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COURT OF APPEALS, DIVISION ONE

OF THE STATE OF WASHINGTON

Court of Appeals Case No. 71525-9-I

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ROBERT HENSLEY

Appellant,

v.

GLORIA HENSLEY (BRINKLEY)

Respondent.



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# PETITION FOR REVIEW

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**TABLE OF AUTHORITIES**

**A. Identity of Petitioner**

Petitioner ROBERT HENSLEY, appellant, asks this court to accept review of the decision designated in Appendix A of this motion.

**B. Decision**

Petitioners seek review of the decision of the Court of Appeals in ROBERT HENSLEY. v. GLORIA HENSELY (BRINKLEY), Court of Appeals of Washington, Division One, No. 71525-9-I, entered November 24, 2014. A true copy is attached as Appendix A.

Petitioners ask this court to review whether the Court of Appeals erred in finding that

The court, when presented with evidence of fraud on the court, erred by failing to set aside the Child Support Order, and thereafter erred in failing to dismiss the action with prejudice.

C. **Issues Presented for Review**

This Court is being asked to consider:

Whether an order presented by the Respondent which does not comport with the verdict found at trial is defective;

Whether an order presented by the Respondent which intentionally distorts and misstates the verdict found at trial constitutes fraud on the court;

Whether the trial court has an obligation to set aside an order that does not comport with the verdict of the court as found at trial;

Whether fraud on the court may be raised at such a late date;

Whether the fraud on the court requires the court to set aside the defective order;

Whether, if the defective order is set aside, the court has any further jurisdiction, or must dismiss the case.

**D. Statement of the Case**

This case arises out of a late post-dissolution motion for an award of child support arrearages following the closing of the case. The child support order, however, when it was originally entered, was defective as a direct and proximate result of a fraud on the court, perpetrated by Respondent and Respondent's counsel, having crafted a Child Support Order that did not comport with the trial verdict in this case.

Because the Child Support Order was defective due to a fraud on the court, the court is required to set aside the order and proceed pursuant to its jurisdiction thereafter. However, because the court no longer has jurisdiction, the order must be set aside.

Mr. Hensley (Appellant) appeals the Order of November 6, 2013 awarding interest on past due child support, and the subsequent Order of January 6, 2014, denying Mr. Hensley's motion for reconsideration pursuant to CR 59(1), CR 60(b)(4), and CR 60(b)(5). Mr. Hensley brought his motion to make a collateral challenge on the initial Order of Child Support pursuant to CR 59(1) on the basis of an irregularity in the proceedings of the court (fraud on the court), pursuant to CR 60(b)(4) (fraud in the procurement of judgment), and CR 60(b)(5), (original judgment entering the Order of Child Support is void). The Order of November 6, 2013 was predicated on claims made by the mother based upon the Order of Child Support from January 31, 2003. (CP 44-50).

The Order of Child Support, however, does not match the verdict of the court at trial on the issues. (C 43).

The verdict of the trial court provided as follows:

The Court will adopt the Child Support Order, and finds the maintenance intended as temporary was appropriate and finds no fraud or extortion re the internet issue. The Court strikes

the retroactive maintenance to the Mother since she is fully employed. The Father shall make a transfer payment of $591.71 in child support to the Mother, from March 1, 2001 through December 12, 2002, which includes medical expenses. The Father shall be responsible for 65% of all outstanding daycare expenses through January 1, 2003. There shall be a judgment for back child support of against the Father, to include $350.00 in civil penalty and attorney fees. (CP 43).

The amount of day care claimed by the mother at trial was set forth on the Child Support Worksheet entered by the Court on the same date as the verdict at trial was entered (Jan. 31, 2003) and sets forth the Total Extraordinary Health Care, Day Care, and Special Expenses in line 11 of the Child Support Worksheet prepared by the mother, as being the sum of $67.90, of which Respondent's portion was $35.31. (CP 51-55). Yet, the mother presented a Child Support Order to the Court that included a charge of back support set at, and a charge of back due day care at $8,555.95. The day care sum, actually $35.31 was confused with the back child support sum, which was adjudicated as $8,555.95, not $10,285.13.

This obfuscation is sufficient indication to warrant one of two conclusions: 1) that the court entered a directed verdict (formerly, judgment *non obstante verdicto*, or JNOV); or 2) that the falseness of this order was not understood by the court at the time of its presentment.

The order as presented did not comport with the verdict, and at no time was there a motion brought to alter the verdict, or to obtain a directed verdict; nor was there a finding that there was no substantial evidence or reasonable inference to sustain the judge's own verdict for the nonmoving party.

Because the judgment is contradictory to the verdict of the court, and fraudulently sets forth a judgment sum $10,249.82 above the actual finding of the court, the Order of Child Support was at all times fraudulent to the court, and therefore must be set aside.

Appellant declared his belief that the trial court judge did not read the Order of Child Support, and in particular, the judgment summary part, when he signed the order, but instead, that he relied on the integrity of Terry Forbes, an officer of the court at that time, to present an order that agreed with the Judge's verdict at trial. (CP 36). The judgment summary, however, had obvious errors in it, and were such that any judge upon reading it would have discovered these errors. For instance, the court awarded back child support in the amount of $8,555.95, yet the Order of Child Support presented to the judge claims $10,285.13. That alone demonstrates that the judge didn't read the judgment summary. The judge never ordered $8,555.95 in back day care; the judge order $8,555.95 in back support, which again demonstrates that the judge did not read the judgment summary. The judge ordered that the civil penalty and attorney's fee amount be included in the $8,555.95, and they were set out separately without adjustment to the total sum awarded, which again demonstrates that the judge didn't read the judgment summary. Finally, the judge awarded 65% of outstanding day care, which Respondent had articulated as a sworn statement on the Child Support Worksheet was a total of $67.90, (CP 52) and further articulated that Appellant's share was $35.31, yet on the Order of Child Support, Respondent placed the sum of $8,555.95, which the judge never found at trial.

Appellant asserts that the mother knew these numbers were false, but claimed them anyway. (CP 36). More importantly, Appellant asserts that attorney Terry Forbes knew that the judge had not ordered this amount, but went ahead and put it in the order hoping the judge wouldn't catch it, and the judge didn't catch it. (CP 36).

Following the entry of the final orders in this dissolution action, Terry Forbes was disbarred by the Washington State Bar Association. Appellant has declared his understanding to be that is that Mr. Forbes was disbarred for fraud. (CP 36).

The obfuscation of these sums and the additions placed in the Order of Child Support were fraudulent to the court, and for these reasons, the court was required to set aside the fraudulent judgment, and has therefore erred in entering judgment in favor of Respondent in awarding interest on this sum.

**E. Argument**

"'Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered.' *Bronson v. Schulten,* 104 U. S. 410. 'This salutary general rule springs from the belief that, in most instances, society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning, there has existed alongside the term rule a rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.' *Marine Insurance Company v. Hodgson,* 7 Cranch 332; *Marshall v. Holmes,* 141 U. S. 589. 'This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments.' *United States v. Throckmorton,* 98 U. S. 61. But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' *Hazel-Atlas Glass Co. v Hartford-Empire Co.,* 322 U.S. 238, 322 (1944), *Pickford v. Talbott,*225 U. S. 651,

225 U. S. 657, they have wielded the power without hesitation. Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment. And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But, whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

"Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office, but the Circuit Court of Appeals." *Hazel-Atlas Glass Co. v Hartford-Empire Co.,* 322 U.S. 238, 322 (1944).

The facts here are not about a patent, but something far more valuable – the loss of liberty for the Appellant, who has suffered loss of liberty, severe financial hardship and unnecessary burden as a direct and proximate result of this fraud. The facts here are persuasive. In this case, a lawyer who would later be disbarred on the basis of fraud deliberately planned and carefully executed a scheme to provide the court with a child support order that did not comport with the verdict of the court in every possible way. The order was nonetheless tendered, and the judge

signed without review. The critical question before the court on review is whether Appellant's claim of fraud on the court was brought in a reasonable time.

The court in the *Hazel-Atlas* case has much to say on this very issue:

"'[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.'" *Hazel-Atlas Glass Co. v Hartford-Empire Co.,* 322 U.S. 238, 322 (1944). The *Hazel-Atlas* decision was published in 1944, concerning a fraud that was perpetrated against the patent office in 1932.

Here, the court relied on the representations of the attorney Terry Forbes, and discounted the claims and protestations of Appellant, who appeared *pro se*. In raising the issue of fraud, one of the reasonable tenets worthy of consideration is whether the court had provided specific safeguards which were necessary to make a civil proceeding fundamentally fair. *Matthews v. Eldridge,* 424 U.S. 319, 335. One wonders how entering a completely errant child support order which is so widely disparate from the verdict of the court comports with the basics of fundamental fairness.

The trial court's inability to finalize a child support order that was consistent with the verdict of the court is, and as a direct result of the fraud intentionally presented before it, an abuse of discretion capable of being set aside by this Court.

An abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Noble v. Safe Harbor Family Preservation Trust,* 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). There is no tenable reason articulated anywhere in the record that provides for the court to enter judgment amounts in the child support order that are completely different than the liabilities determined at trial and finalized by the verdict of the court. In fact, there are no reasons, tenable or untenable, other than that Terry Forbes presented a fraudulent child support order. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State ex. Rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This is just exactly the case here.

In the opinion of this court for which Appellant now petitions for review, the court found that the child support order did not grant more relief than Brinkley requested. However, the trier of fact concluded in its verdict the amount due to Brinkley. Whether or not she requested more, that is what the court determined she was due. Then, the court went on to augment that amount by thousands of dollars. As the court said in *Re Marriage of Leslie:*

"In entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint. *Sceva Steel Bldgs., Inc. v. Weitz,* 66 Wn.2d 260, 262, 401 P.2d 980 (1965); *Stablein v. Stablein,* 59 Wn.2d 465, 466, 368 P.2d 174 (1962); *In re Marriage of Campbell,* 37 Wn. App. 840, 845, 683 P.2d 604 (1984); *In re Marriage of Thompson,* 32 Wn. App. 179, 183-84, 646 P.2d 163 (1982); *Columbia Vly. Credit Exch., Inc. v. Lampson,* 12 Wn. App. 952, 954, 533 P.2d 152 (1975). *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

"Further, a court has no jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process.

*Conner v. Universal Utils.,* 105 Wn.2d 168, *618 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.,* 81 Wn.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips,* 77 Wn.2d 879, 884, 468 P.2d 444 (1970). *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

"To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void. *Stablein,* 59 Wn.2d at 466; *Sheldon v. Sheldon,* 47 Wn.2d 699, 702-03, 289 P.2d 335 (1955); *State ex rel. Adams v. Superior Court,* 36 Wn.2d 868, 872, 220 P.2d 1081 (1950); *In re Marriage of Markowski,* 50 Wn. App. 633, 635, 749 P.2d 754 (1988); *In re Marriage of Hardt,* 39 Wn. App. 493, 496, 693 P.2d 1386 (1985); *Allison v. Boondock's,* 36 Wn. App. 280, 282, 673 P.2d 634 (1983), *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

"Superior Court Civil Rule 60(b)(5) provides that upon a motion to vacate, a court may relieve a party from a final judgment, order or proceeding if that judgment, order or proceeding is void. A vacated judgment has no effect. The rights of the parties are left as though the judgment had never been entered. *Anacortes v. Demopoulos,* 81 Wn.2d 166, 500 P.2d 546 (1972); *Weber v. Biddle,* 72 Wn.2d 22, 28, 431 P.2d 705 (1967); *In re Estate of Couch,* 45 Wn. App. 631, 634, 726 P.2d 1007 (1986). *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

We call the Court's attention in particular to the following language from *Re Marriage of Leslie:*

"In *In re Marriage of Hardt,* 39 Wn. App. 493, 496, 693 P.2d 1386 (1985), the Court of Appeals affirmed vacation of a dissolution decree where, among other reasons, the decree failed to conform to the spouses' stipulation and the decree provided more relief than the petition

requested. Further, the Court of Appeals affirmed the vacation and awarded reimbursement to the husband for child support payments he made pursuant to the void decree despite a 5-year lapse of time between entry of the dissolution decree and the husband's motion to vacate it. The court held that void judgments may be vacated irrespective of the lapse of time. *See John Hancock Mut. Life Ins. Co. v. Gooley,* 196 Wash. 357, 370, 83 P.2d 221, 118 A.L.R. 1484 (1938); *accord,* Restatement (Second) of Judgments § 74, comment a, at 203 (1982). *See also Brenner v. Port of Bellingham,* 53 *619 Wn. App. 182, 765 P.2d 1333 (1989); *In re Marriage of Maxfield,* 47 Wn. App. 699, 703, 737 P.2d 671 (1987). *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

"In *In re Marriage of Markowski,* 50 Wn. App. 633, 635, 749 P.2d 754 (1988), the Court of Appeals followed the decisions in *Hardt* and *Maxfield* by holding that motions to vacate under CR 60(b)(5) on grounds that the judgment is void may be brought at any time after entry of judgment. In *Markowski*, the trial court vacated a dissolution decree obtained by default and without personal jurisdiction against the out-of-state appellant husband despite the fact that the husband for 1 year had paid court ordered child support and attempted to visit his children pursuant to court ordered visitation under the void decree. The court held that the husband's actions during the 1 year following entry of the default dissolution decree could not be construed as his consent to entry of the decree nor as a waiver of jurisdiction. *Markowski*, 50 Wn. App. at 637. *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

The Supreme Court in *Re Marriage of Leslie* went on to agree with the decisions of the Court of Appeals in *Hardt* and *Markowski*, saying that the Petitioner did not waive his right to challenge the default dissolution decree merely because of time lapse or because he may have

complied with other of its provisions which were inconsistent with the relief originally sought. *In Re Marriage of Leslie,* 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

A decision is based on untenable grounds if factual finds are unsupported by the record. Abuse occurs when the decision is based on an incorrect standard or facts do not meet the requirement of the correct standard. *Marriage of Littlefield,* 133 Wn.2d 39, 47 (1997)(court had no authority under facts presented to require a residential schedule requiring geographic restriction on mother).

A trial court abuses its discretion by misapplying the law. *State v. Olivera-Avila,* 89 Wn. App. 313 (1997) (reversing withdrawal of plea of guilty after three years based on failure to inform of community placement requirement and in light of RCW 10.73); *see also, State v. McCarty,* 90 Wn. App. 195 (1998) (trial court's grant of new trial predicated on erroneous interpretation of law, here money laundering); *State v. Smith,* 106 Wn.2d 772, 725 P.2d 951 (1986)(ER 404(b) requiring reversal).

The range of discretionary choices is a question of law and the judge abused his or her discretion if the discretionary decision is contrary to law. *State v. Neal,* 144 Wn.2d 600 (2001) (admission of a document not strictly compliant with CrR 6.13(b) which was, finally, hearsay, was an abuse of discretion).

Civil Rule 59(1) provides that "[o]n the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial."

Civil Rules 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

In *Marriage of Lint,* 135 Wn. 2d at 533, the court described a void marriage due to the lack of solemnization. The *Lint* case outlines the elements of fraud, 135 Wn. 2d at 533, fn.l: The elements of fraud are: (1) representation of an existing fact; (2) materiality of representation; (3) falsity of the representation; (4) knowledge of the falsity or reckless disregard as to its truth; (5) intent to induce reliance on the representation; (6) ignorance of the falsity; (7) reliance on the truth of the representation; (8) justifiable reliance; and (9) damages."

The Order of Child Support upon which the Court relied in entering it. Order of November 6, 2013, was solely predicated upon the Order of Child Support Order entered in this action on January 31, 2003. (CP 44-55). This Order of Child Support is anomalous to the verdict reached by the trial judge. Appellant states that this Order as presented by the wife's attorney, was intentionally false, presented with reckless disregard for the truth, not disclosed to the court, and which deceived the court into entering a judgment against Respondent which was inconsistent with the final verdict of the court. (CP 44). Such a presentation constitutes a fraud upon the court.

The party attacking a judgment under CR 60(b)(4) must establish by clear and convincing evidence the existence of fraud that prevented it from fully and fairly presenting its case,

*Lindgren v Lindgren,* 58 Wn.App. 588, 596, 794 P.2d 526 (1990). Review is limited to determining whether the evidence shows that fraud, misrepresentation or misconduct was "highly probable." *Dalton v State,* 130 Wn. App. 653, 666, 124 P.3d 305 (2005).

"The elements of a 'fraud upon the court' are numerous. Fraud on the court is conduct: 1) on the part of an officer of the court; 2) that is directed to the judicial machinery itself; 3) that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or a concealment when one is under a duty to disclose; 5) that deceives the court." *Workman v. Bell,* 245 F.3d 849, 852 (6th Cir. 2001). "[F]raud upon the court is limited to that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Salsberg v. Trico Marine Servs.* (*In re Trico Marine Servs.*), 360 B.R. 53 (S.D.N.Y. 2006) (*Citing Serzysko v. Chase Manhattan Bank,* 461 F.2d 699, 702 (2d Cir.), *cert. denied,* 409 U.S. 883, 93 S. Ct. 173, 34 L. Ed. 2d 139 (1972).

Establishing fraud on the court does not require that the court officer responsible "attempt" to defraud the court when the positive averment in question does, in fact, defraud the court. "The petitioner must show that an officer of the court 'whose judgment is under attack' acted in a manner that is 'intentionally false, willfully blind to the truth, or is in reckless disregard for the truth.'" *James v. United States,* 603 F. Supp. 2d 472 (E.D.N.Y. 2009) (*Citing Alley v. Bell,* 392 F.3d 822, 831 (6th Cir. 2004)). The Court is reminded that the lawyer who prepared and presented this Order of Child Support for the court's signature was subsequently disbarred. (CP 36).

By encouraging dishonesty on the mother's part, and by exploiting that dishonesty to gain unfair advantage in the litigation, the mother engaged in misrepresentation to the Court of the relevant law and engaged in misconduct as the opposing party. CR 60 (b) (4) provides for the Court to vacate the order of Judge Wynne which had been originally filed on January 31, 2003. The child support order and the child support worksheet which were presented to the court by the mother and her now disbarred attorney deliberately fabricated the verdict of the court 1) by creating a judgment amount of $10,285.13 for a principal amount of back child support, when the court specifically found that $8,555.95 was due in back child support, 2) by entering the sum of $8,555.95 as the amount due in back day care, when the court specifically found that back day care was to be 65% of all back day care due at that time, which the mother had declared as being the sum of $67.90 on her CS Worksheet, and 3) by assessing $250 in attorney's fees and a $100 civil assessment that the court specifically held was to be included in the back child support amount of $8,555.95. The mother knowingly permitted the false and fraudulent Order of Child Support to be entered in the court record without informing the court of that fact that the order was disparate and in fact contrary to the verdict of the court. The mother has therefore perpetuated a fraud in obtaining the judgment.

A representation of fact believed to be true but which proves to be false is actionable, and our law as of right ought to and does afford a remedy for the damage sustained. *Bank v. Tschabold Equipment,* 51 Wn. App. 749, 757, 754 P.2d 1290 (1988). *Brown v. Underwriters at Lloyd's,* 53 Wn.2d 142, 146, 332 P.2d 228 (1958). RCW 6.40.040(2)(b) provides for non-recognition of a judgment obtained by fraud.

Pursuant to CR 60(b)(5), "a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally." The law is well-settled that a void order or

judgment is void even before reversal. *Vallely v. Northern Fire & Marine Ins. Co.,* 254 U.S. 348, 41 S.Ct. 116 (1920). "It is clear and well established law that a void order can be challenged in any court." *Old Wayne Mut. L. Assoc. v McDonough,* 204 U.S. 8, 27 S.Ct. 236 (1907).
A challenge to a void judgment can be brought at any time. *Matter of Marriage of Leslie,* 112 Wash. 2d 612, 618-19, 772 P.2d 1013 (1989) (*citing John Hancock Mut. Life Ins. Co. v. Gooley,* 196 Wash. 357, 370, 83 P.2d 221 (1938) (additional citation omitted); CR 60(b)(5).

"A court has a nondiscretionary duty to vacate a void judgment." *Leen v. Demopolis,* 62 Wash.App. 473, 478, 815 P.2d 269 (1991), *review denied,* 118 Wash.2d 1022, 827 P.2d 1393 (1992); *In re Marriage of Markowski,* 50 Wash. App. 633, 635, 749 P.2d 754 (1988*); Brickum Inv. Co. v. Vernham Corp.,* 46 Wash. App. 517, 520, 731 P.2d 533 (1987).

Following the Court vacating the Order of Child Support which was entered based on the fraud of the mother, the Court was without discretion to then dismiss this action entirely, because the Court no longer has jurisdiction to hear the matter.

The right to challenge jurisdiction cannot be waived and may be raised at any time. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County,* 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

RCW 26.09.170(3) provides: "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child." For purposes of this statute, "emancipation" refers to the age of majority — 18. *In re Marriage of Gimlett,* 95 Wn.2d 699, 702 -04, 629 P.2d 450 (1981). If a decree does not provide for post-majority support, a party must file a motion to modify to add such support before the child turns 18. *Balch v. Balch,* 75 Wn. App. 776, 779, 880 P.2d 78 (1994). Conversely, if a decree expressly provides for post- majority support, a court may modify such support as long as the movant files

a motion to modify before the "termination of support." *Balch,* 75 Wn. App. at 779. In this case, no such motion was made by the mother. The children that are the subject of this Order of Child Support are now both over the age of 18. Alex was born August 19, 1993, and Brian was born July 14, 1995. Termination of support for Alex occurred on August 20, 2011, and Child Support was adjusted accordingly. Termination of support for Brian occurred on July 15, 2013.

The mother brought a motion for interest on child support arrears on September 6, 2013, more than 30 days after the termination of support, and she did not seek ongoing support for continuing education pursuant to paragraph 3.14 of the Order of Child Support, the Court has no jurisdiction to modify, amend, or re-enter an Order of Child Support in this matter.

Because the court no longer has jurisdiction to hear this matter, the court must dismiss this action with prejudice.

**E. Conclusion**

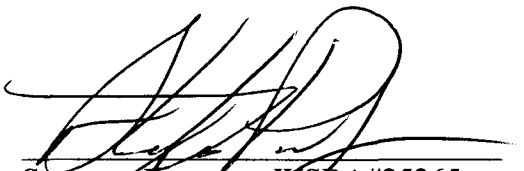
In conclusion, Appellant iterates that because the order of child support exceeded the verdict of the court, the order of child support is void. As a consequence, the court had no jurisdiction to enforce such a void order, and the enforcement of the void order does not make it valid.

Contrary to the dictates of CR 60(b)(4), a void judgment may be challenged in any court at any time. Appellant has once again raised the issue of a practice that his court should take the opportunity to curtail, where practitioners who are officers of the court willingly provide void orders in excess of verdicts, as is the case here. Appellant has raised the issue of fraud on the court, and given the conceptualization expressed in the seminal case of *Hazel-Altas*, such a fraud has implications throughout all of jurisprudence concerning such matters, and therefore the

agencies of public justice should not be found to be so impotent that they must always be mute and helpless victims of deception and fraud merely because of the timeliness of the report.

However, CR 60(b)(5) is most applicable here, because the judgment, being clearly in excess of the verdict is void *ab initia.* Therefore, the court must set aside the decision of the trial court, and declare this order to be a nullity under the laws of the state of Washington.

Respectfully submitted this 23rd day of December, 2014.



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## CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of this PETITION FOR REVIEW was served on the following:

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by first class, U.S. Mail, this 23rd day of December, 2014.

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APPENDIX A –

Opinion of the Court of Appeals, of November 24, 2014.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| GLORIA HENSLEY nka BRINKLEY, | ) | No. 71525-9-I |
| Respondent, | ) | DIVISION ONE |
| v. | ) | |
| ROBERT HENSLEY, | ) | UNPUBLISHED |
| Appellant. | ) | FILED: November 24, 2014 |

Cox, J. – Motions for relief from a final judgment must be brought "within a reasonable time."[1] In this case, Robert Hensley seeks to collaterally attack the Final Order of Child Support entered on January 31, 2003. Because he fails in his burden to show that he brought his CR 60(b) motion within a reasonable time, we hold that the trial court did not abuse its discretion in denying the motion. We affirm.

On January 31, 2003, the trial court entered its final order of child support in this dissolution proceeding. The order was a final judgment for monetary amounts owed by Robert Hensley to Gloria Hensley (Brinkley).[2] There was no appeal from that order.

In 2013, Brinkley moved for an order assessing interest on past due child support obligations that were imposed in the January 31, 2003 final order. A court commissioner initially ruled that Brinkley could not collect the interest. On

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[1] CR 60(b).

[2] Due to the similarity in names, for clarity, this opinion uses the name "Brinkley" to refer to the respondent.

her motion to revise the commissioner's ruling, the superior court judge revised the initial decision. Specifically, the court awarded delinquent interest and other amounts.

Robert Hensley then moved for reconsideration pursuant to CR 59(1), CR 60(b)(4), and CR 60(b)(5). Specifically, he sought to attack the final order of January 2003. The court denied the motion.

Robert Hensley appeals.

Robert Hensley primarily seeks to collaterally attack the 2003 final order of child support as a defense to the November 6, 2013 order awarding interest. He claims that the court's January 2003 final order of child support does not match its verdict. He argues that he has three grounds to attack the order: CR 59(1), CR 60(b)(4), and CR 60(b)(5). None are persuasive.

**CR 60(b)(4)**

Robert Hensley argues that CR 60(b)(4) allows him to collaterally attack the child support order and judgment entered in 2003. Because he fails to persuasively argue why his motion is timely, we disagree.

CR 60 provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding."[3] Under CR 60(b)(4), a party may get relief if the order or final judgment was obtained through fraud.[4]

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[3] CR 60(b).

[4] CR 60(b)(4).

A motion under CR 60(b) must be "made within a reasonable time."[5] What is "reasonable" depends on the facts of the case.[6] "Major considerations that may be relevant in determining timeliness are whether the nonmoving party is prejudiced by the delay and whether the moving party has a good reason for failing to take action sooner."[7]

This court has held that 10 years is an unreasonable amount of time to bring a CR 60(b) motion when the moving party "has not stated any good reason for failing to take appropriate action sooner."[8]

This court reviews a CR 60(b) motion for abuse of discretion.[9] "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons."[10] "An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment."[11]

Robert Hensley first raised CR 60(b)(4) as part of his motion for reconsideration in late 2013, more than 10 years after the January 2003 final

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[5] CR 60(b).

[6] In re Marriage of Thurston, 92 Wn. App. 494, 500, 963 P.2d 947 (1998).

[7] Id.

[8] In re Detention of Ward, 125 Wn. App. 374, 380-81, 104 P.3d 751 (2005).

[9] See Thurston, 92 Wn. App. at 499.

[10] In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[11] Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

order of child support was entered. The two major considerations in timeliness are the reasons for delay, and prejudice to the non-moving party.[12]

In this case, Robert Hensley offers no explanation why he failed to try to correct the final order for more than 10 years. According to Robert Hensley, the order overstates the amounts Robert Hensley owed by more than $10,000. This represents more than half of the total back payments Robert Hensley owed under the order. This alleged overstatement would have been apparent from the face of the order since January 2003. He simply fails in his burden to show his motion is timely.[13] Thus, we need not address prejudice. Accordingly, the trial court did not abuse its discretion by denying Robert Hensley's motion for reconsideration.

**CR 60(b)(5)**

Robert Hensley next argues that CR 60(b)(5) allows him to collaterally attack the judgment from 2003. Because he again fails to show that his motion is timely, we disagree.

CR 60(b)(5) allows relief from void orders or final judgments.[14] Motions under CR 60(b)(5) are not subject to the "reasonable time" limitation in CR 60(b) despite the plain language of the rule.[15]

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[12] Thurston, 92 Wn. App. at 500.

[13] Det. of Ward, 125 Wn. App. at 380-81.

[14] CR 60(b)(5).

[15] See Ellison v. Process Sys. Inc. Const. Co., 112 Wn. App. 636, 642, 50 P.3d 658 (2002); Brenner v. Port of Bellingham, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989).

"A judgment is void only if it is issued by a court which 'lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved.'"[16] "[A] court has no jurisdiction to grant relief beyond that sought in the complaint."[17] For example, in In re Marriage of Leslie, the petitioner did not request that the respondent pay for medical expenses.[18] Regardless, the court's judgment ordered the respondent to pay for medical insurance and any uncovered medical costs.[19] The supreme court held that the portion of the judgment ordering the respondent to pay for medical costs was void, because it exceeded the relief that the petitioner requested.[20]

Here, the trial court's January 2003 final order of child support is not void. The court did not grant more relief than Brinkley requested.

Robert Hensley argues that the judgment awarded Brinkley $10,249.82 more than the court's verdict. The court's verdict stated that Robert Hensley owed $8,555.95 in back child support, and was responsible for 65 percent of all outstanding daycare expenses. The court's order awarded $8,555.95 in ***daycare*** expenses (rather than back child support), and $10,285.13 in back child support.

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[16] Det. of Ward, 125 Wn. App. at 379 (quoting Metro. Fed. Sav. & Loan Ass'n of Seattle v. Greenacres Mem'l Ass'n, 7 Wn. App. 695, 699, 502 P.2d 476 (1972)) (internal quotation marks omitted).

[17] In re Marriage of Leslie, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989).

[18] 112 Wn.2d 612, 614, 772 P.2d 1013 (1989).

[19] Id. at 614.

[20] Id. at 620.

Robert Hensley argues that 65 percent of all daycare expenses, the amount that the verdict awarded, was actually $35.31. Because both the verdict and the judgment award $8,555.95, the alleged windfall arises from the difference between $10,285.13 and $35.31.

Robert Hensley argues that the Child Support Schedule Worksheets from the trial show that Brinkley claimed only $67.90 in daycare expenses.

Robert Hensley is incorrect for two reasons. First, it is unclear whether the worksheet reflects what Brinkley claimed at trial, as Brinkley did not sign the copy Robert Hensley submitted. Second, the worksheet appears to be prospective—it does not contain back expenses. For example, the section on child support sets the prospective child support, but does not list any back child support. Similarly, the section on daycare apportions 52 percent of the cost to Robert Hensley, the same percentage used to calculate prospective child support, while the court's verdict on back daycare apportioned 65 percent of the cost to the father.

Thus, Robert Hensley's argument that 65 percent of back daycare expenses is $35.31 is unpersuasive. And Robert Hensley has not shown that the relief the court awarded exceeded the amount Brinkley claimed at trial. Accordingly, the present case is distinguishable from In re Marriage of Leslie.

In sum, the court's January 2003 final order of child support is not void. Because the judgment is not void, CR 60(b)(5) does not apply to this case. The court did not abuse its discretion in denying the motion for reconsideration.

**CR 59(1)**

Robert Hensley finally argues that CR 59(1) allows him to collaterally attack the child support order entered in 2003. We disagree.

CR 59 allows a party to move for a new trial or for reconsideration.[21] But, "A motion for a new trial or for reconsideration ***shall be filed*** not later than 10 days after the entry of the judgment, order, or other decision."[22] Thus, to challenge the January 2003 final order of child support under CR 59, Robert Hensley was required to file his motion no more than 10 days after the order was entered. Clearly, he did not.

Thus, while CR 59 allowed him to move for reconsideration on the 2013 order, he cannot use it to collaterally attack the January 2003 order.

In sum, Robert Hensley has failed to show that he may collaterally attack the 2003 child support order. Thus, the court did not err by awarding Brinkley interest on past due obligations.

We affirm the trial court's order awarding Brinkley interest, and its order denying Robert Hensley's motion for reconsideration.

Cox, J.



WE CONCUR:

Trickey, J

Schindler, J

[21] CR 59.

[22] CR 59(b) (emphasis added).