No. 31297-6-III

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

In re the Marriage of:

DREW C. OLSEN,

Appellant,

v.

MEGAN M. OLSEN,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Trial occurred in this case on May 16, 2012. Despite having notice, neither Drew Olsen nor his attorney attended the trial. Given the prior continuances, failures to appear and stern warnings from the trial court, trial began without Mr. Olsen and Respondent Megan Olsen, through her attorney, presented evidence supporting her case. After taking trial testimony and reviewing the evidence, the trial court took the matter under advisement and issued a written decision on June 13, 2012. Thereafter, on June 29, 2012, the trial court entered a judgment on the merits.

Following trial, but before entry of judgment, Mr. Olsen obtained new counsel. However, Mr. Olsen and his new counsel decided not to file an appeal of the trial court's decision, a motion for new trial or even a motion for reconsideration. Instead, Mr. Olsen sought to vacate the trial court's judgment. Following a hearing, the trial court denied Mr. Olsen's attempt to vacate the judgment entered on the merits.

Mr. Olsen now asks this Court to reverse the trial court's denial of his CR 60(b) motion to vacate, claiming that the trial court abused its discretion because his lawyer's performance constitutes an irregularity in

the proceedings and the trial court entered a default judgment, which should have been summarily vacated under CR 60(b)(1).

As explained in detail below, this Court should reject Mr. Olsen's arguments because the trial court did not enter a default judgment, but rather issued a decision on the merits following trial. Mr. Olsen wholly fails to establish that the trial court abused its discretion under the strict standard for vacating decisions on the merits. What is more, even applying the more liberal standard for vacating default judgments, Mr. Olsen fails to establish an abuse of discretion in denying his motion to vacate.

II. ASSIGNMENT OF ERROR

Mr. Olsen erroneously asserts that the trial court erred by denying his CR 60(b)(1) motion to vacate the final judgment. The trial court correctly concluded that vacation of the judgment on the merits was not proper under the facts and circumstances at issue. Accordingly, the trial court did not abuse its discretion by denying Mr. Olsen's CR 60(b) 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]

[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.

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 a mediation before attorney Brian Meck. 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 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 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.

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[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.

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 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

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[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.

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. Despite being present on the very day that the judgment was entered, Mr. Olsen did not file an appeal or a motion for reconsideration of the trial court's decision.

Instead, Mr. Olsen chose to delay acting in this matter. On August 10, 2012, Mr. Olsen filed a motion to vacate under CR 60(b)(1), claiming that he was unaware that Mr. Mickey had not been diligently representing him, that he did not appear for trial because Mr. Mickey told him the trial

was going to be continued due to Mr. Mickey's alleged health issues[4], and that the trial court's final order was extremely prejudicial to him. Mr. Olsen disagreed with the court's findings based on the evidence presented at trial. CP 150-156. Hence, Mr. Olsen claimed that the trial court made legal errors in arriving at its decision.

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 in part because the claimed disagreements were legal errors, which are more properly raised on appeal as opposed to a motion to vacate. CP 221. Mr. Olsen timely appealed to this court. CP 223.[5]

IV. ARGUMENT

A. Standard of Review.

Reviewing courts apply an abuse of discretion standard when considering a trial court's ruling on a CR 60(b) motion. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985). Discretion is abused only when it is exercised on untenable grounds or for untenable reasons, or when the trial court's decision is manifestly unreasonable. *In re Marriage*

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[4] Again, inadmissible hearsay. ER 801.

[5] Although Mr. Olsen's motion to vacate challenged the trial court's findings and conclusions, Mr. Olsen does not assign error to any of the court's findings and conclusions on appeal.

of Tang, 57 Wn. App. 648, 653, 789 P.2d 118 (1990). Here, the trial court's decision was a proper use of its discretion and should not be disturbed on appeal.

B. The trial court did not abuse its discretion by denying Mr. Olsen's CR 60(b) motion to vacate the judgment.

Civil Rule 60(b) allows a court, upon motion, to relieve a party or his legal representative from a final judgment only if the moving party can show:

> (1) mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> ...
>
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
>
> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> ...
>
> (11) any other reason justifying relief from the operation of the judgment.

The standard which the trial court is to apply to a CR 60(b) motion to vacate depends upon whether the judgment was a judgment on the merits or a default judgment. If the judgment is a judgment on the merits, then courts apply a strict standard for vacating under CR 60(b). *Stanley v. Cole*, 157 Wn. App. 873, 879-880, 239 P.3d 611 (2010). If the judgment

is a default judgment, then the policy consideration favoring a hearing on the merits allows courts to apply CR 60(b) more liberally. *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994).

Here, Mr. Olsen's argument is based on the faulty premise that the trial court entered a default judgment and therefore under the more liberal standard for vacating a default judgment, the trial court abused its discretion by denying the motion. However, the trial court did not enter a default judgment but instead entered a judgment on the merits following a trial at which Ms. Olsen presented evidence. Indeed, Washington case law provides that a court's decision is one on the merits if it is made after consideration of evidence presented irrespective of whether or not both parties are present. *See Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010) (holding that the mandatory arbitration award was not a default judgment where plaintiff had participated in litigation and the arbitration hearing was on the merits, even though plaintiff and her attorney were absent from the arbitration hearing); *In re Marriage of Daley*, 77 Wn. App. 29, 888 P.2d 1194 (1994) (recognizing a distinction between a situation where a party proceeds with its case and receives a final judgment after an action tried upon the facts in the absence of the adverse party, and the situation where there was never any court action tried upon the facts but instead the trial court simply entered a default judgment

disposing of the case as if one party had never entered an appearance); *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn. App. 392, 394-95, 661 P.2d 609 (1983) (holding that a judgment did not qualify as a default judgment even though the defendant failed to attend the bench trial because the defendant had previously appeared and filed pleadings).

Under the strict standard for vacating a judgment on the merits, Mr. Olsen fails to establish a basis requiring vacation of the judgment. He also fails to establish grounds requiring vacation of the judgment under the more liberal standard applied to default judgments. In this case, the trial court entered a judgment on the merits, and therefore the strict standard applies. Nonetheless, as discussed below, the trial court was justified in denying Mr. Olsen's motion under either standard. The trial court's decision was a proper use of discretion.

1. The trial court did not enter a default judgment in this matter. The stringent standard for vacating a judgment on the merits applies.

As previously stated above, Washington courts have recognized a difference between a situation where a party failed to appear and the court immediately entered a default judgment, and a situation where only one party appeared for trial and the court heard testimony, admitted exhibits and issued a judgment after considering the evidence before it. *See*

Stanley v. Cole, 157 Wn. App. at 880-81; *In re Marriage of Daley*, 77 Wn. App. at 32; and *Tacoma Recycling, Inc.*, 34 Wn. App. at 394-95.

Here, the trial court never entered a default judgment in this matter. The trial court did not find Mr. Olsen liable because he failed to appear for trial. Instead, the trial court decided the issues based, in part, on the evidence Ms. Olsen presented at trial. When Mr. Mickey and Mr. Olsen failed to appear for trial on May 16, 2012, the trial court proceeded to hold the trial in their absence, hearing testimony from Ms. Olsen and admitting 14 exhibits including several of Mr. Olsen's financial documents. CP 92-93.

Although not required to do so, Ms. Olsen's counsel informed the trial court that there were several issues on which the parties disagreed (which are the matters Mr. Olsen takes issue with here) and the trial court elicited testimony relating to those issues. RP 33-38, 58-66. At the close of trial, the trial court decided to take the information under advisement and then issued a memorandum decision. RP 70-71. At that point, Ms. Olsen's counsel requested that an order of default – not a default judgment – be entered only because there was going to be a delay between the completion of the trial and the decision on the merits and some record of what transpired might be helpful in the future. RP 73. The trial court entered an order of default on the day of trial after all the testimony and

evidence was admitted.[6] The trial court then issued its memorandum decision on June 13, 2012, after considering the evidence presented at trial. CP 91, 104.

The situation presented to this Court is very similar to that in *Stanley v. Cole*. There, the plaintiff appealed the denial of her CR 60(b) motion, arguing that an arbitration award should be treated as a default judgment because neither she nor her attorney appeared at the arbitration hearing due the fact that her attorney's parents were very ill. *Stanley*, 157 Wn. App. at 875. Division One of this Court upheld the denial of the CR 60(b) motion, holding that the absence from the arbitration hearing was not the equivalent of failing to appear and prosecute the action where the plaintiff and her attorney had participated in prosecuting the action until the arbitration hearing. *Id.* at 880. Division One held that the arbitration hearing constituted a hearing on the merits, noting that "[w]hen a tribunal

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[6] After a brief discussion on the record, the trial court stated: "[B]efore we go, why don't you prepare a general order that indicates today was the time and place for trial, neither petitioner or his client appeared, the Court went forward with trial, and Mr. Olsen is in default, and I'll sign an order." RP 73-74.

The Order of Default provides:

> Respondent and his counsel failed to appear for trial as reflected in the record of proceedings included in this order by reference. It is ordered that a default trial occurred and an order of default is entered by this Order. The court will issue a Memorandum Decision. CP 91.

considers evidence, the resulting judgment is not a default judgment even if one party is absent." *Id.*

Similarly, here Mr. Olsen and his attorney participated in the prosecution of this case prior to the failure to appear for trial. After Mr. Olsen and his attorney failed to appear, the trial court proceeded to hold the trial, considering the evidence presented, including several financial documents for Mr. Olsen. RP 58-59, 62. The only difference between *Stanley* and this situation is the entry of a default order in between the time trial ended and the issuance of the court's judgment on the merits.[7] But *Stanley* did not turn on such a distinction. The question of whether to apply the strict standard for vacating a judgment on the merits does not turn on the technicality of whether a default order was entered. Instead, the question of which standard of review to apply turns on whether the court issued a judgment on the merits or a judgment based solely on the fact that the opposing party failed to appear. Here, the trial court proceeded to trial and based its decision on the evidence before it, not the fact that Mr. Olsen did not appear for trial. The resulting judgment is a judgment on the merits.

[7] It is worth noting again that the default order only references that the petitioner and his attorney failed to appear and a trial was conducted in their absence. CP 91.

2. The trial court did not abuse its discretion in determining that there were no extraordinary circumstances justifying vacation of the court's judgment.

Since the trial court's final judgment was a decision on the merits after considering the evidence, not a default judgment, the more stringent standard for vacating decisions on the merits applies. *Stanley v. Cole*, 157 Wn. App. 873, 880-81, 239 P.3d 611 (2010). As such, courts will not vacate judgments based upon the merits, except upon a ground listed in CR 60(b) or "extraordinary circumstances relating to irregularities extraneous to court action or go to the question of the regularity of its proceedings." *Shum v. Dept. of Labor & Industries*, 63 Wn. App. 405, 408, 819 P.2d 399 (1991). "[T]here is a strong policy favoring the finality of judgments on the merits." *Stanley v. Cole*, 157 Wn. App. 873, 887, 239 P.3d 611 (2010) (citing *Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912 P.2d 1040 (1996)).[8] In divorce actions specifically, the "compelling

[8] Mr. Olsen appears to cite *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, for the proposition that a trial court does not address the merits of the case where only one side presents evidence. However, Mr. Olsen is mistaken. *Lane* does not stand for that proposition. In fact, quite to the contrary, in *Lane*, the trial court granted the plaintiffs' CR 60(b) motion on the basis that the plaintiffs' attorney's failure to present certain evidence on a crucial evidentiary issue at summary judgment was analogous to the unauthorized surrender of a "substantial right." *Id.* at 104-105. Division Two reversed the trial court's decision, holding that (1) the summary judgment was not a default judgment and (2) where the plaintiffs' attorney appeared in a fully adversarial setting in which the merits were fully

policy interest favoring finality in property settlements militates against setting aside dissolution decrees, except in 'extraordinary circumstances.'" *Wagers v. Godwin*, 92 Wn. App. 876, 882, 964 P.2d 1214 (1998) (citing *In re Marriage of Jennings*, 91 Wn. App. 543, 958 P.2d 358 (1998)).

Here, Mr. Olsen attempts to persuade this Court that his attorney's negligence necessitates the vacation of the trial court's judgment. However, Mr. Olsen's argument is contrary to established Washington case law. In Washington, the general rule 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); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 970 P.2d 803 (1993), *aff'd* 140 Wn.2d 568 (2000).

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addressed, the attorney did not surrender substantial rights without the clients' authorization and the trial court erred in granting the motion to vacate. *Id.* at 106, 109. The Court also held that although the plaintiffs' lawyer neglected to investigate and present certain evidence, he never entered into an unauthorized stipulation or compromise with the defendants and therefore he did not surrender or waive any of the plaintiffs' substantial rights. *Id.* at 108. *Lane* does not support Mr. Olsen's contention whatsoever. Furthermore, Mr. Olsen's contention is directly contradicted by *Stanley v. Cole*, where Division One held that "when a tribunal considers evidence, the resulting judgment is not a default judgment even if one party is absent."

Mr. Olsen attempts to distinguish his case from the general rule on the grounds that his attorney suffered from a physical ailment, rather than incompetence or deliberate inattention, relying on a narrow and limited exception found in *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003). In *Barr*, the plaintiff successfully 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 dismissal of the plaintiff's case. *Id.* at 45-46. On appeal, Division One of this Court merely upheld the trial court's grant of the motion to vacate, 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. The *Barr* court did not hold that it would have been an abuse of discretion to deny the motion to vacate, or that the trial court was bound to grant the vacation.

Mr. Olsen's reliance on *Barr* is misplaced for several reasons.

First, *Barr* is specifically limited to those situations where the moving party can establish that the attorney's physical condition effectively deprived a client of representation and the client was unaware and otherwise diligent. 119 Wn. App. at 49. In *Barr*, the parties did not

dispute that the attorney suffered from a mental illness and that the illness caused him to neglect his practice. *Id.* at 47.

In contrast, there is no evidence in the record that Mr. Olsen's attorney actually suffered from a physical condition or disability, or that the physical condition caused him to neglect his practice. Contrary to Mr. Olsen's argument on appeal, the record is not "replete with evidence of [Mr. Mickey's] health issues." Br. of Appellant at 12[9]. Instead, there is only Mr. Olsen's inadmissible hearsay statement that Mr. Mickey told Mr. Olsen he had vague "health issues," and the fact that Mr. Mickey called the court complaining of chest pains. RP 25. However, neither Mr. Olsen nor his attorney ever provided the trial court with any physician's note (or other evidence) stating that Mr. Mickey suffered from any physical ailment or disability. Mr. Olsen has failed to establish that Mr. Mickey suffered from a physical condition or disability that deprived Mr. Olsen of representation.

Second, the plaintiff in *Barr* was completely unaware of her attorney's disability or the fact that he was depriving her of representation. 119 Wn. App. at 48. However, the record before this Court tells a different story. Here, Mr. Olsen had notice that Mr. Mickey might not be

[9] Conspicuously absent from Mr. Olsen's brief is any citation to the record on this point.

diligently representing him when Mr. Mickey failed to show up for mediation. CP 152. In fact, Mr. Olsen even admits that he thought about getting another attorney to replace Mr. Mickey at that time. CP 152, 162. The fact that Mr. Olsen chose to ignore that potential warning sign more than two months before trial cannot be used to now claim he was unaware of any problem.

Third, *Barr* dealt with a default judgment. *Barr*, 119 Wn. App. at 46-47. There, the trial court granted the defendant's motion to dismiss the plaintiff's case after plaintiff's counsel failed to comply with discovery requests. Unlike the case before this Court, no trial was held, and the court did not consider any evidence. Since the plaintiff was appealing a default judgment, the *Barr* court applied the more deferential standard of review in determining that the trial court did not abuse its discretion by granting the CR 60(b) motion. In contrast, here there was a trial and a judgment on the merits, and the stricter standard for vacating a judgment on the merits applies.

Finally, in *Barr* the reviewing court was considering whether the trial court abused its discretion when it granted the CR 60(b) motion. This Court is considering whether the trial court abused its discretion by denying the CR 60(b) motion. In *Barr*, Division One held that an attorney's serious physical condition or disability **may** be a permissible

ground on which to vacate a default judgment. However, *Barr* does not stand for the proposition that a trial court must grant a CR 60(b) motion where the attorney's negligent performance was caused by a physical condition, and that a failure to do so is an abuse of discretion requiring reversal. Holding that it is within a trial court's discretion to grant a CR 60(b) motion is very different from holding that a trial court abuses its discretion if it declines to grant the CR 60(b) motion on these grounds. To the contrary, finding the matter within the court's discretion implies the court was just as free to deny the motion to vacate. Thus, even if *Barr* were not otherwise distinguishable (which it is), it does not mandate reversal here.[10]

Based on the record before this Court, one can only conclude that Mr. Olsen's attorney was – at worst – negligent.[11] There is no evidence that Mr. Mickey did in fact suffer from a physical condition or disability

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[10] Division One refused to apply the *Barr* exception in *Stanley v. Cole*, 157 Wn. App. 873, for similar reasons. Division One held that *Barr* was not controlling in *Stanley* 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." 157 Wn. App. at 887. The situation in *Stanley* is more analogous to the case at bar.

[11] Even assuming this to be true, Mr. Olsen is not without remedies in the form of an action against his former attorney or resort to the Bar Association, to name a few.

that effectively deprived Mr. Olsen of representation, and therefore *Barr* does not apply. The trial court did not abuse its discretion by denying the CR 60(b) motion.

3. Even under the more liberal standard for vacating default judgments, the trial court did not err by denying Mr. Olsen's CR 60(b) motion.

The standard for vacating default judgments entered solely upon a party's failure to appear differs from vacating judgments on the merits. Such a default judgment may be vacated if the moving party establishes:

> (1) That there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party;
>
> (2) That the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect;
>
> (3) That the moving party acted with due diligence after notice of the default judgment; and
>
> (4) That the opposing party will not suffer substantial hardship if the default judgment is vacated.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Under the lessened standard, where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, courts are more apt to grant a motion to vacate, provided the moving party is timely with his application and the failure to properly appear in the action was not willful. *Id.* However, if the moving party can

only show a minimal prima facie defense, the court will scrutinize the other factors more carefully. *Id.* at 352-53.

Here, Mr. Olsen has failed to meet any of the four requirements necessary to vacate a default judgment. First, Mr. Olsen has not produced substantial evidence contradicting the court's decision. For this reason alone, Mr. Olsen cannot show an abuse of discretion requiring a reversal of the trial court's decision.

In his declaration, Mr. Olsen challenged the trial court's findings regarding his net monthly income, the trial court's finding that Mr. Olsen should pay $7,828.30 of the total out-of-pocket costs for birth expenses for the parties' child, the trial court's denial of deviation from the child support schedule based on Mr. Olsen's travel expenses to visit his son in Kansas, and the trial court's decision regarding which party should receive 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 considerable 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); *Brandli v. Talley*, 98 Wn. App. 521, 523, 991 P.2d 94 (1999). Indeed, a reviewing court will not substitute its judgment for that

of the trial court where the record shows that the trial court considered the relevant factors and its findings are supported by the evidence. *In re Marriage of Stern*, 57 Wn. App.707, 717, 789 P.2d 807 (1990).

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 when calculating his income, noting that the testimony and exhibits presented to the court gave it a succinct understanding regarding Mr. Olsen's current income. CP 137. In regards to the out-of-pocket birth expenses, Ms. Olsen admitted an exhibit at trial indicating her total expenditure for birth expenses was $15,656.61 and she testified that most of those costs were paid by funds which she had saved prior to the marriage. RP 52-54; CP 93. The trial court also considered the issue of deviation based on travel expenses, and concluded it was not appropriate here. RP 64; CP 138. Finally, the trial court concluded that it would be appropriate for the parties to alternate the tax exemption, with Ms. Olsen taking the exemption for tax year 2012 and Mr. Olsen taking it for 2013. 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 addition, Mr. Olsen's contentions are more akin to legal errors, which are the province of appeals, not motions to vacate. As enunciated by binding Washington case law, motions to vacate are not substitutes for appeal. *Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 673, 790 P.2d 145 (1990); *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986); and *State ex. Rel Green v. Superior Court*, 58 Wn.2d 162, 164-165, 361 P.2d 645 (1961). When the challenge to a final order is that it is based on or constitutes an error of law, the appropriate remedy is to appeal – not wait for the appeal deadline to pass and then file a motion to vacate the order. *Port Angeles*, 114 Wn.2d at 673.

"Whether the terms of a separation agreement are unfair is a legal issue which must be raised on appeal – not in a motion to vacate the decree." *Marriage of Moody*, 137 Wn.2d 979, 991, 976 P.2d 1240 (1999); *see also Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990) (holding the trial court abused its discretion in vacating a dissolution decree because of errors relating to the characterization and valuation of property were legal issues that should be considered on appeal).

Mr. Nelson appeared for Mr. Olsen two weeks before the trial court entered the final Orders he sought to vacate. And, Mr. Nelson was present when the Orders were entered on June 29. CP 114-116. Mr.

Olsen could have appealed the trial court's decision, or moved for reconsideration or a new trial, but he did not do so. Instead, he waited until the deadline to file an appeal or motion for reconsideration or new trial had passed, and then attempted to improperly raise errors of law in the CR 60 motion by complaining that the trial court's orders were not fair in light of the testimony he would have provided. In denying the motion, the trial court noted that Mr. Olsen "failed to satisfy any of the necessary requirements mandated by CR 60" raised issues that were more properly raised on appeal and or in a motion for reconsideration. CP 221.

As to the second requirement, Mr. Olsen's failure to appear was not due to mistake or excusable neglect, as discussed above. The record indicates that Mr. Olsen's attorney's failure to appear was due – at best – to negligence. There is no admissible explanation for Mr. Olsen's failure to appear for trial that would justify reversal here. CP 154. Since no admissible justification is given for failing to appear, Mr. Olsen fails to satisfy this requirement.

Third, Mr. Olsen also did not act with due diligence after the trial court entered its order on June 29, 2012. Mr. Olsen obtained a new attorney at least two weeks before the court entered the final orders on June 29. CP 114. Mr. Olsen could have appealed the final order, or filed for reconsideration or a new trial under CR 59. He did not do so. Instead,

he waited to take any action until **after** the deadlines for filing an appeal or a motion for reconsideration or a new trial expired. CP 150.

Finally, Ms. Olsen will suffer substantial hardship if the Court vacates the trial court's order. Mr. Olsen filed this dissolution action in Washington knowing that Ms. Olsen lives in Kansas. She has incurred unnecessary delay after delay and increased expenses as a result of having to litigate this matter in Washington. Despite these increased costs, Ms. Olsen is the only party who has attended every hearing and appointment in this case. Ms. Olsen and her counsel did everything possible to bring this matter to a conclusion, but she has incurred additional attorney fees as a direct result of Mr. Olsen and his prior attorney's delay tactics and failure to attend trial. Vacating the judgment would cause Ms. Olsen to incur yet more attorney fees to resolve a straightforward issue that should have been resolved more than a year ago and there is no evidence or indication that the trial court's discretionary determination of the dissolution issues would be any different a second time around.

In sum, even under the lesser standard for vacating default judgments (which is not applicable to a decision on the merits as presented here) Mr. Olsen has failed to establish any of the four requirements necessary to grant his motion to vacate. Therefore, the trial court did not abuse its discretion by denying the motion to vacate the final judgment.

C. Ms. Olsen is entitled to costs and reasonable attorney fees on appeal.

A party may request attorney fees on appeal if applicable law grants the right to recover attorney fees. RAP 18.1(a). Under RCW 26.09.140, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal of any dissolution proceeding, including attorney fees. RCW 26.09.140 gives the court discretion to award attorney fees to either party based on the party's financial resources, balancing the financial need of the requesting party against the other party's ability to pay. *In re Marriage of Pennamen*, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006). When determining whether a fee award is appropriate under RCW 26.09.140, the court should also consider the arguable merits of the issues raised on appeal. *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998).

Here, there is little arguable merit to the issue raised by Mr. Olsen's appeal. He has failed to show that his and Mr. Mickey's failure to appear was due to anything other than negligence on the part of Mr. Mickey, and he has failed to present substantial evidence that conflicts with the trial court's decision. This appeal has only served to prolong litigation that should have been finished more than a year ago, requiring Ms. Olsen to continue incurring attorney fees to defend this litigation

while living in another state. Given the lack of arguable merit of this appeal, and the financial resources available to both parties, this court should exercise its discretion and grant Ms. Olsen her attorney fees and costs on appeal under RCW 26.09.140.

RESPECTFULLY SUBMITTED this 20th day of September, 2013.

LUKINS & ANNIS, P.S.

By _____

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CERTIFICATE OF SERVICE

I CERTIFY that on September 20th, 2013, a true and correct copy of the foregoing document was delivered to the following person in the manner indicated below:

Kenneth H. Kato
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201

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

LUKINS & ANNIS, P.S.

By: Daena Skobalski
DAENA SKOBALSKI
Legal Assistant