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Court of Appeals No. 68578-3-1  
King County Superior Court No. 09-2-06656-6 KNT

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CONCRETE SERVICES, INC., a Washington Corporation,  
RESPONDENT,

v.

ROBERT KANANY, a single man,  
APPELLANT, and

OVIDIO ESCAMILLA, a single man,  
RESPONDENT, and

FRONTIER BANK, a Washington Bank;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEM, INC., a Delaware Corporation; and  
PRIMELENDING, A PLAINSCAPITAL  
COMPANY, a Texas Corporation,

DEFENDANTS.

68578-3-1  
APPELLANT'S REPLY BRIEF  
FILED  
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COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON  
KING COUNTY  
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APPELLANT'S REPLY BRIEF

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ORIGINAL

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**REPLY OF APPELLANT ROBERT KANANY**

In one and only one respect, Respondent Escamilla has it right; namely, this case turns on the answer to the following question: Whether Plaintiff /Judgment Creditor Concrete Services, Inc.'s Default Judgment against Kanany had been legally satisfied when it was purportedly assigned to Escamilla thus negating such assignment and affording grounds for relief from the judgment and its lien on Kanany's real property in King and Pierce Counties? Under the law, the answer is "Yes" and the trial court erred as a matter of law, and it thereby abused its discretion, by denying Kanany's motion for relief from the Default Judgment brought under CR 60(b)(6).

**A. Kanany's CR 60(b)(6) Motion Asks For Relief From The Judgment And Its Lien -- Not To Vacate Such Judgment**

Upon receipt of documentation, finally delivered under subpoena and several additional requests to Ticor Title, a nonparty, that Concrete Services' Default Judgment against Kanany had in fact been paid and thus satisfied, Kanany immediately moved to amend his pleadings to solely seek

relief from that Judgment under and pursuant to CR 60(b)(6). Kanany only seeks relief from the Court to declare such Default Judgment satisfied and Order Concrete Services and Escamilla together to remove the judgment lien against Kanany's real property now recorded in King and Pierce Counties.

Accordingly, any and all references by the trial court to the vacation of the Default Judgment is erroneous and is mere surplusage, as the issue initially pled by Kanany of deficient service is moot. The only issue before the trial court and now this Court is whether Kanany is entitled to relief from the Default Judgment and its lien.

**B. Beckstead Is Distinguishable And Inapposite**

Escamilla apparently relies on *Credit Bureau Corporation v. Beckstead*, 63 W.2d 183, 385 P.2d 864 (1963), as support for its proposition that a judgment remains valid and in effect upon assignment regardless of the timing as to when such judgment was in fact paid and therefore satisfied. Truth be told, however, the relation back of payment by check to date of receipt and satisfaction of a judgment thereby was not even remotely the issue

that was decided by the *Beckstead* Court. As so plainly stated by the Supreme Court, the "issue of subrogation in the circumstances of the instant case" was the immediate issue to be decided by that Court, and "the ultimate question is whether it is inequitable for appellant Gray Company, Inc., to avail itself of the advantage gained by the satisfaction of judgment which was mistakenly entered." *Beckstead*, 63 Wn.2d at 186.

Here, the subrogation rights of Ticor Title to Escamilla's cross-claims against Kanany under its title insurance with Escamilla are not in dispute.<sup>1</sup> Furthermore, there the issue was whether equitable principles of subrogation should under those particular circumstances allow relief be granted by the removal from the record of a mistakenly entered satisfaction of judgment resulting in the rein-

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<sup>1</sup> Kanany initially questioned the existence of subrogation rights because Escamilla failed to timely present any copy of his title insurance policy from Ticor Title along with any proof whatsoever as to who paid how much and when to whom in settlement of Concrete Services' claim as a materialman's lien against Kanany's and Escamilla's real property improved by its services. Once Ticor Title's insurance policy was produced, its subrogation rights as to Escamilla's alleged claims for breach of warranty and misrepresentation became apparent. It is clear that Ticor Title's subrogation rights attach to Escamilla's cross-claims against Kanany, now properly served and waiting to be litigated.

statement of the judgment lien and its priority over a subsequent mortgage and its lien. Here, the continuation of the judgment lien against Kanany's real property, even though the Default Judgment has clearly been satisfied, has directly and substantially adversely affected him and his property rights and interests and has caused him to be denied refinancing that has resulted in his losing several lots by foreclosure.

Contrary to Escamilla's contentions, *Beckstead* has nothing whatsoever to do with the issues presented in Kanany's case and is clearly distinguishable and inapposite.

**C. Ticor Title's \$10,000 Payment Made Directly To Plaintiff Concrete Services, Inc., In Fact Compromised And Settled Its One And Only Claim For Monetary Damages Against All The Defendants, Including Kanany**

Escamilla appears to contend that Ticor Title Company's \$10,000 payment made directly to Concrete Services, Inc., was intended solely to (1) resolve Plaintiff's claim against Escamilla's property, and (2) purchase the assignment of Plaintiff's Default Judgment against Kanany. Escamilla is wrong on both counts.

First and as clearly explained in Kanany's main brief, Plaintiff Concrete Services, Inc., provided material and services for the improvement of a 6-lot plat for real property then owned by Kanany. Although Kanany paid his contractor, Third Base LLC, it failed to pay Concrete Services from the funds received. As a result Concrete Services properly filed for record a Claim of Lien against Kanany's plat, including that lot eventually sold to Escamilla. As part of the sale, Kanany purchased title insurance from Ticor Title, the purpose of which was to research and discover all liens and encumbrances affecting the lot being purchased by Escamilla. However, Ticor Title failed in its duty and did not report the Concrete Services lien so that it would be paid at closing. Although clearly the fault of Ticor Title, Concrete Services proceeded to file a lawsuit against several named defendants, *except* notably Ticor Title -- the entity clearly at fault -- to collect its claim for materials and services through the foreclosure of its lien against the Kanany and Escamilla properties. There was one and only one claim for

monetary damages in Concrete Services Complaint; namely, its claim for money owed for supplying material and services for improvements to the plat.

Because Kanany failed to answer, Concrete Services proceeded to obtain a Default Judgment against him for its monetary claim. And because Escamilla did answer, in lieu of proceeding to litigate its claim and foreclose its lien as to Escamilla's property, Concrete Services and Escamilla with the direct involvement of Ticor Title proceeded to settle the monetary claim and avoid foreclosure of the lien against the Escamilla property for the lump fixed sum of \$10,000. Ticor Title's payment of this sum directly to Concrete Services in fact paid off its sole monetary claim underlying the Default Judgment that was obtained against Kanany. As a direct result of Ticor Title's payment, Concrete Services' Default Judgment against Kanany was in fact satisfied.<sup>2</sup>

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<sup>2</sup> As explained in more detail in Kanany's main brief, it is an indisputable fact that Concrete Services' only claim for monetary damages was compromised, settled and fully paid as it did not pursue reducing its default Orders against other defendants to judgment for collection and promptly proceeded with the dismissal of its lawsuit, leaving only Escamilla's  
(continued...)

**D. A Judgment Is Satisfied When It Has Been Paid**

Pursuant to and in accordance with RCW 4.56.100 and Black's Law Dictionary, at p. 1204 (5th ed. 1979), a judgment is satisfied when it has been paid, and it is of no matter the manner in which payment is effected. See, e.g., *Strong Memorial Hospital v. Almac Building Maintenance*, 470 N.Y.S.2d 542 (N.Y. City Ct. 1983) (underlying judgment on the hospital's claim against Scott was satisfied when the hospital got judgment against Scott's employer for wrongful refusal of garnishment and it was paid); *Charles P. Young Company v. Anaya*, 891 P.2d 1203 (N.M. 1995) (underlying judgment paid by garnishment of a separate judgment).

The only relevant question now is -- at what time was the Default Judgment paid in our case?

**E. Where Payment Is Made By Check, The Time Of Payment Is The Date Of Its Receipt When All Conditions Subsequent Have Been Fulfilled**

Escamilla appears to place great weight on the condition imposed by his counsel in the transmittal

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<sup>2</sup>(...continued)  
cross-claims against Kanany on his breach of warranty and misrepresentation claims, as subrogated to Ticor Title.

letter sending Ticor Title's \$10,000 check to Concrete Services' attorney that:

Your client is **authorized to cash** the enclosed settlement check once you return to me the signed original Stipulation and Order of Dismissal of All Claims, the signed original Partial Release of Lien, and the signed original Assignment of Default Judgment.

CP at 373 - 74 (emphasis added).

Apparently, Escamilla wishes to equate time of payment by check with the subsequent date upon which the check may be cashed or deposited. However, the statement "authorized to cash" the enclosed check is merely a condition attached to the payment and in no way affects the effective time of payment. It is axiomatic that "a debtor paying his own money may couple the payment with such conditions as he pleases." 70 C.J.S. *Payment* § 4, at p. 11 (1987). Nevertheless,

Where a particular sum or medium is received as conditional payment, and the condition is thereafter performed or fulfilled, payment ordinarily relates back to the time of such receipt.

70 C.J.S. *Payment* § 4, at p. 12 (1987).

A case illustrative of conditions imposed on the deposit/negotiation of a check intended as pay-

ment is *Regents of the University of New Mexico v. Lacey*, 764 P.2d 873 (N.M. 1988). Conditions imposed to the check's presentment by an injured party of an insurance company's settlement check included the execution of a release form in favor of the insurance company. The check was received by the injured party's attorney on May 28, 1986. Settlement was not reached, and the release form was not completed, until November 6, 1986 -- also the date on which the settlement check was deposited into the attorney's trust account. An issue arose between the treating hospital and the injured party as to payment of medical expenses from the insurance proceeds. A one year statute of limitations applied to collection on the hospital's lien from the date of payment to the injured party. The hospital contended that the one year period should be measured from November 6, 1986 as the date on which settlement was reached, the release executed, and the check deposited into the attorney's trust account. On the other hand, the injured party contended that once any and all conditions had been met, the time of payment relates back to the date

of its receipt by his attorney -- May 28, 1986 -- and thus the one year period had expired. The Regents Court held that May 28, 1986 controlled:

[I]f, when the check is delivered, the drawer has funds in the drawee bank to meet it, and the check is honored and paid upon presentment, the conditional nature of the payment becomes absolute and the date of payment will be deemed to have been made as of the date of the original delivery of the check. . . . When a check is paid, the payment of the underlying debt becomes absolute and it is deemed paid as of the date of the giving of the check. 6 R. Anderson, *Anderson On The Uniform Commercial Code* § 3-802:19 (3d ed. 1984). **Cases from other areas of the law also indicate that payment is made upon delivery of the check and not deposit in the bank.**

*Regents*, 764 P.2d at 875 (emphasis added).

Therefore, the condition that Concrete Services' attorney was not *authorized* to **cash** Ticor Title's \$10,000 settlement check until the "signed original Stipulation and Order of Dismissal of All Claims, the signed original Partial Release of Lien, and the signed original Assignment of Default Judgment" had been returned to Escamilla's attorney is of no moment as once such condition was fulfilled and the check deposited and honored, the date of payment was in fact the time of its receipt

by Concrete Services' attorney on May 20, 2010.

And to the same conclusion as a matter of law that when a check may be cashed or deposited is not dispositive as to the time certain on which payment was made is *Staff Builders of Philadelphia, Inc. v. Koschitzki*, 989 F.2d 692 (3rd Cir. 1993):

[I]t does not matter that the check was not cashed or deposited or the drawer's account charged until the following year. The check is regarded as payment on a condition subsequent, and if the condition of honor on presentment is met the payment is regarded as absolute from the time the check was delivered.

*Staff Builders*, 989 F.2d at 694. In addition, as for any inferences that may have been made by Escamilla regarding ante-dated and post-dated checks:<sup>3</sup>

"Payment" on a check that is not post-dated [e.g., ante-dated] is effective as of the date the check is delivered. . . . Payment on a post-dated check is effective on the date it bears.

*Staff Builders*, 989 F.2d at 695.

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<sup>3</sup> Recall here that Ticor Title's Check # 10159689 was dated May 5, 2010 and made payable directly to Concrete Services Incorporated. CP at 367. Ticor Title's check may thus be characterized as an ante-dated check. Because the check was delivered to Concrete Services' attorney on May 20, 2010, when all conditions subsequent had been fulfilled the actual time of payment related back to when the letter containing the check was delivered on May 20 -- and not when it may have been subsequently cashed or deposited into any account.

**F. The Time At Which A Judgment Is Satisfied Is When The Check For Payment Thereof Is Delivered To Judgment Creditor's Attorney**

In case there be any doubt that a judgment is satisfied at the time of the delivery of the check intended for payment thereof to the judgment creditor's attorney, consider *Long v. Cuttle Construction Company*, 70 Cal. Rptr. 2d 698 (Cal. App. 1998). In holding that defendant judgment debtor Cuttle was entitled to an Order to enter Satisfaction of Judgment, the Court concluded that the amount tendered by check to the judgment creditor Long's attorney was correct in amount and fully satisfied the judgment notwithstanding the fact that such amount did not include interest on the judgment to cover a 5-day hold period placed on the check by the bank; the date of payment and thus satisfaction of the judgment occurred as of the time the check was delivered to the judgment creditor's attorney. *Long*, 70 Cal. Rptr. 2d at 699-700.<sup>4</sup>

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<sup>4</sup> The Court also distinguished between the time a Satisfaction of Judgment must be filed (by statute, after the check has been honored upon presentation) and the "time of payment" which is the date of the check's delivery. *Id.* at 699 n.1.

**G. Where Considered As A Relevant Issue, Courts Have Uniformly Determined That The Uniform Commercial Code Supports That When Payment Is Made By Check, The Time Of Payment Is The Date Of Its Receipt When All Conditions Subsequent Have Been Fulfilled**

Escamilla has apparently called into play the Uniform Commercial Code in questioning whether the effective date of payment by check relates back to the time of its delivery. However, it is very clear that where courts and legal scholars<sup>5</sup> have in fact considered the U.C.C. in the context of payment by check and the effective date thereof, they have uniformly held that the U.C.C. and its various provisions support the stated rule of law that upon fulfillment of any conditions subsequent, the date of payment by check is the time of its delivery. See, e.g., *Staff Builders*, 989 F.2d at 694-95 ("the payment is regarded as absolute from the time the check was delivered" and "a debt is paid on the date on the check and that when later honored the debt is deemed to have been discharged as of the

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<sup>5</sup> See, e.g., 6 R. Anderson, *Uniform Commercial Code* § 3-802:19 (1984) ("When [the] check is paid, the payment of the underlying debt becomes absolute and it is deemed paid as of the date of the giving of the check.").

date of the check"); *Roy v. Mugford*, 642 A.2d 688, 690-92 (Vt. 1994) (under the UCC, "payment on a check relates back to the time the check is delivered to the payee"); *RHI Holdings, Inc. v. Debevoise & Plimpton*, 619 N.Y.S.2d 4, 5 (N.Y.App.Div. 1994) (under the UCC, "a check is deemed paid not upon collection but upon its delivery to the payee"); *Aztec Gas & Oil Corporation v. Roemer Oil Company*, 948 P.2d 902, 903-904 (Wyo. 1997) ("We adopt a definition of legal tender consistent with both the UCC and regional common law and hold that payment by check does not discharge a debt unless and until the check is honored; once honored, the time of payment relates back to the time the check is delivered."); *Long v. Cuttle Construction Company*, 70 Cal. Rptr. 2d 698, 699-700 (Cal. App. 1998) ("the rule of relation back of payment is supported by the text of [UCC] section 3[-]310[(b)(1)].").

**H. An Exception To What Constitutes A Reasonable Time In Which To Bring A CR 60(b)(6) Motion For Relief From A Judgment Exists Where The Judgment Has Been Satisfied**

Escamilla fails to cite any cases or treatises that hold the reasonable time requirement of CR

60(b) applies to a motion for relief from a judgment that has been **satisfied**. Adding to the list of citations supporting Kanany's position that it is a long-standing and well-established rule that a CR 60(b)(6) motion may be brought at any time for relief from a judgment that has been satisfied, consider a case decided almost 70 years ago; to wit, *Peoples National Bank v. Weingartner*, 33 A.2d 469 (Pa. Super. 1943). In *Weingartner* the Court held that judgments in fact satisfied more than 5 years earlier were subject to attack at any time notwithstanding the defense of laches.

The delay in attacking the judgment, therefore, whatever the reason, is of no moment, for laches does not estop one from attacking an invalid judgment entered against him . . . **nor a judgment which has been discharged in fact by accord and satisfaction.**

*Weingartner*, 33 A.2d at 471 (emphasis added).

**I. Kanany's Challenged Findings, Conclusions, And Order Have Not Been Overcome By Substantial Competent Evidence In The Record**

This Court reviews a trial court's findings of fact for substantial evidence and the conclusions of law, including any stated findings of fact that are deemed by this Court to be conclusions of law,

*de novo*. *In re Marriage of Zier*, 136 Wn. App. 40, 45, 147 P.3d 624 (2006). **And key in this review** is that the form of a transaction is disregarded in favor of looking at its substance to determine its true effect. *Zachman v. Whirlpool Acceptance Corporation*, 120 Wn.2d 304, 314, 841 P.2d 27 (1992) (transactions as described by a proponent may not necessarily be in substance what its form is proclaimed to be); *Rouse v. Peoples Leasing Company, Inc.*, 96 Wn.2d 722, 726, 638 P.2d 1245 (1982) (real substance of a transaction may easily be hidden by its proclaimed form, and the court must look beyond such form). **This rule is particularly applicable here in determining the true substance and effect of Ticor Title's \$10,000 payment to Concrete Services (the substance of which was the satisfaction of the Default Judgment prior to its assignment).**

In light of the foregoing, there simply is no substantial competent evidence in the record that supports the trial court's findings and conclusions. Kanany's position in the trial court and in this Court is well-taken and well-supported in fact

and law; namely that (1) his Motion for Relief from the Default Judgment should have been granted as it had been satisfied when it was purportedly assigned to Escamilla; (2) Concrete Services had been fully compensated on its single claim for monetary damages by the payment it received from Ticor Title in the amount of \$10,000 delivered by letter on May 20, 2010, and obviously in fact received prior to the execution of any other documents enclosed with it; (3) Concrete Services had no right to further compensation on its claim for money owed;<sup>6</sup> (4) the assignment of a judgment that had been satisfied conveys no present right to collection held by the assignor and is thus invalid and a nullity in the hands of the assignee;<sup>7</sup> (5) although no time

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<sup>6</sup> As clearly evidenced by Concrete Services declining to reduce its default orders to judgment against other defendants and its dismissal of all its claims against defendants, saving only Escamilla's cross-claims against Kanany as a separate action that was to be subsequently litigated.

<sup>7</sup> The obvious lesson taught in this case is that if a judgment creditor wishes to assign its judgment to anyone, and if any payment received is in fact legally to be construed solely as consideration for the assignment, that any payment tendered must clearly be subsequent to the execution of the assignment instrument. A simple agreement between the parties is sufficient to set the arrangement as to the execution of the assignment and its return prior to the date payment is delivered. Here, the trial court erred by its findings and con-

(continued...)

restriction applies to a motion for relief from a judgment that has in fact and law been satisfied, Kanany nevertheless brought his CR 60(b)(6) Motion for Relief immediately upon Ticor Title's producing documentation in response to a subpoena and further requests made on it by Kanany's counsel; (6) no prejudice comes to Escamilla from the relief requested as his cross-claims remain intact as is the subrogation right of Ticor Title; and (7) the trial court's denial of Kanany's requested relief under CR 60(b)(6)<sup>8</sup> was contrary to and a clear error of law, an abuse of discretion, manifestly unreasonable, and arbitrary and capricious. This Court should therefore uphold Kanany's challenges and strike those unsupported findings, conclusions, and portions of the Order from the record.

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<sup>7</sup>(...continued)

clusions that the \$10,000 payment was solely as consideration for the assignment and that no satisfaction of the underlying Default Judgment occurred. This is clearly not in accord with settled principles of law as explained both to that court and to this Court in Kanany's main brief and the foregoing text.

<sup>8</sup> Again, all that Kanany is requesting as relief is for the Court to Order the Default Judgment satisfied, and for Concrete Services and Escamilla to take prompt action to remove the judgment lien from the real property records of King and Pierce Counties.

**J. The Award Of Attorney Fees Is Unwarranted  
And Inequitable**

Escamilla asks this Court to affirm the trial court's award of attorney fees pursuant to the terms of the Default Judgment, the Supplemental Judgment and CR 11, and to add thereto pursuant to RAP 18.1 and 18.9(a). Because Kanany's appeal is not "completely frivolous" as Escamilla contends, and because the underlying Default Judgment has in fact and law been satisfied and no longer is of any force and effect, Kanany respectfully asks this Court to deny Escamilla's request for attorney fees both at the trial court and in this Court.

First, because the Default Judgment has been satisfied, its terms cannot be employed as grounds for an award of attorney fees in the trial court or in this Court.<sup>9</sup> The Court should therefore deny Escamilla's request for attorney fees and costs under RAP 18.1.

Second, although the trial court found other-

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<sup>9</sup> Because "satisfaction of judgment bars any further proceedings on the judgment, a full satisfaction will extinguish plaintiff's right to any post-judgment hearing on a claim for additional attorney's fees, costs, or legal interest." 47 Am. Jur. 2d *Judgments* § 806, at p. 384 (2006).

wise to support its CR 11 sanctions, Kanany in no way intended back in March 2009 to bring these CR 60(b) motions by somehow devising a scheme to deny service as future grounds on which to bring a motion to vacate a September 2009 Default Judgment that he did not know was obtained against him until well after its entry. Kanany's testimony has been, and respectfully continues to be, that he has "absolutely no recollection of being given any papers by Kamran or anyone, or even seeing any such papers, on or about March 1, 2009, regarding or relating to the" Concrete Services' lawsuit. CP at 90, ¶7. At and around that time Robert Kanany was consumed with attention given to his hospitalized mother, who subsequently passed. CP at 90, ¶4. Yes, Robert Kanany did in fact receive a copy at some time somehow, but he has steadfastly maintained that it must have been Kamran Kanany, his half brother, who in fact was served as indicated by the Declaration of Service. CP at 99.<sup>10</sup> Kamran Kanany

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<sup>10</sup> The general physical description could apply to either Robert or Kamran at that time, and the age was felt to be a typo or simple error as neither of them were in their 50's.

admitted that he was likely at Robert's home at the time service was indicated, but that he did not recall being served or receiving any papers related to a lawsuit. CP at 73, ¶8 and ¶9. Based on this information initially available and discovered, it was determined that a motion to vacate was the proper course to follow. However, additional documents finally produced by Ticor Title under subpoena and follow-up requests demonstrated that the Default Judgment had in fact and law been satisfied when Concrete Services purportedly assigned that Judgment to Escamilla.<sup>11</sup> The issue of whether the Default Judgment should be vacated because of the alleged defective service thus was moot.<sup>12</sup> Kanany immediately brought his motion to amend and request

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<sup>11</sup> This is information that had been requested time and again from Escamilla's counsel but never voluntarily supplied until Kanany was forced to obtain documents by subpoena from Ticor.

<sup>12</sup> And it must be noted that because the Default Judgment was in fact and law satisfied and the purported assignment thereof was invalid and ineffective, it was the duty of Concrete Services to file a Satisfaction of Judgment promptly following May 20, 2010. It did not and as a direct consequence, Kanany was faced with liens against his real property. Because of the liens he was denied refinancing on his loans and subsequently lost several of his lots by foreclosure. None of this would have occurred, and no CR 60(b) motion practice would have been necessary, had the Satisfaction of Judgment been filed for record as required by law.

relief under CR 60(b)(6), which motion was consented to by Escamilla and granted by the trial court. Because there was no intention to deceive or to advance any improper purpose in any of Kanany's CR 60(b) motion practice, it was improper for the trial court to impose CR 11 sanctions.

Lastly, in this Court Escamilla is requesting additional attorney fees and costs pursuant to both the Default Judgment (RAP 18.1) and RAP 18.9(a). Again, because the Default Judgment has been satisfied he cannot avail himself of the terms thereof regarding attorney fees and costs. And because Kanany's appeal is not "completely frivolous" as contended, Escamilla is not entitled to this Court awarding attorney fees and costs under RAP 18.9(a). To determine whether an appeal is sufficiently frivolous to warrant sanctions, this Court must consider the following: "(1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are

rejected is not frivolous; [and] (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Moreover, our case presents issues of first impression before the Washington courts; namely, the effective time of payment by check; satisfaction of a judgment at the time it was purportedly assigned; and whether reasonable time applies to a CR 60(b) (6) motion for relief from a judgment that has in fact been satisfied. Attorney fees and costs are not awarded to cases of first impression such as Kanany's. *Moorman v. Walker*, 54 Wn. App. 461, 773 P.2d 887 (1989); *Wheeler v. East Valley School District No. 361*, 59 Wn. App. 326, 332, 796 P.2d 1298 (1990); *Cary v. Allstate Insurance Company*, 78 Wn. App. 434, 440-41, 897 P.2d 409 (1995).

Kanany's appeal is not frivolous under *Streater* and because it presents several important issues of first impression, this appeal is not frivolous and this Court should deny Escamilla's

request for an award of attorney fees and costs under RAP 18.9(a).

### CONCLUSIONS

Concrete Services' Default Judgment against Kanany was satisfied at the time of its attempted assignment to Escamilla. Such assignment was a nullity and the Default Judgment must be declared satisfied and the liens against Kanany's properties released. The trial court's denial of Kanany's CR 60(b)(6) motion for relief was a clear error of law, an abuse of discretion, and manifestly unreasonable.

This Court should vacate the trial court's decision and remand this matter back to it with instructions to grant Kanany the relief from the Default Judgment he has requested.

Dated this 7<sup>th</sup> day of September, 2012.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSEA #13846  
Attorney for Appellant Robert Kanany

Court of Appeals No. 68578-3-I  
King County Superior Court No. 09-2-06656-6 KNT

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CONCRETE SERVICES, INC., a Washington Corporation,  
RESPONDENT,

v.

ROBERT KANANY, a single man,  
APPELLANT, and

OVIDIO ESCAMILLA, a single man,  
RESPONDENT, and

FRONTIER BANK, a Washington Bank;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEM, INC., a Delaware Corporation; and  
PRIMELENDING, A PLAINSCAPITAL  
COMPANY, a Texas Corporation,

DEFENDANTS.

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COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

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DECLARATION OF SERVICE

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RHYS A. STERLING, P.E., J.D.  
By: Rhys A. Sterling, #13846  
Attorney for Appellant Robert Kanany  
P.O. Box 218  
Hobart, Washington 98025-0218  
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ORIGINAL

STATE OF WASHINGTON )  
 ) ss. DECLARATION OF RHYS A.  
 ) STERLING  
COUNTY OF KING )

RHYS A. STERLING hereby says and states under penalty of per jury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Robert Kanany in the action captioned *Concrete Services, Inc. v. Robert Kanany, et al.*, Court of Appeals No. 68578-3-I.

3. On September 7, 2012, I served on the other parties in this action, through their respective counsel of record, a copy of the APPELLANT'S REPLY BRIEF and this DECLARATION OF SERVICE filed in this matter, by first class mail (postage paid) delivered to the Hobart Post Office (98025) and properly addressed to each as follows:

Gregory L. Ursich  
Mark S. Leen  
Inslee, Best, Doezie & Ryder, PS  
P.O. Box 90016  
Bellevue, Washington 98009-9016

Attorneys for Respondent Ovidio Escamilla

Brian L. Parker  
Attorney at Law  
25845 164th Avenue S.E.  
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David R. Riley  
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2001 Western Ave., Suite 400  
Seattle, Washington 98121

Attorney for Defendant Frontier Bank

4. On September 7, 2012, I filed in the Court of Appeals, Division I, the original and one (1) copy of the APPELLANT'S REPLY BRIEF and the original DECLARATION OF SERVICE in this matter, by personally delivering them to the following person, or his authorized representative:

Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals I  
One Union Square, 600 University Street  
Seattle, Washington 98101-1176

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

September 7, 2012  
DATE

  
RHYS A. STERLING  
(WRITTEN) WSBA # 13846

Hobart, WA  
PLACE OF SIGNATURE

Rhys A. Sterling  
RHYS A. STERLING  
(PRINTED)

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September 7, 2012

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COURT OF APPEALS  
STATE OF WASHINGTON  
2012 SEP -- 7 AM 11:53

Re: Concrete Services, Inc. v. Robert Kanany, et al.  
Court of Appeals No. 68578-3-I  
King County Superior Court No. 09-2-06656-6 KNT  
**APPELLANT'S REPLY BRIEF AND DECLARATION OF SERVICE**

Dear Mr. Johnson:

Pursuant to RAP 10.2(d), 10.2(h), and 10.4(a)(1), enclosed herewith are (1) the original and one copy of the APPELLANT'S REPLY BRIEF, and (2) the original DECLARATION OF SERVICE in the above referenced action.

If you have any questions, please phone me at 425-432-9348. Thank you for your continued cooperation in this matter.

Very truly yours,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling  
Attorney for Appellant Robert Kanany

Enclosures

cc: Brian L. Parker, Attorney for Respondent Concrete Services, Inc.  
Gregory L. Ursich and Mark S. Leen,  
Attorneys for Respondent Ovidio Escamilla  
David R. Riley, Attorney for Defendant Frontier Bank