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No.: 101726-0

Ferry County Superior Court Case No.: 17-2-00019-5
Court of Appeals Division III Case No. 387615

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

MARC R. KEITH,

Petitioner,

v.

FERRY COUNTY, WASHINGTON and ALL PERSONS
CLAIMING ANY RIGHT, TITLE OF INTEREST IN THE
REAL PROPERTY DESCRIBED HEREIN,

Respondents.

**FERRY COUNTY, WASHINGTON's ANSWER TO
MARC R. KEITH'S PETITION FOR REVIEW**

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A. IDENTITY OF RESPONDENT

Ferry County, Washington, (Respondent) respectfully requests the Petitioner's request to review the Court of Appeals decision identified in Part B be denied.

B. COURT OF APPEALS DECISION

The decision proposed for review is Keith v. Ferry Cnty., Washington, 38761-5-III, 2022 WL 17420567, at (Wash. Ct. App. Dec. 6, 2022) (Unpublished).

C. ISSUES IMPROPERLY PRESENTED

The issues presented by Petitioner are not properly subject to review by this Court. The sole issue that could have been presented for review is whether the Court of Appeals correctly ruled the Superior Court did not abuse its discretion in denying petitioner's motion to vacate judgment pursuant to CR 60(b)(4).

D. STATEMENT OF THE CASE

Originally, Petitioner Marc R. Keith ("Keith") filed suit against Respondent, Ferry County, asserting facts and various

counts that challenged the legal status of a county-maintained road “Empire Creek Road” located on Petitioner’s property. On April 7, 2020, the Superior Court entered its Order on Cross Motions for Summary Judgment, granting the County judgment as a matter of law and dismissing Keith’s complaint.

Keith appealed from that decision, which was affirmed by the Court of Appeals. Keith v. Ferry Cnty., Washington, 16 Wn. App. 2d 1094 (2021) (unpublished) (“Keith I”). In ruling for the County, the Appellate Court concluded the recorded plat that created Petitioners parcel unambiguously included the dedicated public right of way. Keith I at *4. Keith did not seek review before the Supreme Court and on May 11, 2021, the Appellate Court entered its Mandate terminating review. CP 241-42.

On November 22, 2021, Appellant filed a *pro se* motion in Superior Court seeking to vacate the order on cross motions for summary judgment pursuant to Civil Rule (“CR”) 60(b)(4). CP 259. Keith’s motion included a 20-page affidavit and 121

pages of exhibits. CP 309-450. The Superior Court ordered the County to show cause, if any, why the court should not vacate its order of April 7, 2020. The County filed its memorandum in response to order to show cause and opposing motion to vacate on December 22, 2021. CP 451.

On January 31, 2022, the Superior Court issued its Order Denying Keith's Motion to Vacate Judgment concluding, Keith failed to show by clear and convincing evidence that fraud, misrepresentation, or other misconduct by the County. In addition, Keith failed to show by clear and convincing evidence that the County prevented Keith from fully and fairly presenting his case. CP 502.

Keith appealed from the Superior Court's denial of his motion to vacate. The Appellate Court affirmed the Superior Courts' decision. Keith v. Ferry Cnty., Washington, 38761-5-III, 2022 WL 17420567 (Wash. Ct. App. Dec. 6, 2022) ("Keith II"). It is to that decision that the present petition is addressed.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

Keith's Petition does not meet the standard for review and should be denied. The applicable rule provides for review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)

The order appealed from was the Superior Court's denial of Petitioner's motion to vacate that court's prior ruling under CR 60(b)(2). Petitioner seeks review of the Court of Appeals decision affirming the Superior Court. However, the petition assigns no error to the appellate court's decision affirming denial of Petitioner's CR 60(b)(2) motion. Petitioner makes no

effort to show how the appellate court’s decision satisfies any of the requirements for review under RAP 13.4(b). Instead, Petitioner seeks review of issues that were or could have been conclusively determined in Keith I—issues the appellate court correctly declined to consider.

The vacation of a judgment is an extraordinary remedy. Dalton v. State, 130 Wn.App. 653, 665, 124 P.3d 305 (2005). Under CR 60(b)(4), the moving party must show by clear and convincing evidence that “[f]raud, misrepresentation, or other misconduct” *caused* the entry of the judgment. Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). A party's misconduct will support relief under CR 60(b)(4) only if that misconduct prevented the moving party from fully and fairly presenting his or her case. Dalton, 130 Wn.App. at 668. Misconduct that is harmless will not support a motion to vacate. 4 Karl B. Tegland, *Washington Practice: Rules Practice* § 8, at 613 (6th ed.2013).

The Superior Court denied Mr. Keith's CR 60(b) motion because he failed to satisfy the burden of showing that the County engaged in misconduct or that any alleged misconduct by the County caused judgment to be entered. An appeal from the denial of a CR 60(b) motion is not a substitute for an appeal and is limited to the propriety of *denying the motion to vacate*, not any alleged impropriety of the underlying order. In re Dependency of J.M.R., 160 Wn. App. 929, 938 n.4, 249 P.3d 193 (2011) (citing Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)). The issues presented for review by Petitioner focus on merits of the underlying case. Those issues either were, or could have been, conclusively determined in Keith I. This Court should decline to review the underlying case which is limited to denial of Petitioner's CR 60(b) motion.

Judicial denial of a motion to vacate under CR 60(b) is reviewed for a manifest abuse of discretion.

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be

overturned on appeal unless it appears that this discretion has been abused.

Matter of Guardianship of Adamec, 100 Wash.2d 166, 667 P.2d 1085 (1983) (citing Martin v. Pickering, 85 Wash.2d 241, 245, 533 P.2d 380 (1975)). The Appellate Court ruled the Superior Court did not abuse its discretion in denying the motion to vacate. For this court to accept review of that decision, Petitioner must show that one or more of the factors governing review are met. The petition fails to make that showing and review should be denied.

///

F. CONCLUSION

Petitioner fails to show (or even assert) that the appellate court's decision to affirm denial of his motion to vacate conflicts with any controlling authority or presents a significant legal question or matter of public interest. The petition should be denied.

Respectfully submitted this 28th day of March, 2023.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(c)(10), I hereby certify that the total word count of this document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks and pictorial images do not exceed 1,116 words.

/s/ Peter G. Scott

By: Peter G. Scott, WSBA No.: 31712
Attorney for Appellee, Ferry County

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 28th day of March, 2023, the undersigned caused the electronic original and true and correct copies of the foregoing Ferry County Answer to Petition for Review, to be served on the persons listed below in the manner shown:

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Postage Prepaid
_____ Legal Messenger or
Hand Delivery
_____ By Federal Express or
Overnight Mail Prepaid
X _____ By Email or the
Washington Appellate
court e-file system

Signed and Certified this 28th
Day of March, 2023

/s/ Diana Tyrrell
Scott | Law

PETER G. SCOTT, LAW OFFICES, PLLC

March 28, 2023 - 11:11 AM

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