

NO. 36891-9-II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KAREN KNOUD, Appellant

v.

GREGGORY JOHNSON, Respondent

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming
Pierce County Superior Court Cause No. 05-2-10081-3

BRIEF OF APPELLANT

By
Barbara Corey
Attorney for Appellant
WSB #11778

901 South I, Suite 201
Tacoma, WA 98402
(253) 779-0844

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A. ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it denied the defendant's motion for relief under CR 60 when she presented a prima facie case for relief under CR 60(b)(2), (4)?

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court fail to apply the correct legal standard when ruling on the defendant's motion to vacate judgment?

2. Did the trial court err when it failed to decide whether Knoud had established a prima case that the plaintiffs' claims were fraudulent and that such fraud required vacation of judgment?

3.. Did the trial court err when it failed to decide whether Knoud had established a prima case that the proceedings were held despite her lack of mental soundness and whether that condition was not fully known to the trial court?

C. STATEMENT OF THE CASE.

1. Procedure.

Greggory Johnson, plaintiff below, sued Karen Knoud (aka Karen Stonak) in Pierce County Superior Court case No. 05-2-10081-3 to quiet title on Lot 9, South Ridge, according to the Plat thereof, recorded June 13, 1990, under recording number 9006160169 in Pierce County Washington.

CP 306. Johnson contended that he had executed to Knoud a deed of trust recorded under the Pierce County Auditor's No. 200301271163 on January 27, 2003, to secure payment to Knoud of \$25,500. *Id.*

Johnson contended that he had fully paid to Knoud all money owed to her and that she had refused to execute a reconveyance of the deed of trust to Johnson. *Id.*

Trial was scheduled for July 20, 2006. At that time, Knoud was unable to attend the trial as she was being held on a no-bail hold in the Pierce County Jail and was awaiting a competency evaluation at Western State Hospital. SCP 1¹. Knoud has a history of mental health problems and had been appointed a guardian ad litem in 1999 and then a durable power of attorney had been vested in her sister, Rita Thompson. CP 45-70.

Despite knowledge of Knoud's inability and incapacity to defend, the trial court commenced the trial on July 20, 2006. Rita Thompson, Knoud's sister, appeared and asked the court to set the matter over because Knoud was unavailable. RP 7/20/2006 3. The court declined to hear from Thompson because she was not licensed to practice law. *Id.* The court affirmed its

¹ Supplemental Clerk's Paper 1 is the letter from Attorney Alena Ciecko, dated and filed on July 19, 2006. Appendix A.

knowledge that Knoud was at Western State Hospital for a competency evaluation and declined to continue the proceedings. RP 7/20/06 5, 7-8, 8.

The court granted a default judgment in favor of Johnson, noting:

The record should reflect that Ms. Knoud did not appear. As indicated, she's at Western State Hospital being evaluated for competency in another matter in district court, a criminal matter. Her sister is here from eastern Washington and has indicated in court that she wanted to speak on her behalf, and has indicated they wanted the matter continued because Ms. Knoud is where she is. And I think it's appropriate for the court to proceed as I have proceeded, but the record will reflect the circumstances of this hearing. RP 7/20/06 20.

When Rita Thompson informed the court that Knoud had wanted retain an attorney to represent her at trial, the court observed that Knoud's last attorney had left the case "about 90 days" ago and that she had had inadequate time to find someone to represent her. RP 7/20/06 21.

The trial court thus found for the plaintiff and entered findings of fact and conclusions of law on July 31, 2006. CP 29- 37. Despite having notice that Knoud was in the Pierce County Jail awaiting transfer to Western State Hospital for a competency evaluation, the trial court found that she had been served with personal process, had filed an answer to the complaint, and then had failed to appear for trial. CP 29-37 (Findings of Fact – Jurisdiction, nos. 1.2, 1.4)

On July 31, 2007, Knoud timely filed a motion pursuant to CR 60(b) for an order vacating the judgment and order to quiet title entered against her on July 31, 2007. CP 45-70.

That matter was argued on September 21, 2007. Knoud's attorney asked for relief because there was a prima facie case that Knoud had lacked mental capacity at the time the deed of trust was executed and also at trial as well as that Johnson had forged the signature of Rita Thompson. RP 9/21/07 4-5.

He noted that due to her long term mental health problems, Knoud years before had appointed her sister, Rita Thompson, as her Attorney-in-Fact. CP 45-70. On November 26, 2002, at a time when Knoud was incapacitated, Johnson induced her to sign the agreement to sell referenced above. CP 45-70.

Rita Thompson did not sign the agreement to sell and attested that her signature had been forged on the document. CP 45-70.

Johnson argued that the court should deny Knoud's motion because she had not previously alleged that she was incompetent and that she had been the victim of fraud. RP 9/21/07 8-9. Johnson argued that Knoud should have pleaded those issues prior to trial on July 20, 2006, despite the fact that she was presumed mentally incompetent at that time as she was at Western State

Hospital for an examination and lacked an attorney to represent her. RP 9/2/07

7. Although Johnson argued that even if the court accepted Knoud's arguments, "the trial court conducted appropriately." RP 9/21/08 8.

Knoud clarified that she was not asking for a trial de novo, but rather that she was asking the court to vacate the judgment because it was procured by fraud and because it was procured under circumstances whereby the controlling document in the case, the real estate and purchase agreement, were procured by fraud and were procured under conditions where she lacked capacity to sign it. RP 9/21/07 11.

Knoud emphasized that at the CR 60(b) motion the trial court was required to view the evidence in the light most favorable to the moving party. RP 9/21/07 11.

The trial court denied the motion without responding the merits. The court erroneously recalled: "I remember the circumstances here, to a degree, even though it was back when, and she had legal counsel and she was in jail and didn't appear." RP 9/21/07 14.

In fact, Knoud's attorney had withdrawn on April 7, 2006, thereby leaving her without representation at a time when she was mentally incompetent.² SCP 2.

The court entered the order denying Knoud's motion. CP 116-117.

Knoud thereafter timely filed this appeal. CP 118-120.

D. ARGUMENT.

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S CR 60(B) MOTION FOR RELIEF FROM JUDGMENT AND ORDER WHERE THE DEFENDANT, WHO WAS MENTALLY ILL AT THE TIME OF TRIAL AND WAS UNABLE TO ATTEND BECAUSE SHE WAS AT WESTERN STATE HOSPITAL FOR A COMPETENCY EXAM, AND WHERE DEFENDANT ESTABLISHED PRIMA FACIE CASES OF FRAUD.

This case presents issues regarding trial court proceedings held at a time when the defendant, who had no attorney, was at Western State Hospital (WSH) for a competency evaluation. The proceedings addressed the ownership of Knoud's residence and the disposition thereof by the plaintiff. Because the trial court found that Knoud, although at WSH, had notice of the trial, the trial court heard the case anyway. Knoud attorney-in-fact, Rita Thompson, (appointed after guardian ad litem proceedings) appeared at court and asked for a continuance which was denied. As a result, Knoud lost her

² Supplemental Clerk's Paper 2 is the notice of attorney's intent to withdraw filed on April 7, 2006. Appendix B.

residence. Her CR 60(b)³ motion thereafter was denied and that ruling forms the basis for this appeal.

CR 60(b), entitled Relief from Judgment or Order, provides that on motion of a party, the court may relieve a party or his representative from a final judgment, order, or proceeding for the following reasons (in pertinent part): (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order; and (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending.

The appellate court reviews the trial court's denial on a CR 60(b)⁴ motion for abuse of discretion. Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000); Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994). An abuse of discretion occurs "only where it can be said that no reasonable [person] would take the view adopted by the trial court." State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). A trial court abuses its discretion if it bases its decision on an incorrect legal standard or the facts do not meet the requirements of the standard. In re Marriage of Lawrence, 105 Wn.App. 683, 686, n.1, 20 P.3d 972 (2001).

³ Appendix C – CR 60(b).

An appeal from a denial of a CR 60(b) motion is limited to the propriety of the denial not the propriety of the underlying judgment. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

The party attacking a judgment under CR 60(b)(4) must establish the fraud or misrepresentation “by clear and convincing evidence.” Lindgren v. Lindgren, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). “The fraudulent conduct or misrepresentation must have caused the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.” Lindgren, 58 Wn.App. at 596 (citing Peoples Bank v. Hickey, 55 Wn.App. 367, 372, 727 P.2d 1056, *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989)).

Further, when a trial court considers whether the movant under a CR 60 motion has presented the “facts constituting a defense” required by CR 60(e)(1)⁵, the court must view the evidence presented in the light most favorable to the moving party. Pfaff v. State Farm Mut. Auto Ins. Co., 103 Wn.App. 829, 834, 14 P.3d 827 (2000), *review denied*, 143 Wn.2d 1021 (2001).

a. KNOUD ESTABLISHED A PRIMA FACIE CASE OF FRAUD AS REQUIRED BY CR 60(B)(4).

⁵ Appendix D – CR 60(e).

To establish fraud, the moving party must show (1) the adversary's knowing and false representation of a material fact, (2) the moving party's ignorance of that falsity. (3) the moving party's reasonable reliance on the misrepresentation, and damage to the moving party. North Pac. Plywood, Inc. v Access Road Builders, Inc., 29 Wn. App. 228, 628 P.2d 482, *review denied*, 96 Wn.2d 1002 (1981).

In the instant case, the defendant presented sufficient evidence of fraud in the procurement of the judgment against the defendant and of the defendant's lack of capacity to enter into the real estate purchase and sale agreement that was the subject of this action to meet the standard for vacation of a civil judgment under CR 60(b).

First, Knoud established that Johnson had knowledge that she could not execute any legal documents and that the signature of her attorney-in-fact Rita Thompson was required. CP 45-70 (Declaration of Rita Thompson and June 3, 2006 letter signed by Rita Thompson).

Second, Knoud established that she had no knowledge of that falsity. She was mentally incompetent when the document was executed in November 6, 2002, and her signature was meaningless anyway because Rita Thompson held her durable power of attorney. Rita Thompson attested that her signature had been forged. CP 45-70, *id.*

Further, Gregory Johnson knew that Rita Thompson held durable power of attorney for Knoud and there is no evidence in the file that he served Rita Thompson with any of the paperwork in this case. CP 70-106.

Third, Knoud suffered damages as a result of Johnson's misrepresentations. Johnson fraudulently succeeded in quieting title to the residence of Knoud, a mentally incapacitated individual with a durable power of attorney in Rita Thompson. There is not a scintilla of evidence that Rita Thompson was served with any of pleadings in the case. As a result of Johnson's actions, Knoud now is homeless.

b. KNOUD ESTABLISHED A PRIMA FACIE CASE OF ERRONEOUS PROCEEDINGS AGAINST A PERSON OF UNSOUND MIND WHEN THE CONDITION OF THE DEFENDANT DID NOT APPEAR IN THE RECORD NOR THE ERROR IN THE PROCEEDINGS.

Relief also is warranted under CR 60(b)(4), "for erroneous proceedings against a person of unsound mind, when the condition of the such defendant does not appear in the record nor the error in the proceedings."

In this case, the defendant had a lengthy history of mental illness, brain injury and incapacity. In 1999, she had attempted suicide and had been treated at Harborview Hospital in Seattle and then at Linden Grove Care Center in Puyallup. CP 80-106 (report of guardian ad litem). Knoud was sufficiently incapacitated that her sister Rita Thompson was granted durable

power of attorney for Knoud's affairs. *Id.* Simply put, at the time of the conveyances at issue as well as at the time of trial, Knoud did not have the capacity or competency to defend.

Although the trial court had notice of Knoud's mental health issues, the trial court cavalierly disregarding them, finding that she had been served with notice of the trial date. Because the trial court knew that Knoud was either in the Pierce County Jail awaiting a competency evaluation at Western State Hospital or else was in fact at Western State Hospital, the trial court should not have conducted the erroneous proceedings. RP 9/2/07; SCP 1⁶.

Knoud's July 19, 2006 letter had expressed her intention to be present. Rita Thompson, her guardian ad litem, also appeared and asked for a continuance for Knoud. Even with the limited knowledge that the trial court had, the trial court should have had significant doubts about the propriety of proceeding with a trial without further inquiry into the mental health and competency of Knoud. This is especially true where Rita Thompson, who had durable power of attorney for her, apparently was not ever served with notice of the proceedings and first appeared on the day of trial to ask for a

⁶ Supplemental Clerk's Paper 1 is the letter from Attorney Alena Ciecko, dated and filed on July 19, 2006. Appendix A.

continuance so that she could get a lawyer for her sister and also so that her sister could appear. RP 7/20/06 21.

These facts easily establish a prima facie sufficient to meet the requirements of CR 60(b)(9).

c. THE AFOREGOING ARGUMENTS COMPEL THIS COURT TO FIND THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT KNOUD'S MOTION TO VACATE JUDGMENT.

The abuse of discretion standard ordinarily is difficult to meet. However, in this case, Knoud has easily satisfied it. Simply put, no reasonable person would have denied a defendant who was in jail and awaiting a mental competency evaluation the opportunity to be present and defend during a lawsuit regarding the disposition of her home. This is true especially where the individual who held her durable power of attorney had not ever been served in the lawsuit and first appeared before the court on the day of trial. It can be fairly concluded that no reasonable person would have taken the position adopted by the trial court. No reasonable person would have denied, on the facts of this case, a mentally ill individual to have the opportunity to defend and appear with competent representation at such an action.

Further, the trial court abused its discretion when it based its decision on an incorrect legal standard. As noted above, the trial court was required at the motion to vacate to determine whether Knoud had established a prima facie case of either fraud or unavoidable casualty or misfortune preventing her from defending. In so doing, the trial court was required to view the evidence in the light most favorable to Knoud. The trial court failed to apply this standard. Passim.

As a result of these decisions, a mentally incapacitated individual who had an individual with power of attorney, a fact known to the plaintiff, received a default judgment against her wherein she lost her residence. Her former trial counsel had withdrawn and had filed an inadequate response to the complaint. The trial court held that the representations of an attorney who withdrew for unknown reasons were nevertheless binding on Knoud.

For these reasons, this court must find that the trial court abused its discretion when it denied Knoud' s motion to vacate.

* * *

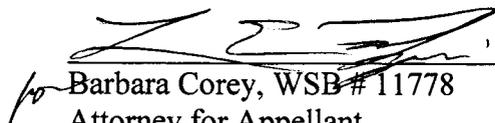
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E. CONCLUSION.

For the foregoing reasons, Ms. Knoud respectfully asks this court to reverse the trial court's order denying her CR 60(b) motion to vacate the judgment entered on September 21, 2007.

DATED this 19th day of May, 2008.


for Barbara Corey, WSB # 11778
Attorney for Appellant

WSB #20177
LeStalzin

CERTIFICATE OF SERVICE:

The undersigned certifies that on this day she delivered by ABC Legal Messenger to Christopher Boutelle, Attorney at Law, 11201 A Street S., Tacoma, WA and by US Mail to appellant, Karen Knoud a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

5/19/08
Date


Signature

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DIVISION II
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APPENDIX A



05-2-10081-3 25820107 LTRATY 07-20-06

JOHN H. HILL
Director

949 Market Street, Suite 334
Tacoma, Washington 98402-3696
(253) 798-6062 • FAX (253) 798-6715

July 19, 2006

Re: Gregory Johnson v. Karen Knoud; Pierce County Superior Court Cause No. 05-2-¹⁰⁰⁸¹⁻³
10081-3; **TRIAL DATE: July 20, 2006, 9:30am, Courtroom 533**

To Whom It May Concern,

As the attorney in Ms. Karen Knoud's Pierce County District Court matter, I am notifying the court that Ms. Knoud is unavailable to attend the trial in the above referenced matter set to begin on July 20th, 2006. Ms. Knoud is currently being held in the Pierce County Jail on a no bail hold awaiting a competency evaluation by Western State Hospital with no scheduled date of release.

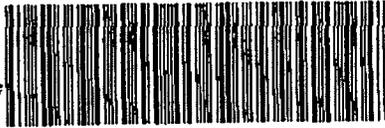
Sincerely,


Alena Cieccko
Attorney at Law

cc: Superior Court File
Judicial Assistant for Judge Flemming
Christopher Boutelle, Attorney for the Plaintiff
Karen Knoud, Defendant

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PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

APPENDIX B

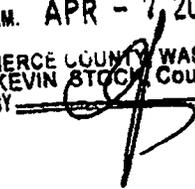


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PIERCE COUNTY WASHINGTON
KEVIN STOCK County Clerk
BY  DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GREGORY JOHNSON, a single man,)
)
Plaintiff,)
vs.)
)
KAREN ANN KNOUD, a single person,)
)
Defendant.)
_____)

NO. 05-2-10081-3

NOTICE OF ATTORNEY'S
INTENT TO WITHDRAW

TO: CLERK OF THE COURT
TO: CHRISTOPHER BOUTELLE, Attorney for the Plaintiff
TO: KAREN ANN KNOUD, Defendant

1. WITHDRAWAL: H. GARY WALLIS, Attorney for the Defendant, hereby gives notice of intent to withdraw from the above-entitled proceedings on Thursday, April 20, 2006. This withdrawal shall be effective without Court order unless an objection to the withdrawal is served upon the withdrawing attorney prior to the intended date of withdrawal set forth above.

//

//

//

NOTICE OF INTENT TO WITHDRAW - 1

LAW OFFICE OF H. GARY
WALLIS
9615 Bridgeport Way SW
Lakewood, Washington 98499
Telephone: (253) 584-1110
Fax: (253) 584-8858

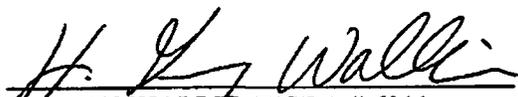
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2. PARTIES: The name and last known address of the person represented by the withdrawing attorney in the above proceeding is as follows:

Karen Knoud
2324 Cherokee Blvd
Puyallup, WA 98374

3. TRIAL DATE: Trial is set for this matter on July 20, 2006 at 9:00 a.m.

DATED this 5 day of April, 2006.


H. GARY WALLIS, WSBA # 6311
Attorney for Defendant.

APPENDIX C

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment:

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) *Statement of Reasons.* In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) *Reopening Judgment.* On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) *Motion to Alter or Amend Judgment.* A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) *Alternative Motions, etc.* Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) *Limit on Motions.* If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.* On motion and upon such terms as are just, the court may relieve a

party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) *Other Remedies.* This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) *Writs Abolished—Procedure.* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) *Procedure on Vacation of Judgment.*

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice.* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) *Statutes.* Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect. [Amended effective September 26, 1972; January 1, 1977.]

RULE 61. HARMLESS ERROR [RESERVED]

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) *Automatic Stays.* Except as to a judgment of a district court filed with the superior court pursuant to RCW 4.56.200, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment. Unless otherwise ordered by the trial court or appellate court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until appellate review is accepted or during the pendency of appellate review.

(b) *Stay on Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security

of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to rule 59, or of a motion for relief from a judgment or order made pursuant to rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to rule 52(b).

(c) *Injunction Pending Appeal.* [Rescinded.]

(d) *Stay Upon Appeal.* [Rescinded.]

(e) *Stay in Favor of State.* [Rescinded.]

(f) *Other Stays.* This rule does not limit the right of a party to a stay otherwise provided by statute or rule.

(g) *Power of Supreme Court Not Limited.* [Rescinded.]

(h) *Multiple Claims or Multiple Parties.* When a court has ordered a final judgment under the conditions stated in rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [Amended effective July 1, 1976; January 1, 1977; September 1, 1990; September 1, 2005.]

RULE 63. JUDGES

(a) *Powers.* See rule 77.

(b) *Disability of a Judge.* If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

8. PROVISIONAL AND FINAL REMEDIES (Rules 64-71)

RULE 64. SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law existing at the time the remedy is sought. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is

ancillary to an action or must be obtained by an independent action.

RULE 65. INJUNCTIONS

(a) *Preliminary Injunction.*

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not or-

APPENDIX D

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment;

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) *Statement of Reasons.* In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) *Reopening Judgment.* On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) *Motion to Alter or Amend Judgment.* A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) *Alternative Motions, etc.* Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) *Limit on Motions.* If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.* On motion and upon such terms as are just, the court may relieve a

party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) *Other Remedies.* This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) *Writs Abolished—Procedure.* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) *Procedure on Vacation of Judgment.*

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.