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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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BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON  
*RB*

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## **I. INTRODUCTION**

Defendant/Appellant Robert Kanany (Kanany) sought relief under CR 60(b) in the King County Superior Court from a Default Judgment against him entered in favor of Plaintiff/Respondent Concrete Services, Inc. (Concrete Services) on its lien claim for materials it supplied for improvements on six residential lots then owned by Kanany. Following Show Cause oral arguments and an evidentiary hearing, and oral arguments on Kanany's motion to amend the ground for relief from CR 60(b) (5) solely to CR 60(b) (6) immediately following discovery of evidence on subpoena to Ticor Title Company (Ticor Title) that the Default Judgment had in fact been satisfied prior to its assignment to Defendant/Respondent Ovidio Escamilla (Escamilla), the trial court granted Kanany's motion to amend but denied relief thereunder from the Default Judgment and further assessed against him substantial attorney fees and costs under the Default Judgment, the lien statute, and CR 11.

## **II. ASSIGNMENTS OF ERROR**

Kanany filed his appeal raising issue with

errors made by the trial court in its (1) Findings Of Fact, Conclusions Of Law, And Order On Defendant Robert Kanany's Motion To Vacate Default Order And Judgment entered March 6, 2012; and (2) Supplemental Judgment Re: Default Judgment entered March 27, 2012.

**A. TRIAL COURT ERRORS**

1. The trial court erred by issuing its Findings Of Fact, Conclusions Of Law, And Order On Defendant Robert Kanany's Motion To Vacate Default Order And Judgment entered March 6, 2012. Clerk's Papers (CP) at 432-39.

2. The trial court erred by entering the Supplemental Judgment Re: Default Judgment dated March 27, 2012. CP at 498-502.

3. In particular, Kanany assigns error to each of the following Findings of Fact entered by the trial court on grounds that such are not supported by substantial competent evidence in the record, and/or are clearly erroneous:

A. Finding of Fact #1 that:

At the September 26, 2011, evidentiary hearing, the Court took testimony of witnesses Defendant Robert Kanany, Gregg Colbo,

and Bernard Dunayski. Robert Kanany's testimony was not credible. The testimony of both Gregg Colbo and Bernard Dunayski was credible.

CP at 435.<sup>1</sup>

B. Finding of Fact #2 that:

As conceded by Defendant Robert Kanany's counsel in open court, Defendant Robert Kanany was personally served with the summons and complaint. Independent from this admission, the court finds that Robert Kanany was personally served with the summons and complaint at his home on March 1, 2009, but that he told the process server, Mr. Dunayski, that his name was Kamran Kanany.

CP at 435.<sup>2</sup>

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<sup>1</sup> Gregg Colbo did not present testimony at the evidentiary hearing held on September 26, 2011, or motion hearing on October 6, 2011. See KCSC Case File Sub #78A (Minute Entry, 9/26/2011), and #85 (Witness Record, 10/6/2011). Although not believed by the trial court, Kanany testified candidly, openly, and consistently as to his recollections of the time and events surrounding the asserted personal service. CP at 89 - 92 (Declaration of Robert Kanany).

<sup>2</sup> Kanany no longer contested sufficiency of service as such issue was moot because the Default Judgment had been satisfied as set forth in Kanany's motion for leave to amend, which was the focus of the October 6, 2011 hearing. CP at 344 - 45; CP at 427. Kanany denies that he answered as "Kamran" as the substantial competent evidence shows Kanany was not at home and his half-brother, Kamran, was present at that time, and neither intended to mislead the trial court regarding such evidence and assertions. CP at 71 - 73 (Declaration of Kamran Kanany); CP at 89 - 92 (Declaration of Robert Kanany). In order to facilitate consideration of Kanany's motion to amend to solely ground relief on CR 60(b)(6), counsel did not challenge the trial court's characterization as to service of process, as such was a moot point under the substantial competent evidence in the record as the Default Judgment was in fact satisfied; and once satisfied - always satisfied, regardless as to whether or not it may have been void where  
(continued...)

C. Finding of Fact #3 that:

The Default Judgment obtained by Plaintiff Concrete Services, Inc., against Defendant Kanany in this matter was assigned to Defendant Escamilla by Concrete Services, Inc., and Concrete Services, Inc., dismissed its claims against Defendant Escamilla all in exchange for the payment of \$10,000.00 to Concrete Services, Inc.

CP at 436.<sup>3</sup>

D. Finding of Fact #4 that:

The \$10,000.00 check was paid to Concrete Services, Inc., on behalf of Defendant Escamilla by Ticor Title Company.

CP at 436.<sup>4</sup>

E. Finding of Fact #8 that:

The evidence clearly establishes that the

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<sup>2</sup>(...continued)

the remedy sought is only the release of the judgment lien.

<sup>3</sup> The Default Judgment was satisfied prior to the assignment of it by Concrete Services to Escamilla thereby negating the validity of any assignment. Concrete Services dismissed its claims against the parties, leaving only Escamilla's cross-claims against Kanany intact, because its Default Judgment had been satisfied by the payment of \$10,000.00 directly from Ticor Title to Concrete Services pursuant to its obligations under its Title Insurance Policy with Escamilla and its breach of duty thereunder to discover and report at closing the claim of lien against the property by Concrete Services. CP at 344 - 74; CP at 427 - 31.

<sup>4</sup> Ticor Title paid \$10,000.00 directly to Concrete Services under its title insurance policy with Escamilla in settlement of its lien claim against all six lots originally owned by Kanany, which satisfied the Concrete Services' Default Judgment it had against Kanany on its claim of lien leaving Concrete Services with nothing further to collect thereunder. CP at 344 - 74; CP at 427 - 31.

\$10,000.00 was not paid to satisfy the Default Judgment, but was consideration for the assignment of the Default Judgment against Defendant Robert Kanany to Defendant Escamilla and the dismissal of Concrete Services, Inc.'s, claims against Defendant Ovidio Escamilla.

CP at 436.<sup>5</sup>

F. Finding of Fact #12 that:

All of the depositions conducted on behalf of, the pleadings and papers filed on behalf of, the witnesses presented on behalf of, and the oral arguments made on behalf of Defendant Ovidio Escamilla were an essential part of the defense of the Default Judgment.

CP at 437.<sup>6</sup>

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<sup>5</sup> The substantial competent evidence in the record is that Concrete Services received the settlement payment of \$10,000.00 directly from Ticor Title prior to its purported assignment of the Default Judgment to Escamilla and subsequent dismissal of its lawsuit against the remaining parties to foreclose its claim of lien. The substantial competent evidence in the record is that Concrete Services had absolutely nothing further under its lien claim to collect against Kanany and its Default Judgment against Kanany had been satisfied in full. Concrete Services' Default Judgment against Kanany was thereby satisfied prior to its purported assignment and the purported assignment was invalid as a matter of law. Concrete Services was obligated to file and record a Satisfaction of Judgment thereby releasing the judgment lien from all of Kanany's real property. CP at 344 - 74; CP at 427 - 31.

<sup>6</sup> Absolutely none of the trial court proceedings, including the depositions, pleadings, papers, and oral arguments would have been required had Concrete Services filed a Satisfaction of Judgment as was its obligation and duty under the law upon its receipt of the \$10,000.00 payment directly from Ticor Title. Escamilla contributed to these expenditures in the drafting of and accepting the purported assignment of the Default Judgment and Concrete Services recorded a transcript of the Default Judgment in Pierce County all to the substantial detriment of Kanany. CP at 344 - 74; CP at 427 - 31.

4. Furthermore, Kanany assigns error to each of the following Conclusions of Law entered by the trial court on grounds that such are clearly erroneous, an abuse of discretion and/or manifestly unreasonable, and/or are not supported by Findings of Fact that must in turn be supported by substantial competent evidence in the record:

A. Conclusion of Law #1 that:

Defendant Kanany was validly and properly served with the summons and complaint in this matter by Plaintiff Concrete Services, Inc.

CP at 437.<sup>7</sup>

B. Conclusion of Law #2 that:

The \$10,000.00 check paid to Plaintiff Concrete Services, Inc., did not result in the satisfaction of the Default Judgment against Defendant Kanany.

CP at 437.<sup>8</sup>

C. Conclusion of Law #3 that:

Whether the check was paid by Defendant Escamilla or Ticor Title Company is of no consequence to the issue of whether or not the Default Judgment should be vacated.

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<sup>7</sup> See Paragraphs 3(A) and 3(B), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law.

<sup>8</sup> See Paragraphs 3(C), 3(D), and 3(E), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law.

CP at 437.<sup>9</sup>

D. Conclusion of Law #4 that:

The Default Judgment against Defendant Kanany was properly assigned to Defendant Escamilla by Plaintiff Concrete Services, Inc.

CP at 437.<sup>10</sup>

E. Conclusion of Law #5 that:

Defendant Kanany has failed to demonstrate by clear, cogent, and convincing evidence or by a preponderance of the evidence that the Default Judgment should be vacated pursuant to CR 60(b)(6).

CP at 438.<sup>11</sup>

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<sup>9</sup> See Paragraphs 3(C), 3(D), and 3(E) above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. Furthermore, under his motion for leave to amend, Kanany only sought relief from the Default Judgment pursuant to CR 60(b)(6) to the effect that Concrete Services must file a Satisfaction of Judgment and release the judgment lien against Kanany's real property in King and Pierce Counties. Kanany did not request that the Default Judgment be vacated, only that it was determined to be satisfied and its lien ordered released. CP at 344 - 74; CP at 427 - 31.

<sup>10</sup> See Paragraphs 3(C), 3(D), and 3(E), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. Such conclusion moreover is an error of law and is a *per se* abuse of discretion and *per se* unreasonable.

<sup>11</sup> See Paragraphs 3(C), 3(D), and 3(E), above, under Part II(A), and Paragraphs 4(C) and 4(D), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. Clearly, under his motion for leave to amend, Kanany only sought relief from the Default Judgment pursuant to CR 60(b)(6) to the effect that Concrete Services must file a Satisfaction of Judgment and release the judgment lien against Kanany's real property in King and Pierce Counties. Under his motion for relief under CR 60(b)(6), Kanany did not request that the Default Judgment be vacated, and only requested that reasonably proper relief as set forth in the foregoing. CP at (continued...)

F. Conclusion of Law #6 that:

Defendant Kanany unreasonably delayed in seeking the vacation of the Default Judgment pursuant to CR 60(b)(6).

CP at 438.<sup>12</sup>

G. Conclusion of Law #7 that:

Because the Default Judgment contained an award of attorneys' fees and costs against Defendant Kanany, Defendant Escamilla is entitled to an award of attorneys' fees and costs in relation to defending the Default Judgment, including the attorneys' fees and costs associated with all of the depositions conducted on behalf of, the pleadings and papers filed on behalf of, the witnesses presented on behalf of, and the oral arguments made on behalf of Defendant Escamilla.

CP at 438.<sup>13</sup>

H. Conclusion of Law #8 that:

In addition, Defendant Escamilla is entitled to an award of costs and attorneys' fees under CR 11. Robert Kanany lied to this court. His motion to vacate the default and default judgment was a frivolous motion without legal or factual basis. It served to waste resources of the parties, attorneys,

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<sup>11</sup>(...continued)  
344 - 74; CP at 427 - 31.

<sup>12</sup> See Paragraphs 3(C), 3(D), 3(E), and 3(F), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. Such conclusion moreover is an error of law and is a *per se* abuse of discretion and *per se* unreasonable.

<sup>13</sup> See Paragraphs 3(C), 3(D), 3(E), and 3(F), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. CP at 344 - 74; CP at 427 - 31.

and the court.

CP at 438.<sup>14</sup>

5. Kanany also assigns error to the trial court's Order as follows because such provisions are clearly erroneous, an abuse of discretion, manifestly unreasonable, and/or are not supported by Conclusions of Law which must be supported by Findings of Fact which in turn must be supported by competent substantial evidence in the record:

A. Order Paragraph #2 that:

Defendant Kanany's Motion to Vacate Default Order and judgment, as amended, is hereby DENIED.

CP at 438.<sup>15</sup>

B. Order Paragraph #3 that:

As attorneys' fees and costs were awarded against Defendant Kanany in the Default Judgment, attorneys' fees and costs are awarded to Defendant Escamilla in relation to defending the Default Judgment, including the attorneys' fees and costs associated with all of the depositions conducted on behalf of,

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<sup>14</sup> See Paragraphs 3(A), 3(B), 3(C), 3(D), 3(E), and 3(F), above, under Part II(A) for grounds of assigned error as to this Conclusion of Law. CP at 344 - 74; CP at 427 - 31.

<sup>15</sup> See Paragraphs 3(A), 3(B), 3(C), 3(D), 3(E), and 3(F), above, under Part II(A), and Paragraphs 4(A), 4(B), 4(C), 4(D), 4(E), and 4(F), above, under Part II(A) for grounds of assigned error as to this part of the Order. CP at 344 - 74; CP at 427 - 31.

the pleadings and papers filed on behalf of, the witnesses presented on behalf of, and the oral arguments made on behalf of Defendant Escamilla. Defendant Escamilla shall file a motion to quantify the amount of attorneys' fees and costs within ten days of the date of this Order is entered. The motion should be noted for at least six judicial days after it is filed. Unless otherwise ordered, the motion shall be heard without oral argument.

CP at 439.<sup>16</sup>

6. Finally, Kanany assigns error to the trial court's approval and entry of the Supplemental Judgment against Kanany dated March 28, 2012, *in toto*. CP at 489 - 90 (objection to Cost Bill); CP at 498 - 502 (Supplemental Judgment).<sup>17</sup>

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<sup>16</sup> See Paragraph 3(F), above, under Part II(A), and Paragraphs 4(G) and 4(H), above, under Part II(A) for grounds of assigned error as to this part of the Order. CP at 344 - 74; CP at 427 - 31; CP at 489 - 90.

<sup>17</sup> But for the fact that Concrete Services failed as was its legal obligation and duty to file a Satisfaction of Judgment and release the judgment lien against Kanany's real property (both in King County and also in Pierce County due to its filing a transcript of the Default Judgment in that County) upon receipt by Concrete Services of the \$ 10,000.00 check from Ticor Title, none of the trial court proceedings would have been necessary and absolutely no costs and fees would have been incurred by any of the parties nor time spent by the trial court. Moreover, Escamilla was not forthcoming and candid in repeated requests by Kanany and counsel for documents relating to the payment purportedly made to Concrete Services. Equity should hold in substantial justice and fairness that not only should the Default Judgment be Ordered Satisfied and the judgment lien be released against all of Kanany's real property in King and Pierce Counties, but Kanany should not be held responsible for any of the additional fees and costs incurred by Escamilla's counsel in this matter. CP at 344 - 74, and 427 - 31; CP at 489 - 90.

## **B. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Whether because the \$10,000.00 payment made by Ticor Title directly to Concrete Services in fact and legally satisfied its Default Judgment against Kanany on its action to Collect Amounts Owed And To Foreclose [its claim of] Lien Pursuant To RCW 60.04 at the time it was received regardless of when the check may have been cashed, the subsequent assignment of that Default Judgment was invalid as a matter of law? (Assignments of Error #1, #2, #3, #4, and #5.)
2. Whether there is any time limitation on bringing a CR 60(b)(6) motion for relief from a judgment that has been satisfied, where there is no prejudice to any party and the motion is brought promptly after the discovery of evidence that the judgment was in fact satisfied? (Assignments of Error #1, #2, #3, #4, and #5.)
3. Whether because the substantial competent evidence in the record clearly and convincingly supports the conclusion that the Default Judgment had in fact and as a matter of law been satisfied at the time of the attempted assignment thereof to Escamilla, the trial court's denial of Kanany's CR 60(b)(6) motion for relief from that Default Judgment is a clear error, manifestly unreasonable, and an abuse of discretion? (Assignments of Error #1, #2, #3, #4, and #5.)

## **III. STATEMENT OF THE CASE**

### **A. FACTUAL BACKGROUND**

Concrete Services contracted as a material supplier to provide curb, sidewalk and gutter concrete for development of a six lot plat then owned by Kanany. CP at 249 - 52. Although Kanany paid his contractor to in turn pay Concrete Services,

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such never happened. CP at 91, ¶ 11. Concrete Services timely recorded in King County a lien against all six lots comprising Kanany's residential development improved by its material and services.<sup>18</sup> During the pendency of this recorded lien, Kanany sold one of the lots to Escamilla. Title insurance covering this transaction through Ticor Title Company (Ticor) was procured and paid in part by Kanany for the closing of the sale by Statutory Warranty Deed.<sup>19</sup> However, Ticor failed to discover and report for payment the recorded lien of Concrete Services and such went unsatisfied at closing; thus continuing the lien against the 5 lots still owned by Kanany and the one lot now owned by Escamilla.<sup>20</sup>

On February 5, 2009, Concrete Services filed suit in King County Superior Court to collect the money it was due for the material and services and to foreclose its lien,<sup>21</sup> naming as Defendants, *inter*

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<sup>18</sup> CP at 9 - 11.

<sup>19</sup> CP at 276 - 77; CP at 348.

<sup>20</sup> CP at 91, ¶ 12; CP at 348.

<sup>21</sup> KCSC Case File Sub# 1. The Amended Complaint is set forth in CP at 1 - 11.

*alia*, Kanany and Escamilla as the two principal property owners of the lots encumbered by the lien.<sup>22</sup> Concrete Services served the named Defendants, and absent a timely Answer proceeded to obtain a Default Order **and** Judgment against Kanany<sup>23</sup> for the full amount of its lien in the amount of \$6,968.75 plus costs.<sup>24</sup> Escamilla timely Answered and filed a cross-claim against Kanany for damages stemming from alleged (1) breach of warranty under the Statutory Warrant Deed or duty to disclose en-

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<sup>22</sup> Ticor Title Company was not named in the original lawsuit, or in any counterclaims or third party actions.

<sup>23</sup> CP at 41 - 42 (Default Order); CP at 43 - 45 (Default Judgment). Kanany initially sought to vacate the Default Judgment against him raising an issue as to improper service of process, CP 56 - 106, as the Affidavit of Service named the person served as Kamran Kanany, his half brother. CP at 99. This contention was ultimately dropped for, *inter alia*, the reason that whether or not he was properly served was moot grounded on the issues presented in this Appeal; namely, that the Default Judgment against him had been satisfied prior to its assignment from Concrete Services to Escamilla and should be removed from the real property records as a judgment lien. CP at 344 - 374; CP at 427 - 431.

<sup>24</sup> The amount of the Default Judgment against Kanany was \$ 10,126.35 in principal, attorney fees, and costs; plus \$ 1,179.91 in pre-judgment interest. CP at 44. Concrete Services also obtained Default Orders against Defendants Primestructure, a Plainscapital Company (KCSC Case File Sub# 28, 9/4/2009) and Mortgage Electronic Registration System, Inc. (KCSC Case File Sub# 38, 4/23/2010). However, Concrete Services never moved for and no default judgment was ever entered against either of these Defendants. The only monetary judgment entered in this case was the Default Judgment against Kanany.

cumbrances; (2) intentional misrepresentation for failing to clear title; (3) negligent misrepresentation in failing to disclose and remove encumbrances from title; (4) breach of Purchase and Sale Agreement; and (6) unjust enrichment.<sup>25</sup>

After entry of Concrete Services' Default Judgment against Kanany and the filing of Escamilla's cross-claims against Kanany, Concrete Services reached agreement with Escamilla to settle its lien claim by the payment from Ticor Title directly to Concrete Services in the amount of \$10,000.<sup>26</sup>

In May 2010, Mr. **Escamilla reached a settlement with plaintiff, Concrete Services, Inc., in this matter involving the payment of \$ 10,000.00 to Concrete Services, Inc. to pay off the lien** and have it released from Mr. Escamilla's property.

CP at 133, ¶ 8 (emphasis added).

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<sup>25</sup> CP at 136 - 142. All of Escamilla's cross-claims against Kanany arise under the Statutory Warranty Deed and warranty against encumbrances and are separate and distinct from Concrete Services' claim for money owed for materials and services supplied and for the RCW 60.04 foreclosure of its lien, which was its sole claim and basis for its Default Judgment entered against Kanany. CP at 345.

<sup>26</sup> By letter dated March 3, 2009, Escamilla gave notice to his title insurer, Ticor Title, of Concrete Services' lawsuit and the outstanding lien on what was now his property. CP at 156 (Title Order # 6402221; 208 3<sup>rd</sup> Ave NW). Ticor Title responded by letter dated March 16, 2009, that "your file has been submitted to our Claims Dept. for review and analysis." CP at 178 (Title Policy No. 6402221).

***Following are the only documents appearing in the public and trial court records prior to Kanany's CR 60(b) motion regarding and relating to Concrete Services' lawsuit and the sequence of events affecting its Default Judgment against Kanany.***

On December 29, 2009, Concrete Services filed a Certified Copy of its Default Judgment against Kanany for record in Pierce County under Recording Number 200912290188. CP at 318 - 21. The result of this recording was to impose a judgment lien on all of Kanany's real property in Pierce County.

On June 18, 2010, Concrete Services and Escamilla filed in the trial court an *Assignment Of Default Judgment By Plaintiff Concrete Services, Inc. To Defendant Ovidio Escamilla* and specifically referenced therein that the assignment was of the Default Judgment against Robert Kanany dated September 4, 2009. CP at 46. This document filed with the court and signed by the parties' attorneys expressly states as fact the following:

***Concrete warrants and represents to Escamilla that Concrete has not collected upon or received any payment or satisfaction, in whole or in part, of any amount owing pursu-***

**ant to said judgment.** Concrete makes no representation or warranty, express or implied, as to the ability to collect any amount owing as to said judgment but hereby assigns, transfers and conveys all of its rights and interests, such as they may be, therein to Escamilla, **effective the date hereof.**

CP at 46 - 47 (emphasis added). The effective date of Concrete Services assignment of its Default Judgment to Escamilla was **May 20, 2010.** CP at 47. The assignment was executed by the respective attorneys for Concrete Services and for Escamilla. CP at 47.

On June 21, 2010, the trial court approved a *Stipulation And Order Of Dismissal Of All Claims Between Concrete Services, Inc., As Plaintiff, And Ovidio Escamilla, As Defendant Only.* CP at 48 - 50. As clearly written and represented by the parties' attorneys and approved by the trial court in its Order:

**[T]he parties have agreed to compromise and settle this dispute** by dismissal of all claims and counterclaims between Plaintiff, Concrete Services, Inc., and Defendant/Crossclaimant, Ovidio Escamilla only. . . . **[A]ll claims by and between Plaintiff Concrete Services, Inc. and Defendant/Crossclaimant Ovidio Escamilla only in the above-entitled action are hereby dismissed with prejudice and without costs.** The crossclaims of Ovidio

Escamilla against Robert Kanany remain at issue.

CP at 49 - 50.

On June 22, 2010, Concrete Services filed for record a *Partial Release Of Lien* in King County under Recording Number 20100622000820 thereby releasing the Escamilla property from its claim of lien.

And finally on July 27, 2010, the trial court approved and entered Concrete Services presentment of an *Order Of Dismissal Of Plaintiff's Remaining Claims Without Prejudice*. CP at 54 - 55. It is stated therein that "Plaintiff's claims herein have been resolved as to all defendants . . . [and therefore] Plaintiff's remaining claims herein be and hereby are dismissed without prejudice, and without an award of attorney's fees or costs." CP at 55.

***The following details did not emerge, notwithstanding repeated requests made by both Kanany and his counsel for Escamilla and Ticor Title to voluntarily produce documents related to what was now only an alleged payment made to Concrete Servi-***

*ces,*<sup>27</sup> *until a full production was received in answer to Kanany's subpoena duces tecum served on Ticor Title on September 6, 2011, as part of his CR 60(b) motion discovery.*<sup>28</sup>

By letter dated May 7, 2010, and VIA OVERNIGHT MAIL Ticor Title's Senior Claims Counsel delivered to Escamilla's attorney, Gregory L. Ursich, Ticor Title's check for \$ 10,000.00 as follows:

<b>Claim No.:</b>	327611
<b>Policy No.:</b>	6402221-1
<b>Insured:</b>	Ovidio Escamilla
<b>Property:</b>	208 3 <sup>rd</sup> Avenue Northwest

I have enclosed with this letter **Ticor Title Insurance Company's check number 10159689 in the amount of \$10,000 made payable to Concrete Services Incorporated for the purpose of settling the above referenced claim.** You are directed to hold the check until you receive instruction from an attorney at Fidelity National Title Group to **deliver the check to the lien claimant or its attorney.**

CP at 366 (emphasis added). A photocopy of Ticor Title's Check # 10159689 dated May 5, 2010 and made

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<sup>27</sup> Recall that the only assertion of fact made in the public and trial court records available to Kanany and counsel prior to his CR 60(b) motion was Concrete Services' flat and unmistakable representation that it had "not collected upon or received any payment or satisfaction, in whole or in part, of any amount owing pursuant to" its Default Judgment against Kanany. CP at 46 - 47.

<sup>28</sup> CP at 357 - 61; CP at 363.

payable directly to Concrete Services Incorporated is now part of the court record. CP at 367.

By letter dated May 19, 2010, Escamilla's attorney, Gregory L. Ursich, mailed to Concrete Services' attorney, Brian L. Parker, the following content and instructions related to unsigned original court documents enclosed therein:

Enclosed please find the following:

1. Stipulation and Order of Dismissal of All Claims Between Concrete Services, Inc., as Plaintiff, and Ovidio Escamilla, as Defendant Only; and
2. Assignment of Default Judgment by Plaintiff Concrete Services, Inc. to Defendant Ovidio Escamilla; and
3. Partial Release of Lien; and
4. **Settlement check for \$10,000.00 made payable to Concrete Services, Inc.**

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. Please also forward to me a conformed copy of the Default Judgment you obtained against Robert Kanany, including the version where **you recorded it against him in the Pierce County records regarding his property interests in Pierce County.**

CP at 373 - 74 (emphasis added).

Immediately upon receipt of the foregoing records from Ticor Title, Kanany moved to amend his pending CR 60(b)(5) motion to CR 60(b)(6) as his sole ground for relief from the Default Judgment.<sup>29</sup> CP at 344 - 45.

#### **B. PROCEDURAL BACKGROUND**

Upon discovery of substantial competent evidence proving that Concrete Services received payment in satisfaction of its Default Judgment against Kanany on its claim of lien prior to its assignment of the Default Judgment to Escamilla, Kanany immediately moved the trial court for leave to amend his previously filed motion to vacate the Default Judgment under CR 60(b)(5)<sup>30</sup> to a motion for relief from the Default Judgment pursuant to CR 60(b)(6) because the judgment had been satisfied.<sup>31</sup>

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<sup>29</sup> Counsel received the last production of records from Ticor Title by e-mail on September 28, 2011. CP at 369 - 70. Kanany's motion to amend to CR 60(b)(6) was immediately filed and served later on that same day. CP at 355.

<sup>30</sup> As to which the Court had held a Show Cause and evidentiary hearing and heard testimony from two witnesses regarding the dispute as to sufficiency of service of process.

<sup>31</sup> CP at 344 - 45.

The trial court granted Kanany's motion for leave to amend to CR 60(b)(6), but denied relief and furthermore imposed costs and fees that were added to the Default Judgment, which still remains intact and burdening Kanany's real property in King and Pierce Counties.<sup>32</sup> Without relief from the Default Judgment and its judgment lien, Kanany has been unable to refinance the loans on his property and had four of his five remaining lots foreclosed by Trustee's sale to Union Bank.

#### **IV. STANDARD OF REVIEW**

Relief from a default judgment is available under CR 60(b)(6) when that judgment has been satisfied, released, or discharged. Washington courts will look to federal cases interpreting federal counterparts to state court rules as persuasive authority when the rules are substantially similar.<sup>33</sup> Fed. R. Civ. P. Rule 60(b)(5) is substantially similar to Washington's CR 60(b)(6).

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<sup>32</sup> CP at 432 - 39; CP at 498 - 502.

<sup>33</sup> *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311-12, 989 P.2d 1144 (1999); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 370-71, 777 P.2d 1056 (1989).

An appellate court reviews a trial court's decision on a CR 60(b) motion for relief from judgment under the abuse of discretion standard. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). This Court reviews challenged findings of fact for substantial evidence and the conclusions of law *de novo*. *In re Marriage of Dodd*, 120 Wn. App. 638, 643, 86 P.3d 801 (2004). Substantial evidence is that which is "sufficient to persuade a rational, fair minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons, *Little*, 160 Wn.2d at 703, or its order is manifestly unreasonable. *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.

*Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Moreover, and in line with federal court decisions, it is a **per se** abuse of discretion for a trial court to misapply the law to the facts of a particular case;<sup>34</sup> i.e., "a [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (an error of law is an abuse of discretion *per se*). Accordingly, "the abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon*, 518 U.S. at 100.

And although a CR 60(b) motion is generally required to be brought within a reasonable time, *Luckett*, 98 Wn. App. at 312, similar to a CR 60(b) (5) motion to vacate a judgment that is void for insufficient service of process, "a [CR 60(b) (6)]

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<sup>34</sup> "A [trial] court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Federal Deposit Insurance Corporation v. United Pacific Insurance Company*, 152 F.3d 1266, 1272 (10th Cir. 1998).

motion is not subject to a specific time limitation, [and] such a motion could be made [at any time]." *Sunderland v. City of Philadelphia*, 575 F.2d 1089, 1090 (3rd Cir. 1978).<sup>35</sup> This is true simply because:

The only question is whether the judgment from which relief is sought has, indeed, been satisfied.

12 James Wm. Moore, et al., *Moore's Federal Practice* § 60.45 (2011).<sup>36</sup>

And finally, a trial court's reasons for imposing CR 11 or discovery sanctions should be clearly stated on the record so that meaningful review may be had on appeal. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

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<sup>35</sup> Reference in decision was to Rule 60(b)(5) of the Fed. R. Civ. P. which is substantially similar to our CR 60(b)(6).

<sup>36</sup> "It is true that a trial judge has considerable discretion in deciding motions under Rule 60(b). But a [trial] court does not have discretion to require two satisfactions [of the same judgment]." *Otos Tech Co., Ltd. v. OGK America, Inc.*, 2011 U.S. Dist. LEXIS 126537 (D.N.J. 2011). Note that "a court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as *unpublished* . . . issued on or after January 1, 2007." Federal Rules of Appellate Procedure, Rule 32.1(a) (2011). Similarly, "[t]he existence of a meritorious defense simply is not a relevant consideration when relief is sought on the ground that the judgment has been satisfied nor is the timing of the motion particularly relevant[; as] once the judgment has been satisfied, relief should be available at any time." *Rohner Distributors v. Pantona*, 1999 WL 195663, \*6 (Ohio App. 1999, Rocco, J., concurring). See Ohio Supreme Court Rule 4 (2002).

## **V. ARGUMENT**

### **SUMMARY**

On September 4, 2009 the trial court entered a Default Judgment in this action against Kanany, as judgment debtor, and solely in favor of Concrete Services, as judgment creditor, in the amount of \$6,968.75 plus costs. Concrete Services' claims against Kanany were for moneys owed under its construction contract providing improvements to Kanany's six residential lot plat and to foreclose on its lien claim against the lots then owned by Kanany. The subsequent sale of one of Kanany's lots to Escamilla was insured by Ticor Title, which missed the properly recorded claim of lien and was pecuniarily liable for such omission. Escamilla filed a claim on his title insurance policy with Ticor Title, which subsequently settled with Concrete Services by direct payment to it of \$ 10,000. The settlement included Concrete Services' release of its lien claim against the Escamilla property; the dismissal of Concrete Services' lawsuit against Escamilla with prejudice but saving Escamilla's crossclaims against Kanany for breach of warranties

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under his Statutory Warranty Deed by which Kanany conveyed the lot to Escamilla; and the assignment of Concrete Services' Default Judgment against Kanany to Escamilla.

Ticor Title's check for \$ 10,000.00 was received by Concrete Services' attorney in the same envelope and at the same time that he received the foregoing unsigned instruments. Findings of Fact # 6 and # 7. CP at 436. This letter and its contents were mailed by Escamilla's attorney, Gregory Ursich, on May 19, 2010, and received by Concrete Services' attorney, Brian Parker, on May 20, 2010. Mr Parker retained Ticor Title's check and signed and dated, *inter alia*, the Assignment of Default Judgment for return to Mr Ursich as instructed. CP at 46 - 47; CP at 429. However, the assignment was invalid as a matter of law because upon the receipt of Ticor Title's check in the amount of \$ 10,000.00 payable directly to Concrete Services, its Default Judgment against Kanany was thereby satisfied and Concrete Services, as judgment creditor, had nothing left under its Default Judgment to assign.

Because Concrete Services' Default Judgment

had been satisfied by Ticor Title's payment to it of \$ 10,000.00, Concrete Services was obligated to file and record a Satisfaction of Judgment and release the judgment liens against all of Kanany's real property in both King and Pierce Counties.<sup>37</sup> Escamilla's cross-claims for breach of warranties under the Statutory Warranty Deed all remain intact and subject to further litigation; and it is to these claims of Escamilla, its insured, against Kanany that Ticor Title is now subrogated pursuant to its Policy of Title Insurance.

Because the substantial competent evidence is clear and convincing that Concrete Services' Default Judgment against Kanany has been satisfied and the attempted Assignment thereof was invalid, the trial court committed an error of law, a *per se* abuse of discretion and unreasonable decision, in denying Kanany's CR 60(b)(6) motion for relief.

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<sup>37</sup> RCW 4.56.100 provides that "when any judgment for the payment of money only shall have been paid or satisfied, the clerk of the court in which such judgment was rendered shall note upon the record in the execution docket satisfaction thereof giving the date of such satisfaction upon . . . the filing with such clerk a satisfaction entitled in such action and identifying the same executed by the judgment creditor or his or her attorney of record in such action or his or her assignee acknowledged as deeds are acknowledged."

**LEGAL DISCUSSION AND ARGUMENT**

**A. CONCRETE SERVICES' DEFAULT JUDGMENT AGAINST  
KANANY ENTERED ON SEPTEMBER 4, 2009 HAS  
BEEN PAID AND FULLY SATISFIED**

A judgment is satisfied when it has been paid.

RCW 4.56.100. By definition, satisfaction is:

The discharge of an obligation by paying a party what is due him . . . or what is awarded to him, by the judgment of a court . . . [and] a judgment is satisfied by the payment of the amount due to the party who has recovered such judgment.

Black's Law Dictionary, at p. 1204 (5th ed. 1979).

Ticor Title paid \$ 10,000.00 directly to Concrete Services "to compromise and settle this dispute," CP at 49, between Concrete Services and Escamilla, and "for the purpose of settling the above referenced claim," CP at 366, that Escamilla had against Ticor Title under its Policy of Title Insurance arising from its missing Concrete Services' claim of lien against Kanany's property stemming from construction improvements made to the residential lots, including that one now owned by Escamilla. And by what the substantial competent evidence clearly proves is that Concrete Services entered into a settlement by accord and satisfaction, by

which the claim underlying its Default Judgment against Kanany was in fact paid and satisfied in full upon payment directly to it of the \$10,000 from Ticor Title Company. That Concrete Services accepted such payment from Ticor Title as full satisfaction of its Default Judgment against Kanany is clearly evidenced by (1) its dismissal of all claims against Escamilla with prejudice but leaving Escamilla's cross-claims against Kanany intact; (2) the dismissal of its claims against all other parties; (3) its obtaining Default Orders against the two other named Defendants but never reducing such to judgment; (4) the release of its lien from the Escamilla property; and finally, (5) the Assignment of its Default Judgment against Kanany, and all of its rights and interests thereunder, to Escamilla. Clearly, with the foregoing actions taken, Concrete Services had nothing left in its arsenal upon which to collect anything further from Kanany or any other named Defendant in its lawsuit. The substantial competent evidence is clear and convincing that Concrete Services accepted Ticor Title's \$ 10,000 payment as full satisfaction of

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its claims under its lawsuit and its Default Judgment against Kanany.

It is not subject to good faith dispute or argument, and is clearly and convincingly supported by substantial competent evidence in the record, that the claims that Concrete Services had against Kanany, as were solely included in its Default Judgment, have been paid and fully satisfied. The controlling question now is exactly when was Concrete Services' Default Judgment against Kanany satisfied?

**B. PAYMENT BY CHECK IS LEGALLY DEEMED MADE ON THE DATE OF ITS DELIVERY**

It is a well-established principle of law, and one which directly applies to our case, that:

Since a check is not considered absolute payment until it is honored, if an uncertified check is honored and paid on presentment, **the date of the payment for the underlying obligation relates back to the date of the delivery of the check.**

60 Am. Jur. 2d *Payment* § 11, at p. 719 (2003, emphasis added).<sup>38</sup> See also *Scalise v. American Emp-*

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<sup>38</sup> To the same effect is 70 C.J.S. *Payment* § 18, at p. 22 (1987) ("where a check delivered to a creditor, although without any agreement or consent on his part to receive it as  
(continued...)

*loyers Insurance Company*, 789 A.2d 1066, 1071 (Conn. App. 2002); *Gudenau v. Bierria*, 868 P.2d 907, 911 (Alaska 1994); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 909 (3rd Cir. 1994); *Consolidated Freightways v. The Industrial Commission*, 269 N.E.2d 291, 293-94 (Ill. 1971); *Duke v. Sun Oil Co.*, 320 F.2d 853, 861 (5th Cir. 1963).

Moreover, it makes no difference whatsoever that a delivered check is held onto for a period of time before presenting it to a bank.

[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 of Philadelphia, Inc. v. Koschitzki*, 989 F.2d 692, 694 (3rd Cir. 1993). See also *Sca-lise*, 789 A.2d at 1069-71 (payment by check relates

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<sup>38</sup>(...continued)  
absolute payment, is in fact paid in due course, the debt is discharged *pro tanto*, as of the time at which the check was received"). There is also persuasive authority that "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 date of the check." *Staff Builders of Philadelphia, Inc. v. Koschitzki*, 989 F.2d 692, 695 (3d Cir. 1993). Ticor Title's \$10,000 check payable to Concrete Services was in fact dated May 5, 2010. CP at 367.

to date of receipt, not to when the check cleared); *Regents of University of New Mexico v. Lacey*, 764 P.2d 873, 875 (N.M. 1988) (payment is made upon delivery of check and not upon its deposit).

Washington law is *in accord* with the general rule that conditional payment applies to checks and that when honored upon presentment the date of payment relates back to the date of delivery.

[If] an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken [and the check is honored upon presentment].

RCW 62A.3-310(b). See also *Long v. Cuttle Const. Co.*, 70 Cal. Rptr. 2d 698, 700 (Cal. Ct. App. 1998) (UCC supports payment as of date of delivery). The trial court's findings and conclusions otherwise are an error of law, abuse of discretion, and manifestly unreasonable. CP at 436; CP at 437 - 38.

**C. BECAUSE CONCRETE SERVICES' DEFAULT JUDGMENT AGAINST KANANY WAS PAID AND FULLY SATISFIED ON ITS DATE OF DELIVERY, MAY 20, 2010, NO RIGHTS AND INTERESTS THEREUNDER REMAINED TO BE ASSIGNED AS A MATTER OF LAW**

Concrete Services was paid \$ 10,000.00 on the date its counsel received Ticor Title's check in

the mail; namely, on May 20, 2010.<sup>39</sup> Although paid by Ticor Title, this payment was nevertheless clearly an accord and satisfaction of all of Concrete Services' claims that were the basis for its Default Judgment against Kanany.<sup>40</sup> And because its claims against Kanany had been paid and fully satisfied, Concrete Services was thereafter barred from enforcing or otherwise attempting any further recovery on its Default Judgment from Kanany.

Indeed, it is a basic principle of damages -- tort and contract -- that there shall be no double recovery for the same injury.

*Public Employees Mutual Insurance Company v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822, review denied, 116 Wn.2d 1031 (1991). And as a direct consequence of this *one satisfaction rule* any attempt to assign a judgment that has been satisfied is invalid as a

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<sup>39</sup> That Ticor Title's check was subsequently honored upon presentment is clearly supported by the substantial competent evidence as Concrete Services subsequently proceeded to dismiss all of its claims against all Defendants. CP at 49 - 50; CP at 54 - 55. Obviously, it would not have done so had Ticor Title's check been dishonored. Moreover, in answer to Kanany's subpoena Ticor Title produced no further documents related to its payment made to Concrete Services.

<sup>40</sup> Again, as a result of its receipt of \$ 10,000.00 Concrete Services proceeded to not only divest itself totally of all rights and interests in its claims under its lawsuit against Kanany and others, but also as to the Default Judgment itself when it purported to assign it to Escamilla *in toto*.

matter of law.<sup>41</sup>

Under the "one satisfaction" rule, the judgment creditor can receive only one satisfaction of a debt. Thus, once the judgment creditor has received satisfaction on his or her judgment, he or she has nothing to assign, and the assignee would receive nothing by the transfer.

47 Am. Jur. 2d *Judgments* § 811, at p. 387 (2006).<sup>42</sup>

At the time Concrete Services assigned its Default Judgment to Escamilla on May 20, 2010, its claims against Kanany had already been paid and fully satisfied. As a result, Concrete Services

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<sup>41</sup> "An assignee steps into the shoes of the assignor, and has all the rights of the assignor," *Jordan v. Hartford Accident and Indemnity Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993), "and cannot recover more than the assignor could recover." *Pain Diagnostics and Rehabilitation Assoc. v. Brockman*, 97 Wn. App. 691, 699, 988 P.2d 972 (1999). See also 6A C.J.S. *Assignments* § 110, at pp. 505-07 (2004).

<sup>42</sup> And furthermore in an analogous context, "a joint judgment debtor who pays the entire principal and interest due on judgment extinguishes the judgment, and it is not in the power of the parties to the transaction, by any arrangement between them, to keep the judgment alive for the benefit of the party making the payment. A subsequent assignment of the judgment to the co-obligor or joint debtor who pays the judgment is a nullity, and the only remedy of the paying debtor is to commence a separate action against his or her co-debtor for contribution." *Id.* Escamilla is liable to Concrete Services for the same injury as is Kanany by reason of its claim of lien against Escamilla's property that could be foreclosed to secure payment of its judgment against Kanany. But in lieu of a separate action for contribution, in our case Escamilla commenced an action against Kanany by cross-claim seeking damages on his breach of warranty under Statutory Warranty Deed claims, as to which Ticor Title is now subrogated to the extent of its \$ 10,000.00 payment to Concrete Services under its Policy of Title Insurance with Escamilla.

could itself recover no more from Kanany and thus there were no rights and interests left in its Default Judgment to assign to anyone. The case of *Strong Memorial Hospital v. Almac Building Maintenance*, 470 N.Y.S.2d 542 (N.Y. City Ct. 1983) is illustrative. In *Strong* an underlying judgment on the hospital's claim against Scott was satisfied when the hospital got a judgment against Scott's employer for wrongful refusal of garnishment and it was paid. The hospital's attempted subsequent assignment of its initial judgment to Scott's employer to collect against Scott was held by the court to be invalid.

An assignment of a judgment is, of course, proper in theory. . . . However, an assignment of a judgment is the transfer of a *present right* to the judgment. . . . When Strong purported to transfer its right to a judgment against Scott, it had no such right; it had received the debt in full. The recovery extinguished any claims Strong had against Scott. The creditor is entitled to but one complete satisfaction of the debt and to the extent that such a judgment has been satisfied the right to a further recovery is barred. . . . At the time of the assignment, Strong had no claim, therefore, no right to assign.

*Strong Memorial Hospital*, 470 N.Y.S.2d at 544. The court ruled that because the judgment had been sat-

isfied at the time of its assignment, "it was an improper assignment and must be disallowed." *Id.*

To the same effect is the analogous case of *Charles P. Young Company v. Anaya*, 891 P.2d 1203 (N.M. 1995). In this case, members of an association were found liable for an unpaid debt to a printer. Several of the members sued their law firm for legal malpractice and received a judgment to compensate them for the money owed the printing company. The printer collected on a writ of garnishment against the law firm for the malpractice judgment, which was satisfied. The printer then assigned its judgment for the unpaid debt to the several members of the association who had sued the law firm. The court held that because the judgment had been satisfied at the time it was assigned, the assignment was invalid.

Payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment [whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment], and the defendant paying cannot take an assignment of it, or be subrogated to the rights of the creditor as against his co-defendant, or keep the judgment alive in any

manner or for any purpose.

*Charles P. Young Co.*, 891 P.2d at 1205.

Accordingly, because Concrete Services' Default Judgment against Kanany had been paid and fully satisfied at the time it was assigned to Escamilla, the assignment was invalid as a matter of law and the purported assignment was a nullity.

It was therefore a clear error of law<sup>43</sup> and a *per se* abuse of discretion and manifestly unreasonable for the trial court to conclude as it did that (1) the \$ 10,000.00 check paid to Concrete Services did not result in the satisfaction of the Default Judgment against Kanany, Conclusion of Law #2, CP at 437; (2) the check paid by Ticor Title is of no consequence to the issue of whether or not relief from the Default Judgment should be granted, Conclusion of Law #3, CP at 437;<sup>44</sup> (3) the Default

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<sup>43</sup> The applicable and dispositive rule of law is succinctly stated that "a judgment once fully paid off and satisfied is not thereafter capable of assignment." 50 C.J.S. *Judgment* § 617, at p. 168 (1997).

<sup>44</sup> By this Conclusion of Law, the trial court committed a clear error of law by abrogating the "one satisfaction rule;" to wit, "a person can sue any number of parties, and obtain a judgment against any one, or several of them, but can gain but one satisfaction . . . [as] a claimant is only entitled to one  
(continued...)

Judgment against Kanany was properly assigned to Escamilla by Concrete Services, Conclusion of Law #4, CP at 437; and (5) Kanany has failed by clear, cogent and convincing evidence or a preponderance of the evidence that relief from the Default Judgment should be granted, Conclusion of Law #5, CP at 438.<sup>45</sup>

**D. THE APPROPRIATE RELIEF FROM A JUDGMENT THAT HAS BEEN SATISFIED IS FOR THE COURT TO ORDER THE JUDGMENT CREDITOR TO FILE A SATISFACTION OF JUDGMENT AND TO RELEASE THE JUDGMENT LIENS AGAINST THE JUDGMENT DEBTOR'S PROPERTY**

In his CR 60(b)(6) motion, all Kanany requested as relief from the trial court is an Order directing Concrete Services, and as appropriate Escamilla, to file and record a Satisfaction of Judgment, RCW 4.56.100, as should have been done long

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<sup>44</sup>(...continued)

payment of its loss and that an injured party should not be allowed to recover more than once for the same wrong." 47 Am. Jur. 2d *Judgments* § 808, at p. 385 (2006).

<sup>45</sup> Moreover, "a satisfaction of judgment bars any further effort to alter or amend the final judgment." 47 Am. Jur. 2d *Judgments* § 806, at p. 384 (2006). And "since 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." *Id.* Because the Default Judgment has been satisfied, it is clear error of law for the trial court to add any further fees and costs to that Judgment by way of Supplemental Judgment. CP at 498 - 502.

ago, and release the judgment lien that yet remains and unjustly encumbers Kanany's real property in both King and Pierce Counties. CP at 351.

Where a judgment creditor has received actual payment of the judgment or any equivalent therefor, or the obligation of the judgment is otherwise discharged, but he or she refuses to acknowledge or enter satisfaction, the court having control of the judgment may compel him or her to satisfy it, or may order satisfaction to be entered officially. Such action can be based only on matter arising subsequent to the judgment . . . . Courts have inherent power to entertain an action to determine whether a judgment has been carried out and satisfied. The duty to satisfy of record a judgment or decree, in full performance by the party bound thereby, follows as a necessary incident of the power of the court to enforce its orders and prevent abuse of its process, and, therefore, in ordering satisfaction on an application therefor, the court acts judicially.

50 C.J.S. *Judgment* § 687, at p. 225 (1997).

Kanany's CR 60(b)(6) motion did not ask the trial court to vacate the Default Judgment, as such is a moot point because it has been satisfied.<sup>46</sup> It was therefore clear error of law and a *per se* abuse of discretion and manifestly unreasonable, and moreover unduly prejudicial, for the trial court to

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<sup>46</sup> Because "a court cannot rescind or annul a judgment therefor paid by one of several solidary judgment debtors." 49 C.J.S. *Judgments* § 451, at p. 615 (1997).

style his CR 60(b)(6) motion as one to vacate the Default Judgment. Conclusion of Law #5, CP at 438; Conclusion of Law #6, CP at 438; Conclusion of Law #8, CP at 438; and Order Paragraph #2, CP at 438.

**E. KANANY'S CR 60(b)(6) MOTION FOR RELIEF FROM THE DEFAULT JUDGMENT ON GROUNDS THAT IT HAS BEEN SATISFIED WAS TIMELY BROUGHT BEFORE THE COURT**

A CR 60(b) motion for relief must generally be brought in a reasonable time, and "what constitutes a reasonable time depends on the facts and circumstances of each case." *Lockett v. Boeing Company*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999).<sup>47</sup> Considerations as to timeliness include any prejudice to the nonmoving party due to the delay and whether the moving party has good reasons for failing to take appropriate action sooner. *Id.*

Here, there is absolutely no prejudice to either Concrete Services, as it has been paid and fully satisfied on its claims, or Escamilla by now ordering that the Default Judgment is satisfied,

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<sup>47</sup> The one notable exception thus far adopted by Washington courts is a CR 60(b)(5) motion to vacate a judgment because of insufficiency of process and lack of personal jurisdiction, thus rendering any judgment void *ab initio*. *Allstate Insurance v. Khani*, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994).

that the attempted Assignment of Default Judgment is invalid and a legal nullity, and that the judgment liens must be released from Kanany's properties in King and Pierce Counties. First, under the purported Assignment of Default Judgment, Escamilla has never executed thereon and reduced it to money that he must now pay back. Second, Escamilla's cross-claims against Kanany seeking damages for breach of warranties under the Statutory Warranty Deed are still intact, properly served on Kanany, and fully capable of being litigated in the trial court. And lastly, Ticor Title's subrogation rights are still intact and it remains subrogated to Escamilla's cross-claims against Kanany to the extent of its \$ 10,000.00 payment made directly to Concrete Services pursuant to its Policy of Title Insurance issued to Escamilla for the lot he purchased from Kanany and that was subject to foreclosure on the claim of lien by Concrete Services, paid and settled by accord and satisfaction.<sup>48</sup>

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<sup>48</sup> "In case of a claim under this policy, the Company [Ticor Title] shall have the option . . . to pay or otherwise settle with other parties for or in the name of an Insured Claimant  
(continued...)

Whenever the Company [Ticor Title] shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant [Escamilla] in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company.

Ticor Title Insurance Company, *Owner's Policy of Title Insurance*, Conditions ¶ 13(a) "Rights of Recovery Upon Payment Or Settlement" (2006).

Delay in bringing the CR 60(b)(6) motion for relief was due entirely to Concrete Services failure to acknowledge payment and full satisfaction of its Default Judgment and its duty to then file and record a Satisfaction of Judgment and release the judgment lien from Kanany's properties in King and Pierce Counties. Because the public and court records state that Concrete Services represented as fact that it "has not collected upon or received any payment or satisfaction, in whole or in part, of any amount owing pursuant to said judgment," CP

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<sup>48</sup>(...continued)  
[Escamilla] any claim insured against under this policy." Ticor Title Insurance Company, *Owner's Policy of Title Insurance*, Conditions ¶ 7(b)(i) "Options To Pay Or Otherwise Settle Claims" (2006).

at 46 - 47, Kanany reasonably believed this assertion of fact made by counsel for the public record and to the court was true; however, it proved not to be as evidenced by the production of documents from Ticor Title in answer to Kanany's subpoena made during the CR 60(b) discovery process. Immediately upon his receipt of the Ticor Title file documents showing by substantial competent evidence that the Default Judgment had in fact been paid and fully satisfied at the time the Assignment thereof was made, Kanany filed his motion to amend and proceeded solely for relief from the Default Judgment under and pursuant to CR 60(b)(6).<sup>49</sup> If anyone suf-

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<sup>49</sup> As there is an absolute paucity of appellate court decisions regarding the timeliness issue in the specific context of a CR 60(b)(6) motion for relief from a judgment that has been satisfied, the Court should remain mindful that CR 60(b) relief from judgments is an equitable remedy, and equity should be the focal point of the Court's consideration of the facts and circumstances surrounding the CR 60(b) motion. *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 599-601 (5th Cir. 1980) ("we recognize that Rule 60(b) is to be construed liberally to do substantial justice"); *BUC International Corp. v. International Yacht Council Limited*, 517 F.3d 1271, 1274-76 (11th Cir. 2008). Because there is no specific time limitation imposed for bringing a motion for relief from a judgment that has been satisfied, so long as the moving party has acted with "relative alacrity" in seeking relief, the motion is timely made -- and more than a year after the judgment was entered for bringing a motion for relief is timely under the circumstances. *The Travelers Indemnity Company v. United States*, 81 Fed. Cl. 508, 510, 2008 U.S. Claims LEXIS 97 (2008).

ferred prejudice in this matter, it was Kanany by Concrete Services' abject failure and duty to acknowledge the payment received and full satisfaction of its Default Judgment, and the substantial pecuniary damages suffered by him by the continuing lien of the Default Judgment against his properties resulting in bank foreclosures on four of his remaining five lots because of an inability to refinance with the judgment lien still in force.

Furthermore, should there even be a reasonable time limitation imposed on CR 60(b)(6) motions for relief where the underlying judgment has in fact been satisfied? The answer of those courts which and scholars who have specifically addressed this issue respond with a resounding "No".

Moreover, judgments that are void or have been previously satisfied may be attacked at anytime on motion of a party.

*Gara, Challenging the Finality of Tax Court Judgments: When Is Final Not Really Final?*, 20 Akron Tax J. 35, 43 (2005). To the same effect is the corollary that "in most instances [considering a motion for relief under Fed. R. Civ. P. 60(b)(5)], the only question is whether the judgment from

which relief is sought has, indeed, been satisfied." 12-60 *Moore's Federal Practice - Civil* § 60.45 (2012).<sup>50</sup> Courts considering this same issue have come to the same conclusion; namely, whether or not the judgment has in fact been satisfied should be dispositive, regardless of the time lapse in bringing a motion for relief under CR 60(b). See, e.g., *Sunderland v. City of Philadelphia*, 575 F.2d 1089, 1090 (3rd Cir. 1978) ("a Rule 60(b)(5) motion is not subject to a specific time limitation, [and] such a motion could be made [at any time]"); *Federal Deposit Insurance Corporation v. United Pacific Insurance Company*, 152 F.3d 1266, 1275 (10th Cir. 1998) ("a district court does not have discretion to require two satisfactions [so] that when there is practically conclusive evidence that judgment has been satisfied, judgment should be set aside"); *Otos Tech Co., Ltd. v. OGK America, Inc.*, 2011 U.S. Dist. LEXIS 126537, \*4 (D.N.J. 2011) ("the only question is whether the judgment from which relief is sought has, indeed, been sat-

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<sup>50</sup> Recall that Fed. R. Civ. P. Rule 60(b)(5) is the same as Washington's CR 60(b)(6).

isfied"); *Rohner Distributors v. Pantona*, 1999 WL 195663, \*6 (Ohio App. 1999, Rocco, J., concurring) (the timing of a motion for relief from a judgment that has been satisfied is not particularly relevant, because "once the judgment has been satisfied, relief should be available at any time").

It was therefore clear error of law and a *per se* abuse of discretion and manifestly unreasonable for the trial court to deny Kanany's motion for relief under CR 60(b)(6) on the ground that, without any analysis of the circumstances except as to dates, the motion was not brought in a reasonable time. Conclusion of Law #6, CP at 438.

**F. BECAUSE KANANY'S CR 60(b)(6) MOTION FOR RELIEF WAS MERITORIOUS AND BROUGHT IMMEDIATELY UPON DISCOVERY OF EVIDENCE THAT THE DEFAULT JUDGMENT HAD IN FACT BEEN SATISFIED CONTRARY TO THE ASSERTIONS IN THE PUBLIC AND COURT RECORDS MADE BY CONCRETE SERVICES, IT WAS AN ABUSE OF DISCRETION, UNREASONABLE AND UNJUST FOR THE TRIAL COURT TO IMPOSE SUBSTANTIAL FEES AND COSTS ON KANANY**

The trial court erroneously imposed all of the attorney fees and costs incurred in this CR 60(b) proceeding by Escamilla solely on Kanany, and abused its discretion in so doing without a fair and impartial assessment of all the circumstances

comprising this matter.<sup>51</sup> The Court should be mindful that but for Concrete Services, and subsequently Escamilla's, actions in failing to acknowledge payment and full satisfaction of the Default Judgment thereby continuing the patently unjust judgment lien on all of Kanany's property leading to foreclosures thereof, the entire CR 60(b) motion proceedings would not have been necessary. The Court should take into consideration the foregoing in determining whether Kanany should in substantial justice and equity be compelled to pay any or only a significantly reduced part of Escamilla's attorney fees and costs as a judgment<sup>52</sup> or under CR 11.

## **VI. CONCLUSIONS**

Substantial competent evidence is in the record to prove clearly and convincingly that Concrete Services' Default Judgment against Kanany was paid and fully satisfied at the time of its at-

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<sup>51</sup> See challenged Finding of Fact #12, CP at 437; Conclusion of Law #7, CP at 438; Conclusion of Law #8, CP at 438; Order Paragraph #3, CP at 439; and Supplemental Judgment, CP at 498 - 502.

<sup>52</sup> Because the Default Judgment has been satisfied, it is no longer subject to modification or supplement by the trial court. If any fees and costs are to be assessed against Kanany, it must be done by separate judgment.

tempted assignment to Escamilla. Such assignment was a nullity and the Default Judgment must be declared satisfied and the liens against Kanany's properties be released. The trial court's decision to deny Kanany's CR 60(b)(6) motion for relief was a clear error of law, an abuse of discretion, manifestly unreasonable, and based on untenable grounds and reasons under the specific facts and circumstances of this case.

This Court should vacate the trial court's decision and remand this matter back to it with instructions to grant Kanany the CR 60(b)(6) relief from the Default Judgment he has requested.

Dated this 11<sup>th</sup> day of June, 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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DECLARATION OF SERVICE

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RHYS A. STERLING, P.E., J.D.  
By: Rhys A. Sterling, #13846  
Attorney for Appellant Robert Kanany  
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2012 JUN 11 AM 11:40

COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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 June 11, 2012, I served on the other parties in this action, through their respective counsel of record, a copy of the BRIEF OF APPELLANT and this DECLARATION OF SERVICE filed in this matter, by delivering them personally to counsel, or to his authorized representative, as follows:

Gregory L. Ursich  
Mark S. Leen  
Inslee, Best, Doezie & Ryder, PS  
Symetra Financial Center, Suite 1900  
777 - 108th Avenue N.E.  
Bellevue, Washington 98009-9016

Attorneys for Respondent Ovidio Escamilla

DECLARATION OF SERVICE  
-- PAGE 1 OF 2

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Attorney for Respondent Concrete Services

David R. Riley  
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2001 Western Ave., Suite 400  
Seattle, Washington 98121

Attorney for Defendant Frontier Bank

4. On June 11, 2012, I filed in the Court of Appeals, Division I the original and one (1) copy of the BRIEF OF APPELLANT 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:**

June 11, 2012  
DATE

  
RHYS A. STERLING  
(WRITTEN) WSBA # 13846

Hobart, WA  
PLACE OF SIGNATURE

Rhys A. Sterling  
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June 11, 2012

Richard D. Johnson  
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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  
**BRIEF OF APPELLANT AND DECLARATION OF SERVICE**

Dear Mr. Johnson:

Pursuant to RAP 10.2(a), 10.2(h), and 10.4(a)(1), enclosed herewith are (1) the original and one copy of the BRIEF OF APPELLANT, 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

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