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No. 70707-8-I

STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

ALICYN KOMINE,
Respondent,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
COMPANY,
Appellant.

On Appeal from Snohomish County Superior Court
Case No. 11-2-09414-4
The Honorable Marybeth E. Dingley

**BRIEF OF APPELLANT METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY**

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I. INTRODUCTION

This appeal concerns the validity of a Stipulation and Order of Dismissal that was entered on August 27, 2012 *after respondent Alicyn Komine intentionally presented the Stipulation and Order of Dismissal to the trial court to voluntarily dismiss this case.*

This litigation arises out of a motor vehicle accident that occurred on December 20, 2009, when the vehicle occupied by respondent Alicyn Komine and her husband, Jon Komine, was rear ended by a vehicle driven by defendant Humberto Anguiano. The Komines commenced litigation against Mr. Anguiano on October 31, 2011. In February 2012, the trial court granted the motion of appellant Metropolitan Property and Casualty Insurance Company (“MetLife”), the Komines’ insurance carrier, to intervene in the suit to protect its interest as the provider of the Komines’ Under Insured and Uninsured Motorist (“UIM”) coverage.

In May 2012, *Ms.* Komine accepted an offer of settlement from Mr. Anguiano’s insurance company for the \$30,000 policy limits. In August 2012, *Mr.* Komine accepted an offer of settlement from Mr. Anguiano’s insurance company. On August 27, 2012, a stipulation and order of dismissal was entered. The stipulations provided as follows: *“It is hereby stipulated by and between the parties hereto that the above-entitled matter has been fully settled and compromised and may be dismissed with prejudice and without costs.”* The Order of Dismissal ordered that *“the above-entitled matter be, and the same is hereby dismissed with prejudice and without costs.”*

MetLife was not given notice of the Stipulation and Order of Dismissal and did not learn the case had been dismissed until November 2012. Counsel for MetLife then advised Ms. Komine's counsel, in correspondence dated November 13, 2012, that he had just learned all claims had been dismissed with prejudice in August. Ms. Komine subsequently requested that MetLife stipulate to an order vacating the dismissal of her UIM claim against MetLife; MetLife advised her in December 2012 that it was not willing to stipulate to a motion to vacate.

Ms. Komine indicated her intent to proceed with a motion to vacate, and with that in mind, MetLife engaged in settlement negotiations in early 2013. MetLife extended its final settlement offer on February 25, 2013, which remained open until March 13, 2013. Ms. Komine did not respond to the February 25 final settlement offer and negotiations ceased.

Ms. Komine waited *seven months* after she learned the Order of Dismissal had dismissed her claims against MetLife to bring her motion to vacate, *six months* after being told that MetLife would not agree to vacate the order, and after failing to participate in settlement negotiations for *three months*. Ms. Komine's motion was not brought within a reasonable time and she did not exercise the requisite due diligence as a matter of law

Ms. Komine eventually filed a motion to vacate the Order of Dismissal on June 20, 2013. In moving to vacate, Ms. Komine argued (1) that while *Mr. Komine* intended to dismiss his claims against Mr. Anguiano and against MetLife, *Ms. Komine* did not intend to dismiss her claim against MetLife, and her dismissal of the entire matter was due to

mistake, inadvertence, or excusable neglect; (2) that she acted with due diligence once she learned of the dismissal; (3) that her claim against MetLife has merit; (4) that MetLife would suffer no hardship if the dismissal were overturned; (5) that her voluntary dismissal of her claims was not a final adjudication on the merits and was analogous to a default; and (6) that her UIM claim against MetLife could not be dismissed because she had not pleaded it in her complaint.

The trial court granted Ms. Komine's motion and vacated the Order of Dismissal. MetLife appealed that ruling as a matter of right under RAP 2.2(a)(10). For the following reasons, this Court must now reverse the trial court's decision and reinstate the Order of Dismissal.

First, Ms. Komine cannot establish mistake, inadvertence, or excusable neglect because she knowingly and intentionally presented the Stipulation and Order of Dismissal to the trial court for entry.

Second, Ms. Komine did not act with due diligence because she waited *ten months* after the order was entered on August 27, 2012 before taking any steps to address the Order of Dismissal, *seven months* after MetLife advised her of the dismissal of all claims, *six months* after being told that MetLife would not stipulate to vacating the order, and after failing to respond to MetLife's final settlement offer for *three months*.

Third, Ms. Komine failed to make an independent showing of fact supporting a valid cause of action against MetLife. She simply argues that because MetLife intervened to protect its interests and participated in the case, that its behavior demonstrates Ms. Komine's claims have merit. The

fact that MetLife prudently intervened to protect its interests cannot be construed as tacit acknowledgment of the merits of Ms. Komine's claims. Insurance companies routinely participate in litigation they find of little or no merit in order to protect their interests.

Fourth, Ms. Komine failed to establish that MetLife would suffer no hardship if the dismissal were overturned. Indeed, MetLife would be subjected to substantial hardship including unnecessarily lengthy litigation, increased costs, and unavailable discovery due to Ms. Komine's unexplained delay.

Fifth, Ms. Komine failed to meet the four factors of the equitable test for excusable neglect adopted by the Ninth Circuit, and the test is the wrong legal standard as it directly conflicts with the longstanding rule in Washington that an attorney's negligence does not constitute grounds for vacating a judgment under CR 60(b).

Sixth, Ms. Komine failed to meet the requirements for vacating a voluntary dismissal pursuant to CR 60(a). While she cited the rule in her motion, she failed to brief or argue the issue and CR 60(a) is inapplicable because the relief sought by Ms. Komine differs from the trial court's original intent in entering the order of dismissal.

Seventh, the order of dismissal was a final adjudication on the merits and is not analogous to a default.

Eighth, as an intervener MetLife is a full party to the action in all respects and the dismissal was a final judgment as to all claims raised and

all claims which could have been but were not raised and litigated in the suit, including any claims by Ms. Komine against MetLife.

For these and other reasons set forth below, this Court must reverse the trial court's decision and reinstate the Order of Dismissal.

II. ASSIGNMENTS OF ERROR

The trial court erred by granting Ms. Komine's motion to vacate and by vacating the Order of Dismissal.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Ms. Komine failed to establish mistake, inadvertence, or excusable neglect when she knowingly and intentionally presented the Stipulation and Order of Dismissal to the trial court for entry.

2. Whether Ms. Komine failed to act with due diligence when she waited ten months before taking steps to vacate the Order of Dismissal entered in August 2012, seven months after she learned there was a problem, and six months after being told that MetLife would not agree to vacate the order.

3. Whether Ms. Komine failed to make an independent showing of facts which would entitle her to relief against MetLife when she failed to demonstrate that her damages exceed the amount of her settlement with Mr. Anguiano.

4. Whether Ms. Komine failed to establish that MetLife would suffer no hardship when the record contains undisputed evidence

that overturning the default would substantially delay any resolution of this case.

5. Whether the trial court applied the wrong legal standard in applying the equitable test for excusable neglect adopted by the Ninth Circuit, the elements of which Ms. Komine failed to establish mistake.

6. Whether Ms. Komine failed to meet the requirements for vacating a voluntary dismissal pursuant to CR 60(a) where she sought an outcome different from the trial court's original intent in entering the order of dismissal.

7. Whether the order of dismissal was a final adjudication on the merits not analogous to a default order.

8. Whether the dismissal was a final judgment as to all claims raised and all claims which could have been but were not raised and litigated in the suit, including any claims by Ms. Komine against MetLife

IV. STATEMENT OF THE CASE

A. The Accident

This case arises out of a motor vehicle accident that occurred on December 20, 2009. (CP 87.) In their complaint, Ms. Komine and her husband, Jon Komine, allege that they were injured when they were rear-ended while waiting at a red light by an SUV driven by defendant Humberto Anguiano. (CP 87-88.)

B. The Lawsuit

On October 31, 2011, the Komines filed a Complaint for Personal Injury ("Complaint") alleging claims for negligence against Mr.

Anguiano. (CP 87-88.) On February 12, 2012, MetLife, the Komines' insurance carrier, filed a motion to intervene in the suit to protect its interest as the provider of the Komines' Under Insured and Uninsured Motorist ("UIM") coverage. (CP 73-77.) The trial court granted the motion to intervene on February 29, 2012. (CP 70-72.)

In the Complaint, Ms. Komine alleged that Mr. Anguiano acted negligently by failing to operate and control his vehicle in a reasonably safe manner, thus rear-ending the Komines' vehicle (CP 88.) As a result of the accident, Ms. Komine alleged that she sustained injuries to her back, neck, and wrist. (CP 87.) Ms. Komine further alleged that she suffered general and special damages including medical expenses, pain and suffering and disfigurement, wage loss, and economic damages. (CP 88.)

C. Ms. Komine's Voluntary Dismissal of All Claims

In May 2012, Ms. Komine settled her claim against Mr. Anguiano for \$30,000. (CP 38.) In August 2012, Mr. Komine also settled his claim against Mr. Anguiano. (CP 38.) Also in August 2012, counsel for Mr. Anguiano forwarded a proposed stipulation and order of dismissal to counsel for the Komines. (CP 39.) The Komines' counsel understood the significance of a stipulated dismissal (CP 10) and signed the Stipulation and Order of Dismissal (CP 45-46).

On August 27, 2012, the Stipulation and Order of Dismissal was entered by the trial court. (CP 63-64.) The stipulation provided as follows: "*It is hereby stipulated by and between the parties hereto that*

the above-entitled matter has been fully settled and compromised and may be dismissed with prejudice and without costs.” (CP 63.) Based upon the forgoing stipulation, the trial court entered an order of dismissal, which ordered “*that the above-entitled matter, be, and the same is hereby dismissed with prejudice and without costs.”* (CP 64.)

In November 2012, MetLife learned that all claims in the case had been dismissed with prejudice in the August 2012 Stipulation and Order of Dismissal. (CP 50.) By letter dated November 13, 2012, counsel for MetLife wrote counsel for the Komines and advised that MetLife had just learned that all claims in the lawsuit had been dismissed with prejudice back in August. (CP 50.)

Counsel for the Komines responded in a letter articulating Ms. Komine’s position that the Order of Dismissal did not dismiss her claims against MetLife, and even if it did, that she would seek to vacate the order pursuant to CR 60. (CP 40.) Enclosed with the letter she provided a stipulated motion to vacate or amend the order of dismissal. (CP 40.) MetLife declined to stipulate to vacate or amend the order. (CP 40.)

Ms. Komine having stated her intent to move to vacate or amend the order, MetLife expressed its continued interest in negotiating a settlement with Ms. Komine. (CP 40-41.) In early 2013, Ms. Komine communicated a demand to MetLife (CP 41) and on February 25, 2013, MetLife extended its final offer of settlement to Ms. Komine. (CP 21). In extending its final offer, MetLife communicated its position that Ms. Komine had been fully compensated for her injuries in her settlement with

Mr. Anguiano, and the final offer would remain open until March 13, 2013. (CP 21.) Ms. Komine did not respond to the offer. (CP 21.) There was no further communication from Ms. Komine until counsel for MetLife received a voicemail message from counsel for Ms. Komine three months later on May 24, 2013. (CP 21.)

D. Ms. Komine’s Motion to Vacate

Ms. Komine eventually filed a motion to vacate the Order of Dismissal on June 20, 2013—nearly ten months after entry of the order. (CP 51-62.) Ms. Komine had waited seven months after she learned she had dismissed her claims and communicated her intent to MetLife to move to vacate or amend the order, and six months after being told that MetLife would not agree to vacate the order. (CP 40-41.)

In her motion to vacate, Ms. Komine argued (1) that dismissal of her claims was due to mistake, inadvertence, or excusable neglect; (2) that her claim has merit; (3) that she had acted with due diligence once she learned of the dismissal; and (4) that MetLife would suffer no hardship if the dismissal were vacated. (CP 51-62.)

The trial court granted Ms. Komine’s motion with little explanation of the basis of its ruling and vacated the Order of Dismissal. (CP 7-8.) MetLife appealed that ruling as a matter of right under RAP 2.2(a)(10). (CP 1-6.)

V. STANDARD OF REVIEW

The following questions are presented before this Court for review: (1) whether Ms. Komine’s dismissal of her claims was due to mistake,

inadvertence, or excusable neglect; (2) whether Ms. Komine acted with due diligence once she learned of the dismissal; (3) whether Ms. Komine made an independent showing of facts which would entitle her to relief against MetLife; and (4) whether Ms. Komine established that MetLife would suffer no hardship if the dismissal were vacated. The trial court's rulings on these issues are reviewed for abuse of discretion. *In re Estate of Stevens*, 94 Wn. App. 20, 29-30, 971 P.2d 58 (1999).

Trial court's vacation of an order under CR 60(b) "will be overturned only upon a showing that the court abused its discretion. *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Id.* A decision is based on untenable grounds or for untenable reasons if the court applies the wrong legal standard or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

VI. LEGAL ARGUMENT

A. Ms. Komine Failed to Meet the Requirements for Vacating a Voluntary Dismissal Pursuant to CR 60(b)(1)

The analysis of whether Ms. Komine is entitled to relief under CR 60(b)(1) comes down to whether she intentionally filed the stipulation and order of dismissal, and on that issue there can be no dispute. There is no dispute that she filed the stipulated motion to dismiss, and there is no dispute that the trial court granted the relief Ms. Komine specifically requested in her stipulated motion. Instead, her sole argument is that she

was mistaken as to the effect of the order she was requesting, at the time she requested it. As discussed below, her counsel's error in misapprehending the effect of an agreed order is not grounds to vacate a judgment under CR 60(b)(1).

Under CR 60(b)(1), the court may grant relief on the basis of mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order. CR 60(b)(1). "Generally, the...neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." *Lane*, 81 Wn. App. at 106-07 (citing 47 Am.Jur.2d *Judgments* § 812 (1995); *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978); *Winstone v. Winstone*, 40 Wn. 272, 274, 82 P. 268 (1905); *In re Marriage of Burkey*, 36 Wn. App. 487, 490, 675 P.2d 619 (1984)). Federal courts agree. "Neither ignorance nor carelessness on the part of a litigant or his attorney will provide grounds for rule 60(b) relief." *Bershad v. McDonough*, 469 F.2d 1333, 1337 (7th Cir.1972); *Sutherland v. ITT Continental Baking Co.*, 710 F.2d 473, 476-77 (8th Cir.1983) ("Rule 60(b) has never been a vehicle for relief because of an attorney's incompetence or carelessness.").

"Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The 'sins of the lawyer' are visited upon the client." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) (footnote omitted). Accordingly, "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in

a civil action.” *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 838, 970 P.2d 803 (1999) *aff’d*, 140 Wn.2d 568, 998 P.2d 305 (2000). In addition, “[k]nowledge by the attorney is imputed to the client.” *Hill v. Department of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978).

These legal principles are significant because Ms. Komine has tried to distance herself from her attorney’s conduct and knowledge. Ms. Komine has argued that she did not intend to dismiss her UIM claim and that she did not authorize her attorney to dismiss her UIM claim. (CP 26-27.) But these arguments are legally and factually incorrect.

Ms. Komine is bound by the action of her attorney as a matter of law and her attorney’s knowledge is imputed to Ms. Komine as a matter of law. “The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.” *Haller*, 89 Wn.2d at 547.

1. Ms. Komine’s Dismissal of her Claims Was Not Caused by Mistake, Inadvertence, or Excusable Neglect

Because Ms. Komine sought to overturn an agreed order, her burden is quite high. Attorney mistake or negligence and “erroneous advi[c]e of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment.” *Lane*, 81 Wn. App. at 109 (citing *Haller*, 89 Wn.2d at 544). “When the parties submit to an agreed-upon disposition...the burden to obtain Rule 60(b) relief *is heavier than if*

one party proceeded to trial, lost, and failed to appeal.” *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986) (citation omitted) (emphasis added). “Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.” *Hoffman v. Celebrezze*, 405 F.2d 833, 835 (8th Cir. 1969). “[T]he law favors resolution of cases on their merits and, accordingly, favors their finality.” *Lane*, 81 Wn. App. at 106. For the reasons stated below, Ms. Komine failed to meet her burden and the trial court abused its discretion in finding the burden had been met in this case.

a. Under the general rule in Washington, an attorney’s negligence does not constitute grounds for vacating a judgment under CR 60(b)

The Court of Appeals, Division One stated the general rule in Washington that an attorney’s negligence does not constitute grounds for vacating a judgment under CR 60(b). *Bar v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003). There, the court recognized that where an attorney is authorized to appear on behalf of a client, that attorney’s acts are binding on the client and the attorney’s negligence is attributable to the client. 119 Wn. App. at 47.

While the court in *Barr* recognized an exception in that case under CR 60(b)(11) where the attorney suffered from severe clinical depression, which accounted for the negligence, the court specifically emphasized that the negligence was due to the extraordinary circumstance of the attorney’s mental illness and not incompetence or deliberate inattention to his

workload. *Id.* at 46-47. The exception recognized in *Barr* was limited to those “situations where an attorney’s condition effectively deprives a diligent but unknowing client of representation.” *Id.* at 48. Important to the court’s holding was the fact that “there is no basis for attributing the attorney’s ‘acts’ to the client when the agency relationship has disintegrated to the point where as a practical matter there is no representation.” *Id.*

A search of Washington case law did not reveal any published cases with facts similar to those presented here. However, cases from all over the country, many with extremely similar facts to the case at bar, all found that counsel’s failure to recognize the unintended consequences of a voluntary act was not grounds to vacate a judgment under CR 60(b).

b. Federal courts similarly hold that attorney negligence or misapprehension of the legal effect of voluntary acts does not constitute grounds for vacating a judgment under CR 60(b)

The Tenth Circuit has held, “a party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes.” *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999); *see also Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir.1990) (“Carelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1).”).

The Fifth Circuit has also held, “[A] court would *abuse its discretion* if it were to reopen a case under Rule 60(b)(1) when the reason

asserted as justifying relief is one attributable solely to counsel's carelessness with *or misapprehension of the law* or the applicable rules of court." *Edward H. Bohlin Co. v. Banning*, 6 F.3d 350, 356-57 (5th Cir. 1993). The *Banning* court went on to hold, "[t]he broad power granted by [Rule 60(b)](6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made." *Id.*

The Second Circuit held, "The law in this circuit is reasonably clear when a conscious decision has been made by counsel, ignorance of the law 'is not the sort of 'excusable neglect' contemplated by Federal Civil Rule 60(b), 28 U.S.C.A. as ground for vacating an adverse judgment.'" *Ohliger v. United States*, 308 F.2d 667 (2d Cir. 1962) (citation omitted). The Sixth Circuit came to the same conclusion, holding, "neither strategic miscalculation nor counsel's misinterpretation of the law warrants relief from judgment." *McCurry v. Adventist Health Sys./Sunbelt*, 298 F.3d 586, 592 (6th Cir. 2002).

Treatises have also recognized this national trend. *See e.g.* 46 Am.Jur.2d *Judgments* § 823 (2004) ("As a general rule, parties seeking relief from judgment on the basis of surprise, mistake, inadvertence, or excusable neglect under the Federal Rules are denied relief from the result of voluntary actions on their part."); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2858 (2d ed. 1995) ("Voluntary action also may estop a party from seeking relief on the ground of mistake or excusable neglect.... This includes matters such as ... *voluntary dismissals*, even when based on erroneous facts.") (emphasis

added) (as cited in *In re Pettle*, 410 F.3d 189, 192 (5th Cir. 2005)). The *Pettle* court found that the plaintiff was not entitled to relief under CR 60 because he “made a specific choice to voluntarily request dismissal of his case with prejudice ***without fully understanding the consequences of his decision*** on his state court action.” *In re Pettle*, 410 F.3d at 193 (emphasis added).

As the Court can see, it is widely accepted in the federal courts that in a situation where an attorney intentionally files for a judgment of dismissal, the judgment cannot be vacated simply because the attorney’s filing had unintended results, or because she misapprehended the effect of an order. It is instructive to review the specific analysis of two of the cases (one federal and one state) to better understand their reasoning. Those cases are discussed below.

i. The Second Circuit held it was reversible error to vacate a stipulated order of dismissal based on a misunderstanding of its effect

In a Second Circuit case, a plaintiff dismissed a claim based on state law with the intention of re-filing against the same defendant under the same operative facts based on federal law. *See Nemaizer*, 793 F.2d 58. Identically to this case, “the stipulation stated in relevant part that ‘this action is dismissed with prejudice and without costs against either party.’” *Id.* at 60. The plaintiff then filed his federal claim in federal court. The district court judge to whom the new action was assigned “indicated that he would dismiss it on *res judicata* grounds unless plaintiffs convinced

[the judge in the original action] to modify the earlier ‘with prejudice’ order to encompass only a dismissal of plaintiffs’ original state law complaint.” *Id.*

“When the matter was referred to him, [the judge in the original action] found that such was [plaintiffs’] intent in entering the stipulation, and granted [plaintiffs’] Fed.R.Civ.P. 60(b) motion relieving them from the judgment that had dismissed the state action ‘with prejudice,’ and which otherwise would have precluded them from now raising claims arising under federal law.” *Id.* The Court noted, “The reason [plaintiffs] advance to obtain Rule 60(b) relief from the order of dismissal is that the stipulation contemplated only a pending state claim, not a federal claim.” *Id.* at 59. The trial court in the *Nemaizer* case found, just as plaintiff asserts in this case, “***a genuine misunderstanding had occurred concerning the stipulation’s scope*** and that equity dictated giving [plaintiffs] an opportunity to make their [federal] claims in federal court.” *Id.* at 60 (emphasis added). Based on its finding of a misunderstanding, the trial court vacated the judgment of dismissal and defendant appealed. The Second Circuit, for the reasons that follow, found that the trial court had abused its discretion in vacating the dismissal and reversed with an order to dismiss the claim. *Id.* at 66.

The Second Circuit held, “The legal consequences of a stipulation incorporated in a court order may not be undone simply because, with the benefit of hindsight, stipulating turns out to have been an unfortunate tactic. Although obviously better informed than foresight, an argument

based on hindsight is not a ground upon which a court may grant Rule 60(b) relief.” *Id.* at 59-60. “Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.” *Id.* at 62 (citations omitted). “More particularly for our purposes, ***an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment.***” *Id.* (emphasis added) (citations omitted).

The Court reasoned,

Insofar as [plaintiff] or his counsel read the order’s ‘proper’ and ‘technical’ language differently, he misread the law. More likely, the consequences of entering into such an agreement were not fully weighed. Admittedly, the choice made was poor, but even if responsibility rests with plaintiff’s prior counsel, Rule 60(b)(1) does not provide an avenue for relief. There is no allegation, for example, that former counsel lacked authority to enter into the stipulation. Moreover, in this context, an attorney’s actions, whether arising from neglect, carelessness or inexperience, are attributable to the client, who has a duty to protect his own interests by taking such legal steps as are necessary. *Ackerman v. United States*, 340 U.S. 193, 197-98, 71 S.Ct. 209, 211, 212, 95 L.Ed. 207 (1950).

To rule otherwise would empty the finality of judgments rule of meaning.

Id. at 62-63 (emphasis added).

ii. The Nebraska Court of Appeals held it would be reversible error to vacate a judgment under similar circumstances

The Nebraska courts dealt with an issue extremely similar to the one here, and found that the trial court lacked the authority to vacate a judgment under these circumstances. *See Bevard v. Kelly*, 15 Neb. App. 960, 739 N.W.2d 243 (Neb. 2007). In that case, plaintiff filed suit against seven defendants. *Id.* at 245. An eighth defendant, an insurance company, was granted leave to intervene. *Id.* Three defendants were granted summary judgment and were dismissed. *Id.* The insurance company settled, and plaintiff, intending to appeal the court's ruling on the motions for summary judgment, filed a dismissal, which read, "The Plaintiff dismisses the above captioned proceeding without prejudice." On the same date the plaintiff appealed from the court's orders granting summary judgment in favor of the three dismissed defendants. *Id.* On appeal, the defendants argued that the appellate court lacked jurisdiction to hear the appeal, "because the dismissal filed by the [plaintiff], was broad enough to operate as a dismissal of the entire action against all defendants." *Id.* at 246.

In an attempt to remedy the jurisdictional problem, the plaintiffs "filed a motion requesting that the court enter an order *nunc pro tunc* stating the proceedings to be dismissed were those pending against the [intended defendants] and that the court enter an order of dismissal accordingly." *Id.* The trial court granted plaintiffs' motion. *Id.* Based on the trial court's granting of their motion, the plaintiffs argued, "even if

their dismissal was broad enough to dismiss all eight defendants, the *nunc pro tunc* order entered by the court was effective to modify the dismissal so as to specify that the [plaintiffs] were dismissing only [three defendants].” *Id.* The defendants appealed, and the Court of Appeals reversed the trial court’s amendment of the order of dismissal.

In its ruling the appellate court stated, “we decline to allow an order *nunc pro tunc* to be used when the mistake or error at issue is a party’s own. We conclude that ‘clerical mistakes’ and ‘errors therein arising from oversight or omission’ refer only to mistakes or errors made by the court clerk and not those made by a party or the party’s attorney.” *Id.* at 247. That court went on to hold, “according to case law, a *nunc pro tunc* order operates to correct a clerical error or a scrivener’s error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, *even if such order was not the order intended.*” *Id.* (citation omitted)(emphasis added).

c. Ms. Komine’s misapprehension of the effect of her voluntary dismissal is not grounds for vacating the Order of Dismissal under CR 60(b)

The failure of Ms. Komine’s counsel to properly apprehend the legal effect of her voluntary act, dismissing all of the claims of both parties based on the plain language of the stipulation for voluntary dismissal with prejudice, is not grounds under Washington law to vacate the Order of Dismissal pursuant to CR 60(b)(1). As the above discussion

illustrates, Ms. Komine is bound by the acts of her attorney and her attorney's neglect or misapprehension of the legal effect of the language she stipulated to in the Order of Dismissal is insufficient grounds to justify relief from judgment.

Because there was no mistake, inadvertence, or excusable neglect, the trial court abused its discretion to the extent that it vacated the Order of Dismissal on this basis. Accordingly, this Court must reverse the trial court's decision and issue a ruling clarifying that Ms. Komine's dismissal of her claims was not due to mistake, inadvertence, or excusable neglect.

2. Ms. Komine Did Not Act With Due Diligence

A party must use diligence in asking for relief following notice of the entry of the aggrieved order. *Gutz v. Johnson*, 128 Wn. App. 901, 919, 117 P.3d 930 (2005). A motion brought under CR60(b) is timely only if it meets two separate time requirements—that it “be made within a reasonable time” and that it “be made not more than one year from the judgment.” *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310-11, 989 P.2d 1144 (1999). The one-year time limit “is merely the outermost limit” and a motion to vacate “will be rejected as untimely if not made within a ‘reasonable time’ even though the one-year period has not expired.” *Id.* at 312 (citing 4 Lewis H. Orland and Karl B. Tegland, *Washington Practice* § 723 (4th ed. 1992); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2866, at 386 (2d ed. 1995)). “The critical period in the determination of whether a motion to vacate is

brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion.” *Id.*

As a matter of law, “three months is not within a reasonable time to respond to an order of default” under CR 60(6). *In re Estate of Stevens*, 94 Wn. App. at 35 (emphasis added). As discussed at more length below, the present case involves an order on the merits and not a default judgment like that considered by the *Stevens* court. The *Stevens* holding is instructive, however, because the standard for vacation of a default judgment is more lenient than that applied to vacation of a judgment on the merits. *Lane*, 81 Wn. App. at 106. Such a delay, unreasonable in the more lenient default judgment context, can only be more so in the present circumstances involving a judgment on the merits. Similarly in *Lucket*, the court held that a four month delay in moving to vacate an order of dismissal was unreasonable. 98 Wn. App. at 313.

The trial court granted the order of dismissal of this case on August 27, 2012. (CP 63-64.) The fact that the dismissal included all claims against all defendants was brought to Ms. Komine’s counsel’s attention on November 13, 2012. (CP 40.) Ms. Komine communicated her intent to move to vacate the dismissal, and sought MetLife’s agreement to stipulate to vacating or amending the order. (CP 40.) Ms. Komine was told MetLife was not willing to stipulate to an order vacating the dismissal in December 2012. (CP 40-41.) MetLife’s final settlement offer was extended on February 25, 2013, which remained open until March 13, 2013. (CP 21.) Ms. Komine did not respond to MetLife’s final offer, and

did not continue settlement negotiations following the February 25, 2013 offer. (CP 21.) Counsel for Ms. Komine did not contact counsel for MetLife again until three months later, on May 24, 2013. (CP 21.) She did not file the motion to vacate until June 20, 2013. (CP 51.)

When Ms. Komine brought her motion, it had been seven months since she learned she had dismissed her claims, six months since MetLife informed her it would not stipulate to a motion to vacate, and she had failed to respond to MetLife's settlement offer and ceased to participate in settlement negotiations for three months. Ms. Komine offers no explanation for this lengthy delay, apart from the settlement negotiations, which cannot account for the three-month delay after she failed to respond to MetLife's final offer. Ms. Komine's motion was not brought within a reasonable time and she did not exercise the requisite due diligence as a matter of law.

The trial court abused its discretion in finding that delay was "not an issue" and that the reasons for the delay were the "lag in the parties' discovery of the entry of the Order as to the UIM claim, and then the parties' mutual effort to resolve the claim." (CP 8.) The effect of the dismissal was discovered seven months before Ms. Komine filed her motion, and she ceased participating in settlement negotiations in February but did not file until June. Accordingly, neither reason accounts for the unreasonable delay and her lack of diligence in seeking relief from the court.

Because Ms. Komine did not act with due diligence and her motion was not made within a reasonable time, the trial court abused its discretion to the extent that it found due diligence and vacated the Order of Dismissal on this basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that Ms. Komine did not bring her motion within a reasonable time and did not act with due diligence in seeking to vacate the Order of Dismissal.

3. Ms. Komine Failed To Make An Independent Showing Of Facts Which Would Entitle Her To Relief Against MetLife

“The inherent power of the court to vacate or amend a judgment is embodied in CR 60 which in turn is based on RCW 4.72.010.” *Seattle-First Nat. Bank Connell Branch v. Treiber*, 13 Wn. App. 478, 480-82, 534 P.2d 1376 (1975). That statute states, “The judgment shall not be vacated on motion or petition until it is adjudged...that there is a valid cause of action.” RCW 4.72.050. In making a showing that there is a valid cause of action, plaintiff cannot rely upon the allegations in the original complaint, “but must make an independent showing of facts which would entitle him to relief.” *Haller*, 89 Wn. 2d at 546; *see also Lockett*, 98 Wn. App. at 313-15 (denying motion to vacate because plaintiff “did not attempt to persuade the trial court on the merits of her claim, which was her burden”).

Ms. Komine offered no evidence demonstrating she is entitled to relief from MetLife. She acknowledged her duty to meet the “meritorious claim” requirement in her motion, but her only attempt to meet the

requirement in her motion was a single sentence in her brief arguing, without citation, that “MetLife has certainly given outward acknowledgement that Alicyn’s damages exceed the \$30,000 third-party insurance limits.” (CP 58.) Ms. Komine offered no evidence to support this allegation, and in fact, it is untrue. MetLife specifically stated its position that Ms. Komine has been fully compensated for her injuries. (CP 21.) In her reply brief, Ms. Komine makes additional, uncited allegations regarding the nature of her injuries. (CP 18.) Those allegations are unsupported and are not cited to any facts in the record before the Court.

The language of RCW 4.72.050, “*The judgment shall not be vacated,*” is mandatory not permissive. Ms. Komine failed to make the necessary showing because she did not make any independent showing that she has a valid cause of action against MetLife beyond mere allegations. There is no factual basis in the record to support her claim, and her failure to make the requisite showing pursuant to RCW 4.72.050 precludes vacation of the dismissal.

Because Ms. Komine failed to provide any evidence of the merit of her claim against MetLife, the trial court abused its discretion to the extent that it found Ms. Komine had made an independent showing of facts which would entitle her to relief and vacated the Order of Dismissal on this basis. Accordingly, the Court must reverse the trial court’s decision and issue a ruling clarifying that Ms. Komine failed to make an

independent showing which would entitle her to relief in seeking to vacate the Order of Dismissal.

4. Ms. Komine Did Not Demonstrate That No Hardship Would Result If the Default Were Overturned

In her brief, Ms. Komine argued MetLife would not suffer undue hardship “since it believed all along that it was ‘on the hook’ for Alicyn’s damages over \$30,000.” (CP 58.) Ms. Komine’s position overlooks the fact that she has not established that she has damages in excess of \$30,000 and MetLife had expressly communicated its position that she has been fully compensated for her injuries. (CP 21.) Contrary to Ms. Komine’s assertion, MetLife’s intervention in order to protect its interests cannot be construed as a tacit acknowledgement that her claims have merit, and MetLife would be subjected to substantial hardship including unnecessarily lengthy litigation, increased costs, and unavailable discovery due to Ms. Komine’s unexplained delay in moving to vacate her ‘mistaken’ voluntary dismissal of her claims (*See* CP 14).

On a motion to vacate, the moving party must demonstrate “that no substantial hardship will result to the opposing party.” *White v. Holm*, 73 Wn. 2d 348, 352, 438 P.2d 581 (1968). Substantial hardship is a secondary factor to be demonstrated by the moving party, which varies “in dispositive significance as the circumstances of the particular case dictate.” *Id.*

Litigation in this case had gone on for ten months when the order of dismissal was entered. Another ten months passed before Ms. Komine

filed her motion to vacate. After participating in the litigation for a year and a half, since February 2012, MetLife would be back at the beginning of the process all over again, substantially delaying any resolution of the claims against it. MetLife would be subjected to the additional time and cost of the ongoing litigation entirely due to Ms. Komine's voluntary conduct and unexplained delays.

The accident that is the subject of this litigation occurred almost four years ago on December 20, 2009. The possibility of prejudice is “inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence may be lost.” *State v. Ansell*, 36 Wn.App. 492, 498, 675 P.2d 614 (1984) (quoting *United States v. Marion*, 404 U.S. 307, 325–26, 92 S.Ct. 455 (1971)). Further, Ms. Komine dismissed Mr. Anguiano without any notice to MetLife, the order vacating the dismissal is limited to the claims against MetLife, and it is therefore deprived of the opportunity to obtain discovery from Mr. Anguiano as he is no longer a party to the suit.

Because Ms. Komine did not demonstrate no hardship to MetLife, and MetLife would suffer hardship if the Order of Dismissal were overturned, the trial court abused its discretion to the extent it vacated the Order of Dismissal on this basis. Accordingly, the Court must reverse the trial court’s decision and issue a ruling clarifying that MetLife would suffer hardship if the default were overturned.

B. Ms. Komine Failed to Meet the Requirements of the Equitable Test for Excusable Neglect Adopted by the Ninth Circuit

Ms. Komine argued that the Ninth Circuit's decision in *Bateman v. U.S. Postal Service*, 231 F.3d 1220 (9th Cir. 2000) supports her position. Because CR60(b) parallels the federal rule, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive. *Luckett*, 98 Wn. App. at 311. However, the equitable test adopted by the Ninth Circuit for federal Rule 60(b)(1) has not been adopted by Washington courts, and is in direct conflict with the longstanding rule in Washington that an attorney's negligence does not constitute grounds for vacating a judgment under CR 60(b). *See Bar v. MacGugan*, 119 Wn. App. at 78. To the extent the trial court based its decision on the Ninth Circuit's equitable test, its decision is based on untenable grounds—application of the wrong legal standard—and is therefore an abuse of discretion. *Salas*, 168 Wn.2d at 668–69.

Even if the equitable analysis were applicable, Ms. Komine is not entitled to relief. Under the equitable test, whether neglect is excusable depends on the following the four factors: 1) the reason for the delay, 2) the prejudice to the defendant, 3) the length of the delay and its potential impact on the proceedings, and 4) whether the party acted in good faith. *Bateman*, 231 F.3d at 1224.

As discussed above, Ms. Komine provides little explanation or reason for her delay in moving to vacate the dismissal. Seven months passed from when she learned of the effect of the dismissal and when she brought her motion. While she attributed the delay to the parties'

settlement negotiations, three months had passed since she had failed to respond to MetLife's final settlement offer and ceased to negotiate. Ms. Komine provides no explanation for the three month delay.

The delay in this case is also substantially longer than the two week and one month delays discussed by the court in *Bateman*. *Id.* at 1225. While the court noted that loss of a "quick victory" is insufficient prejudice, there the judgment was timely vacated within a month permitting the case to proceed with little impact on its administration. *Id.* In contrast, Ms. Komine waited seven months before moving to vacate the dismissal and she offers no explanation for much of that delay.

"Prejudice is 'tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.'" *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1118 (C.D. Cal. 2005) (citing *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 433-34 (9th Cir. 1992)). As discussed above, MetLife no longer has the opportunity to obtain discovery from Mr. Anguiano as Ms. Komine dismissed him from the suit without notice to MetLife. The fact that it has now been almost four years since the subject accident may also impact witness memory and the availability of evidence. For the reasons discussed more fully above in subsection four, there is prejudice here both to MetLife and to the efficient administration of justice.

While there is no evidence of bad faith on the record before the Court, Ms. Komine has failed to articulate reasons accounting for her lengthy delay or to demonstrate good faith. She has failed to demonstrate

excusable neglect under the Ninth Circuit's equitable test, and the trial court abused its discretion to the extent that it vacated the Order of Dismissal on that basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that Ms. Komine's dismissal of her claims was not due to excusable neglect.

C. Ms. Komine Failed to Meet the Requirements for Vacating a Voluntary Dismissal Pursuant to CR 60(a)

Ms. Komine cited to but did not provide any briefing or argument that CR 60(a) provides a basis for relief from the Order of Dismissal. (CR 51-62.) Pursuant to CR 60(a), the court may correct clerical mistakes in “judgments, orders or other parts of the record and errors therein arising from oversight or omission.” CR 60(a). Civil Rule 60(a) “allows a court to correct clerical mistakes in a judgment by correcting language that did not convey the court's intention, or to supply language that was inadvertently omitted.” *Green v. Normandy Park*, 137 Wn. App. 665, 700, 151 P.3d 1038 (2007). The rule does not allow the court to enter an amended order different than the order originally intended by the court. *Id.*

Ms. Komine presumably agrees that CR 60(a) does not apply to the circumstances of this case, but to the extent she implied such an argument, it is in error. “The provision in CR 60 allowing a judgment to be vacated for ‘clerical error’ has been given a relatively narrow reading. The rule allows a judgment to be vacated only for purposes of changing the judgment to accurately reflect the court’s original intent as expressed on

the record *before* the original judgment was entered.” 15A Wash. Prac., Handbook Civil Procedure § 70.4 (2012-2013 ed.) (citing *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002)). “The rule does not allow a judgment to be vacated for purposes of adding new provisions that were not part of the court’s original intent as expressed on the record before the judgment was entered.” *Id.* (citing *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 917 P.2d 100 (1996)).

Below, Ms. Komine provided the new information that she did not intend to dismiss MetLife, and then asked the trial court to reconsider its prior ruling on that basis. As stated above, a judgment can only be vacated if it does not “accurately reflect the court’s original intent as expressed on the record *before* the original judgment was entered.” *Id.* Here, there is no question that the trial court’s intent was to dismiss this entire matter with prejudice, and that intent cannot be changed based on post-judgment information regarding Ms. Komine’s subjective intent.

The trial court abused its discretion to the extent that it vacated the Order of Dismissal pursuant to CR 60(a). Accordingly, the Court must reverse the trial court’s decision and issue a ruling clarifying that Ms. Komine is not entitled to relief from the Order of Dismissal pursuant to CR 60(a).

D. Ms. Komine’s Voluntary Dismissal of Her Claims Is A Final Adjudication On the Merits That Is Not Analogous To A Default

The cases addressing vacation of a default judgment on which Ms. Komine relies by analogy are not dispositive here as, unlike a default

judgment, a voluntary dismissal with prejudice is a final adjudication on the merits. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865–66 n.10, 93 P.3d 108 (2004) (“a dismissal with prejudice constitutes a final judgment on the merits”); *see also Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P.2d 916 (1986) (“A dismissal with prejudice . . . is equivalent to a final judgment on the merits.”). In circumstances similar to the present case, the court in *Marshall v. Thurston Cnty.*, 165 Wn. App. 346, 267 P.3d 491 (2011), noted that the parties stipulated dismissal of their claims with prejudice following settlement constituted a final adjudication on the merits. 165 Wn. App. at 352 n.3.

When a plaintiff attempted to make a similar analogy to the Washington Supreme Court, the Court found, “There is an obvious difference in the view which courts take of judgments by default and judgments by consent.” *Haller*, 89 Wn.2d at 544. There are four reasons why cases vacating defaults are not analogous to this case.

First, default judgments *are not* judgments on the merits, while a voluntary dismissal *is* a judgment on the merits. Here, Ms. Komine dismissed the above-captioned lawsuit “with prejudice.” (CP 64.) “A dismissal ‘with prejudice’ is equivalent to *an adjudication upon the merits* and will operate as a bar to a future action.” *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943) (emphasis added). Ms. Komine consistently argues throughout her brief that the judgment in this case should be vacated because the courts have a “‘strong preference’ that

cases be decided on their merits.” (CP 56.) What she ignores is that her case was decided on the merits.

That being said, “The vacation of a default judgment is distinguishable from the vacation of a judgment on the merits in two ways. First, a court must apply a different set of equitable factors when considering a motion to vacate a default judgment as opposed to a motion to vacate a judgment on the merits.” *Lane*, 81 Wn. App. at 105-06 (citations omitted). “Second, the law favors resolution of cases on their merits and, accordingly, favors their finality.” *Id.* at 106 (citation omitted). “Therefore, an appellate court will review the vacation of a default judgment more leniently than the vacation of a judgment on the merits.” *Id.*

Second, default judgments, by their nature, involve a party that has, for whatever reason, failed to participate in the litigation. A judgment in a case such as this “differs from a judgment by default in that both parties have appeared before the court and have sought its approval of their agreement disposing of the case, different equitable factors must be considered when the court is asked to vacate such a judgment.” *Haller*, 89 Wn.2d at 544 (therein plaintiff seeking to overturn approval of minor settlement and dismissal).

Third, CR 55(c) specifically contemplates vacation under CR 60(b), while no similar rule contemplates vacating a voluntary dismissal. *See Vaughn v. Chung*, 119 Wn. 2d 273, 281, 830 P.2d 668 (1992).

Fourth, defaults and, in fact, every excusable neglect case found involved an omission by a party rather than an intentional act. Here, there was no omission (such as a failure to file an answer in the case of a default), there was an affirmative act by Ms. Komine's counsel, which apparently had an unintended effect. As stated repeatedly above, a party is not entitled to relief under CR 60 because he "made a specific choice to voluntarily request dismissal of his case with prejudice without fully understanding the consequences of his decision." *In re Pettie*, 410 F.3d 189.

Here there is no dispute that Ms. Komine intended to file a motion for dismissal. There can be no dispute that the Court's order reflected the relief sought in the parties' stipulation. Ms. Komine's only argument is that she misapprehended the legal effect of the stipulation and order and did not intend the consequences of her act (*i.e.* dismissing both defendants). But the unintended consequences have no relevance here; because she intended the dismissal, Ms. Komine can get no relief under CR 60(b).

The trial court abused its discretion to the extent that it found the voluntary dismissal was not a final judgment on the merits and vacated the Order of Dismissal on that basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that the Order of Dismissal was a final judgment on the merits.

E. Ms. Komine’s Argument That Her Claim Against MetLife Could Not Be Dismissed Because She Did Not Plead It Is Legally Flawed

Ms. Komine states in her brief, “At no time did Jon or Alicyn Komine ever amend the Complaint to plead a claim against MetLife under the UIM contract.” (CP 52.) She also argues, “Plaintiff disputes that the Order of Dismissal entered in this case could dismiss her contract claim against MetLife, which was never pleaded.” (CP 62.) Ms. Komine’s arguments show a misunderstanding of the role of MetLife as intervener defendant.

Once a party is permitted to intervene, it is “as much a party to that action as the parties who had originally appeared in the action.” *Fairfield v. Binnian*, 13 Wn. 1, 4, 42 P. 632 (1895). This is consistent with the risks faced by an intervener defendant. “[A]n insurer will be bound by the ‘findings, conclusions and judgment’ entered in the action against the tortfeasor when it has notice and an opportunity to intervene in the underlying action against the tortfeasor.” *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 246-47, 961 P.2d 350 (1998).

As an intervener defendant, MetLife was bound by the results of this matter; there would have been no further litigation. Our Supreme Court acknowledged this when it held, “The possibility of anomalous results, redundant litigation, as well as preventing insurers from picking and choosing their judgments justifies application of such principles, provided notice and an opportunity to intervene are afforded to the insurer.” *Id.* at 248. “Through joinder of the UIM insurer, society is

benefitted by the efficiency of judicial economy. The insured is benefitted by *the elimination of multiple suit* costs.” *Id.* (emphasis added). Because MetLife properly intervened, it was a defendant, and it was entitled to all of the benefits of being a defendant, including the benefit of a dismissal with prejudice.

A dismissal with prejudice is a final judgment on the merits to which the doctrine of *res judicata* applies. *Krikava*, 43 Wn. App. at 219. *Res judicata* bars the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000) (citing *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)), review denied, 143 Wn.2d 1006 (2001). “Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.” *Ensley v. Pitcher*, 152 Wn. App. 891, 898–99, 222 P.3d 99 (2009) (quoting *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274, review denied, 139 Wn.2d 1006 (1999)), review denied, 168 Wn.2d 1028 (2010).

“Such a dismissal constitutes a final judgment with the preclusive effect of ‘*res judicata* not only as to all matters litigated and decided by it, **but as to all relevant issues which could have been but were not raised and litigated in the suit.**’” *Nemaizer*, 793 F.2d at 61 (citing *Heiser v. Woodruff*, 327 U.S. 726, 90 L.Ed. 970 (1946); *Teltronics v. L M Ericsson Telecommunications*, 642 F.2d 31, 35 (2d Cir.1981)) (emphasis added); see *Kelly–Hansen v. Kelly–Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (“a matter may not be relitigated, or even litigated for the first time,

if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding”). Accordingly, the dismissal was a final judgment as to all claims “which could have been but were not raised and litigated in the suit,” including any claims by Ms. Komine against MetLife.

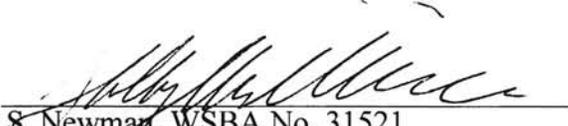
The trial court abused its discretion to the extent that it found Ms. Komine’s claim against MetLife could not be dismissed because she had not pleaded it and vacated the Order of Dismissal on that basis. Accordingly, the Court must reverse the trial court’s decision and issue a ruling clarifying that the Order of Dismissal was a final judgment as to all claims which could have been raised and litigated in the suit.

VII. CONCLUSION

For all of the foregoing reasons, the Court must reverse the trial court’s decision and reinstate the Order of Dismissal.

Respectfully submitted this 10th day of October, 2013.

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By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 10, 2013, I caused a true and correct copy of the foregoing document to be filed with the Washington Court of Appeals, Division I, and to be served on the following in the manner indicated:

Counsel for Plaintiff

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Via:

Legal Messenger
 Email
 First Class Mail
 Hand Delivery

DATED this 10th day of October, 2013, at Seattle, Washington.


Katherine Slack

