S. Ct. No. 90885-1
COA No. 31297-6-III

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

DREW C. OLSEN,

Petitioner,

v.

MEGAN M. OLSEN,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This appeal involves a dissolution trial that occurred on May 16, 2012. While Petitioner Drew Olsen and his attorney had notice of the trial, neither one appeared. Based upon Mr. Olsen's and his attorney's failure to appear, Mr. Olsen attempts to characterize the trial as a default proceeding. However, that is not the case. The trial was on the merits, as the court took evidence, including testimony from Megan Olsen and 14 exhibits introduced by Ms. Olsen. These exhibits included Mr. Olsen's financial documents produced in discovery. Additionally, Ms. Olsen's lawyer, who was aware of the issues contested by Mr. Olsen based on his previous filings, brought those issues to the attention of the court and questioned Ms. Olsen about them. At the conclusion of trial, the court determined that it was going to take the matter under advisement. Because the trial court wanted a reference for what had transpired in the record, an order of default was entered that merely noted that Mr. Olsen and his attorney did not appear for trial. The court later issued a memorandum decision based on the evidence presented at trial. Thereafter, on July 29, 2012, the trial court entered a judgment on the merits.

Between the trial and entry of judgment, Mr. Olsen obtained new counsel. Following the entry of the final orders, Mr. Olsen moved under

CR 60(b)(1) to vacate the trial court's judgment. Following a hearing, the superior court denied the motion to vacate the judgment. Mr. Olsen appealed to Division Three of the Court of Appeals, contending that vacation was required under *Barr v. MacGugan* because his attorney's performance constituted an irregularity in the proceedings.

Division Three of the Court of Appeals denied Mr. Olsen's appeal, holding: (1) the superior court proceedings were not default proceedings for purposes of the civil rules, but rather a trial on the merits, and (2) Mr. Olsen bears responsibility for his attorney's negligence and the narrow exception to the rule set forth in *Barr v. MacGugan* did not apply.

Mr. Olsen now asks this Court to accept discretionary review of the Court of Appeals' decision, claiming for the first time (and without proper foundation or supporting evidence) that the exception recognized in *Barr* should be "expanded" to excuse clients and their lawyers' failure to attend trial and present evidence. Mr. Olsen's suggested expansion of *Barr* in this case would result in the exception swallowing the rule and give every litigant who is displeased with their attorney's performance a road map to vacate a judgment and obtain a new trial.

II. ASSIGNMENT OF ERROR

Mr. Olsen erroneously asserts that the Court of Appeals erred by affirming the trial court's decision denying his CR 60(b)(1) motion to

vacate. However, the trial court correctly concluded that vacation of the judgment on the merits was not proper under the facts and circumstances at issue. Therefore, the Court of Appeals concluded that the trial court did not abuse its discretion by denying Mr. Olsen's CR 60(b)(1) motion.

III. STATEMENT OF THE CASE

Drew Olsen and Megan Olsen were married on August 10, 2009. CP 136. They separated on or about May 20, 2010. CP 136. Together, Drew and Megan Olsen have one minor child, who was born on June 20, 2010. CP 136. When the parties separated, Ms. Olsen relocated to Kansas from Washington. In October 2010, Ms. Olsen filed an action for the Dissolution of Marriage in Kansas. CP 136. A trial took place in the Kansas action related to child custody, and a Decree of Divorce was filed with the court on May 9, 2012. CP 136. The Kansas court granted Ms. Olsen sole custody of the parties' child and limited Mr. Olsen to supervised parenting time once a month. CP 136. Mr. Olsen's parenting time was limited to supervised visits based upon concerns about the child's safety. CP 136; RP 32, 62.

On May 20, 2011, more than six months after Ms. Olsen initiated the dissolution proceedings in Kansas, Mr. Olsen initiated a dissolution proceeding in the State of Washington. CP 105. Mr. Olsen served Megan Olsen in Kansas. CP 1-7. Two dissolution proceedings in two different

states presented logistical difficulties. CP 160. The Spokane action addressed the issues of child support, property division, debt, and attorney's fees. CP 136.[1]

The Spokane matter was originally set for trial on January 23, 2012, and was continued by the agreement of the parties. CP 31, 51-52. Mr. Olsen, through his attorney Kevin Mickey, set mediation before attorney Brian Mick. CP 162. The mediation was scheduled for March 16, 2012. CP 162. Mr. Mickey failed to attend the mediation. CP 152. Nonetheless, the mediation went forward as scheduled with Mr. Olsen representing himself. *See* CP 152. As a result of his attorney's failure to show up for mediation, Mr. Olsen expressed some concerns about his attorney, and said he might be looking for other counsel. CP 162; CP 152. Despite any reservation he might have had, Mr. Olsen chose to retain Mr. Mickey as his attorney.

Following a continuance, the trial was re-set for April 16, 2012. CP 78-80. Ms. Olsen and her counsel prepared for trial. CP 162. As required by the court, Ms. Olsen timely provided the respondent's portion

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[1] Both parties agreed to calculate the back child support to May 20, 2011, the day Mr. Olsen filed the dissolution proceedings in Washington. RP 35. Mr. Olsen refused to pay child support prior to that date on the grounds that only a Washington court could order him to pay child support. RP 35.

of the Domestic Trial Management Report, together with the respondent's Exhibits to the trial court on April 12, 2012. CP 81-84. Ms. Olsen also provided copies of all those documents to Mr. Mickey. CP 81-84. Neither Mr. Olsen nor Mr. Mickey submitted a Joint Trial Management Report or exhibits. CP 86.

On April 16, 2012, Ms. Olsen's counsel appeared for trial, but neither Mr. Olsen nor his attorney, Mr. Mickey, appeared at that time. RP 3. At a hearing in open court, Judge Price noted that the failure of Mr. Mickey and Mr. Olsen to show appeared to be a default, but chose not to enter a default at that time. RP 8-11. Instead, the trial court gave Mr. Olsen and his attorney another chance to attend trial, and continued the trial to May 14, 2012. CP 86-87. In so doing, Judge Price advised that, if Mr. Mickey and Mr. Olsen failed to appear on the continued trial date, the case would be resolved in their absence. CP 86-87. The court also sent an Amended Domestic Case Schedule Order to both counsel. CP 88-89.

On May 14, 2012, counsel for both parties appeared in court for trial. CP 135. However, Mr. Mickey advised the court that Mr. Olsen was unavailable for trial that day. CP 135. The trial was again rescheduled to commence at 9 a.m. on May 16, 2012. CP 163.

On May 16, 2012, Ms. Olsen's counsel appeared in court and Ms. Olsen arranged for time off of work to be available by telephone, as allowed by the trial court. RP 17. Mr. Mickey did not appear for trial, but the trial court noted in the record that Mr. Mickey had called the court that morning and claimed that he was outside the courtroom suffering chest pains and was going to the hospital. RP 22, 25. The trial court advised Mr. Mickey by telephone message that trial would commence at 1:30 p.m. unless there was documentation from a healthcare provider stating that Mr. Mickey had a health issue preventing him from attending trial. RP 27-28. No such documentation was ever provided to the trial court.

According to Mr. Olsen, he was present in the courthouse on May 16, 2012, and saw Ms. Olsen's counsel, Mr. Whitten. CP 154. He admits he did not speak to Mr. Whitten or ask him about the status of the matter. CP 154, 163. Mr. Olsen also admits that he did not go into the courtroom and inquire of the court personnel regarding the status of the matter. CP 163. Rather, he left.[2]

The trial commenced at 1:30 p.m. on May 16, 2012, and neither Mr. Mickey nor Mr. Olsen appeared for trial. Ms. Olsen testified via

[2] Mr. Olsen's self-serving reasons for leaving the courthouse (while largely irrelevant) are based upon inadmissible hearsay, objected to in briefing before the trial court, and cannot be considered.

telephone and was questioned by the trial court. CP 92-93. A total of 14 exhibits were introduced into evidence, including Ms. Olsen's financial documents and documentation of her proof of out-of-pocket birth expenses relating to the parties' son. CP 92-93. The exhibits also included documents from Mr. Olsen, including his 2011 W-2 form and a paystub. CP 93. In short, the trial court had substantial evidence to render a decision on the merits, which is exactly what occurred.

As Ms. Olsen's counsel was aware of a number of Mr. Olsen's arguments from previous discussions he had with Mr. Mickey, he notified the court of these issues.[3] Ms. Olsen's counsel raised each of these issues through Ms. Olsen's testimony, and the court questioned Ms. Olsen with respect to each of these issues as well. RP 33-38, 52-54, 58-66.

When the testimony was concluded, Judge Price indicated that he would take the matter under advisement and issue a written Memorandum Decision. RP 69. After all the evidence and testimony was presented at trial, the trial court entered an order of default noting that Mr. Olsen and Mr. Mickey failed to appear. CP 91. However, the trial court did not

[3] These issues included: the amount of Mr. Olsen's income and his various sources of income, the out-of-pocket birth expenses Ms. Olsen paid for the parties' child, the amount of credit Mr. Olsen should receive for back support payments made, and whether Mr. Olsen should receive a child support deviation for the travel expenses he incurred to visit that parties' child in Kansas. RP 33-38.

enter a default judgment. Rather, the trial court issued a Memorandum Decision that would become the basis for the trial court's judgment on the merits. CP 104.

The Memorandum Decision was issued on June 13, 2012. CP 104. The trial court's decision specifically addressed all of the issues raised during trial, including net monthly income of each of the parties, the amount Mr. Olsen owed for the out-of-pocket birth expenses, and whether Mr. Olsen should receive a child support deviation for travel expenses relating to visitation, among other things. CP 134-138. The next day, attorney Jason Nelson filed a Notice of Appearance on behalf of Mr. Olsen. CP 114. Mr. Nelson requested the trial court set a hearing on Mr. Nelson's motion to vacate the court's decision, but was prevented from doing so because the final order and judgment had not yet been entered with the court. CP 114-115.

On June 29, 2012, the trial court conducted a presentment hearing on final orders. CP 114. Both Mr. Olsen and Mr. Nelson appeared at that hearing, and Mr. Nelson filed a notice of substitution officially appearing as Mr. Olsen's attorney. CP 116. The trial court entered the Order Re Dissolution Issues formalizing the Memorandum Decision into a judgment, together with the Order of Child Support, Findings of Fact and

Conclusions of Law, and the Washington State Child Support Worksheet. CP 117-149.

Specifically, Mr. Olsen claimed the trial court's findings regarding his income, the back child support owed, and the travel expenses he incurred to visit his son were incorrect. However, Mr. Olsen did not provide any documentation to support his asserted figures or refute the trial court's findings. See CP 150-156. Mr. Olsen also erroneously claimed that there was no verification supporting Ms. Olsen's out-of-pocket birth expenses and health insurance premiums, even though Ms. Olsen presented evidence of these costs to the court in the trial exhibits. CP 92-93.

Additionally, Mr. Olsen failed to demonstrate how the trial outcome would have been different if he had appeared at trial and presented his evidence. Instead, he simply relied on unsupported conclusory statements that the outcome of the trial would have been different had he been able to present additional evidence. CP 150-156. After a hearing on Mr. Olsen's motion to vacate, the trial court denied the motion. The court held that Mr. Olsen "failed to satisfy any of the necessary requirements" for a motion to vacate under CR 60. CP 221.

Mr. Olsen appealed the trial court's decision to Division Three of the Court of Appeals. CP 223. On September 9, 2014, the Court of

Appeals affirmed the trial court. *In re Marriage of Olsen*, 333 P.3d 561 (2014).

IV. ARGUMENT

A. Standard of Review.

This Court will accept a petition for review of a Court of Appeals decision terminating review only if:

> (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) A significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Mr. Olsen asserts that review is warranted on two grounds. First, he claims review is proper because the Court of Appeals' decision is in conflict with *Barr v. MacGugan* (which it is not). Second, Mr. Olsen claims that review is proper because this case offers the Court the opportunity to address whether gross negligence by an attorney warrants vacation of a judgment pursuant to CR 60(b) (which it does not).

B. The Court Should Deny Mr. Olsen's Request for Discretionary Review

As explained in detail below, this Court should reject Mr. Olsen's petition for review because the Court of Appeals' decision is not in conflict with *Barr v. MacGugan*, and this case does not involve an issue of substantial public interest that should be determined by the Washington Supreme Court.

1. Review is not warranted pursuant to RAP 13.4(b)(2) because the Court of Appeal's Opinion is not in conflict with *Barr v. MacGugan*.

The general rule in Washington is that attorney negligence or incompetence is insufficient grounds to justify relief from judgment against the client. *See Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (holding that an attorney's negligence or neglect does not constitute grounds for vacating a judgment under CR 60(b)); *see also Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996).

In *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003), Division One of the Court of Appeals recognized a narrow exception to this general rule, which applies only when the agency relationship between lawyer and client "has disintegrated to the point where as a practical matter there is no representation." *Id.* at 48. This is contrasted, of course, with situations where a client gets false advice or bad advice.

In *Barr*, the plaintiff filed a CR 60(b) motion after discovering that her attorney had been suffering from severe clinical depression which caused him to neglect his practice by failing to comply with discovery requests, resulting in the default dismissal of the plaintiff's case. *Id.* at 45-46. On appeal, Division One upheld the trial court's grant of the CR 60(b) motion, finding that the court did not abuse its discretion by vacating a default order when there is evidence that "the attorney's condition effectively deprives a diligent but unknowing client of representation." *Id.* at 48.

Mr. Olsen claims that the *Barr* exception also applies to cases of deliberate and affirmative misrepresentation by the lawyer. However, that is not the case: the *Barr* court expressly noted that it was not deciding whether gross negligence could constitute valid grounds to vacate a judgment under CR 60(b)(11). *Barr*, 119 Wn. App. at 48. The *Barr* exception is narrowly confined to those situations where the attorney's health or disability has effectively deprived the client of representation, and therefore does not apply to Mr. Olsen's situation. *Id.* at 48.

The Court of Appeals' decision at issue is not in conflict with *Barr*. As the Court of Appeals noted, this case is distinguishable from *Barr*. *Barr* was limited specifically to those situations where: (1) a default judgment was entered, (2) the party challenging the default judgment can

establish that the attorney's physical condition effectively deprived that party of representation, and (3) the party was unaware of any issues and was otherwise diligent. This is not the situation presented here.

Here, in contrast, the judgment was entered after a trial on the merits, and there was no evidence in the record that Mr. Olsen's attorney actually suffered from a medical condition or that the alleged condition caused him to neglect his practice as was the case in *Barr*. Indeed, the record establishes that Mr. Olsen had warning signs that his attorney was not diligently representing him more than two months before trial, when his attorney failed to appear for mediation. As such, the present case is much more similar to *Stanley v. Cole*, 157 Wn. App. 873, 887, 239 P.3d 611 (2010), where Division One refused to apply the *Barr* exception because "(1) [appellant] failed to offer argument or case authority under CR 60(b)(11)'s "catch-all" provision, (2) [appellant] offered no evidence to show her attorney suffered from a mental condition and she acted diligently to learn about the status of her case, and (3) [the appellant's] case was resolved on the merits, not by default judgment." *Id.* at 887.

Furthermore, as the Court of Appeals noted, since *Barr* was decided, the United States Supreme Court has only been willing to excuse a client from responsibility for her lawyer's procedural defaults where there is evidence of near-total abandonment of the client. *See Maples v.*

Thomas, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012) (abandonment justifying vacation found where two appointed lawyers who had provided post conviction representation to a capital prisoner left their Wall Street law firm for other employment in which they could no longer represent him, left no forwarding address, and provided no notice to the client or the court); *Holland v. Florida*, 560 U.S. 631, 659, 130 S. Ct. 2549, 177 L.Ed.2d 130 (2010) (abandonment evidenced by "counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years"). As the Court of Appeals properly noted, the record, which demonstrates sporadic absences by Mr. Olsen's attorney over a period of several months, demonstrates negligence on the part of Mr. Olsen's attorney but it does not demonstrate near-total abandonment such that vacation was required. *In re Marriage of Olsen*, 333 P.3d at 566. Thus, the Court of Appeals' decision is not in conflict with *Barr* and Mr. Olsen has failed to demonstrate adequate grounds for review under RAP 13.4(b)(2).

2. Review is not warranted pursuant to RAP 13.4(b)(4) because this case does not present an issue of substantial public interest that should be determined by this Court.

A case involves an issue of substantial public interest warranting this Court's review pursuant to RAP 13.4(b)(4) if it has the potential to

have a far-reaching effect. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (opinion determining that a memorandum by the county prosecutor to all county superior court judges regarding sentencing policies was an *ex parte* communication presented a prime example of an issue of substantial public interest because the holding had the potential to affect every sentencing proceeding in Pierce County where a DOSA sentence was at issue, and the opinion had the potential to chill policy actions taken by both attorneys and judges in later proceedings); *In re Marriage of Ortiz*, 108 Wn.2d 643, 740 P.2d 843 (1987) (opinion addressing whether a custodial parent must repay noncustodial parent for child support payments made pursuant to an invalid escalation clause in a child support decree involved issue of substantial public interest).

The present case does not involve an issue of substantial public interest that should be determined by this Court. Unlike the ruling at issue in the *Watson* case, which had the potential to affect a number of other proceedings and influence future policies, the Court of Appeals' decision here has limited application to other proceedings, given the unusual facts of this case.[4]

[4] Other than a bare assertion that this case involves an issue of substantial public interest because it gives the Court an opportunity to consider whether the *Barr* exception should be expanded, Mr. Olsen provides no other argument in support of his position that this petition involves a matter of substantial public interest.

Furthermore, this case does not properly afford the Court the opportunity to consider whether the *Barr* exception should be expanded, as there is no evidence before the Court to differentiate it from cases such as *Stanley v. Cole* that have already declined to expand *Barr*.

Furthermore, Mr. Olsen failed to demonstrate substantial evidence that the outcome of the trial would have been any different if he had appeared at trial. Such a showing is required to vacate a judgment pursuant to CR 60(b)(1). *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). In the absence of such a showing, Mr. Olsen cannot demonstrate an abuse of discretion requiring a reversal of the trial court's decision.

In the declaration accompanying his CR 60(b) motion, Mr. Olsen challenged the trial court's findings regarding his net monthly income, the amount he should pay for out-of-pocket birth expenses, the denial of deviation from the child support schedule, and the determination regarding the income tax exemption. CP 155-157. All of these issues were expressly considered by the trial court using the considerable discretion available to courts when ruling on dissolution issues. The court's discretion in making property divisions and child support awards are not disturbed on appeal absent a manifest abuse of that discretion. *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984); *see also*

In re Marriage of Stern, 57 Wn. App.707, 717, 789 P.2d 807 (1990) (reviewing court will not substitute its judgment for that of the trial court where record demonstrates that trial court considered the relevant factors and its findings are supported by the evidence).

Mr. Olsen fails to put forth evidence of a nature that would substantially support a prima facie defense to the trial court's resolution of the issues. The trial court considered Mr. Olsen's 2011 W-2 and a paystub to calculate his income, and considered an exhibit indicating Ms. Olsen's total out-of-pocket birth expenses to determine Mr. Olsen's share of those costs. CP 93, 137; RP 53-54. The trial court also considered Mr. Olsen's request for a support deviation based on travel expenses and concluded it was not appropriate. RP 64; CP 138. Finally, the court concluded it was appropriate for the parties to alternate the tax exemption. CP 137. Based on this record, the trial court's decision was supported by substantial evidence in the record, and Mr. Olsen has not presented substantial evidence contradicting the trial court's decision. In the absence of a showing that the trial outcome would likely have been different if he had been able to present his alleged evidence, Mr. Olsen cannot show that vacation is appropriate pursuant to CR 60(b)(1) and his case lacks substantial public interest justifying Supreme Court review.

V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Olsen respectfully requests this Court deny Mr. Olsen's request for discretionary review.

RESPECTFULLY SUBMITTED this 7th day of November, 2014.

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CERTIFICATE OF SERVICE

I CERTIFY that on the 7th day of November, 2014, a true and correct copy of the foregoing document was delivered to the following person in the manner indicated below:

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[ ] VIA FIRST CLASS MAIL
[ ] VIA CERTIFIED MAIL
[X] VIA HAND DELIVERY
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