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I. WHY THE COUNTY'S APPEAL MUST BE DENIED

In this case, the Court only needs to decide whether Judge Costello abused his discretionary power. For nearly twenty years now, Washington has recognized that CR 60(b)(1) provides grounds for vacating excessively broad stipulations. And fact after fact in this case indicates that M.B. Diddy and Swinerton never intended for the settlement of M.B. Diddy's claims (the only claims asserted in the litigation) to result in a release of claims between Swinerton and the County. To hold in favor of the County, the Court would have to: (1) distinguish existing case law; and (2) find that Judge Costello was **manifestly unreasonable** in both following Washington's long-standing precedent and judging the facts before him.

The County does not attempt to demonstrate how Judge Costello abused his discretion in this case. Instead, the County asks the Court to fashion a broad, hard-and-fast rule for Washington that ignores the underlying facts that lead to the trial court dismissing this case. Because the facts support Judge Costello's order, the County's new rule would tear the fabric of Washington's contextual-contract case law and undermine the long-established equitable powers entrusted to the discretion of trial judges like Judge Costello.

Judge Costello vacated and modified the dismissal at issue in this appeal after reviewing a record where M.B. Diddy sued, mediated, and

settled entirely with Swinerton. The undisputed record is that the County took no active role in pursuing or resolving any claim in the underlying action. Within this context, Judge Costello correctly concluded that M.B. Diddy and Swinerton never released Swinerton's potential future claims against the County, and to avoid such an unintended and improper result, Judge Costello vacated and modified the dismissal.

To win on appeal, the County must clearly show that Judge Costello abused his discretion—the highest burden for reversal of trial court decisions. Given the context in which the dismissal was entered, the County cannot credibly argue that Judge Costello abused his discretion in granting CR 60 relief. Accordingly, Judge Costello's order should be affirmed.

II. ISSUES

Judge Costello Did Not Abuse His Discretionary Power to Grant CR 60(b) Relief

Did Judge Costello abuse his discretionary power in concluding that the entered dismissal should be modified to more clearly show that it only applied to the claims asserted by M.B. Diddy—not potential, unalleged claims between Swinerton and the County?

The answer is no because the facts before Judge Costello demonstrated that: (1) M.B. Diddy sued Swinerton; (2) Swinerton and

M.B. Diddy mediated and executed a settlement of M.B. Diddy's claims—without the County's participation; and (3) neither Swinerton nor the County ever alleged or attempted to settle any claims between each other. As a result, while M.B. Diddy and Swinerton mediated the dispute without the County, any potential claims between Swinerton and the County were never mediated or settled.

M.B. Diddy and Swinerton concluded their mediation by signing a handwritten settlement agreement. The settlement agreement required Swinerton to pay M.B. Diddy \$35,000 and made no mention of the County. Swinerton made the required payment. And eight months later, after the trial court inquired as to the status of the mediation, M.B. Diddy and Swinerton filed a stipulation and order of dismissal that the County signed as a nominal party without any discussion or negotiation with either M.B. Diddy or Swinerton.

Despite the County never mediating any disputes, never negotiating or signing any settlement agreement, and never negotiating the stipulation and dismissal, another seventh months after the dismissal was entered, the County alleged that Swinerton already dismissed its unasserted claims against the County. Given the facts here, the County cannot meet its heavy burden of showing that Judge Costello abused his discretion. Accordingly, the Court must affirm Judge Costello's order.

III. STATEMENT OF THE CASE

M.B. Diddy Construction, Inc. (“M.B. Diddy”) sued Swinerton Builders Northwest, Inc. (“Swinerton”) for breach of contract and unjust enrichment.¹ In pursuing its retainage under RCW chapter 60.28, M.B. Diddy also named the County as a nominal defendant.²

Swinerton appeared, but did not assert any cross-claims against the County.³

The County also appeared.⁴ But the County did not file an answer. Nor did the County assert any cross claims.⁵

M.B. Diddy and Swinerton mediated M.B. Diddy’s claims.⁶ Upon reaching a settlement, M.B. Diddy and Swinerton executed a CR 2A agreement.⁷ Consistent with its role as a nominal defendant, the County did not participate in the mediation.⁸

¹ CP 1.

² *Id.* 10; *see also id.* 45 (stating that M.B. Diddy named the County as a “nominal” defendant pursuant to RCW chapter 60.28).

³ *Id.* 26.

⁴ *See id.*

⁵ *Id.*

⁶ *Id.* 46.

⁷ *Id.*

⁸ *Id.*

The CR 2A agreement required Swinerton to pay M.B. Diddy \$35,000.⁹ Further, the CR 2A agreement required M.B. Diddy to release all of its claims and dismiss the action.¹⁰ The County did not sign the CR 2A agreement.¹¹ And the County had no obligations or duties under the CR 2A agreement.¹²

Swinerton paid the required settlement amount.¹³ The County provided no portion of the payment.¹⁴

Approximately eight months later, the trial court contacted M.B. Diddy to request M.B. Diddy closeout the case.¹⁵ In response, M.B. Diddy and Swinerton submitted a dismissal for entry by the court.¹⁶ The dismissal was signed by the County as a nominal defendant.¹⁷ The County had no substantive discussion with Swinerton or M.B. Diddy prior to signing the dismissal.¹⁸

⁹ *Id.* 58.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* 46.

¹⁴ *See* RP 4 (stating that the County had nothing to do with negotiating, mediating, or settling M.B. Diddy's claim).

¹⁵ *Id.* 5.

¹⁶ *Id.*; CP 19.

¹⁷ RP 5, 6.

¹⁸ CP 46; RP 4.

Although neither M.B. Diddy nor Swinerton ever negotiated with the County at any time,¹⁹ the stipulation potentially contained language that could be construed as waiving unasserted claims between the County and Swinerton.²⁰

The dismissal was entered in January 2008.²¹ Approximately seventh months later, the County first advised M.B. Diddy of the County's intent to argue that the dismissal applied to Swinerton's separate action against the County.²² Recognizing the impropriety of the County's argument, M.B. Diddy and Swinerton jointly moved the trial court to vacate and modify the earlier dismissal to remove any confusion and more clearly reflect the CR 2A agreement.²³

The trial court found the circumstances supported CR 60 relief and granted the motion.²⁴ Accordingly, the trial judge ordered the stipulation and dismissal to be vacated and reformed under CR 60.²⁵

¹⁹ CP 46.

²⁰ RP 10-11.

²¹ CP 18.

²² *Id.* 77.

²³ *Id.* 24.

²⁴ RP 10.

²⁵ *Id.* 10-11.

IV. ARGUMENT AND AUTHORITIES

A. The County falls far short of the standard for reversing Judge Costello's Order

A trial court's decision to vacate a stipulated judgment will not be disturbed on appeal absent a manifest abuse of the court's discretion.²⁶ The County must clearly show that Judge Costello's order was manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.²⁷ In other words, the County must show that Judge Costello's order was (1) clearly outside the range of acceptable choices for applying CR 60(b)(1) to the facts in this case; (2) clearly based on a misapplication of law or was clearly unsupported by the facts; or (3) based on facts that clearly did not rise to the correct legal standard.²⁸

Here, Judge Costello reviewed uncontroverted declarations and courtroom testimony that supported the following facts:

1. This suit was based on M.B. Diddy's claims against Swinerton, naming the County only to the extent necessary to collect from the statutory retainage fund held by the County.²⁹
2. The County never answered M.B. Diddy's lawsuit.³⁰

²⁶ *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 652 (1967) (interpreting the statutory predecessor to CR 60).

²⁷ *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971).

²⁸ *Ryan v. State*, 112 Wn. App. 896, 899-900 (2002) quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47 (1997).

3. No cross-claims or counterclaims ever created an interest in the County that needed settling.³¹

4. M.B. Diddy and Swinerton mediated M.B. Diddy's claims without regard for the County.³²

5. M.B. Diddy and Swinerton resolved their claims and signed a settlement agreement that made no mention of the County.³³

6. Because M.B. Diddy had named the County as the retainage fund stakeholder, in order to formally dismiss M.B. Diddy's lawsuit against Swinerton, M.B. Diddy included the County in its stipulation.³⁴

7. The County never negotiated the terms of the stipulation.³⁵

It cannot be said that Judge Costello abused his discretion in vacating the parties' stipulation. Since 1990, Washington has expressly recognized that excessively broad release provisions qualify as a "mistake" under CR 60(b)(1).³⁶ And given any of the above facts, a reasonable person could conclude that Swinerton did not contemplate

²⁹ RP 5.

³⁰ CP 45.

³¹ *Id.*; CP 53; RP 4, 6.

³² CP 46, 53; RP 4, 6.

³³ *Id.*

³⁴ RP 5.

³⁵ *Id.* 10.

³⁶ *Ebsary v. Pioneer Human Servs.*, 59 Wn. App. 218, 226 (1990).

extending its release to separate claims it potentially had against the County.

B. Washington expressly recognizes CR 60 relief for unintentionally broad stipulations and dismissals

In *Ebsary v. Pioneer Human Services*, the Washington Court of Appeals plainly recognized that CR 60 appropriately provides relief where parties sign a release which goes beyond the intended scope of the settlement.³⁷ As the court stated, “The inclusion of excessively broad release provisions was a ‘mistake’ within the meaning of CR 60.”³⁸

In *Ebsary*, the Washington Department of Labor and Industries (“DLI”) was assigned a surviving wife’s right to pursue a wrongful death claim.³⁹ The decedent’s children also pursued their own wrongful death actions against the defendants.⁴⁰ DLI settled its claims with the defendants and filed settlement papers that broadly released “any other special and general damages for any beneficiary.”⁴¹

Importantly, the decedent’s children never participated in DLI’s settlement.⁴² Like the County in this case, however, the defendants in

³⁷ 59 Wn. App. 218, 226 (1990).

³⁸ *Id.*

³⁹ *Id.* at 221.

⁴⁰ *Id.* at 222.

⁴¹ *Id.* at 223.

⁴² *Id.* at 223.

Ebsary sought to capitalize on the broad settlement language and wrap the children's claims into the stipulated judgment.⁴³ Realizing their mistake, DLI's attorneys subsequently filed a motion to amend and/or vacate the judgment.⁴⁴ The trial court agreed with DLI, ruling that the stipulated judgment did not prevent the children from pursuing their claims.⁴⁵

The court of appeals affirmed the trial court on the basis of both DLI lacking authority to settle the children's claims,⁴⁶ and moreover, the circumstances overwhelmingly indicating that the parties never intended to release the children's claims.⁴⁷

In attempting to distinguish *Ebsary* to the trial court, the County portrayed *Ebsary* as a one-note decision limited to instances of counsel acting without authority.⁴⁸ But importantly, the appellate court provided "additional reasons for affirming the trial court's order,"⁴⁹ observing that DLI made no attempt to settle the children's claims; the children's claims were never involved in the settlement negotiations; the children did not participate in the negotiations, whether personally or through counsel; and

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 223-24.

⁴⁶ *Id.* at 225.

⁴⁷ *Id.* at 225-26.

⁴⁸ CP 72-73.

⁴⁹ *Ebsary*, 59 Wn. App. at 225.

the entire issue under appeal arose when the release's language went beyond the intended scope of the settlement.⁵⁰

Accordingly, the second prong of the *Ebsary* decision becomes virtually indistinguishable from the circumstances surrounding Swinerton's stipulation. Parelleling the *Ebsary* case, here, neither Swinerton nor the County made any attempt to settle their claims; claims against the County were never involved in M.B. Diddy and Swinerton's mediation; the County did not participate in M.B. Diddy and Swinerton's mediation; and the entire issue under appeal arose when the entered stipulation went beyond the intended scope of the settlement.

Washington interprets stipulations as contracts, which necessarily requires considering the context of the stipulation to determine the parties' intent.⁵¹ As the context of the stipulation in this case demonstrates again and again, there was never any intent to release future claims between co-defendants Swinerton and the County. Judge Costello properly used his discretionary power under CR 60(b)(1) to correct the overly-broad language included in the M.B. Diddy-Swinerton stipulation.

Adopting the County's argument would undermine trial courts' discretionary authority, wholly ignore the context of M.B. Diddy and

⁵⁰ *Id.* at 225-26.

⁵¹ *See, e.g., Stephens v. Gillespie*, 126 Wn. App. 375, 380 (2005).

Swinerton’s stipulation and dismissal, and unnecessarily punish Swinerton. By contrast, affirming the trial court will result in Swinerton’s claims being decided on their merits—not being dismissed out of hand based on four words found in a boilerplate provision.

C. The County’s arguments fail to provide a substantive basis for holding that Judge Costello abused his discretionary power

The County fails to present the Court with a Washington decision that overrules *Ebsary*. Instead, the County presents the Court with dated notions of both CR 60 and contract law. For example, to support its draconian contention that Swinerton must pay for the ‘sins of its lawyer,’ the County cites at length pre-1994 decisions from the Second and Eighth federal circuits. In the 1993 decision *Pioneer Investor Services Co. v. Brunswick Associates*, however, the United States Supreme Court explicitly rejected these circuits’ narrow, inflexible views of “excusable neglect.”⁵²

The modern approach recognized in *Pioneer* allows an attorney’s carelessness to constitute excusable neglect where the attorney acted in good faith and did not prejudice the adverse party or efficient judicial administration.⁵³ After *Pioneer*, a trial court has discretion to consider the

⁵² *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 387 n.3 (1993).

⁵³ *Id.* at 397-98.

equities when determining whether an attorney's neglect is excusable.⁵⁴ Of course, here, Judge Costello vacated the stipulation based on mistake or inadvertence—not excusable neglect. Nevertheless, even under the modern-day excusable neglect theory, Judge Costello's decision to grant CR 60 relief was still reasonable.

Ignoring both the abuse of discretion threshold and the context in which the settlement and stipulation arose from, much of the County's incessant focus on attorney neglect is based on *Nemaizer v. Baker*, a case going to the federal circuit from the Southern District of New York.⁵⁵ Adhering to the anachronous pre-*Pioneer* approach to mistakes or omissions committed by an attorney, the majority in *Nemaizer* denied relief under Rule 60(b)(1).⁵⁶ This is the approach the County urges the Court to take.

The only relevance *Nemaizer* has to this case and to Washington case law is found in the dissent. In its dissent, the circuit court takes the contextual contract approach Washington adopted in *Berg v. Hudesman* and grafts it onto stipulated dismissals.⁵⁷ (As noted above, Washington

⁵⁴ *Robb v. Norfolk & Western Ry. Co.*, 112 F.3d 354, 360 (7th Cir. 1997).

⁵⁵ 793 F.2d 58 (2d Cir. 1986).

⁵⁶ *Id.* at 62-63.

⁵⁷ *Id.* at 67 (Meskill, J., dissenting); *cf. Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990).

courts also take this approach to stipulations.⁵⁸) The dissenting opinion then highlights the trial court's reasonable holding that the parties had a genuine misunderstanding of the stipulation's scope.⁵⁹ And the dissent criticizes the disregard for the trial court's conclusion and the majority's failure to give the trial court the deference it deserved.⁶⁰

The *Nemaizer* dissent draws a lucid (and far more modern and relevant) distinction between negligent omissions and a mistake regarding the scope of the release.⁶¹ According to the dissent, the stipulation entered into in *Nemaizer* "did not clearly express the intent of the parties and relief from it was properly available under Rule 60(b)(1)."⁶² In light of the circumstances surrounding the stipulation, the dissent reasoned that a district court judge should be allowed to use "sound discretion . . . to do substantial justice."⁶³ This is the approach supported by the Washington Court of Appeals in *Ebsary v. Pioneer Human Services*.⁶⁴ And in this case, Judge Costello did not abuse his sound discretion in similarly concluding

⁵⁸ See *supra* text accompanying note 51.

⁵⁹ *Nemaizer*, 793 F.2d at 67 (Meskill, J., dissenting).

⁶⁰ *Id.*

⁶¹ *Id.* at 68.

⁶² *Id.*

⁶³ *Id.* at 69 ("Considering all of these factors, the experienced district judge here used sound discretion in construing his own order in such a way as to do substantial justice.").

⁶⁴ 59 Wn. App. 218, 225-26 (1990).

that M.B. Diddy and Swinerton did not intend to release Swinerton's claims against the County.

V. CONCLUSION

M.B. Diddy sued Swinerton, Swinerton settled M.B. Diddy's suit for \$35,000, and M.B. Diddy and Swinerton entered a formal dismissal with the trial court. These circumstances demonstrated that neither Swinerton nor M.B. Diddy contemplated dismissing Swinerton's unalleged claims against the County, and Judge Costello reasonably concluded that M.B. Diddy and Swinerton entered a stipulated dismissal that was much broader than what the parties contemplated.

The facts in this case do not rise to the abuse of discretion standard the County needs to prevail on appeal. Forcing a reversal of Judge Costello's order would not only be an irreconcilable departure from Washington's contextual approach to contracts, the reversal would turn abuse of discretion stare decisis on its head. While the County or even the Court might not agree with Judge Costello's order, Judge Costello was not unreasonable under the circumstances. Judge Costello's order should therefore be affirmed.

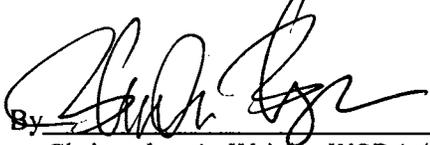
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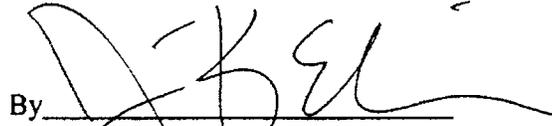
RESPECTFULLY SUBMITTED this 8th day of April, 2009.

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CERTIFICATE OF SERVICE

On the 8th day of April, 2009, a true and correct copy of the within document was served by facsimile transmission and first-class mail on counsel for Appellant, as follows:

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