, so there is no excusable neglect. Furthermore, the trial court erred in granting Montalo's motion for CR 60 relief because even if Mary

Bodimer's declaration contained a partial misrepresentation, the factual record is clear – Montalvo breached the Agreement by not paying as she agreed. Since Dimension was entitled to the relief it obtained on December 27, 2018, the court improperly granted Montalvo's motion.

First, in her motion to vacate, Montalvo claimed that the order was improperly entered *ex parte*, and had she been given notice, she could have demonstrated that she had not breached the agreement. Second, Montalvo asserted that Dimension only obtained the sought relief by intentionally misrepresenting that she breached the terms of the agreement by (1) not identifying her dog, and (2) not paying rent as agreed. The objective truth of the matter is that Montalvo had breached the agreement, and had she appeared in Court to argue otherwise, she would have committed perjury because the fact of her breach is clear and unambiguous.

1. Montalvo can not assert a prima facie defense to Dimension's obtained Order for Writ of Restitution.

Settlement Agreements are contracts. *Riley Pleas v. State*, 88 Wn.2d 933, 937, 568 P.2d 780, 783, (1977). Failure of a party to perform a duty imposed under the contract when it is due constitutes a breach of that contract. *Northwest Independent Forest Mfrs. v. Dept. of Labor & Indus.*, 78 Wn.App. 707, 712, 899 P.2d 6 (1995), *see also* Restatement

(2d) of Contracts § 235(2). Montalvo failed to perform her duty to pay assessments as required of her in the Agreement, so Dimension had every right to obtain the relief it obtained against her: an Order for Writ of Restitution *ex parte* without notice to Montalvo.

Montalvo’s motion for CR 60 Relief asserts that Montalvo agreed to (1) pay rent for December and January, and (2) provide a license for her pet. However, in so stating, perhaps Montalvo, (or more likely, her legal counsel,) have lumped rent and “usual assessments” into a singular element of “rent”.<sup>3</sup> After asserting that Montalvo was to pay rent for December and January, Montalvo argued that she complied with this obligation because Pierce County Housing Authority (“PCHA”) paid 100% of her rent for December and January. Montalvo’s motion for CR 60 Relief ignores any reference to the terms of the agreement that require her to pay her portion of rental assessments to Dimension: utilities. As a result, Montalvo falsely asserts that Dimension improperly sought relief after PCHA made Dimension whole on Montalvo’s obligation to pay Dimension pursuant to the Agreement.

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<sup>3</sup> It is not uncommon to combine traditional rent and assessments into one umbrella term “rent”, as is evidenced by the legislature’s recent definition of “Rent” which includes all recurring periodic charges, including utilities. *See* Rev. Code. Wash. § 59.18.030(28) (2020).

It is true that Pierce County Housing Authority (“PCHA”) paid Montalvo’s base rent, and it is debatable whether Dimension’s employee’s actions served as an impediment to Montalvo’s ability to produce evidence that her pet was licensed. However, this Court should not ignore that the Agreement entitled Dimension to the relief it obtained on December 27, 2018 upon Montalvo’s breach of any, or all, of the required terms of the Agreement. This Court should also acknowledge that Montalvo breached her obligation to pay Dimension as agreed at the time Dimension enforced the Agreement.

Montalvo had a duty to personally pay Dimension her rental assessments for her utilities. Montalvo did not pay her rental assessments for utilities, which was a clear condition of her agreement with Dimension. Montalvo’s submitted false testimony under oath that on December 5, 2018, she reviewed her ledger balance to pay her utilities to Dimension in compliance with the agreement, and, on that very same day, she obtained a money order for \$78.00 based upon her review of the ledger. In fact, the money order Montalvo tendered to Dimension was obtained in November 2018; one can determine the date of purchase by reviewing Exhibit B to Montalvo’s September 3, 2019 declaration (“110718”). CP 85-93.

The objective facts indicate that Montalvo had a money order from November 2018 that she provided to Dimension, who applied it to her outstanding balance of utilities on December 5, 2018. Thereafter, Montalvo made no attempt to pay the balance of utilities owed to Dimension prior to Dimension availing their right to enforce the agreement. The Agreement gave Dimension the right to obtain relief in the form of an Order for Writ of Restitution, *ex parte*, without notice to Montalvo if she failed to follow through on her obligations under the Agreement. On December 27, 2018, Dimension elected to enforce the Agreement without notice to Montalvo.

Had Montalvo been notified of the motion, and had she appeared on December 27, 2018, she would have not been able to assert that Dimension was not entitled to the relief sought because she objectively failed to pay the usual assessments that she agreed to pay Dimension. On this basis, the trial court should have rejected Montalvo's request for an order to vacate the Order for Writ of Restitution and Writ of Restitution because she had objectively breached the Agreement, and lacked any defense to non-payment. The record certainly does not support a finding that Dimension's unlawful detainer action was sufficiently without basis in fact or law.

2. Dimension's declaration referencing the non-payment of rent does not amount to an intentional misrepresentation.

Dimension's declarant, Mary Bodimer, submitted a declaration indicating that Montalvo (1) "failed to identify her dog as agreed, and" (2) Montalvo "has failed to pay rent as agreed; so she has completely ignored the agreement." CP 23-28 Whether or not Ms. Bodimer's actions were primarily to blame for Montalvo's inability to produce a pet license in a timely fashion, Ms. Bodimer is correct that Montalvo, herself, failed to pay rent as agreed. At the time Ms. Bodimer's testimony was not an intentional misrepresentation, it was an accurate statement of fact. Though Ms. Bodimer may have blame placed upon her for Montalvo's failure does not negate the second part of Ms. Bodimer's testimony: that Montalvo failed to pay Dimension as agreed.

The Agreement contained an element whereby Montalvo was to pay her rent "and usual assessments", and, as is discussed above, it is not uncommon to use the term "rent" when referring to aggregate monthly payments that come due in a residential lease. Montalvo's argument that Ms. Bodimer's declaration was a misrepresentation used to obtain relief Dimension was not entitled to is not accurate. Montalvo's allegation amounts to an attempt to raise form over substance to obfuscate the fact that she had an obligation to pay Dimension in the Agreement, and she did

not do so. To further obfuscate the fact that she failed to abide by the Agreement's requirement to pay the utilities, she provided objectively false testimony to the trial court by weaving a narrative whereby she checked her balance of utilities that were due, and immediately went to obtain a money order to pay what she believed was due. In truth, Ms. Bodimer's testimony accurately stated to the Court that Montalvo did not pay Dimension pursuant to the Agreement, and Dimension was entitled to an Order for Writ of Restitution as a result.

Montalvo's counsel, in bringing her motion to vacate, literally did precisely what Montalvo argues was so improper as to obtain a finding of fact from the trial court that Dimension had no basis in law or fact to even bring the unlawful detainer against Montalvo – much less obtain a writ of restitution. Montalvo's motion to vacate asserts that her obligations to Dimension in the Agreement were simply to (1) pay rent, and (2) identify her dog; and Montalvo analyzed the facts of the matter thereafter – neglecting the fact that the payment included usual assessments.

Both Ms. Bodimer and Montalvo's counsel have expressed the payment element of the Agreement simply as rent, and it is not credible to insinuate that either party did so with an intent to misrepresent a fact.

In fact, Ms. Bodimer's testimony is the only testimony that accurately concluded that Montalvo breached her payment obligation to Dimension

because Montalvo's blanket use of the term "rent" ignored the payments that Montalvo, herself, was to pay to Dimension.

No reasonable person could conclude that Montalvo had paid as she agreed to do under the terms of the Agreement, so Ms. Bodimer had no reason to misrepresent the truth of the matter – Dimension was entitled to enforce the Agreement on December 27, 2018 because Montalvo did not pay as agreed.

Once again, in applying the factors to determine whether Montalvo was entitled to relief of the December 27, 2018 Order and resultant Writ of Restitution, it is clear that the trial court erred in concluding that Montalvo had a defense to her non-payment, such that Dimension was not entitled to the relief sought.

**B. The Trial Court's Order for Limiting Dissemination, And Its Declaratory Finding Of Fact Should Be Reversed Because It Was Based Upon A Faulty Conclusion.**

As with a review of a trial court's order under CR 60, the appellate court reviews the trial court's order for limited dissemination for abuse of discretion. *In re Dependency of Q.L.M.*, 105 Wn. App. 532, 538, 20 P.3d 465, 468, (2001). An order for limited dissemination can be granted by the trial court upon a finding of any of the following: "(a) The court finds that the plaintiff's case was sufficiently without basis in fact or law; (b)

the tenancy was reinstated under RCW 59.18.410 or other law; or (c) other good cause exists for limiting dissemination of the unlawful detainer action.” Rev Code Wash. § 59.18.367 (2020).

Here, the Trial Court abused its discretion because it found the basis for the Order under subsection (a), by declaring that Dimension’s “unlawful detainer action was without basis in fact or law”. CP 94-95. While there is a catch all basis for an Order of Limited Dissemination that would allow the Trial Court to grant such relief, the Trial Court’s Order for Limited Dissemination should be vacated because the basis for the Order amounts to an abuse of discretion.

As is stated above, Dimension was entitled to the obtained relief because Montalvo breached the Agreement. Any other conclusion requires one to ignore the terms of the Agreement, and the fact that Montalvo did abide by the terms of the Agreement.

## **V. CONCLUSION**

Based upon the foregoing, the Appellant respectfully requests that this Court reverse the trial court’s Order Granting Relief Under CR 60, the basis for the trial court’s Order for Limited Dissemination, and the Order for Limited Dissemination.

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RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of March, 2020.

BOICE LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Brian A. Boice".

By \_\_\_\_\_  
Brian A. Boice, WSBA #42525  
Attorney for Appellant

**BOICE LAW FIRM PLLC**

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