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No. 70707-8-I

STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

ALICYN KOMINE,
Respondent,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
COMPANY,
Appellant.

On Appeal from Snohomish County Superior Court
Case No. 11-2-09414-4
The Honorable Marybeth E. Dingley

**REPLY BRIEF OF APPELLANT METROPOLITAN
PROPERTY AND CASUALTY INSURANCE COMPANY**

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I. REPLY ARGUMENT

The issue on appeal is whether the trial court abused its discretion when it vacated the Stipulation and Order of Dismissal entered on August 27, 2012 as to respondent Alicyn Komine's claims against her insurance carrier, appellant Metropolitan Property and Casualty Insurance Company ("MetLife").

A. **The Trial Court Abused Its Discretion In Granting Relief To Ms. Komine Pursuant To CR 60(b)(1) Because Ms. Komine's Dismissal Of Her Claims Was Not Due To Mistake, Inadvertence, or Excusable Neglect**

Under CR 60(b)(1), the court may grant relief on the basis of mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order. CR 60(b)(1). However, the neglect of a party's own attorney is not generally sufficient grounds for rule 60(b) relief. *Lane v. Brown & Haley*, 81 Wn.App. 102, 106-07, 912 P.2d 1040 (1996). Attorney mistake or negligence and "erroneous advi[c]e of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment." *Id.* at 109 (citing *Haller v. Wallis*, 89 Wn. 2d 539, 544, 573 P.2d 1302 (1978)).

1. **Ms. Komine's Dismissal Of Her Claims Was Due To Misapprehension Of The Legal Effect Of The Language In The Order And Not Mistake, Inadvertence, or Excusable Neglect**

Ms. Komine's primary argument is that she was mistaken as to the effect of the order she was requesting, at the time she requested it. The actions and knowledge of her attorney are imputed to her, and her attorney intended to and intentionally stipulated to the dismissal as written. The

error was in misapprehending the legal effect of the language used in the stipulation and order and such a legal error of counsel is not grounds to vacate the stipulated dismissal under Washington law.

As Ms. Komine discusses at length in her brief, she believes the fact that MetLife's name does not appear in the case caption and the use of the preposition "between" rather than the preposition "among," in the stipulation means that the statement "the above entitled-matter be, and the same is hereby dismissed with prejudice" in the Order of Dismissal does not legally operate to dismiss all claims and all parties to the instant case. This discussion demonstrates her continuing misapprehension the legal effect of the plain language included in the Stipulation and Order of Dismissal, and her misapprehension of MetLife's legal status and rights as an intervener and party to the case.

The stipulation provides that "***the above-entitled matter has been fully settled and compromised and may be dismissed with prejudice.***" (CP 63) (emphasis added). The stipulation is signed by Ms. Komine's counsel on her behalf. The Order of Dismissal orders "that the above-entitled matter be, and the same is hereby dismissed with prejudice and without costs." (CP 64.) The order, again, is signed by Ms. Komine's counsel on her behalf.

The language in the stipulation and order is not remotely ambiguous. The phrase "the above-entitled matter" clearly refers to the entirety of the case and not particular claims within the case. Had the order been drafted with language stating that plaintiff dismissed all claims

against defendant Anguiano, as opposed to the language used—“the above-entitled matter”—then plaintiff would have preserved her claims against MetLife and not have dismissed the entire case with prejudice. There can be no argument, however, that the plain language in the Stipulation and Order of Dismissal as written does anything other than legally operate to dismiss the entire matter, all claims and all parties, and not just the claims against defendant Anguiano.

In contrast to *Hope v. Larry's Market*, 108 Wn. App. 185, 29 P.3d 1268 (2001), on which Ms. Komine relies, she did not unintentionally include language whose legal affect she did not intend. Ms. Komine intentionally approved, via her counsel's signature on the stipulation and order, the language included in the order. She simply misapprehended the legal effect of the language intentionally approved, and continues to misapprehend the legal effect of that language as the discussion in her brief demonstrates.

This case is readily distinguished from *Hope*. There, counsel signed an order without realizing it included the word “content” in the phrase “approved as to form *and content*.” 108 Wn. App. at 191. Counsel did not intend to approve the content of the summary judgment order, merely its form. *Id.* In contrast here, there is no language that was accidentally included in the stipulation and order. Ms. Komine does not claim that her counsel signed the order without realizing it included the language, “the above-entitled matter be, and the same is hereby dismissed with prejudice.” Instead, she argues that language does not have the legal

effect it plainly has, that is, dismissal of the entire matter.

Counsel signed the order and intended that the order be presented to the court as written. Her misapprehension of the legal effect of the language in the order was simply a legal error of counsel and is not grounds to vacate a consent order under Washington law. “[A]ttorney mistake or negligence does not provide an equitable basis for relief for the client” and Ms. Komine is bound by the actions of her attorney. *Lane*, 81 Wn. App. at 109.

2. The Cases Relied On By Ms. Komine Are Readily Distinguished And Do Not Support Her Position

Like *Hope*, the remaining cases relied on by Ms. Komine as examples of mistake, inadvertence, or excusable neglect are likewise readily distinguished. In contrast to *Morgan v. Burks*, 17 Wn. App. 193, 563 P.2d 1260 (1977), Ms. Komine did not rely on bad advice from counsel or misunderstand her counsel’s advice regarding the effects of the stipulated dismissal she authorized her attorney to enter on her behalf. In *Morgan*, the Morgans did not understand or agree to the settlement terms entered into by their counsel due to a “serious misunderstanding between attorney and client.” *Id.* at 199. Because they did not authorize the settlement and dismissal or give their informed consent, and thus their counsel acted without authority, the court vacated the dismissal. *Id.*

Unlike the Morgans, Ms. Komine did authorize and consent to the settlement and stipulated Order of Dismissal that was presented to the court on her behalf. However, the language approved in the order and

intentionally presented to the trial court did not have the legal effect intended. Ms. Komine's counsel acted with authority, she simply acted in error.

The instant case is likewise readily distinguished from *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 605 P.2d 348, *aff'd in part, rev'd in part*, 94 Wn.2d 298, 616 P.2d 1223 (1980), because Ms. Komine's counsel did not surrender a substantial right through an unauthorized stipulation. In *Graves*, the attorney's entry into a series of stipulations without *any* authorization from his client warranted vacation of the judgment pursuant to CR 60(b)(11). 25 Wn. App. 126. The *Graves* court recognized that "the general rule—a client is bound by the actions of his attorney—continued to be applicable, noting that the exception applied because the attorney "misrepresent[ed]" his authority to the court and the adversary." *Lane*, 81 Wn. App. at 109 (citing *Graves*, 94 Wn.2d at 304).

Ebsary v. Pioneer Human Services, Inc., 59 Wn. App. 218, 796 P.2d 769 (1990), on which Ms. Komine also relies, is distinguished on the same basis. There, a decedent's children and the Department of Labor and Industries, as assignee of the decedent's wife, brought wrongful death claims. Without any authority or participation from the plaintiff children, the Department of Labor and Industries and the defendants entered into a broad settlement that disposed of all claims including the children's. The trial court subsequently vacated the stipulated order because the parties had acted without any authority or involvement from the plaintiff children. The Court of Appeals upheld the trial court on the ground that the

children's claim "was purportedly settled without their knowledge or consent." 59 Wn. App. at 228.

3. Ms. Komine Authorized And Consented To The Stipulation And Order Of Dismissal

Here, Ms. Komine's counsel, with authority and consent from her client, approved the language in, entered into, and presented the Stipulation and Order of Dismissal to the trial court. Ms. Komine in effect argues that though she authorized the stipulation and dismissal, because she did not authorize counsel to make the legal error counsel made, that counsel acted without authority. On that logic a client would never be bound by an attorney's mistake. Counsel acted with authority and within the scope of her representation. Ms. Komine is, therefore, bound by the acts of her attorney on her behalf, including the error in misunderstanding the legal effect of the language in the Stipulation and Order of Dismissal

The default judgment cases relied on by Ms. Komine are even less on point. She relies on *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004), for the proposition that an error of communication resulting in a party's failure to appear can support vacating a default judgment. The instant case, however, does not involve a failure to appear, a default judgment, or an error of communication. Ms. Komine authorized her counsel to enter the Stipulation and Order of Dismissal, and she points to no error of communication or misunderstanding between herself and her counsel that led to entry of the Stipulation and Order of Dismissal. Neither does she point to a misunderstanding between client and counsel

like the one in *Gutz v. Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005), that led to a delay in answering a complaint, or reliance on erroneous advice of counsel as in *Moe v. Walter*, 134 Wn. 340, 235 P. 803, *aff'd*, 136 Wn. 696, 240 P. 565 (1925).

No error of communication, misunderstanding, or erroneous advice between client and counsel resulted in the Stipulation and Order of Dismissal here. Ms. Komine authorized and consented to the stipulated dismissal with the advice of counsel and counsel approved the order and presented it to the court within the scope of that representation. Again, counsel's error of law was in misapprehending the legal effect of the language she approved in the order, but she acted with her client's authority when she did so.

4. Ms. Komine Presented The Stipulation And Order Of Dismissal To The Trial Court

As a corollary matter, Ms. Komine's argument that she did not present the order to the court because it was on the letterhead of counsel for defendant Anguiano and apparently actually filed with the court by counsel for defendant Anguiano is misplaced. (Resp. Br. 6.) Regardless of how or by whom the stipulated order was actually filed with the court, as a legal matter since the Stipulation document and Order of Dismissal document are both signed by counsel for Ms. Komine and by counsel for Mr. Anguiano the documents were approved and presented to the court by both attorneys on behalf of their respective clients. (CP 63-64.) Accordingly, by virtue of her counsel's signature, Ms. Komine did for all

intents and purposes approve and present the Stipulation and Order of Dismissal to the trial court.

“The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.” *Haller*, 89 Wn.2d at 547. Because the dismissal was not the result of mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order, the trial court abused its discretion when it granted the motion to vacate on that basis.

B. The Trial Court Abused Its Discretion In Granting Relief To Ms. Komine Pursuant To CR 60(b)(1) Because Ms. Komine Did Not Bring Her Motion To Vacate Within A Reasonable Time And Did Not Act With Due Diligence

Ms. Komine offers no explanation for why she waited three months after failing to respond to MetLife’s final offer to file her motion to vacate. The unexplained delay is unreasonable and Ms. Komine did not act with due diligence. MetLife made its settlement offer to Ms. Komine on February 25, 2013, and communicated that the offer was MetLife’s final offer. (CP 21.) She did not accept or respond to the offer at all, and then had no further negotiations or communication with MetLife or its counsel until three months later on May 24, 2013, when she suddenly sought to resume settlement negotiations after three months of silence on the matter and on the eve of filing her motion to vacate. (CP 21.)

It is not MetLife’s recitation of the facts that is misleading but Ms. Komine’s characterization of them. She makes the claim, uncited to the

record, that the parties “exchanged settlement offers through March 2013” (Resp.’s Br. 33) when in fact, MetLife extended its final offer on February 25, 2013, and Ms. Komine did not respond to it (CP 21). While MetLife extended the offer with a March 31, 2013 expiration date, Ms. Komine did not negotiate with MetLife “through March” or communicate in any way in March, in April, or in May until the voicemail message from her counsel on May 24, 2013. (CP 21.)

Regardless of settlement negotiations, “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.” *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999). Ms. Komine became aware of the dismissal in November 2012. The parties attempted to negotiate settlement into January and February 2013, and then negotiations broke down and she failed to act for three months. That three month delay is unexplained and is not a reasonable time to delay filing the motion to vacate where settlement negotiations had ceased altogether.

That she contacted MetLife again until three months later, seeking to resume settlement negotiations on May 24, 2013, mere weeks before she would finally file her motion to vacate and after three months of silence, does not excuse or erase her three month delay. Contrary to Ms. Komine’s unfounded assertion that there was no three month delay, (Resp. Br. 34) there were no settlement negotiations with, action by, or communication of any kind from Ms. Komine from February 25, 2013

until May 24, 2013 (CP 21).

While Ms. Komine seeks to attribute the delay to MetLife's refusal to stipulate to vacate the dismissal, that argument verges on the disingenuous. MetLife cannot have been expected to concede its position in the interest of averting delay and the delay cannot be imputed to MetLife. It clearly communicated it was not willing to stipulate to vacate the dismissal, and it certainly was not required to do so and waive its right to challenge the motion to vacate in order to prevent delay. Ms. Komine knew MetLife's position and was free at any time to move to vacate the dismissal. She was free to do so at any point once she learned of the dismissal in November 2012, and was certainly free to do so once she ceased to participate in settlement negotiations or to respond to MetLife's final offer in February 2013.

Likewise, MetLife should not be penalized for participating in settlement negotiations where Ms. Komine had indicated her intent to move to vacate the dismissal and the outcome of any such motion was uncertain. MetLife's participation in settlement negotiations cannot be construed as a waiver of any of its rights or as acquiescence to Ms. Komine's position. MetLife was not condoning her delay by participating in the settlement negotiations she revived, merely protecting its rights and interests where the legal outcome was, as always, uncertain. Ms. Komine can not erase her delay or its effects simply because she made a last-ditch settlement effort prior to finally filing her motion to vacate after months of silence, a motion she could have filed at any point after discovery of the

dismissal.

The parties' settlement efforts may account for Ms. Komine's failure to bring the motion to vacate in January or February 2013, but does not excuse the delay, and, regardless, it certainly does not account for Ms. Komine's delay once she ceased to participate in settlement negotiations and indeed, ceased to act or communicate at all. (CP 21.) While there is no suggestion in the record that Ms. Komine acted in bad faith, there is in fact no means of evaluating the reasons for her three-month delay because she does not provide any explanation for it.

The record before the Court clearly demonstrates Ms. Komine did not bring her motion to vacate within a reasonable time and did not exercise the requisite due diligence. The trial court therefore abused its discretion in finding she brought the motion within a reasonable time and acted with due diligence, and in granting the motion to vacate on that basis.

C. The Trial Court Abused Its Discretion In Granting Relief To Ms. Komine Pursuant To CR 60(b)(1) Because Ms. Komine Failed To Meet Her Burden And Demonstrate The Merits Of Her Claim Against MetLife

Ms. Komine argues that she need make no showing she is entitled to the relief sought because CR 60 is silent on a showing by the plaintiff but provides that "if the moving party be a defendant, the facts constituting a defense to the action or proceeding" shall be stated. CR 60(e)(1). She makes the unsupported argument that the silence in CR 60 as to plaintiff's burden modifies the requirement in RCW 4.72.050 that a

judgment shall not be vacated unless it is adjudged there is a valid cause of action.

CR 60(e)(4) provides that “[e]xcept as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.” Ms. Komine cites no case for the proposition that the silence in CR 60(e)(1) as to plaintiff’s showing should be construed as a modification of the requirement in RCW 4.72.050 that a plaintiff demonstrate a valid cause of action.

Ms. Komine raises this argument for the first time on appeal. Indeed, she argued before the trial court that the test from *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), for vacating a default judgment should apply and argued she had satisfied the first prong and demonstrated the merits of her claim. (CP 57-58.) Only now does she argue she need not make such a showing, though she cites no authority to support the proposition.

The record before the court is devoid of any evidence of the merits of Ms. Komine’s claim. She failed to meet her burden and make the necessary showing and, indeed, such a finding is not included in the trial court’s order granting the motion to vacate. (CP 20-21.) The trial court abused its discretion in granting the motion to vacate in the absence of any demonstration by Ms. Komine and any consideration and finding by the trial court of the merits of Ms. Komine’s claim.

D. The Trial Court Abused Its Discretion In Finding The Risk Of Prejudice to MetLife Minimal

To the extent the *White* factors for vacating a judgment apply

outside the default judgment context, they are not weighted equally and the first two factors—demonstrating a meritorious claim and demonstrating mistake, inadvertence, surprise or excusable neglect—are primary and the remaining two factors—demonstrating due diligence and that no substantial hardship will result—are secondary. *Luckett*, 98 Wn. App. at 314 (citing *White*, 73 Wn.2d at 438)). Accordingly, in *Luckett*, the court denied plaintiff's motion to vacate even though Boeing did not show how it was prejudiced by the delay where Luckett had "fail[ed] to put forth any good reason for her attorney's four-month delay in bringing the motion to vacate" and "did not attempt to persuade the trial court on the merits of her claim, which was her burden." *Id.*

Ms. Komine argues that the only prejudice to MetLife is the loss of a quick victory, an argument which would have applied had she promptly moved to vacate the dismissal following its discovery in November 2012. She did not and her repeated efforts to lay the burden of her delay on MetLife are unpersuasive. The delay was occasioned by her error in dismissing the entire matter with prejudice and her failure to move to vacate the dismissal. Notwithstanding the fact that the entire delay is due to plaintiff's error, the delay from February 25, 2013, onward is entirely of her own making.

At that point, it had been almost sixteen months since Ms. Komine commenced litigation and over three years since the December 20, 2009 accident. In *Lucket*, plaintiff brought her motion to vacate 18 months after litigation commenced and four months after she discovered the dismissal.

Id. at 308-09. In contrast, in *White* the motion to vacate was brought 40 days after the complaint was filed and 11 days after the default judgment. *Id.* The additional delay occasioned by Ms. Komine's unexplained failure after February 25 to move to vacate the dismissal only increased the length of time between any continued discovery by MetLife and the date of the subject accident. As the length of time since the date of the accident and Ms. Komine's claimed injuries grows, the more difficult it becomes for MetLife to evaluate the cause and extent of those injuries and to defend against her claims.

Substantial hardship is a secondary factor that varies in dispositive significance depending on the circumstances of the particular case. *White*, 73 Wn.2d at 352. Here, as in *Luckett*, Ms. Komine made no showing of the merits of her claim and offered no explanation for her three-month delay once settlement negotiations broke down. Under such circumstances, the threshold of hardship which must be shown is lowered. Nevertheless, MetLife is prejudiced as the length of the litigation continues to extend and the time when the events at issue occurred recedes further into the past.

Ms. Komine failed to establish that MetLife would suffer no hardship when the record demonstrates her unexplained delay in moving to vacate substantially delayed any resolution of this case and resulted in any further discovery occurring over three years after the subject accident. The trial court abused its discretion in finding the risk of prejudice to MetLife minimal and in granting the motion to vacate on that basis.

E. A Stipulated Order Of Dismissal Is A Final Adjudication On The Merits

Ms. Komine makes the equitable argument that the trial court's decision should be upheld because Washington law favors judgments on the merits, but this argument ignores the fact that Washington law is clear that a dismissal with prejudice is equivalent to a final judgment on merits to which principles of *res judicata* may apply. See *Krikava v. Webber*, 43 Wn. App. 217, 716 P.2d 916 (1986). Ms. Komine cites no case law for the proposition that a stipulated dismissal with prejudice is not a final judgment on the merits. While she dismisses MetLife's argument based on the actual law as "technical" and asserts the dismissal here was not the result of a "thorough litigation of the parties' claims and defenses," (Resp.'s Br. 49.) litigation had indeed been underway for almost ten months when the dismissal was entered. Moreover, final judgments on the merits are not limited to judgments following trial or summary judgment; the category includes consent judgments and dismissals with prejudice just like the Stipulation and Order of Dismissal in this case.

"There is an obvious difference in the view which courts take of judgments by default and judgments by consent. In the one, the defendant has had no representation and no hearing, whereas in the other, the moving party has, usually with the aid of counsel, had the merits of his claim or defense examined and has agreed upon the disposition of the controversy." *Haller*, 89 Wn. 2d at 544.

Ms. Komine commenced suit on October 31, 2011. (CP 85.) MetLife moved to intervene on February 16, 2012, and its motion was

granted February 29, 2012. (CP 70-73.) It answered plaintiff's complaint and the parties' participated in discovery. (CP 81, 39.) At the time the Stipulation and Order of Dismissal was entered litigation had been underway for almost ten months and Ms. Komine had examined the merits of her claim with the aid of counsel. The stipulated order was a dismissal with prejudice and a dismissal with prejudice constitutes a final adjudication on the merits. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865–66 n.10, 93 P.3d 108 (2004).

F. There Is No Basis On The Record Before The Court For Relief Pursuant To CR 60(a) And It Does Not Provide An Alternative Basis For Affirming The Trial Court

Ms. Komine argues that CR 60(a) provides an alternative basis for vacating the Order of Dismissal because it did not conform with the trial court's intent. The argument is without merit. She argues for the first time that due to a clerical error the Order of Dismissal fails pursuant to CR 41(a)(1)(A) because it was not signed by all of the parties. Ms. Komine did not raise these arguments below and they are not properly before this Court now. Notwithstanding that fact, the arguments fail.

As the plaintiff, a voluntary dismissal was available to Ms. Komine as a matter of right and the court has no discretion to deny a voluntary dismissal. *Goin v. Goin*, 8 Wn. App. 801, 508 P.2d 1405 (1973). A plaintiff does not even need to give advance notice to a defendant before requesting a voluntary dismissal. *Greenlaw v. Renn*, 64 Wn. App. 499, 824 P.2d 1263 (1992). Accordingly, the court's entry of the Order of Dismissal is not a clerical error within the meaning of CR 60(a).

1. Nothing In The Record Suggests The Order Entered Did Not Convey The Court's Intent

Further, CR 60(a) is narrowly limited and only permits the trial court to correct clerical mistakes in orders by correcting language included in an order that did not convey the court's intent or supplying language that was inadvertently omitted. *Green v. Normandy Park*, 137 Wn. App. 665, 700, 151 P.3d 1038 (2007). It is not a vehicle for entering an amended order that differs from the order originally intended by the court. *Id.* The issue for purposes of CR 60(a) is determining whether an error is judicial or clerical, that is, "whether, based on the record, the judgment embodies the trial court's intention." *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990) (citing *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.2d 406, review denied, 85 Wn.2d 1012 (1975)). An order may be vacated only for purposes of changing it "to accurately reflect the court's original intent as expressed on the record *before* the original judgment was entered." 15A Wash. Prac., Handbook Civil Procedure § 70.4 (2012-2013 ed.) (citing *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002)).

Ms. Komine cites nothing in the record that indicates any intent of the trial court expressed on the record before the original order was entered contrary to the plain, unambiguous language of the order. She invites the Court to draw unsubstantiated inferences based on a lack of evidence in the record, a request that falls well outside the bounds of CR 60(a). "Whether a trial court intended that a judgment *should have a certain result* is a matter involving legal analysis and is beyond the scope

of CR 60(a). The rule is limited to situations where there is a question whether a trial court intended to enter the judgment that was actually entered.” *Presidential Estates Apartment Associates v. Barrett*, 129 Wn. 2d 320, 330, 917 P.2d 100 (1996).

Ms. Komine argues there is no evidence in the record to suggest the court intended to dismiss MetLife or was even aware of MetLife’s presence in the case. This argument turns the CR 60(a) analysis on its head. The burden under CR 60(a) is to demonstrate the intent of the court as expressed on the record prior to an order’s entry, not to draw unsubstantiated inferences about a court’s intent based on the absence of such evidence in the record. The court was presented with a stipulated order that by its plain, unambiguous language operated to dismiss the entire case with prejudice. There is nothing in the record to suggest the court intended anything other than dismissal of the entire case with prejudice when it entered the order and relief is not available to Ms. Komine under CR 60(a). Absent some showing to the contrary in the record, the court’s intent upon entry of the order is derived from the plain language of the order itself.

2. The Order Entered Was Intended To And Did Dismiss All Of Jon Komine’s Claims Including His Claims Against MetLife

Another flaw in Ms. Komine’s CR 60(a) argument is the fact that the Order of Dismissal dismissed not only her claims, but also all of her husband Jon Komine’s claims. She moved to vacate the dismissal of her claims against MetLife and now argues the trial court did not intend those

claims be included in the Order of Dismissal, but there is no argument the order was not intended to encompass all of Jon Komine's claims including his claims against MetLife. Indeed, the order granting the motion to vacate is explicitly limited by its express language to Ms. Komine's claims against MetLife and does not disturb the dismissal of Jon Komine's claims against MetLife. (CP 7-8.) It is too much to suggest that the absence of evidence in the record of the trial court's intent is proof the court intended dismissal of all of Jon Komine's claims, including his claims against MetLife, but did not intend to dismiss the claims of Ms. Komine.

3. Any Interpretation Of The Court Clerk Has No Bearing On The Legal Effect Of The Order Of Dismissal

Ms. Komine's discussion of the court clerk's interpretation of the order is equally off the mark. The order does not operate to dismiss the entire case with prejudice because of an interpretation by the court clerk; it does so by its plain language. The communication from the court clerk is relevant only in that it alerted the parties to the dismissal. The language of the order is controlling and the legal effect of the plain language in the order was dismissal of the entire case. Nothing in the record before the Court suggests the trial court intended to enter anything other than the order that was actually entered. Rule 60(a) therefore does not provide an alternate basis for upholding the trial court's decision to vacate the stipulated order.

G. Federal Law On Excusable Neglect Is Not Persuasive Or Applicable Where, As Here, Longstanding Washington Law Controls

Ms. Komine, not MetLife, misinterprets *Bar v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003), where the court looked to persuasive federal law and crafted a very limited exception under CR 60(b)(11) to Washington's general rule that attorney negligence or incompetence is insufficient grounds to justify relief from judgment against the client. The *Bar* court held that extraordinary circumstances existed under CR 60(b)(11) to vacate a dismissal where counsel's severe mental illness effectively deprived his client of representation and therefore his actions could not be imputed to her. 119 Wn. App. at 48. The court acknowledged Washington's general rule and expressly noted that in recognizing this exception to the rule, "we limit it to situations where an attorney's condition effectively deprives a diligent but unknowing client of representation." *Id.* No such extraordinary situation warrants an exception to the general rule in this case.

1. Washington Law Controls And Resort To Federal Law Is Unnecessary

As discussed in MetLife's brief and as the court in *Bar* notes, Washington courts may look to federal courts for guidance where the state rule at issue parallels the federal rule and Washington courts have not addressed the circumstances before the court. *Id.* at 47. In *Bar*, the trial court dismissed the plaintiff's case with prejudice after the plaintiff's attorney failed to comply with the trial court's order compelling discovery because his severe clinical depression had caused him to neglect his

practice. *Id.* at 44-45. While acknowledging the line of Washington cases applying the general rule, the court found those cases provided little guidance in the particular circumstances before it—where counsel’s neglect of the case and its dismissal were the result of his “severe clinical depression—not incompetence or deliberate inattention to his workload.” *Id.* at 47. Based on the lack of Washington law addressing the unique issue of whether “a lawyer’s mental illness or disability can constitute grounds for vacating a judgment under CR 60(b)” the court looked to federal cases for guidance. *Id.*

A comparably unique circumstance is not present in the instant case. Ms. Komine did not seek to vacate the dismissal based upon extraordinary circumstances under CR 60(b)(11) and she does not claim some condition or circumstance effectively deprived her of counsel. Application of CR 60(b)(11) is limited to extraordinary circumstances not covered by any other section of the rule that “involve irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *Lane*, 81 Wn. App. at 107. None is present on the facts before the Court.

Federal guidance was warranted in *Bar* because the particular, unique circumstances of that case were not addressed by Washington law. That is not the case here. Washington’s general rule applies to circumstances precisely such as these involving “error of counsel.” *Id.* at 109. In *Lane*, plaintiff’s counsel “neglected or refused to investigate possible sources of notice evidence, choosing instead to rely on an

erroneous legal theory.” *Id.* at 108. That error of counsel was an insufficient ground to set aside a judgment and the court of appeals held that the trial court erred in vacating its order and reversed. *Id.* at 109.

2. Under The Federal Law Cited, Ms. Komine Is Not Entitled To Relief

The Court need not look to federal law for guidance under the circumstances of this case, and even if it did, the test from *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 398, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), does not apply for the same reason relief is not available under CR 60(b)—because this case does not involve mistake, inadvertence or excusable neglect. If it did, and if, as in *Bar*, the circumstances were not addressed by a Washington case, then federal case law would provide persuasive guidance. Instead, this case involves a legal error by counsel—she misapprehended the legal effect of the language in the stipulation and order. There is Washington case law addressing errors of counsel and the federal cases cited by Ms. Komine provide little guidance as none involve a comparable legal error.

Excusable neglect under federal law includes negligence on the part of counsel, carelessness, and inadvertent mistake. *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000). In *Bateman*, plaintiff’s attorney failed to timely respond to a motion for summary judgment because of a trip to Nigeria for family emergency. In *Pioneer* itself, a bankruptcy creditor’s counsel failed to timely file proofs of claim with the Bankruptcy Court because “counsel was experiencing upheaval in

his law practice” and inadvertently missed the deadline. 507 U.S. at 398. These and the remaining federal cases cited by Ms. Komine involve missed filing deadlines. Such instances of procedural neglect and inadvertent mistake are readily distinguished from the substantive, legal error in the instant case. Ms. Komine cites no federal case with circumstances similar to these and no authority that consideration of the *Pioneer* factors is appropriate in such circumstances.

Ms. Komine’s dismissal was not due to excusable neglect, it was due to her legal error. Washington law addresses the circumstances of this case and the federal cases relied on by Ms. Komine do not. The trial court’s findings in the order granting the motion to vacate—on the risk of prejudice, delay, the reason for the delay, and bad faith—are the four factors from *Pioneer*. (CP 7-8.) The trial court applied the wrong legal standard when it vacated the dismissal based on the *Pioneer* test for excusable neglect. Not only does the federal case law relied on by Ms. Komine not address the circumstances present in this case, well-established Washington law does. The trial court abused its discretion in applying the wrong legal standard and in granting the motion to vacate on that basis.

II. CONCLUSION

For all of the foregoing reasons, the Court must reverse the trial court's decision and reinstate the Order of Dismissal.

Respectfully submitted this 3rd day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on February 3, 2014 I caused a true and correct copy of the foregoing document to be filed with the Washington Court of Appeals, Division I, and to be served on the following in the manner indicated:

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DATED this 3rd day of February, 2014, at Seattle, Washington.


Katherine Slack