

FILED

AUG 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291561-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

DANIAL L. NEWLON
Petitioner/Appellant

v.

NICOLE (fka NEWLON) ALEXANDER
Respondent

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

Charles T. Conrad, P.S.
Charles T. Conrad
Attorney for Respondent
9011 E. Valleyway Avenue
Spokane Valley, WA 99212-2835
(509) 924-4825

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | iii, iv |
| I. INTRODUCTION | 1 |
| II. ASSIGNMENT OF ERRORS | 2 |
| III. STATEMENT OF THE CASE | 2 |
| IV. ARGUMENT | 5 |
| A. ISSUE ON APPEAL | 5 |
| B. JUDGE SYPOLT’S ORDER DENYING APPELLANT’S CR 60(b) MOTION SHOULD BE AFFIRMED UNLESS HE COMMITTED ABUSE OF DISCRETION | 6 |
| C. A CR 60(b) MOTION IS NOT A SUBSTITUTE FOR AN APPEAL | 8 |
| D. CR 60(b) MOTIONS MUST BE FILED WITH A “REASONABLE TIME.” | 10 |
| E. VOID OR MERELY ERRONEOUS JUDGMENTS | 15 |
| F. NEWLON’S MISREPRESENTATION TO TRIAL COURT | 20 |
| NEW ARGUMENT & THEORIES | 20 |
| G. SUBJECT MATTER JURISDICTION | 22 |
| ATTORNEY’S FEES | 28 |
| V. CONCLUSION | 30 |

APPENDIX:

Ex. "B" Hennessey-Smith Funeral Home Notice

Ex. "C"Correspondence from Attorney Peter E. Moye

Ex. "D"Trenton's headstone and grave sight

Ex. "E" Newlon's Responses to Nicole Alexander's Second
Set of Requests for Production of Documents

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page(s)</u> |
|---|-----------------------|
| <i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 450-451, 618 P.2d 533 (1980) | 6 |
| <i>Bresolin v. Morris</i> , 86 Wn. 2d 241, 245, 543 P.2d 325 (1975) | 15 |
| <i>Burlingame v. Consolidated Mines</i> , 106 Wn.2d 328, 722 P.2d 67 (1986) | .8, 9 |
| <i>Dependency of J.M.R.</i> , 160 Wn. App. 929 (April, 2011) | .27, 28 |
| <i>Harberg v. Swartz</i> , 89 Wn.2d 916, 925, 578 P.2d 17 (1978) | 21 |
| <i>In Marriage of Corrie</i> , 32 Wn. App. 592, 648 P.2d 501 (1982) | 19 |
| <i>In re Marriage of Furrow</i> 115 Wn. App. 661, 63 P.3d 821 (2003) | 22, 23, 24, 25 |
| <i>In the Marriage of Tang</i> , 57 Wn. App. 648, 789 P.2d 118 (1990) | 13, 14, 15 |
| <i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990) | 7, 8 |
| <i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144 (1999) | .11, 12, 13 |
| <i>Northwest Investment v. New West Fed.</i> , 64 Wn. App. 938, 827 P.2 334 (1992) | 8 |
| <i>Port of Port Angeles v. CMC</i> , 114 Wn.2d 670, 790 P.2d 145 (1990) | 9 |

| | |
|---|--------|
| <i>Sherry v. Fin. Indem. Co.</i> , 132 Wn. App. 355, 131 P.3d 922 (2006) | 26 |
| <i>State v. Gaut</i> , 111 Wn. App. 875, 46 P.3 rd 832 (2002) | 19, 20 |
| <i>Union Elevator & Warehouse v. State</i> , 152 Wn. App. 199 (2009) | 29, 30 |
| <i>Woods v. Woods</i> , 48 Wn. App. 767, 740 P.2d 379 (1987) | 21, 22 |

Statutes

| | |
|--------------------------------|----|
| RCW 4.28.020 | 7 |
| RCW 4.84.185 | 29 |
| RCW 7.04.150 | 26 |
| RCW 26 | 25 |
| RCW 26.09 | 15 |
| RCW 26.09.160 | 15 |
| RCW 26.09.170 | 15 |
| RCW 26.09.260 | 15 |
| RCW 26.09.280 | 16 |
| RCW 68.08.160 | 22 |
| RCW 68.08.245 | 22 |
| RCW 68.50.200 | 25 |
| Wash. Const. Art. 4, § 6 | 21 |

Rules

| | |
|--|-------|
| CR 60(b) . . .1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 17, 19, 21, 22, 27, 28, 29, 30 | |
| CR 60(b)(11) | 18 |
| CR 60(b)(4)[5] | 18 |
| Federal Practice & Procedure, §2851 (1995) | 17,18 |
| Federal Rule of Civil Procedure 60(b)(6) | 18 |

I. INTRODUCTION

DANIAL NEWLON is the Appellant and the Father of TRENTON NEWLON. NICOLE ALEXANDER is the Respondent and the Mother of TRENTON NEWLON.

On July 15, 2008, TRENTON NEWLON (hereafter "TRENTON") died in a boating accident.

At the time of TRENTON'S death, DANIAL NEWLON and NICOLE ALEXANDER had been divorced for several years and they could not agree on where TRENTON should be buried. As JUDGE LINDA TOMPKINS presided over the divorce proceedings, the parties through their attorneys, verbally stipulated that JUDGE LINDA TOMPKINS would have jurisdiction to decide the burial issue. The written Stipulation was signed August 5, 2008 (CP 270-271).

After a hearing on July 30, 2008, JUDGE LINDA TOMPKINS signed an Order dated August 8, 2008, that TRENTON would be buried in Spokane (CP 272-273). The parties subsequently agreed TRENTON would be buried in Post Falls, Idaho.

On August 10, 2009, DANIAL NEWLON filed a CR 60(b) Motion to Vacate the August 8, 2008, Order.

The CR 60(b) motion was heard and denied by JUDGE GREGORY SYPOLT on June 18, 2010 (CP 596-597).

DANIAL NEWLON has appealed JUDGE GREGORY SYPOLT'S Order denying the CR 60(b) motion (CP 593-595).

II. ASSIGNMENT OF ERRORS

NICOLE ALEXANDER argues there are no errors at the trial court level and that JUDGE GREGORY SYPOLT properly denied DANIAL NEWLON'S CR 60(b) Motion on June 18, 2010 (CP 596-597).

III. STATEMENT OF THE CASE

When MS. ALEXANDER was sixteen (16) years of age, she became pregnant by MR. NEWLON, who was twenty-one (21) years of age, and in the Air Force stationed at Fairchild Air Force Base. MR. NEWLON and MS. ALEXANDER named their son "TRENTON NEWLON." TRENTON was born on January 12, 1995. The parties divorced in December, 1999. JUDGE LINDA TOMPKINS presided over the divorce trial in Spokane County Superior Court.

Unfortunately, TRENTON died in a boating accident on July 15, 2008, when his maternal grandfather was operating the boat (CP 232, ¶ 1).

The parents could not agree where TRENTON should be buried. TRENTON'S remains were at the funeral home of Hennessey-Smith in Spokane at the time of the July 30, 2008, hearing. (CP 276-282, Ex. "B"). Later in the day, TRENTON was flown to his father's residence in Tennessee via Atlanta, Georgia, for a memorial service and TRENTON'S

final resting place was to be determined by JUDGE LINDA TOMPKINS at the July 30, 2008 hearing.

MR. NEWLON hired Spokane Attorney Peter Moyer, who scheduled a hearing on the burial issue before the HONORABLE LINDA TOMPKINS (CP 563-571).

MS. ALEXANDER took Mr. Moyer's July 18, 2008 letter concerning the burial hearing with JUDGE LINDA TOMPKINS to Attorney Al Gauper (CP 563-571) (Ex. "C"). MS. SCHULTZ received a copy in the mail.

The parties, through Attorney Gauper and Attorney Moyer, agreed on the language of the Stipulation Re Jurisdiction, Hearing and Judicial Assignment dated July 25, 2008 (CP 563-571), (CP 270-271).

Mr. Gauper's Declaration (CP 563-571) of April 9, 2010, clearly states Paragraph "7" of the Stipulation (CP 270-271) was prepared by Attorney Peter Moyer on behalf of MR. NEWLON (CP 563-571). This paragraph provides, in part:

Regardless of whether or not this Court has jurisdiction over this matter, the parties agree to be bound by JUDGE LINDA TOMPKINS ruling as to the final disposition of TRENTON'S remains . . .

The parties agree to fully comply with said ruling, and further agree that failure to abide by said ruling is actionable in the Spokane County Superior Court for

specific performance, damages, costs and any other appropriate relief. [Emphasis added].

Pursuant to the Stipulation, JUDGE LINDA TOMPKINS conducted a hearing on July 30, 2008, under the dissolution proceeding, Cause No. 98-3-01755-2, to decide TRENTON'S burial site (CP 272-273).

JUDGE LINDA TOMPKIN'S Order dated August 8, 2008, and filed August 11, 2008, provides, in part, "Subsequent to the Court's ruling, the parties have agreed that Trenton should be buried at the Evergreen Cemetery in Post Falls, Idaho." [Emphasis added]. (CP 272-273) Evergreen Cemetery is TRENTON'S final resting place. A beautiful headstone designed and paid for by MS. ALEXANDER is in place. (CP 304-308, Ex. "D").

Attorneys for MR. NEWLON and MS. ALEXANDER signed the August 8, 2008 Order. (CP 272-273).

Three hundred and sixty-four (364) days after JUDGE LINDA TOMPKINS' Order was filed, DANIAL NEWLON filed a CR 60(b) motion to vacate the August 8th Order. (CP 293-294).

After the CR 60(b) motion is filed, ATTORNEY MARY SCHULTZ winds the motion through the court system by improperly trying to have the CR 60(b) motion heard by a court commissioner instead of by JUDGE LINDA TOMPKINS, the Trial Judge. (CP 295-296, CP 302-303, CP 461-

462). When that tactic fails, ATTORNEY SCHULTZ files motions to recuse JUDGE LINDA TOMPKINS from hearing the CR 60(b) Motion by alleging JUDGE LINDA TOMPKINS' hearing of July 30, 2008 was "coercive, ersatz and summary." (CP 572-573; CP 420-434).

JUDGE LINDA TOMPKINS sends the CR 60(b) Motion to Presiding to determine, in light of MS. SCHULTZ'S accusations, which department should hear the CR 60(b) motion. (CP 99-100).

Presiding sends the Motion back to JUDGE LINDA TOMPKINS. JUDGE LINDA TOMPKINS decides to recuse herself (CP 572-573). The CR 60(b) Motion is then set before the HONORABLE GREGORY SYPOLT. JUDGE SYPOLT denies the Motion to Vacate on June 18, 2010 (CP 596-597). MR. NEWLON has appealed JUDGE SYPOLT'S June 18, 2010 Order (CP 593-595).

IV. ARGUMENT

A. ISSUE ON APPEAL

The only issue on appeal is JUDGE GREGORY SYPOLT'S Order of June 18, 2010 (CP 596-597), denying MR. NEWLON'S Motion under CR 60(b) to vacate JUDGE LINDA TOMPKINS' Order signed August 8, 2008, and filed August 11, 2008.

The scope of DANIAL NEWLON'S appeal is limited to JUDGE SYPOLT'S Order of June 18, 2010 (CP 596-597). The only issue on appeal

is did JUDGE SYPOLT abuse his discretion in denying MR. NEWLON'S CR 60(b) motion? The underlying Order of August 8, 2008, by JUDGE LINDA TOMPKINS is not before this Court. In *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-451, 618 P.2d 533 (1980), the court held:

An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment.«2» The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion. *De Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977).

Washington has long recognized the principle that a mistake of law will not support vacation of a judgment. *In Re Estate Of Leroux*, 55 Wn. 2d 889, 350 P.2d 1001 (1960). In *State Ex Rel. Green V. Superior Court*, 58 Wn.2d 162, 164-65, 361 P.2d 643 (1961), the court stated:

" If . . . the court decided the issue wrongly, the error, if any, may be corrected by that court itself . . . or by this court on appeal, but the motion to vacate the judgment is not a substitute.

B. JUDGE SYPOLT'S ORDER DENYING APPELLANT'S CR 60(b) MOTION SHOULD BE AFFIRMED UNLESS HE COMMITTED ABUSE OF DISCRETION.

«2» Recently in *BROWDER v. DIRECTOR*, 434 U.S. 257, 263 n.7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978), the Supreme Court stated that an appeal from an order denying a rule 60(b) motion brings up for review only the correctness of that denial and does not bring up for review the final judgment.

In *Lindgren v. Lindgren*, 58 Wn. App. 588, 794 P.2d 526 (1990), a party sought to vacate under CR 60(b) a default judgment.

The Court, at 591, cites RCW 4.28.020, which provides:

Jurisdiction acquired, when. From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.

This statute was cited to answer the argument that the trial court did not have jurisdiction to vacate a judgment as service of the motion to vacate was defective.

The Court held at 591, “This statute declares that once original jurisdiction is properly acquired, a superior court has continuing jurisdiction over a controversy from beginning to end.”

The Court further held at 595:

. . . On appeal, a trial court’s disposition of a motion to vacate will not be disturbed unless it clearly appears that it abused its discretion; abuse of discretion is less likely to be found when a default judgment is set aside. [Case cited]. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. [Case cited].

. . .

However, we note that the discretionary judgment of a trial court of whether to vacate a judgment is a decision upon

which reasonable minds can sometimes differ. For this reason, if the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. [Case cited].

In the case of *Northwest Investment v. New West Fed.*, 64 Wn. App.

938, 827 P.2d 334 (1992), the Court held at 942:

Motions to vacate or for relief from judgment are addressed to the sound discretion of the trial court and will not be disturbed absent a showing of manifest abuse of discretion. (Cases cited). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court (Case cited). Appeal from a denial of CR 60(b) motion is limited to the propriety of the denial.

C. A CR 60(b) MOTION IS NOT A SUBSTITUTE FOR AN APPEAL.

In *Burlingame v. Consolidated Mines*, 106 Wn.2d 328, 722 P.2d 67 (1986), the trial court entered a contempt order. Then the trial court vacated the contempt order under CR 60(b) as the trial court believed there was insufficient evidence to support the contempt order.

The Court held at 336:

Relief from judgments and orders in both civil and criminal cases is governed by CR 60(b). *State v. Scott*, 92 Wn.2d 209, 595 P. 2d 549 (1979); *State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973). Civil Rule 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966). Errors of law are not correctable

through CR 60(b); rather, direct appeal is the proper means of remedying legal errors. *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982); See also *Pamelin Indus., Inc. V. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 622 P. 2d 1270 (1981). Here, insufficiency of the evidence is not an error that is extraneous to the action or affects the regularity of the proceedings.

The Court held the judgment of contempt was valid, the CR 60(b) motion should have been denied and the Court reversed the trial court.

In *Port of Port Angeles v. CMC*, 114 Wn.2d 670, 790 P.2d 145 (1990), the Court restates the long standing rule that if a trial court commits an error of law, the remedy is a direct appeal not a motion under CR 60(b).

The Court held at 673,

This court has long recognized the principle that an error of law will not support vacation of a judgment. *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986); *In Re Estate Of Leroux*, 55 Wn.2d 889, 890, 350 P.2d 1001 (1960). In *State Ex Rel. Green v. Superior Court*, 58 Wn.2d 162, 164, 165, 361 P.2d 643 (1961), the court stated:

If . . . the court decided the issue wrongly, the error, if any, may be corrected by that court itself . . . or by this court on appeal, but the motion to vacate the judgment is not a substitute.

**D. CR 60(b) MOTIONS MUST BE FILED WITHIN A
“REASONABLE TIME.”**

JUDGE LINDA TOMPKINS’ Order was signed on August 8, 2008, and filed on August 11, 2008 (CP 272-273). MR. NEWLON filed a CR 60(b) Motion to Vacate on August 10, 2009 (CP 295-296). This is one day short of the one-year time limit to file a CR 60(b) motion. It is not a “reasonable time” to file a CR 60(b) motion. All CR 60(b) motions must be filed within a “reasonable time” and the one-year time period represents an “extreme limit” to file a CR 60(b) motion. The Motion to Vacate was delayed to the last permissible day to file. This is unreasonable delay and a basis in itself to deny MR. NEWLON’S CR 60(b) Motion.

ATTORNEY SCHULTZ received a copy of Mr. Moye’s letter dated July 18, 2008, to MS. ALEXANDER on or about July 18, 2008. This means MS. SCHULTZ knew of the burial issue in July, 2008, and still waited to file her CR 60(b) Motion for 364 days. Although MR. NEWLON was represented by ATTORNEY SCHULTZ in the dissolution proceedings and in the wrongful death suit, neither MS. SCHULTZ nor MR. NEWLON elected to appeal JUDGE LINDA TOMPKINS’ Order. DANIAL NEWLON was represented by Attorney Peter Moye at the burial hearing. Attorney Moye also did not appeal JUDGE LINDA TOMPKINS’

Order. MR. NEWLON puts forth no compelling reason why an appeal was not filed or the reason the CR 60(b) motion was delayed for 364 days.

In *Lockett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999), the plaintiff in a discrimination action sought to vacate an order dismissing the action without prejudice. The plaintiff's attorney filed the motion to vacate four months after learning that the action had been dismissed but within one year of the dismissal.

The Court held at 308:

We hold that a motion brought under CR 60(b)(1) may be untimely if it is not made within a reasonable time even if it is filed within one year from the date of the judgment, order, or proceeding from which relief is sought. Although we prefer the resolution of cases on their merits, we affirm the trial court's denial of *Lockett's* motion to vacate because it was not an abuse of discretion to find that the motion was untimely.

The Court held at 309-310:

A trial court's decision to vacate a judgment or order under CR 60(b) is reviewed for abuse of discretion. (Case cited). 'Discretion is abused when it is exercised on untenable grounds or for untenable reasons.'

The Court held at 310:

We hold that a motion brought under CR 60(b)(1) is timely only if it is filed within a reasonable time *and* not more than one year from the date of the judgment, order, or proceeding from which relief is sought.

The Court states at 311-313:

Second, the plain language of CR 60(b) creates two separate time requirements applicable to subsections (1), (2), and (3) of the rule. The first time requirement, that the motion to vacate be made within a reasonable time, is applicable to all subsections of the rule. [Emphasis added]. The second time requirement, that a motion to vacate under subsections (1), (2), or (3) be made not more than one year from the judgment, is linked conjunctively to the first requirement. Thus, a motion brought under CR 60(b)(1), (2), or (3) is timely only if it meets *both* time requirements.

Third, we find support in the interpretation of very similar language in FEDERAL RULE OF CIVIL PROCEDURE 60(b).«4» Because the time limitations of CR 60(b) parallel those in the federal rule, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive. See *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998); see also *Pybas v. Paolino*, 73 Wn. App. 393, 402, 869 P.2d 427 (1994) (looking to federal decisions in interpreting CR 60(b)(D)). Federal courts consistently interpret the time requirements in the federal rule to mean that a motion under Rule 60(b)(1) must be made within a reasonable time and in no event later than one year from the judgment. See, e.g., *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981); *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986); *White v. American Airlines, Inc.*, 915 F.2d 1414, 1425 (10th Cir. 1990).«5»

Moreover, practice guides confirm the uniformity of this interpretation. See 4 LEWIS H. ORLAND AND KARL B. TEGLAND, WASHINGTON PRACTICE § 723 (4th ed. 1992) ("[T]he one-year time limit on the first three grounds is merely the outermost limit; in individual cases, the court may find that the motion should have been earlier made."); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2866, at 386 (2d ed. 1995) ("The one-year period represents an extreme limit, and the motion will be

rejected as untimely if not made within a 'reasonable time' even though the one-year period has not expired.").

...

What constitutes a reasonable time depends on the facts and circumstances of each case. [Cases cited] The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate actions sooner.

...

The record shows that *Lockett's* attorney became aware in August 1996 that the action had been dismissed but waited until December 31, 1996, to file a motion to vacate the order of dismissal. Although *Boeing* does not show how it is prejudiced by *Lockett's* delay, *Lockett* fails to put forth any good reason for her attorney's four-month delay in bringing a motion to vacate.

The Court states at 315:

Although we prefer the resolution of cases on their merits, we cannot say in this case that the trial court abused its discretion in denying *Lockett's* motion to vacate a dismissal order where her attorney waited four months after learning of the dismissal to move for vacation and offered no good reason for his lack of diligence. Thus, we affirm.

In the Marriage of Tang, 57 Wn. App. 648, 789 P.2d 118 (1990), the appellant appealed the trial court's order under CR 60(b), which vacated a dissolution decree. Again, the Court reiterates the fundamental rules concerning a trial court order to grant or deny a CR 60(b) motion.

The Court held at 653:

The decision to vacate a judgment under CR 60(b) will not be overturned on appeal unless it plainly appears that the trial court has abused its discretion. *In Re Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). Discretion is abused where it is exercised on untenable grounds for untenable reasons. *In Re Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986).

At 654:

The absence of factual support for Linda Tang's motion sheds light on the basic flaw in the trial court's ruling. Errors of law may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal. *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986). Since vacation of the decree was based upon no grounds other than the alleged errors of law set forth above, the trial court abused its discretion by granting the motion.

At 655-656:

Finally, Linda Tang asserts that the trial court's order [vacating the divorce decree based on errors of law] can be upheld under CR 60(b)(11), which permits the vacation of a judgment due to '[a]ny other reason justifying relief from the operation of the judgment.' The use of CR 60(b)(11) is to be 'confined to situations involving extraordinary circumstances not covered by any other section of the rule.' (Cases cited). 'Such circumstances must relate to irregularities extraneous to the action of the court'. (Case cited). The rule has previously been invoked in unusual situations which typically involve reliance on mistaken information. (Cases cited). The circumstances of this case do not justify relief under CR 60(b)(11).

In sum, the trial court had no tenable grounds on which to grant the relief requested by Linda Tang under CR 60(b). Therefore, it abused its discretion by granting the motion. The issues presented to it were exclusively matters of law,

which were properly appealable and not suitable for a CR 60(b) motion. We therefore reverse the order vacating the decree.

E. VOID OR MERELY ERRONEOUS JUDGMENTS

A judgment is considered void as opposed to merely erroneous when “the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved.” [Emphasis added]. *Bresolin v. Morris*, 86 Wn. 2d 241, 245, 543 P.2d 325 (1975).

The Order of August 8, 2008, was entered under Superior Court Cause No. 98-3-01755-2 (the divorce proceedings). The hearing was held pursuant to the Stipulation of the parties. The parties stipulated that the court had jurisdiction, the parties were before the Court and TRENTON’S remains were at Hennessey-Smith Funeral Home, in Spokane County (CP 276-282, Ex. “B”). The coroner’s office had nothing to do with the burial of TRENTON. Under RCW Chapter 26.09, the Court retained jurisdiction in the divorce proceedings over the parties’ minor child.

Under RCW Chapter 26.09, the trial court retains jurisdiction after the decree of divorce is entered to enter contempt orders, to modify child support and spousal maintenance and to modify custody and placement of visitation schedules and to award costs and attorney’s fees. RCW 26.09.170, RCW 26.09.160, and RCW 26.09.260.

MR. NEWLON’S argument that the Court did not have continuing

jurisdiction over TRENTON, a minor, is erroneous on its face for the following reasons:

- (1) TRENTON'S remains were in Spokane County;
- (2) The parents were before the Court;
- (3) The parties stipulated to the Court's jurisdiction; and,
- (4) The Court had inherent, equitable powers to decide the site of TRENTON'S burial.

The truth is both parents submitted to JUDGE LINDA TOMPKINS authority to determine the burial site for TRENTON. Contrary to DANIAL NEWLON'S argument about being "forced" into court on the burial issue, it was MS. ALEXANDER who had to scurry to hire an attorney as MR. NEWLON had already hired Attorney Pete Moye, who had scheduled a hearing with JUDGE LINDA TOMPKINS (CP 563-571, Ex. "C").

The Stipulation of the parties makes it clear both parents understood the burial issue had to be decided with finality.

RCW 26.09.280 provides, in part:

Every action or proceeding to change, modify, or enforce any final order, judgment or decree entered in any dissolution . . . may be brought in the court in which the final order, judgment, or decree was entered . . .

The trial court, which entered the divorce decree in 1999 (JUDGE LINDA TOMPKINS), retained jurisdiction over the parties after the divorce

decree was entered and further the parties, through their respective counsel, specifically stipulated JUDGE LINDA TOMPKINS preside over the hearing of July 30, 2008.

“Rule 60 regulates the procedure by which a party may obtain relief from a final judgment.” Federal Practice & Procedure, § 2851 (1995).

CR 60(b):

It provides two types of procedures to obtain relief from judgments. The usual procedure is by motion in the Court in the action in which the judgment was rendered. In six clauses, the amended rules specifies fourteen grounds in which the motion may be based and it also permits a motion for ‘any other reason justifying relief from the operation of the judgment.’ At 229.

Generally the cases interpreting Rule 60(b) have reflected the courts’ preference for finality. At 231.

As is recognized in many cases, a motion for relief from a judgment under Rule 60(b) is addressed to the discretion of the court, . . . § 2857, at 254.

Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b), §2857, at 255.

The cases show that although the courts have sought to accomplish justice, they have administered Rule 60(b) with the scrupulous regard for the aims of finality. Thus, they have held that the motion must be made within a ‘reasonable time’ even though the stated time limit has not expired. They have been unyielding in requiring that a party show good cause for the failure to take appropriate action sooner. They have prevented the needless protraction of litigation by requiring the moving party to show a good claim or defense. They have been diligent to consider the hardship

that a reopening of the judgment might cause to other persons. § 2857, at 261-262.

As the case indicates, ‘relief will not be granted under Rule 60(b)(1) merely because the party is unhappy with the judgment.’ § 2858, at 276.

A motion under Rule 60(b)(3) must be made within a reasonable time and in any event not more than a year after judgment. § 2860, at 311.

Rule 60(b)(4)[5] authorizes relief from void judgments. Either a judgment is void or it is valid. § 2862, at 322.

It must be noted, however, that a court has jurisdiction to determine its own jurisdiction. Thus, if defendant has challenged the court’s personal jurisdiction and this issue has been resolved against the defendant by a final judgment, that judgment is not void, but is binding on the issue of jurisdiction. By the same token, a court’s determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so. § 2962 @ 331. [Emphasis added].

Federal Rule of Civil Procedure 60(b)(6) allows the court in its discretion to give relief from judgment when other reasons justified relief.

This is the same wording as CR 60(b)(11) for Superior Court.

The most common ‘other reasons’ from which courts have granted relief is when the losing party fails to receive notice of the entry of judgment in time to file an appeal. § 2864.

Thus, the power granted by Clause (6)[11] is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a

duty to take legal steps to protect his own interests. In particular, it ordinarily is not permissible to use this motion to remedy a failure to take an appeal. § 2864, at 359-360.

In *Marriage of Corrie*, 32 Wn. App. 592, 648 P.2d 501 (1982), the divorced wife sought to enforce the provisions of the dissolution decree giving her custody of her daughter. The court held at 596:

To deprive a court of its authority to enforce its prior orders requires a clear legislative mandate. *Jiminez*, 24 Wn.2d at 205.

If the trial court makes an error of law in entering a judgment, it cannot be vacated under CR 60(b), but must be appealed.

. . . An error of law has been said to have been committed when the judge ‘makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make.’ *In Re Ellern*, 23 Wn.2d 219, 222, 160 P.2d 639 (1945).

In the case of *State v. Gaut*, 111 Wn. App. 875, 46 P.3rd 832 (2002), the appeal was from an order denying a motion to withdraw a plea. The Court held at 881:

CR 60(b), governing motions to vacate a civil judgment, is analogous. (Case cited). On review of an order denying a motion to vacate only ‘the propriety of the denial *not* the impropriety of the underlying judgment’ is before the reviewing court. (Case cited). Said another way, an unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion.

The same principle should apply to criminal judgments. A motion to vacate a judgment is inherently a collateral

action. " 'The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something *extraneous to the action* of the court or goes only to the question of the regularity of its proceedings.' " *Bjurstrom*, 27 Wn. App. at 451 (emphasis added) (quoting *State ex rel. Green v. Superior Court*, 58 Wn.2d 162, 165, 361 P.2d 643 (1961)). The claim that the judgment is erroneous as a matter of law is a matter to be raised by appeal, writ, or personal restraint petition. " '[I]t is no ground for setting aside the judgment on motion.' " *Bjurstrom*, 27 Wn. App. at 451 (quoting *Green*, 58 Wn.2d at 165).

F. NEWLON'S MISREPRESENTATION TO TRIAL COURT

During the Hearing on TRENTON'S burial site, DANIAL NEWLON represented to JUDGE LINDA TOMPKINS that according to his faith, he needed to be named the "custodian of Trenton Newlon." This was a misrepresentation to the Court. The Order of August 8th provides, in part, "The parties further agree that to honor the tenets of the Church of Jesus Christ of Latter Day Saints, Danial Newlon is the custodian of Trenton Newlon." (CP 272-273).

In DANIAL NEWLON'S Responses to Nicole Alexander's Second Set of Requests for Production of Documents, MR. NEWLON states, "There are no tenets of the Church of Jesus Christ of Latter Day Saints that 'Danial Newlon is to be the custodian of Trenton Newlon.'" (CP 470-523, Ex. "E").

NEW ARGUMENT & THEORIES:

DANIAL NEWLON'S brief contains numerous arguments and theories which were never argued to the trial court on his CR 60(b) Motion to Vacate. Again, the only issue on appeal is whether JUDGE GREGORY SYPOLT abused his discretion by denying MR. NEWLON'S CR 60(b) Motion?

An issue, theory or argument not presented at trial will not be considered on appeal. *Harberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

If DANIAL NEWLON is arguing no court has authority to determine where a child should be buried if the parents cannot agree and no statute specifically grants such authority to courts of general jurisdiction, then MR. NEWLON is ignoring the Washington Constitution which gives jurisdiction to the superior courts under its inherent equity powers "and for such special cases and proceedings as are not otherwise provided for . . ."

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law . . . and for such special cases and proceedings as are not otherwise provided for . . . **Wash. Const. Art. 4, § 6. Jurisdiction of Superior Courts**

In *Woods v. Woods*, 48 Wn. App. 767, 740 P.2d 379 (1987), the parties' child had died. The mother had the body cremated without the

father's consent. The father subsequently agreed the child's ashes should be placed with Evergreen—Washelli Memorial Park.

Subsequently, the mother filed a motion to show cause and the cemetery was ordered to deliver the remains to her. The father appealed.

The court cites RCW 68.08.160 for the proposition that under the facts, the surviving parents of the child had the right to control the disposition of the remains of the child.

The Court held as both had agreed the son's ashes would be placed at Evergreen—Washelli Memorial Park, the mother could not unilaterally rescind that agreement and the trial court was reversed.

DANIAL NEWLON and NICOLE ALEXANDER as surviving parents had the statutory authority under RCW 68.08.245 to control the disposition of the remains of TRENTON.

As they could not agree, they stipulated through their attorneys that JUDGE LINDA TOMPKINS would make the decision. Now, DANIAL NEWLON wants to unilaterally rescind that agreement (Stipulation).

G. SUBJECT MATTER JURISDICTION

In the case of *In re Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003), a motion to vacate under CR 60(b) was filed to vacate an order terminating parental rights.

The Court held at 664:

The modification court did not lack subject matter jurisdiction; thus, the order terminating Ms. Taylor's parental rights was not void. But notwithstanding the fact that Ms. Taylor signed a voluntary relinquishment of her parental rights, the modification court's departure from statutory procedures that are designed to serve the best interests of children, and not as a means for parents to avoid responsibility for their children, requires that the order be vacated under CR 60(b)(11).

The Court further held at 667-669:

No provision in chapter 26.09 RCW permits a court to terminate parental rights in the course of a marital dissolution or a post decree modification action. Even RCW 26.09.191, which allows a court to restrict a parent's time with a child based upon parental behavior that puts the child at risk, makes no reference to the possibility of termination of parental rights as a potential remedy for parental shortcomings. This being so, Ms. Taylor and amici urge this court to declare that the modification court lacked subject matter jurisdiction to enter the order terminating Ms. Taylor's parental rights, and that the order is, accordingly, void and subject to vacation under CR 60(b)(5). Upon motion and upon such terms as are just, the court may relieve a party or his or her legal representative from a final judgment for the reason that the judgment is void. CR 60(b)(5). Parties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter jurisdiction or it does not; if it does not, any judgment entered is void, and is, in legal effect, no judgment at all. *In re Habeas Corpus of Wesley*, 55 Wn. 93-94, 346 P.2d 658 (1959).

In *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994), our Supreme Court adopted the requisites of a valid judgment set forth in *Restatement (Second) of Judgments* § 1 (1982). That section provides:

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and

(1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or

(2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action as stated in §§ 4 to 9.

Section 11 of the *Restatement (Second) of Judgments* (1982) defines "subject matter jurisdiction." " 'A judgment may properly be rendered against a party only if the court has authority to adjudicate the *type of controversy* involved in the action.' " (Emphasis added by the *Marley* court, 125 Wn.2d at 539, to emphasize the importance of the phrase "type of controversy.") A tribunal does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. *Id.* "A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief." *Id.* [Emphasis added].

A superior court proceeding solely under the marital dissolution statutes certainly lacks statutory authority to enter an order terminating parental rights. But it has the authority to terminate parental rights under chapter 26.33 RCW, the adoption statutes, and chapter 13.34 RCW, the dependency statutes. Moreover, RCW 26.12.010 provides:

Each superior court shall exercise the jurisdiction conferred by this chapter and while sitting in the exercise of such jurisdiction shall be known and referred to as the "family court." A family court proceeding under this chapter is: (1) Any proceeding under [Title 26 RCW] or any proceeding in which the family court is requested to adjudicate or enforce the rights of the parties or their children regarding the determination or modification of parenting plans, child custody, visitation, or support, or the distribution of property or obligations, or (2) concurrent with the

juvenile court, any proceeding under Title 13 or chapter 28A.225 RCW.

And finally, the broad original jurisdiction of the superior court as provided in article IV, section 6 of the state constitution "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court" encompasses proceedings to terminate parental rights. So it cannot be said that the modification court had no authority in this case to decide the matter of termination of parental rights at all, let alone to order that particular kind of relief, when acting under the appropriate statutes and procedures. We conclude that although the modification court committed egregious legal and procedural error by terminating Ms. Taylor's parental rights in the modification action without proceeding within the parameters of the adoption code, the order was not thereby rendered void.

Accordingly, notwithstanding the fact that the modification court lacked statutory authority under chapter 26.09 RCW to terminate Ms. Taylor's parental rights, the trial court did not err by refusing to vacate the termination order under CR 60(b)(5).

If I understand DANIAL NEWLON'S argument, he is arguing a court may order the removal of human remains under RCW 68.50.200, but the same court cannot order where a child will be buried when the parents cannot agree and the parents enter a "Stipulation re Jurisdiction, Hearing and Judicial Assignment." (CP 270-271).

The court has jurisdiction under RCW Chapter 26 in a divorce proceeding over minor children, and the court has inherent equity jurisdiction. It is a non sequitur to argue a court of general jurisdiction

has jurisdiction of living minor children but loses jurisdiction if the child dies.

Sherry v. Fin. Indem. Co., 132 Wn. App. 355, 131 P.3d 922 (2006), is an insurance case. The Plaintiff submitted his UIM claim to arbitration. Plaintiff wanted his arbitration award confirmed by the superior court.

The carrier objected to the arbitration award arguing the award should be reduced by PIP benefits previously paid to the insured.

The interesting part of the case is the fact that under the arbitration statutes RCW 7.04.150, the superior court did not have jurisdiction to determine the offset issue. However, both parties agreed to submit the offset issue to the superior court.

The court ruled the proper procedure to determine the offset issue is through a declaratory judgment action and not by a proceeding to confirm an arbitration award.

The court held at 361,

Both parties agreed to submit this issue to resolution by the superior court in order to save time and expense. In this context, this agreement was sufficient to give the trial court authority to resolve the issue.

. . . Because this action was resolved under the trial court's general jurisdiction, as a declaratory judgment, the issue was properly before the trial court.

In the very recent case of *Dependency of J.M.R.*, 160 Wn. App. 929 (April, 2011), a father whose parental rights were terminated by court order on the basis of a stipulation to voluntary termination signed during the second day of trial moved to vacate under CR 60(b) arguing that the trial court did not have statutory authority to accept the stipulation.

The Superior Court denied the CR 60(b) motion and the Court of Appeals affirmed the denial order.

The Court held at 941-942:

Courts have the authority to accept the stipulation of a party and enter a judgment by consent. *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). Stipulations are favored by courts and will be enforced absent good cause is shown to the contrary. *Parra*, 122 Wn.2d at 601; *see also In re Det. of Scott*, 150 Wn. App. 414, 426, 208 P.3d 1211 (2009) (affirming stipulation to civil commitment); *In re Welfare of M.G.*, 148 Wn. App. 781, 791, 201 P.3d 354 (2009) (affirming stipulation to agreed dependency order).

The Court also held at 943:

In *M.G.*, we held that even though the court did not comply with the requirements of RCW 13.34.110, the parent could not withdraw the stipulation under CR 60(b) without showing actual prejudice to entry of an order of dependency. *M.G.*, 148 Wn. App. at 791. In *M.G.*, the court held that the failure to conduct a colloquy with the mother as required by RCW 13.34.110(3)(c) was not a reason to set aside the agreed order. In reaching that conclusion, the court pointed to the fact that the mother was represented by counsel and ‘appeared to be aware and

engaged' in the process, and she could not show 'actual prejudice.' *M.G.*, 148 Wn. App. at 791.

Likewise, here the record shows that Rousseau actively engaged in the decision to enter into the stipulation and had ample opportunity to discuss the decision with his attorney before agreeing to do so. . . .

. . .

We reject Rousseau's argument that without express statutory authority, the court could not accept a stipulation to terminate parental rights entered into knowingly, intelligently, and voluntarily, and affirm.

ATTORNEY'S FEES:

NICOLE ALEXANDER hereby requests an award for reasonable attorney's fees and costs against DANIAL NEWLON and ATTORNEY SCHULTZ. MR. NEWLON'S CR 60(b) Motion for vacation of JUDGE LINDA TOMPKINS' Order (CP 272-273) is in direct violation of the parties' Stipulation, was delayed to the last possible moment and provided financial gain to MS. SCHULTZ. (CP 270-271).

The Stipulation (CP 270-271) is clear. The parties/parents needed a final determination as to TRENTON'S burial site. Both parties stipulated by and through their respective attorneys that JUDGE LINDA TOMPKINS was best qualified to decide this sensitive issue as she had heard the divorce proceedings. The Stipulation (CP 270-271) states, in part:

. . . the parties agree to be bound by Judge Linda Tompkins' ruling as to the final disposition of TRENTON'S remains, . .

. The parties agree to fully comply with said ruling, and further agree that failure to abide by said ruling is actionable in the Spokane County Superior Court for specific performance, damages, costs and other appropriate relief.

DANIAL NEWLON'S CR 60(b) motion and appeal are in direct violation of the parties' agreement and subsequent court Order. An award for reasonable attorney's fees and costs to NICOLE ALEXANDER is appropriate and mandated by the parties' own agreement (CP 270-271).

To paraphrase RCW 4.84.185, in any civil action, the court having jurisdiction may award attorney's fees and costs against the nonprevailing party if the action was frivolous and advanced without reasonable cause.

It is NICOLE ALEXANDER'S position DANIAL NEWLON'S CR 60(b) Motion was filed for MS. SCHULTZ'S financial gain. I submit, MR. NEWLON does not know what a CR 60(b) motion is. MS. SCHULTZ was paid additional legal fees for bringing this CR 60(b) motion. If this Court finds this is the case, awarding attorney's fees and costs to MS. ALEXANDER is appropriate without further inquiry as to other legal basis for the award. It is hard to imagine a father (MR. NEWLON) would chose to disinter his son (TRENTON) without MS. SCHULTZ'S influence.

In *Union Elevator & Warehouse v. State*, 152 Wn. App. 199 (2009), the Court held at 211:

A court's inherent equitable powers authorize an award of attorney fees in cases of bad faith conduct. *In re Recall of*

Pearsall-Stipek, 136 Wn.2d 255, 961 P.2d 343 (1998). The definition of "bad faith" is narrow and places a significant burden on the party claiming fees on this basis. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999). "Bad faith" includes " 'obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right," " 'vexatious' " conduct during the litigation, or the intentional bringing of a frivolous claim or defense with improper motive. *Id.* at 927-28 (quoting Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 632 (1983)).

V. CONCLUSION

Because the issue of TRENTON'S burial place was so profoundly human, the parents and their lawyers wanted to make absolutely certain that JUDGE LINDA TOMPKINS' ruling would be the last and final word on TRENTON'S burial site. TRENTON'S final resting place must not be desecrated.

It is respectfully submitted JUDGE GREGORY SYPOLT'S Order (CP 596-597) denying DANIAL NEWLON'S CR 60(b) Motion to Vacate JUDGE LINDA TOMPKINS' Order (CP 272-273) be affirmed and NICOLE ALEXANDER be awarded reasonable attorney's fees and costs against MR. NEWLON and ATTORNEY SCHULTZ.

DATED this 3rd day of August, 2011.

Respectfully submitted,

CHARLES T. CONRAD, P.S.

By: 

Charles T. Conrad
Attorney for Respondent
9011 E. Valleyway Avenue
Spokane, WA 99212-2835
(509) 924-4825
WSBA #7905

Hennessey-Smith Funeral Home
And Crematorium, Inc.

TO: Morris-Baker Funeral Home
2001 E. Oakland Ave.
Johnson City TN 37601
423/282-1521

FROM: Hennessey-Smith Funeral Home
2203 N. Division St.
Spokane WA 99207
509/328-2600

DECEASED: Trenton Newlon

Airbill # 01242262382 Northwest Airlines

Flt # 612 Lv Spokane WA 7/30/08 1114
Arr Minneapolis MN 7/30/08 1600

#1432 Lv Minneapolis MN 7/30/08 1855
Arr Atlanta GA 7/30/08 2230

* Letter of Guarantee Included

EXHIBIT "B"
(CP 276-282)

2203 N. DIVISION ST: SPOKANE, WASHINGTON

(509) 328-2600
FAX # (509) 328-7276

July 18, 2008

Peter E. Moya
D (509) 241-1594
peter.moya@kigatas.com

Nicole Alexander
1012 North Woodruff
Spokane, WA 99206

Re: Trenton Newlon

Dear Ms. Alexander:

I would like to express my deepest sympathy for the loss of your son Trenton. I know this is a very difficult and emotional time for you and your family.

Trenton's father, Danial Newlon, has indicated to me there are some differences in how you and Danial wish to handle Trenton. He has requested our assistance in addressing those differences. To that end, we have contacted Judge Tomkins who has agreed to either hear or mediate this matter pursuant to the parenting plan. A hearing has been set for July 30, 2008. This hearing may be pushed forward to July 23, 2008, if no agreement as to services can be reached.

In the best interests and consideration for all concerned, we would like to reach an amicable agreement as to the status of Trenton. Danial is very concerned that both your family and his are able to hold memorial services for Trenton while his body is still in good condition for viewing. Danial would like to propose that Trenton be embalmed and that a memorial service be held in Spokane for Trenton, and then Danial be allowed to transport Trenton to Tennessee for a memorial service with his family. If no agreement has been reached by then between you and Danial on the final disposition of Trenton, he would be held in Tennessee pending resolution by the court.

If the above agreement is acceptable to you, I would ask that you sign a copy of this letter and return it to me. I will have Danial sign a copy of the letter and provide both of you with the mutually signed copies, so there is a binding agreement between the two of you at least as to the holding of memorial services in both Spokane and Tennessee.

EXHIBIT "C"
(CP 563-571)

Nicole Alexander
July 18, 2008
Page 2

As to the ongoing discussions regarding the disposition of Trenton, I would suggest you contact your attorneys and ask them to contact me directly. It is our sincere desire to be sensitive to your pain and loss during this time. Again, we offer our heartfelt sympathy to your family.

Very truly yours,

K&L GATES LLP

Peter E. Moyé

PEM:cj
cc: Danial Newlon
Mary Schultz

ACKNOWLEDGMENT AND BINDING AGREEMENT:

I hereby agree to the proposed agreement as set forth in the above letter to hold memorial services for Trenton in both Spokane and Tennessee.

Nicole Alexander

I hereby agree to the proposed agreement as set forth in the above letter to hold memorial services for Trenton in both Spokane and Tennessee.

Danial Newlon



Trenton Lee Newlon

1-12-1995 7-15-2008

What a beautiful difference
one single life made

In spirit, heart,
and memory,
love lives forever!

Worlds greatest Big Brother

Love You Always

EX. "D"
(CP 304-308)

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SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF SPOKANE

DANIAL L. NEWLON,
Plaintiff,

NICOLE ALEXANDER,
Plaintiff/Defendant,

v.

MARVIN MARKHAM and PHYLLIS
MARKHAM, as husband and wife and
their marital community; LEISHA
KONRAD and JOHN DOE KONRAD, as
husband and wife and their marital
community; NICOLE ALEXANDER and
JOHN DOE HUSBAND, as husband and
wife and their marital community.

Defendants.

NO. 08-2-04662-6

RESPONSES TO NICOLE
ALEXANDER'S SECOND SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS

TO: NICOLE ALEXANDER, Plaintiff/Defendant, and your attorney, CHARLES
CONRAD.

RESPONSES TO REQUESTS FOR PRODUCTION

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

There are no tenets of the Church of Jesus Christ of Latter Day Saints that "Danial
Newlon is to be the custodian of Trenton Newlon."

ANSWERS TO 2nd RFPs - Page 1 of 3
WRONGFUL DEATH INEWLON.RESPONSE_ALEXANDER.2nd.RFP.doc

MARY
SCHULTZ
LAW, P.S.

Davenport Tower • Pembrose Suite 2250
111 South Post • Spokane, WA 99201
Phone: 509.458.2750 • Fax: 509.458.2730

EXHIBIT "E" (CP 470-523)

1 The thirteen Articles of Faith as the basic tenets of the Church of Jesus Christ of
2 Latter Day Saints, i.e., a summary of such, can be found at www.lds.org.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on the 4th day of August, 2011, he served a copy of ^{AMENDED} **BRIEF OF RESPONDENT** to the person hereinafter named at the place of address stated below which is the last known address via hand delivery.

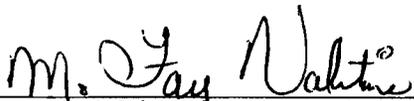
ATTORNEY FOR APPELLANT:

MARY SCHULTZ LAW, P.S.
DAVENPORT TOWER, PENTHOUSE 2250
111 S. POST STREET
SPOKANE, WA 99201-3913



CHARLES T. CONRAD

SUBSCRIBED AND SWORN before me this 4TH
day of August, 2011.



Notary Public in and for the State
of Washington, residing Spokane.
My commission expires: 11/18/11

