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CASE NO. ~~67393-9~~

67393-9

Court of Appeals  
State of Washington  
Division I

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VILA PACE-KNAPP

Appellant,

v.

DICK PELASCINI and CECILIA PELASCINI;  
THOMAS BOBOTH;  
and PACIFIC SHORELINE MORTGAGE, INC.

Respondents.

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Respondent's Brief in Opposition

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CASES AND AUTHORITIES.....	i
I. DEFENDANT/RESPONDENT’S COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR .....	1
II. STATEMENT OF CASE .....	1
A. BACKGROUND .....	1
B. EVENTS LEADING TO THIS APPEAL .....	5
III. STANDARD ON REVIEW .....	10
IV. SUMMARY OF ARGUMENT.....	11
V. ARGUMENT .....	12
<u>ISSUE A: WHETHER PLAINTIFF/APPELLANT’S ATTACK ON THE JUDGMENT ENTERED APRIL 22, 2011 IS TIME-BARRED AND RENDERED NUGATORY BY HER FAILURE TO APPEAL THAT JUDGMENT WITHIN THIRTY DAYS AS REQUIRED PURSUANT TO RAP 5.2?</u> .....	12
<u>ISSUE B: WHETHER, DESPITE THE ABSENCE OF ANY AUTHORITY SUPPORTING THE PROPOSITION, PLAINTIFF IS ENTITLED TO A POST-JUDGMENT AWARD OF ATTORNEY’S FEES AND COSTS INCURRED IN COLLECTION ATTEMPTS?</u> .....	19
<u>ISSUE C: WHETHER THE QUESTION OF THE TRIAL COURT’S RELEASE TO DEFENDANTS OF THEIR PREVIOUSLY EXISTING SUPERSEDEAS BOND IS, APART FROM ALL ELSE, MOOTED BY DEFENDANTS’ PROMPT TENDER AND PAYMENT OF THE FULL JUDGMENT AMOUNT?</u> .....	20
VI. CONCLUSION.....	22

TABLE OF AUTHORITIES

	PAGE(S)
A. CASES	
1. WASHINGTON STATE SUPREME COURT:	
<i>Beckman v. State of Washington</i> , 102 Wn.2d 687, 11 P.3d 315 (2000).....	15
<i>Curtis v. Seattle</i> , 97 Wn.2d 59, 639 P.2d 1370 (1982) .....	17
<i>Green v. McAllister</i> , 103 Wn.2d 452, 14 P.3d 795 (2000) .....	19
<i>SEIU Healthcare 775NW v. Gregoire</i> , 168 Wash.2d 593 (2010) .....	22
<i>Seattle v. Sheperd</i> , 93 Wn.2d 861, 613 P.2d 1158 (1980) .....	11
<i>Skamania County v. Columbia River Gorge Commission</i> , 144 Wn.2d 30, 26 P.3d 241 (2001) .....	10
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980) ...	17
<i>State v. Barberio</i> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	17
2. WASHINGTON STATE COURT OF APPEALS:	
<i>Caine &amp; Weiner v. Barker</i> , 42 Wn.App. 835, 713 P.2d 1133 (1986) .....	20
<i>Crystal, China and Gold, Ltd. v. Factoria Center Investments</i> , 93 Wn. App. 606, 969 P.2d 1093 (1999) .....	11
<i>State v. Barringer</i> , 32 Wn.App. 882, 650 P.2d 1129 (1982) .....	17
<i>State v. Cunningham</i> , 27 Wn.App. 834, 620 P.2d 535 (1980) .....	17
<i>State v. Fagalde</i> , 85 Wn.2d 730, 539 P.2d 86 (1975).....	17
<i>State v. Niedergang</i> , 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986) .....	11
<i>State v. Penn</i> , 32 Wn.App. 911, 650 P.2d 1111 (1982) .....	17
<i>State v. Rodriguez</i> , 32 Wn.App. 758, 650 P.2d 225 (1982) .....	17
<i>State v. Smith</i> , 31 Wn.App. 226, 640 P.2d 25 (1982) .....	17
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	17
<i>State v. Wiley</i> , 26 Wn.App. 422, 613 P.2d 549 (1980) .....	17
<i>Woodcraft Constr., Inc. v. Hamilton</i> , 56 Wn. App. 885, (1990) .....	20

B. OTHER AUTHORITIES:

RAP 5.2.....	15, 17, 18
RAP 8.1.....	5, 20
RAP 18.1.....	4, 5
RAP 18.8.....	15

I. DEFENDANT/RESPONDENT'S<sup>1</sup> COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

ISSUE A: WHETHER PLAINTIFF/APPELLANT'S<sup>2</sup> ATTACK ON THE JUDGMENT ENTERED APRIL 22, 2011 IS TIME-BARRED AND RENDERED NUGATORY BY HER FAILURE TO APPEAL THAT JUDGMENT WITHIN THIRTY DAYS AS REQUIRED BY RAP 5.2?

ISSUE B: WHETHER, DESPITE THE ABSENCE OF ANY AUTHORITY SUPPORTING THE PROPOSITION, PLAINTIFF IS ENTITLED TO A POST-JUDGMENT AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN COLLECTION ATTEMPTS?

ISSUE C: WHETHER THE QUESTION OF THE TRIAL COURT'S RELEASE TO DEFENDANTS OF THEIR PREVIOUSLY EXISTING SUPERSEDEAS BOND IS, APART FROM ALL ELSE, MOOTED BY DEFENDANTS' PROMPT TENDER AND PAYMENT OF THE FULL JUDGMENT AMOUNT?

II. STATEMENT OF CASE

A. BACKGROUND:

Plaintiff, Vila Pace-Knapp, appellant on this appeal (hereinafter "Plaintiff"), initially brought this action against defendants Dick and Cecilia Pelascini, Thomas Boboth, Pacific Shoreline Mortgage, Inc. (hereinafter, collectively "defendants"), and Windermere Real Estate/Bellevue Commons, Inc.<sup>3</sup> CP 1-2.

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<sup>1</sup> Hereinafter "defendants."

<sup>2</sup> Hereinafter "plaintiff."

<sup>3</sup> Windermere was dismissed on summary judgment and is not a party to this appeal. CP 10-11.

Plaintiff claimed against defendants for fraud, fraud in the inducement, violations of the Consumer Protection Act (hereinafter “CPA”), intentional and negligent infliction of emotional distress, unconscionability, and breach of fiduciary or quasi-fiduciary duty. CP 6-8.<sup>4</sup>

Plaintiff’s claim for breach of fiduciary or quasi-fiduciary duty was dismissed on summary judgment. CP 11.

At the commencement of trial, Plaintiff conceded her claim for negligent infliction of emotional distress. *Id.*

After an extended bench trial, the trial court denied Plaintiff’s claims for unconscionability (CP 15-16) and intentional infliction of emotional distress. CP 18.

The trial court also denied plaintiff’s claim for fraud in the execution, holding that defendants’ “misrepresentations were in the nature of intentions, rather than misrepresentations of existing fact,” and concluded, therefore, that plaintiff had failed to prove the requisite elements of fraud. CP 16.

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<sup>4</sup> In its (1st) Findings of Fact the trial court ruled on both fraud and fraud in inducement (CP 188-197); the Complaint seems to only allege one fraud, but alleges both negligent and intentional infliction of emotional distress, and breach of both fiduciary and quasi fiduciary duty. CP 6-8.

Nevertheless, the trial court ruled for plaintiff on her claim for fraud in the inducement and, on this basis, granted rescission. CP 16-17. The trial court also found for plaintiff on her claim under the Consumer Protection Act (CPA). CP 17-18. On October 16, 2006, the Superior Court entered its “Findings of Fact and Conclusions of Law,” giving the Plaintiff the following right:

Plaintiff is nonetheless entitled to recover attorney’s fees for this violation of the CPA. Plaintiff’s counsel may submit a detailed fee request and cost bill and supplemental judgment on ten business days notice. Defendants may respond four court days before the date of submission for determination.

Findings of Fact and Conclusions of Law entered on October 16, 2006 (CP 197) (hereinafter “1<sup>st</sup> Findings and Conclusions”).

No Judgment was entered at that time.<sup>5</sup>

Defendants appealed. On the 1<sup>st</sup> appeal in this case, this Court ruled that plaintiff had “waived the right to rescission” and reversed the trial court’s determination of fraud in the inducement. CP 93-96. However, the Court of Appeals affirmed the trial court in regard to plaintiff’s CPA claim, and remanded the case to the trial court for a redetermination of damages and an award of attorney’s fees and costs. CP 96.

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<sup>5</sup> In fact no Judgment was entered until June of 2009. See *infra*.

Defendants' Petition for Review to the Washington State Supreme Court was denied. The Supreme Court's ruling denying this petition instructed plaintiff to bring her request for attorney's fees and costs before the Clerk of the Court of Appeals pursuant to RAP 18.1(d). CP 99.

On remand to the Superior Court, after extensive briefing, a two hour hearing regarding damages and attorneys fees took place on May 22, 2009. Judgment was entered on June 12, 2009<sup>6</sup>.

Disagreeing with the manner in which certain amounts had been calculated and included in that Judgment, defendants appealed the June 12, 2009 Judgment.

On this second appeal this Court ruled:

The Pelascinis also contend the trial court erred in awarding duplicative prejudgment interest. The court found that Pace-Knapp's lots equity damages totaled \$54,747. The Court awarded prejudgment interest on the lost equity damages from October 25, 2002 to the date of entry of the judgment on June 12, 2009, at a rate of 12 percent per year, totaling \$43,579. The court also awarded prejudgment interest on the total damages awarded, including the prejudgment interest already awarded, from "the date of the Court of Appeal's ruling, March 17, 2008, through the date of entry of the Judgment," June 12, 2009. Pace-Knapp concedes that the trial court erred in awarding duplicative prejudgment interest. We accept Pace-Knapp's concession as well

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<sup>6</sup> Drafted by plaintiff and endorsed by the trial court, this was the first Judgment entered in this case.

taken. On remand, the court shall correct the prejudgment interest.

*Footnote 9: Pace-Knapp concedes that post judgment interest should accrue only on the damages awarded by the trial court for lost equity, excess rental payment, and treble damages under the CPA.*

Unpublished Opinion, Division One, February 14, 2011, p. 16. CP 349 and CP 446.

In addition, this Court ruled that the Plaintiff's attorney's fees should be reduced by \$5,582 for the attorney's fees the Plaintiff incurred for the petition for review to the Supreme Court for Plaintiff's failure to comply with RAP 18.1. *Id.*

**B. EVENTS LEADING TO THIS (THIRD) APPEAL:**

Pursuant to RAP 8.1(c)(2) defendants had posted a \$35,990 bond to stay collection pending the first two appeals. On March 4, 2011, Plaintiff moved the trial court to "Lift Stay and/or Increase the Amount of the Supersedeas Bond."

On March 22, 2011, the trial court granted plaintiff's Motion, and increased the bond to \$300,000. (CP 357-358). The trial court's "Order Regarding Plaintiff's Notice of Presentment of the Order to Lift Stay and Exonerate the Bond in the Amount of \$35,900.00," dated June 7, 2011, states that "...the \$35,990 presently posted with the registry of the court is

to be paid to defendants,” and further provides that should the defendants “...elect not to post the \$300,000 bond... the stay shall expire.” CP 602.

On March 28, 2011, in accordance with this court’s remand on the second appeal, defendants moved to “Establish Judgment Amount,” asking the trial court to eliminate duplicative prejudgment interest, and subtract the \$5,582 of the attorney’s fees, which Plaintiff had been awarded on the petition for review to the Supreme Court in the first Judgment entered (June 12, 2009).<sup>7</sup> The appellate court had expressly directed that its remand was for the:

“...*sole purpose* of correcting the calculation of prejudgment interest and deducting the fees relayed to Pace-Knapp’s response to the petition for review...”

CP 349 and CP 446 (emphasis added).

In her opposition to defendants’ Motion to Establish Judgment Amount, plaintiff advanced her argument for an amendment to the Judgment entered on June 12, 2009, seeking to retroactively include in that Judgment interest on plaintiff’s attorney’s fees from the date of the trial court’s entry of the 1<sup>st</sup> Findings and Conclusions (October 16, 2006).

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<sup>7</sup> Defendants’ Motion to Establish Judgment Amount. CP 363.

CP 460. Plaintiff contended the 1<sup>st</sup> Findings and Conclusions was a final judgment<sup>8</sup>. CP 457.

On April 8, 2011, while defendants' "Motion to Establish Judgment Amount" was still pending, plaintiff moved the trial court for "Contempt, to Lift the Stay, Fix the Amount of Additional Attorney's Fees and to Clarify the Date on which Defendants Began to Accrue Post Judgment Interest." ("hereinafter "Motion for Contempt"). In this motion, plaintiff essentially repeated the arguments set forth in her opposition to defendants' "Motion to Establish Judgment Amount," in particular her argument that interest on the attorney's fees and costs should accrue retroactively from either the date of the 1<sup>st</sup> Findings and Conclusions (e.g. October 16, 2006) or from the entry of the Judgment on June 12, 2009 forward. Compare: CP 228, Ins 3-7, CP 354, Ins. 15-17 (date of Judgment entered on June 12, 2009), and CP 493-496 and 564-565 (date of 1<sup>st</sup> Findings and Conclusions entered on October 16, 2006).

Defendants objected to the Plaintiff's Motion for Contempt under LCR 7(D) and (E), pointing out it was a late sur-reply to the Defendants "Motion to Establish Judgment Amount," and that plaintiff had raised

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<sup>8</sup> As this court is no doubt aware, while the result of such 1<sup>st</sup> Findings and Conclusions may be designated a "final judgment" for purposes of appeal and pursuant to CR 54(b), such Findings and Conclusions themselves are not judgments as such.

these same issues concerning the Judgment entered on June 12, 2009 in her opposition to the Defendant's Motion to Establish the Judgment Amount.

An amended Judgment was entered on April 22, 2011. CP 570-572. In keeping with the directives of this court regarding remand, the Judgment entered in 2011 differed from the Judgment entered in 2009 *only* to the extent it eliminated the duplicative award of pre-judgment interest and the improper award of plaintiff's attorney's fees (related to a prior Motion for Discretionary Review to the Supreme Court).

On April 22, 2011, the same day the amended Judgment was entered, the trial court denied Plaintiff's Motion for Contempt. CP 568-569.

Of particular interest on this appeal, the Judgment entered in 2009 did not change the October 26, 2002 date (set forth in the 1<sup>st</sup> Findings and Conclusion on October 16, 2006 and then again in the Judgment entered on June 12, 2009) on which plaintiff's economic loss was calculated for purposes of the accrual of her pre-judgment interest award. Moreover, like the original Judgment entered in 2009, the Judgment entered in 2011 did not provide for any interest on the attorney's fees and costs then awarded, or provide for an award of fees and costs in collection.

On May 3, 2011, plaintiff moved the trial court for reconsideration of its April 22, 2011 order denying her Motion for Contempt. CP 575-582. This Motion for Reconsideration was untimely; a day late: CR 59(b) requires motions for reconsideration to be filed “not later than 10 days” after the entry of the decision questioned. This Motion also failed to identify any new facts or circumstances that might ground this requested reconsideration or lead to a different result.<sup>9</sup>

*It is especially noteworthy that plaintiff's Motion for Reconsideration sought reconsideration only of the trial court's denial of her Motion for Contempt; it did not seek reconsideration of the Judgment entered in 2011.*

On June 9, 2011, the trial court denied plaintiff's Motion for Reconsideration, noting that these issues had previously been raised, considered, and determined when the amended Judgment was entered in 2011:

*The Court entered judgment in this case on April 22, 2011. The terms of that judgment encompass the Court's ruling on the matters raised by plaintiff in her motion for contempt...and raised again in this motion for reconsideration.*

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<sup>9</sup> It is ironic that plaintiff was unable to conform to the requisite procedures in employing a procedural tactic in her attempt to prolong the period in which to appeal.

CP 627 (emphasis added).

In sum, the issues Plaintiff now appeals were first decided in the 1<sup>st</sup> Findings and Conclusions, the Judgment entered in June of 2009 and then again decided in the Judgment entered in 2011.<sup>10</sup> These Judgments were not challenged in plaintiff's Motion for Reconsideration nor addressed by her in her Motion for Contempt.

Plaintiff's appeal to this court is untimely, unsupported by the law or evidence. It is, in fact, flatly frivolous.

### III. STANDARD ON REVIEW

Though plaintiff did not timely appeal either the Judgment entered in 2009 or the Judgment entered in 2011, she now disputes the trial court's denial of her (untimely) Motion for Reconsideration, and the denial of her (duplicative) Motion for Contempt. Conclusions of law are reviewed *de novo*, a standard which permits the appellate court to substitute its judgment for that of the trial court. *See: e.g., Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

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<sup>10</sup> This amended Judgment modified the first Judgment only on the two narrow issues identified in the appellate court's remand. Neither of these issues is a subject of this appeal.

Here, there are no factual disputes. When the facts are undisputed, application of the facts to the law is reviewed *de novo*. *Crystal, China and Gold, Ltd. v. Factoria Center Investments*, 93 Wn. App. 606, 610, 969 P.2d 1093 (1999); *and see: Seattle v. Sheperd*, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980); *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986).

#### IV. SUMMARY OF ARGUMENT

Plaintiff attempts to raise four issues on this appeal<sup>11</sup>: (1) whether she is entitled to pre-judgment interest on her attorneys fees and costs award, though this is not provided for in either the 2009 Judgment or 2011 Judgment; (2) whether, though again neither Judgment provides for it, she is entitled to attorney's fees and costs for her collection efforts; (3) whether, after the conclusion of the second appeal, the trial court erred in releasing to defendants a supersedes bond they had posted during the pendency of earlier appeals; and, (4) whether the Judgment should be amended to provide for the calculation of pre-judgment interest awarded (on her economic losses) from a new date, earlier than that stated in the 1<sup>st</sup> Findings and again in both the 2009 and 2011 Judgments.

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<sup>11</sup> See Appellant's Brief, pp. 1-2, and "Table of Contents," p. i.

The first and fourth of these issues are time-barred on this appeal, and moot in any event: Plaintiff has not appealed the Judgments she wishes to challenge. The second of these questions is also (on the same basis) time-barred and moot, and is additionally unsupported by any relevant authority. The third question plaintiff attempts to raise, regarding release of defendants' supersedeas bond, was mooted by defendants' prompt tender and payment of the full Judgment amount.

Not one of one of the issues plaintiff attempts to raise possesses merit or bears scrutiny.

#### V. ARGUMENT

ISSUE A: WHETHER PLAINTIFF/APPELLANT'S ATTACK ON THE JUDGMENT ENTERED ON APRIL 22, 2011 IS TIME-BARRED AND RENDERED NUGATORY BY HER FAILURE TO APPEAL THAT JUDGMENT WITHIN THIRTY DAYS AS REQUIRED BY RAP 5.2?

In the first and fourth of these issues plaintiff directly attacks the Judgment entered in 2009 and the Judgment entered in 2011. In the first of these contentions, plaintiff claims these Judgments should provide her with pre-judgment interest on the attorneys fees and costs awarded.<sup>12</sup> In what she identifies as the fourth of her contentions, plaintiff claims that

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<sup>12</sup> This argument is somewhat confusing on its face: How can pre-judgment interest be assessed on an amount not awarded or determined until entry of 2009 judgment?

the Judgment entered in 2009 (that she herself drafted) miscalculated the date from which pre-judgment interest began to accrue on the award she received for her economic losses and that this date should, therefore, be altered.

Fatally however, though plaintiff's Amended Notice of Appeal refers to the April 2011 Judgment and states that she is "filing a motion relating to relief" from it, no such motion has been filed in either the trial court or the appellate court. *Plaintiff has not actually appealed either the Judgment entered in 2009 or the amended Judgment entered in 2011 and only attached this latter judgment out of an "abundance of caution."* CP 637-638

*In fact, plaintiff's Amended Notice of Appeal states that she appeals the trial court's Order Denying Plaintiff's Motion for Contempt and the trial court's denial of plaintiff's Motion to Reconsider that motion. CP 637-638.*

*If plaintiff wanted to appeal the Judgment entered in either 2009 or 2011, she should have appealed the judgments within thirty (30) days following their entry, but she did not, and the Judgment entered in 2011 is only attached to plaintiff's Amended Notice of Appeal out of an "abundance of caution."*

Even if plaintiff somehow prevailed on this appeal of the denial of her Motion for Contempt (and reconsideration thereof), the Judgment entered April 22, 2011 would stand.

Not having been placed at issue on this appeal, the amended Judgment entered on April 22, 2011 would be no more and no less enforceable, regardless of the result on this appeal.

Moreover, and equally fatal, plaintiff did not file her Notice of Appeal until July 7, 2011. However, the April 22, 2011 amended Judgment was not included in plaintiff's May 3, 2011 Motion for Reconsideration, just as it had not been included in plaintiff's Notice of Appeal. Therefore, even if this Motion for Reconsideration was not itself untimely, any issues plaintiff may have in regard to that amended Judgment are time-barred on this appeal. As the trial court noted in denying reconsideration:

The court entered judgment in this case on 4-22-11. The terms of that judgment encompass the court's ruling on the matters raised by plaintiff in her Motion for Contempt... raised again on this Motion for Reconsideration.

CP 627.

Plaintiff cannot deny that the questions she raises challenge the Judgment, *but she does not appeal any judgment*. Nor can she: Plaintiff's

appeal was filed July 7, 2011 more than thirty days after the entry of both the June, 2009 Judgment or the April, 2011 Judgment.

Thus, the first and fourth issues plaintiff attempts to raise on this appeal, which call into question the Judgments entered by the trial court, are time-barred, as well as mooted by plaintiff's failure to appeal these judgments themselves.

Any attempt to attack the Judgment is invalid, in violation of RAP 5.2 and RAP 18.8(b), which provides in pertinent part that

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal... or a motion for reconsideration.

Here no such extraordinary circumstances obtain, and there is no gross miscarriage of justice in confining plaintiff's recovery to the amounts set forth in the Judgment entered by the trial court. Our court's have been quite strict in enforcing the thirty day period required by RAP 5.2. *See, e.g., Beckman v. State of Washington*, 102 Wn.2d 687, 11 P.3d 315 (2000).

The Judgment entered in 2009 provided for pre-judgment interest on plaintiff's economic loss, *not* the attorney's fees awarded in the Judgment itself. That same Judgment calculated pre-judgment interest from a date provided by plaintiff herself and was in the 1<sup>st</sup> Findings and

Conclusions entered in 2006. Now, more than two years later in the case of the Judgment entered in 2009, these are among very judgment provisions Plaintiff seeks to dispute on this appeal.

Thus, these specific questions have been settled since June 2009. Yet plaintiff first raised her complaints about these provisions in her April 2011 opposition to Defendant's Motion to Establish Judgment. Despite this opposition, the trial court entered the amended Judgment on April 22, 2011.

In the Judgment entered on April 22, 2011 (as in the Judgment of June 2009) pre-judgment interest is provided for on the "Principal Judgment Amount"<sup>13</sup> from October 26, 2002 to June 12, 2009. There is nothing unclear or ambiguous about this date. Despite plaintiff's claimed intent to "clarify" this date, she is actually seeking to change it.

Both the June 2009 Judgment and the April 2011 amended Judgment were entered without interlineations in the form submitted to the trial court. Neither of these Judgments provided for interest on the award of attorney's fees and costs incurred. These Judgments were non-appealable thirty (30) days after entry, and Plaintiff did not appeal either Judgment within the requisite thirty (30) day time period.

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<sup>13</sup> This "Principal Judgment Amount" does not include the attorney's fees and costs awarded.

Plaintiff's appeal on these issues is untimely pursuant to RAP 5.2(a). *Her appeal is not merely some six weeks late; it is in fact some two years late. And the claim the plaintiff raises concerning changing the date from when the economic damages from October 2002 to October 2001 was first raised on this appeal and should not be considered at all.*<sup>14</sup>

From 2009 to April 2011 plaintiff never requested an award of interest on the attorney's fees or costs awarded, or an alteration of the October 26, 2002 date.<sup>15</sup> After the 2011 amended Judgment was entered in April of 2011, plaintiff waited more than two months, and still failed to appeal this Judgment, instead appealing the denial of her Motion for Contempt, and the trial court's denial of her Motion for Reconsideration. Her belated attempt to obtain this interest on appeal is massively untimely, actually frivolous.

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<sup>14</sup> State v. Wiley, 26 Wn.App. 422, 613 P.2d 549 (1980); State v. Smith, 31 Wn.App. 226, 640 P.2d 25 (1982); State v. Rodriguez, 32 Wn.App. 758, 650 P.2d 225 (1982); State v. Barringer, 32 Wn.App. 882, 650 P.2d 1129 (1982); State v. Penn, 32 Wn.App. 911, 650 P.2d 1111 (1982); State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975); State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979); State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980), on remand 27 Wn.App. 834, 620 P.2d 535 (1980); Curtis v. Seattle, 97 Wn.2d 59, 639 P.2d 1370 (1982); State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) (appellate court may decline to consider on a second appeal issues that could have been presented in a prior appeal but were not) and RAP 5.2.

<sup>15</sup> In fact, plaintiff did not actually attempt to "clarify" this date until she filed her Notice of Appeal in early July, 2011.

In summary, Plaintiff is challenging the terms of the Judgment entered in 2009 and the amended Judgment entered in 2011, but has not actually appealed *any* judgment. By plaintiff's own admission, she appeals the denial of her Motion for Contempt and the trial court's denial of reconsideration thereof.

In 2009, plaintiff herself drafted the Judgment entered in 2009 and inserted therein the provisions she now seeks to "clarify." On two issues unrelated to this appeal, this Judgment was amended on remand on April 22, 2011. It is otherwise identical to the original Judgment entered in 2009.

Even assuming, solely for the sake of argument, that plaintiff has somehow successfully filed a Notice of Appeal alleging errors in the Judgment, her appeal of this Judgment is untimely under RAP 5.2(a): The amended Judgment was entered on April 22, 2011; plaintiff subsequently moved to reconsider the denial of her Motion for Contempt, *not the amended Judgment* entered on April 22, 2011. Plaintiff's Amended Notice of Appeal was filed July 7, 2011, more than two months after the entry of the amended Judgment she now seeks to challenge.

ISSUE B: WHETHER, DESPITE THE ABSENCE OF ANY AUTHORITY SUPPORTING THE PROPOSITION, PLAINTIFF IS ENTITLED TO A POST-JUDGMENT AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN COLLECTION ATTEMPTS?

The second of the issues plaintiff seeks to raise on this appeal is her attempt to obtain an award of attorney's fees and costs for post-judgment collection efforts.

Plaintiff's effort to gain these fees is, like the issues discussed above, another untimely attack on the Judgment, i.e., an attempt to include in it provisions previously absent from it.

Plaintiff's efforts on this issue are even more infirm: While plaintiff cites some case law generally regarding fee and cost awards, she cites *no* authority at all for the proposition that such awards extend to post-judgment collection efforts.

This absence of authority is unsurprising: Insofar as undersigned counsel has been able to determine, there is no Washington authority for the proposition that one holding a judgment is entitled to, without more, an award of the attorney's fees and costs incurred in collecting that Judgment.

Under Washington law attorney's fees are never automatically awarded. In Washington, "Parties generally pay their own fees." *Green v. McAllister*, 103 Wn.2d 452, 468, 14 P.3d 795 (2000), citations omitted.

Absent some case law, rule, legislation, or contractual obligation one can only conclude that no award is proper.

In Washington, “[a]s a general rule, when a valid final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it.” *Woodcraft Constr., Inc. v. Hamilton*, 56 Wn. App. 885, 888 (1990) and *Caine & Weiner v. Barker*, 42 Wn.App. 835, 837, 713 P.2d 1133 (1986). Thus, plaintiff’s claim to an attorney’s fee and cost award under the CPA was extinguished, merged into the Judgment after it was entered. Thereafter, her action was an action to collect the Judgment itself.

On a multitude of grounds plaintiff is not entitled to an award of attorney’s fees and costs on collection: Her appeal is time-barred. She has failed to effectively appeal the Judgment she seeks to “clarify.” Her argument is in conflict with existing settled authority, and is itself unsupported by any relevant authority.

**ISSUE C: WHETHER THE QUESTION OF THE TRIAL COURT’S RELEASE TO DEFENDANTS OF THEIR PREVIOUSLY EXISTING SUPERSEDEAS BOND IS, APART FROM ALL ELSE, MOOTED BY DEFENDANTS’ PROMPT TENDER AND PAYMENT OF THE FULL JUDGMENT AMOUNT?**

The third of the issues plaintiff attempts to raise on this appeal is, at best, moot: The \$35,990 cash bond in question was posted under RAP

8.1(c)(2). The amount of this bond was determined by the trial court on the basis the reasonable value of the use of the property during the pendency of the appeal.

When, at the conclusion of the first appeal, the trial court's grant of rescission was reversed, there was no longer any reason to stay the enforcement of the judgment, and Plaintiff could have moved the court to increase the bond amount and/or simply garnished the cash bond. Plaintiff, however, did nothing while the second appeal worked its way to conclusion.

Following the conclusion of the second appeal, plaintiff moved to increase the bond amount and to lift the stay. CP 225-231. Her motion was granted: On June 7, 2011, the trial court increased the bond amount to \$300,000. CP 357-358.

On May 6, 2011, plaintiff filed a "Notice of Presentment of Order to Lift Stay and Exonerate the Bond." CP 583-584. On June 7, 2011 the court entered an "Order Regarding Plaintiff's Notice of Presentment" and released the previously filed \$35,990 bond to defendants. CP 601-602.

Despite the fact this is exactly what she had asked for, plaintiff appealed this Order in early July.

It really doesn't matter. Defendants tendered full payment of the amount of the amended Judgment in August, 2011. After initially refusing this tender, plaintiff was paid the full amount of the amended Judgment on September 8, 2011 and the issue on appeal is moot and purely academic; because the court can no longer provide effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wash.2d 593 (2010)

Release of the supersedeas bond defendants had posted while this case worked its way through the first two appeals, was proper.<sup>16</sup>

## VI. CONCLUSION

Plaintiff has no one but herself to blame for her troubles and there is, at this point, little any court can do for her—all avenues for relief are time barred.

Plaintiff drafted the Judgment entered in 2009. The provisions of the Judgment that she now seeks to challenge have remained unchanged from June of 2009 through the April 2011 entry of the amended Judgment. These provisions have continued unchanged to the present date.

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<sup>16</sup> One hardly needs to point out to this court that the purpose of a supersedeas bond is to stay collection while a case is on appeal. No purpose is served thereafter. The posting of such bonds is optional; it is not required by any rule. The trial court properly released this bond when the appeals concluded. If plaintiff wanted these funds she should have, and could have garnished those funds. She did not do so.

The amended Judgment was entered on April 22, 2011, yet plaintiff never properly challenged its terms. She did not move for reconsideration of this Judgment and did not file this appeal until July 7, 2011, two months after Judgment was entered.

When plaintiff finally did appeal, she failed to properly appeal the amended Judgment she now seeks to challenge.

Given this, her attempt to appeal this Judgment is time-barred and completely misdirected.

Wherefore defendants ask this court to dismiss plaintiff's appeal in its entirety and deny her request for attorney's fees on appeal because, *inter alia*, plaintiff failed to comply with the provisions of RAP 18.

DATED this 6<sup>th</sup> day of October 2011.

Respectfully Submitted,

THE LANZ FIRM, P.S.

By   
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

VILA PACE-KNAPP, )  
 )  
 Appellant, ) Case No. 63758-4-I  
 )  
 and )  
 ) PROOF OF SERVICE  
 )  
 DICK PELASCINI and CECILIA )  
 PELASCINI, husband and wife and their )  
 marital community; THOMAS BOBOTH; )  
 and PACIFIC SHORELINE MORTGAGE, )  
 INC., )  
 )  
 Respondents. )  
 )  
 \_\_\_\_\_ )

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is Suite 809, AGC Building, 1200 Westlake Avenue North, Seattle, Washington 98109.

On October 6, 2011, I personally delivered a true and correct copy of the foregoing documents:

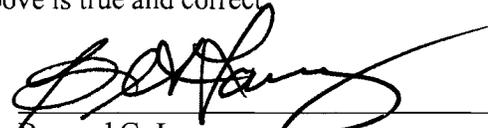
1. Respondent's Brief in Opposition;
2. Declaration of Service,

to the following:

Melissa Huelsman  
705 Second Avenue, Suite 1050  
Seattle, WA 98101

Executed on October 6, 2011 at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

  
Bernard G. Lanz

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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