

No. 68177-01

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SCOTTY'S GENERAL CONSTRUCTION, INC., a Washington  
corporation

Respondent,

vs.

GLORIA PAZOOKI and SIAVOOSH PAZOOKI, husband and wife  
and the marital community comprised thereof; and OMIED RYAN  
PAZOOKI and JANE DOE PAZOOKI, husband and wife and the  
marital community composed thereof; WMC MORTGAGE CORP., a  
California corporation, CENTRALBANC MORTGAGE  
CORPORATION, a California Corporation, IRA FARAMARZI and  
PEADOR FARAMARZI, husband and wife and the marital community  
composed thereof,

Appellant.

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**BRIEF OF RESPONDENT SCOTTY'S GENERAL  
CONSTRUCTION, INC.**

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## I. INTRODUCTION

At the outset, Respondent Scotty's General Construction, Inc. ("Scotty's") would like to note the deficiency of the heading of the Brief of Appellant filed by Appellant WMC Mortgage Corp. ("WMC"). The heading of WMC's Brief labels the case as "*WMC v. Scotty's*." Such heading is incorrect. The case that WMC is appealing relates to its Motion to Vacate in *Scotty's v. Gloria Pazooki and Siavoosh Pazooki, et al.* in King County Superior Court Case No.: 09-2-07414-3 KNT. In that case, WMC was not the Plaintiff—WMC was one of the Defendants and the heading of this appellate action should properly reflect the lower court action. *See* RAP 3.4. As the Court will learn, WMC has a history of deficient motion and pleading practice.

Be that as it may, Respondent Scotty's respectfully requests the Court Affirm the King County Superior Court's denial of WMC's Motion to Set Aside Default and Vacate Judgment ("Motion to Vacate") and uphold the award of reasonable attorney's fees against WMC, as: (1) WMC did not provide the requisite affidavit setting forth a meritorious defense or facts or errors upon which the motion was based; and (2) WMC provided no argument for an unavoidable casualty or misfortune preventing it from prosecuting or defending the

action within one year; and (3) WMC seeks to bring multiple new Declaratory Judgment actions, for the first time on appeal, within the body of its appellate brief, ignoring RAP 2, *et seq.*

Scotty's is further requesting an award of attorneys' fees and costs for this appellate action pursuant to RAP 14, *et. seq.* In addition, this Court has authority to order sanctions pursuant to RAP 18.9(a), because of WMC's multiple violations of the Rules of Appellate Procedure.

## II. STATEMENT OF THE CASE

On May 31, 2005, Gloria Pazooki obtained a residential mortgage loan in the amount of \$332,500. CP 42 at 3. Ms. Pazooki secured the May 31, 2005 promissory note with a Deed of Trust on property she owned known by the King County tax assessor as Parcels No: 062205-9056. *Id.* The May 31, 2005 Deed of Trust was filed on June 7, 2005. *Id.*, Exs. "A" and "B". The Deed of Trust defines Gloria Pazooki and Siavoosh Pazooki as the "Borrower"; WMC as the "Lender"; and MERS as "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." *Id.*

Apparently, on June 6, 2005, Ms. Pazooki obtained a second residential mortgage loan in the amount of \$352,000. Ms. Pazooki secured

the June 6, 2005 promissory note with a second Deed of Trust on Parcel No: 062005-9036. *Id.* The June 6, 2005 Deed of Trust was filed on June 7, 2005. *Id.* at 3-4, Ex. “C”. The Deed of Trust defines Gloria Pazooki as “Borrower”; Centralbanc Mortgage Corporation (“Centralbanc”) as “Lender”; and MERS as “a separate corporation that is acting solely as nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Instrument.” *Id.* at 4.

On May 31, 2007, Omied Pazooki executed a contract with Scotty’s whereby Scotty’s furnished labor and materials necessary to improve real property owned by Gloria and Siavoosh Pazooki and their marital community located at 20541 92<sup>nd</sup> Avenue South, King County, Kent, Washington (the “property”). CP 31 at 2-3. The Legal Description of the Property describes both Parcels 062205-9036 and 062205-9056 (these two Parcels will hereinafter be referenced as “9036” and “9056”). CP 31 at Ex. A. The original contract price was \$261,353.00 plus sales tax. CP 31 at 3.

On July 25, 2008, the scope of the work was increased and \$128,681.00, plus sales tax, was added to the original contract price. *Id.*

Scotty's completed all work on October 16, 2008. *Id.* The Pazookis failed to pay the contract balance of \$199,335.06, which remains due and owing. *Id.*

On December 29, 2008, within ninety (90) days of the last date that it furnished labor and materials to the Property, Scotty's caused to be recorded and served its Claim of Lien for amounts owed pursuant to the parties' contracts plus interest, permissible costs, and attorney's fees. *Id.*

Scotty's filed its Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien on February 10, 2009, within eight (8) months of the filing of its Claim of Lien. *Id.* at 3-4. The Complaint sought a money judgment against Gloria and Siavoosh Pazooki and Omied Pazooki in the principal amount of \$199,335.06, plus prejudgment and post-judgment interest, and attorney's fees and costs. *Id.* The Complaint alleged that WMC, Centralbanc and Peador Faramarzi and Ira Faramazi each claimed an interest in the Property. *Id.* at 4. The Complaint asked for: (1) judgment declaring Scotty's interest superior to all others claiming an interest in the subject property and against the interest of any person or person claiming under them, and against right, title and interest subsequently acquired by the other lien holders or any of them; and, (2) for an order

foreclosing its lien by sale in the manner provided by law and for application of the proceeds to the payment of such lien, interest, attorney's fees and costs. *Id.*

It is undisputed that Centralbanc was served with Scotty's Summons and Complaint on February 19, 2009. *Id.* Centralbanc's interest in the property related to parcel 9036. Centralbanc appeared through counsel on March 4, 2009. *Id.* Centralbanc's President, John Delaney then testified by declaration that Centralbanc had no interest in the Property and had no objection to Scotty's request for relief. *Id.*

It is undisputed that WMC was served with Scotty's Summons and Complaint on February 19, 2009. *Id.* WMC's interest in the property related to Parcel 9056. On April 16, 2009, the Court entered an Order of Default against WMC because it failed to appear or respond in any regard. *Id.*

In July, 2010, in preparation for trial, counsel for Scotty's discovered that in April, 2010, approximately one year after the Court had entered its Order of Default against WMC, WMC transferred its interest to Deutsche Bank National Trust ("Deutsche"). CP 43 at 3, Ex. J and K. WMC and Deutsche had, without notice to Scotty's, and in disregard of the pending action, conducted a foreclosure sale on June 23, 2010. *Id.* On July 14, 2010, Scotty's put Northwest Trustee's

Service and Deutsche on notice it was reasserting its lien rights advising that it would seek to foreclose those rights at trial on August 2, 2010, and demanding that the trustee's sale be set aside. *Id.*

On August 2, 2010, only Scotty's appeared at trial and the court entered a Judgment Summary and Order of Judgment in favor of Scotty's, in the amount of \$252,418.83, and ordering:

[T]hat the interest of Plaintiff Scotty's General Construction, Inc. in the property ... is superior to the interest of all Defendants and the Plaintiff Scotty's General Construction, Inc. is entitled to foreclosure of its interest as against such property, as against the interest of all the Defendants therein and as against all parties which claim to have acquired an interest subsequent to May 7, 2007...."

CP 33 at 3.

Deutsche, ignoring the Judgment, then sold its purported interest in Parcel 9056 to Shiad Investments, LLC on August 27, 2010, some twenty-five (25) days after the Judgment was entered in Scotty's favor. Appellate Brief ("AP") at 9.

On September 15, 2011, **thirty one (31) months** after being served with Scotty's Summons and Complaint and **thirteen (13) months** after failing to appear for trial, WMC filed the Motion to Set Aside Default and Vacate Judgment which is the subject matter of this appeal. CP 39.

The hearing for WMC's Motion to Vacate was set for September 23, 2011. CP 40. Scotty's Construction properly filed its Response to the Motion to Vacate on September 21, 2011. CP 42. In the Response, Scotty's noted the deficiency of WMC's motion in that: (1) WMC did not supply the affidavit required by CR 60(e)(1) setting forth the facts in support of its meritorious defense; (2) WMC failed to satisfy the requirements of CR 60 (b); and (3) WMC incorrectly conflated the rules CR 55 and CR 60. *Id.*

On September 22, 2011 (the day WMC's Reply Motion was due and the day before the hearing on the Motion to Vacate), WMC filed an amended notice of hearing and unilaterally changed the hearing date to September 30, 2011. CP 45.

On September 26, 2011, (four days past the due date for WMC's Reply), WMC filed a document entitled "Affidavit of Facts by Daniel A. Womac in Support of Defendants Motion to Set Aside Default and Vacate Judgment" that is wholly deficient in complying with CR 60(e)(1). CP at 45. Nothing in the Affidavit represents the requisite statement of facts or errors upon which the Motion to Vacate was based. *Id.*<sup>1</sup> There is no statement or assertion that supports a

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<sup>1</sup> The substance of the Affidavit is contained in paragraph 7, which states:

meritorious defense. CP 45. Nor is there an assertion which supports WMC's contention in its Motion to Vacate that it suffered unavoidable casualty or misfortune. *Id.*

On December 18, 2011, Superior Court Judge Honorable Mary E. Roberts issued the Order Denying WMC's Motion to Vacate and awarded Scotty's its reasonable costs and attorneys' fees in responding to WMC's Motion to Vacate. CP 48.

### III. ARGUMENT

#### A. The Standard of Review is Abuse of Discretion.

On an appeal from a ruling on a motion to vacate, the scope of review is limited to determining whether the trial court abused its discretion in ruling on the motion. *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990). As the court noted in *Northwest Land and Inv., Inc. v. New West Federal Sav. and Loan Ass'n.*,

Motions to vacate or for relief of judgment are addressed to the sound discretion of the trial court and will not be disturbed absent a showing of manifest abuse of discretion .... An abuse of discretion exists only when no reasonable

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WMC received the Summons and Complaint on February 19, 2009 and learned that the loan had been sold to Goldman Sachs & Co. (Goldman). On March 9, 2009 WMC forwarded the Summons and Complaint to Goldman with a letter indicating WMC was not going to take any further action, and that it would seek indemnity and contribution from Goldman should costs of any nature be incurred on the Complaint. Exhibit I.  
(CP 46 at 2).

person would take the position adopted by the trial court  
.... Appeal from a denial of a CR 60(b) motion is limited to  
the propriety of the denial.

64 Wn. App. 938, 942, 827 P.2d 334 (1992).

Of further importance for the appeal at hand, is that a motion to vacate is not the correct vehicle for correcting purported errors of law. *In re Marriage of Tang*, 57 Wn. App. at 654, 789 P.2d 118. Unlike a motion for reconsideration or for a new trial, a motion to vacate a judgment is not a basis for asserting errors of law that occurred in the underlying proceeding and an appeal from such ruling will not bring those purported errors up for review. *See State v. Santo*, 104 Wn.2d 142, 145-146, 702 P.2d 1179 (1985) (noting that “Appeal from denial of a CR 60(b) motion is generally limited to the propriety of the denial.”). *See generally Port of Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 790 P.2d 145 (1990); *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 722 P.2d 67 (1986); *Northwest Land and Inv., Inc. v. New West Federal Sav. And Loan Ass’n.*, 64 Wn. App. 938, 827 P.2d 334 (1992).

B. The Content of WMC’s Appeal of Its Unsuccessful Motion to Vacate Clearly Fails to Establish that the King County Superior Court Abused Its Discretion as WMC’s Motion to Vacate Misstated Settled Law and did not Comport with Applicable Court Rules.

1. *CR 60 is the applicable standard in order to vacate a default judgment and not a combination of CR 55 and CR 60.*

WMC sets forth the Assignment of Error in its Appellant Brief by stating, “Did the trial court err in denying a Civil CR 55(c) and CR 60 motion to set aside and vacate the judgment?” AB at 13. Just as it did in its original Motion to Vacate, WMC has corrupted the separate court rules relating to vacating an entry of default (CR 55) and vacating a default judgment (CR 60), and now seeks this Court to rule in its favor based on its corrupt reading of clearly controlled law. WMC stated in its Motion to Vacate that:

In this instance, then, WMC is asking the court to vacate the Judgment under CR 60(b)(9) and (11), which do not fall under any time limits. Second, WMC is asking the court to apply the good faith analysis of Rule 55(c) in consideration of WMC’s Motion to Set Aside the Order of Default, where the court is likewise not bound by any time limits. Here, the court can, in its discretion, apply the conditions enumerated in Rule 60(b)(1) as a roadmap to a ruling on whether to set aside the Order of Default and Default Judgment.

CP 39 at 8.

WMC, having still confused CR 55 and CR 60, has stated to this Court in support of its appellate brief that, “[t]he Court has two primary methods by which it can undo a default.” AP at 24. WMC then, amazingly, explains to this Court how CR 55 and CR 60 can be

used together (by picking and choosing between the two rules) in order to “undo a default.” AP at 24-27.

WMC has repeatedly shown its failure to grasp the literal reading and intended purpose related to setting aside an order of default (CR 55) and vacating an entry of judgment (CR 60). As if proposing the convoluted reading of combining CR 55 and CR 60 was not enough, WMC then cites the case of *Jensmore v. Frank*, 105 Wn. App. 1043 (2001) at length in its motion at pages 27 – 28 in support of its position. Scotty’s is, yet again, forced to point out WMC’s deficient motion practice. *Jensmore v. Frank* is an unpublished opinion from Division III. As this court is well aware, the citation of unpublished opinions is not tolerated. In *Dwyer v. J.I. Kislak Mortg. Corp.*, the Court imposed sanctions for such a violation, stating:

[W]e impose sanctions against counsel for Kislak in the sum of \$500, because counsel cited and discussed at length in their appellate brief an unpublished opinion of this court in direction violation of RAP 10.4(h) ... RCW 2.06.040 prohibits our publication of cases lacking precedential value ... [c]ounsel for Kislak shall direct its payment to the clerk of this court.

103 Wn. App. 542, 549, 13 P.3d 240 (2000).

Unpublished citation aside, the reality is that CR 55(c)(1) relates only to setting aside an *entry of default* and CR 60(b) relates to vacating a *default judgment*. As CR 55(c)(1) clearly states, “For good

cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, *if a judgment by default* has been entered, may likewise set it aside in accordance with rule 60(b)” (emphasis added). This distinction is not only clearly defined in the Court Rules, but also confirmed in case law. *In re Estate of Stevens*, 94 Wn. App. 20, 28, 971 P.2d 58 (1999), (a case cite by WMC in support of its position at page 29 of its Appellate Brief, but which supports Scotty’s position) states, “The Superior Court Civil Rules provide different standards for setting aside orders of default and default judgments.” In other words, the Court Rules and case law are clear: CR 55 applies when a party seeks to vacate a default order *prior to the entry of the default judgment*. Once the default judgment has been entered, the party seeking to vacate the default judgment must meet the standards set in CR 60. Scotty’s received an order of default on April 16, 2010. CP 20. Scotty’s then received a default judgment against WMC on August 2, 2010. CP 33-35. Thus, WMC must satisfy the requirements of CR 60(b) in order to vacate the August 2, 2010 default judgment and is not entitled to its corrupted combination of both CR 55 and CR 60 in order to “undue a default.”

- i. CR 60 requires showing of a meritorious defense in an affidavit setting forth a concise statement of the facts or errors upon which the CR 60 motion is based.

In order to vacate the Default Judgment, WMC must demonstrate to the court the applicability of one of the 11 enumerated exceptions provided in CR 60 (b) *and additionally*, CR 60(e)(1) requires that:

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.

CR 60(e) (emphasis added).

The strict requirement of a CR 60(e) affidavit has been repeatedly upheld by the Washington Courts. In *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 239, 974 P.2d 1275 (1999), the court stated, “To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the facts constituting a defense and cannot merely state allegations and conclusions. A court hearing a motion to vacate decides whether the affidavits presented set forth substantial evidence to support a defense to the claim.”

In the present case, WMC did not provide an affidavit of the facts or errors upon which the motion was based and did not provide an affidavit of the facts constituting a defense to the action or proceeding. While WMC claimed that “WMC has a prima facie defense and meritorious case ...” it did not provide such prima facie defense and meritorious case in the required affidavit. CP 39 at 9. On September 26, 2011, (four days past the hearing date originally set by WMC) WMC filed a document entitled “Affidavit of Facts by Daniel A. Womac in Support of Defendants Motion to Set Aside Default and Vacate Judgment.” CP 46. Nothing in the Affidavit represents even a feeble attempt to state facts or errors upon which the Motion to Vacate was could be based. *See infra* page 7, fn.1. *Id.* There is no statement, which, in any way, amounts to a meritorious defense.

ii. *CR 60(b)(9) requires WMC to show “Unavoidable casualty or misfortune preventing the party from prosecuting or defending.”*

WMC argued that its Motion to Vacate should be granted based on CR 60(b)(9), yet provided no argument as to the unavoidable casualty or misfortune that prevented WMC from prosecuting or defending the Default Judgment action. CP 39.

WMC was served with the Summons and Complaint on February 19, 2009. *Id.* at 3. WMC then mailed the Summons and

Complaint to Goldman Sachs and consciously with premeditation took no action to appear. *Id.* at 4. The Motion to Vacate (dated some 31 months after service of the Complaint) is the first formal “response” of any kind that WMC entered in this action. *See* Designation of Clerk’s Papers. The Order of Default was entered against WMC on April 16, 2009. CP 39 at 4. Thereafter, WMC’s successor became aware of the Order of Default no later than July 13, 2010. CP 43 at 3, Ex. J and K. Still, neither WMC, nor any of its successors or assigns took any action, each apparently satisfied if something is awry it happened upstream. Judgment was entered on August 2, 2010. CP 33. The only statement provided by WMC is in two sentences in the Facts of its Motion to Vacate: “At that point, WMC was in wind down, yet still followed through to learn that the loan had been sold to Goldman. With that knowledge, WMC immediately forwarded the Summons and Complaint to Goldman.” CP 39 at 10. Such a statement hardly meets the standard of “unavoidable casualty or misfortune” and is more in the nature of risk assumption. *See Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010) (finding that plaintiff’s attorney’s need to care for ill and elderly parents during the timeline of the proceedings was not an unavoidable casualty or misfortune). As was aptly stated in *Hayward v. Hansen*:

Because the motion to vacate was brought more than 1 year after the order was entered, the grounds of mistake, inadvertence and excusable neglect are foreclosed. See CR 60(b). Fraud, misrepresentation or misconduct and unavoidable casualty or misfortune are grounds which find no support in the record, and no affidavit asserting facts supporting these grounds appears in the record. See CR 60(e)(1).

29 Wn. App. 400, 404, 628 P.2d 1326 (1981) (emphasis added).

There like in *Hayward*, WMC's "present predicament stems from [its] own inaction [and] no justification to vacate has been shown." *Id.* at 405.

WMC's appeal clearly fails to establish that the King County Superior Court abused its discretion in denying WMC's Motion to Vacate as: (1) WMC did not provide the requisite affidavit with its Motion to Vacate; (2) the affidavit supplied by WMC some four (4) days after its Reply motion was due is deficient; and (3) WMC has provided no justification for its more than one year delay in prosecuting its action. Instead, WMC's submission to this Court clearly shows it elected to take its chances with a later action against Goldman Sachs. Scotty's respectfully requests the Court Affirm the King County Superior Court's denial of WMC's Motion to Set Aside Default and Vacate Judgment and uphold the award of its reasonable attorney's fees against WMC.

C. WMC Improperly Added Multiple Different Versions of a Declaratory Judgment Action on Behalf of WMC and Deutsche in Its Appellant Brief in Derogation of Established Court Rules and Procedure.

Scotty's submits that, ideally, the Declaratory Judgment actions proposed by WMC in the body of its appellate brief do not warrant response, because they are in no way related to the record to which this appeal relates. WMC's submission is a conglomeration of blind alleys and roads to nowhere. WMC states in its **Introduction** that "WMC also seeks a declaratory judgment that the [Deutsche] mortgage is first in time and first in right over the construction lien." AB at 10. WMC then asks in its **Assignment of Error**, "Deutsche holds the mortgage note and the recorded assignment of the mortgage. Do the holder of the mortgage note and transferee of the mortgage have standing to *bring a declaratory action* regarding the priority of the mortgage over a junior construction lien?" AB at 13. In the **Statement of the Case**, WMC states it is asking that "this court grant declaratory relief establishing lien priority over the property in question in its favor" (WMC has apparently forgotten it assigned its interest to Deutsche) AB at 15. Finally, in its **Argument** section, WMC states that "WMC is not a representative of Deutsche in the foreclosure suit" (AB at 41), then subsequently argues in its **Conclusion** that the Court should

“award a declaratory judgment that Deutsche was not bound by the prior suit and its mortgage has priority of record over the junior construction lien” (AB at 53). Putting it altogether, WMC states it is not the holder of the note or the mortgage. It then disclaims any representation of Deutsche. Illogically, it then asks that Deutsche, a non-party by intervention or otherwise, ought to be in the case. It might have piqued interest if this had been presented in the trial court by WMC, but it was not.

1. *Bringing declaratory actions for the first time on appeal disregards all civil and appellate court rules and procedure.*

The established rule in Washington is that ordinary rules of appellate procedure apply to an appeal from a declaratory judgment. *City of Spokane v. Spokane Civil Service Com'n*, 98 Wn. App. 574, 989 P.2d 1245 (1999); *see also Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992). The Court of Appeals will determine if the trial court’s findings of fact on the Declaratory Action was supported by substantial evidence. *Schneider v. Snyder’s Foods, Inc.*, 116 Wn. App. 706, 713 66 P.3d 640 (2003).

In the present appeal, WMC seeks this Court to rule on declaratory judgments (one of which is brought by WMC on behalf of

non-party Deutsche), when there has been no order, judgment or decree entered by any court in any jurisdiction on the proposed declaratory actions. There has been no order, judgment or decree, because no action has ever been filed by WMC or Deutsche. WMC has not shown (nor can it) how this Court has jurisdiction to entertain the proposed declaratory actions. WMC's position defies any explanation and should be dismissed.

2. *The proposed declaratory "Actions" are wholly deficient.*

WMC's Brief is outlined as follows: (1) in the **Introduction**, WMC is seeking a Declaratory Judgment on its behalf (AB at 10); (2) in the **Assignment of Error**, Deutsche (who is not a party to WMC's Motion to Vacate) is apparently asking the Court to rule that Deutsche has standing to bring a Declaratory Action (AB at 13); (3) in the **Statement of the Case**, WMC is seeking Declaratory Relief establishing lien priority in its favor (AB at 15); (4) in the **Argument**, WMC states that it is not a representative of Deutsche (AB at 41); and (5) in the **Conclusion**, WMC argues that declaratory judgment should be awarded on behalf of Deutsche (when in the Assignment of Error, WMC is seeking this Court to simply rule that Deutsche has standing

to bring a Declaratory Action) (AB at 53). The arguments defy explanation.

Further, Scotty's Construction would like to note *yet another* flaw with WMC's Appellate brief: In Section 3 of its Argument, WMC argues that the case of *BNC Mortg., Inc. v. Tax Pros, Inc.* provides an example of where "another commercial lender sought a similar judgment that its deed of trust was superior to a creditor's judgment lien." See AB at 44 (citing *BNC Mortg., Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 246, 46 P.3d 812 (2002)). First, Scotty's feels compelled to advise the Court that *BNC Mortg. Inc. v. Tax Pros, Inc.* is no longer good law regarding the "volunteer rule" in the context of a commercial loan. See *Columbia Commn. Bank v. Newman Park, LLC*, ---P.3d--- Wn. App. Div. 2 (2012); and see *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007). Second, WMC's use of *BNC Mortg. Inc.* in order to illustrate a case with a similar ruling to that which WMC's proposal is wholly inaccurate. In *BNC Mortg. Inc.*, the commercial lender (BNC Mortgage) was *unsuccessful* in its attempt to obtain a reversal of the lower court's finding. *Id.* at 258. In *BNC Mortg Inc.*, BNC Mortgage lost its Declaratory Judgment action in the lower court wherein it sought a ruling that its deed of trust was superior to Tax Pros. *Id.* The Court of Appeals upheld the denial of BNC

Mortgage's Declaratory Judgment action and left the creditor's judgment lien superior to the commercial lender. *Id.* To the extent *BNC Mortgage, Inc.* has any vitality in a commercial setting, it supports Scotty's' position and rejects WMC's position. Regardless, the case is no longer good for at least one point of law cited (and the case concluded with a ruling contrary to what WMC has cited the case to illustrate).

3. *WMC's violation of RAP 10.3 (a)(8).*

WMC also seeks to add an entire appendix of "Other Authorities," in derogation of RAP 10.3(a)(8), which states, "[a]n appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." Nothing in WMC's appendix has ever been presented to any court in any capacity relating to this appeal.

WMC's Declaratory Judgment actions are wholly deficient and clearly derogate established court rules.

D. Scotty's is Entitled to an Award of Its Costs on Appeal.

Rule of Appellate Procedure 14.2 authorizes an award of costs "to the party that substantially prevails on review". Scotty's requests an award of its costs as the substantially prevailing party in this action.

#### IV. CONCLUSION

Scotty's Construction submits that it is of importance to note that at all times relevant, WMC has been represented by counsel. WMC brought a Motion to Vacate, and mistakenly conflated two Court Rules to create a non-existent third rule to support its position that the default judgment should be vacated. WMC failed to provide the requisite affidavit setting forth the facts constituting its alleged "prima facie and meritorious defense." WMC provided no justification for its failure to bring the action within a year of the default judgment proceeding. WMC then sought to appeal (with the incorrect heading on the Appellate Brief) the lower court's ruling on WMC's wholly deficient Motion to Vacate. WMC now argues the merits of its wholly deficient motion to vacate by citing and discussing at length an unpublished opinion.

As if that was not enough, WMC seeks to initiate Declaratory Judgment actions in the body of its appellant brief. WMC pleads these Declaratory Judgment actions (without a Complaint, Answer or *any* pleadings of any kind) and asks this Court to decide, as a matter of law, in favor of a non-party. WMC ignores Deutsche's non-party, non-represented status and uses an outdated case, which supports Scotty's.

Finally, WMC introduces material by way of an Appendix in violation of RAP 10.3(a)(8).

Scotty's respectfully requests this Court Affirm the trial court's ruling in the Superior Court in denying WMC's Motion to Set Aside Default and Vacate Judgment and its attorneys' fees awarded to Scotty's. Scotty's further requests an award of attorney's fees for this appellate action pursuant to RAP 14, *et seq.* In addition, this Court has authority to order sanctions pursuant to RAP 18.9(a), because of WMC's multiple violations of the Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 23rd day of May, 2012.

BAROKAS MARTIN & TOMLINSON

By



Larry L. Barokas, WSBA #483

Attorneys for Respondent Scotty's

**DECLARATION OF SERVICE**

I declare that on the 23rd day of May 2012, I caused to be served the foregoing document entitled **Brief of Respondent Scotty's General Construction, Inc.** on counsel of record at the following addresses in the manner indicated:

Daniel A. Womac, WSBA #36394 Fidelity National Law Group, Inc., a Division of Fidelity National Title Group, Inc. 1200 – 6 <sup>th</sup> Avenue, Suite 620 Seattle, WA 98101 T: 206-224-6004 F: 206-877-655-5279 <i>Attorney for Litton Loan</i>	<input checked="" type="checkbox"/> <b>Legal Messenger</b> <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx
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**SIGNED** this 23<sup>rd</sup> day of May 2012 at Seattle, Washington.

  
Diana L. D'Antuono