NO. 92494-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEBRA CROMER,

Respondent,

v.

THOMAS A. THORN,

Appellant.

MS. CROMER'S ANSWER TO PETITION FOR REVIEW

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1. INTRODUCTION

The Court should deny Dr. Thomas Thorn's Petition for Review. Dr. Thorn fails to claim the factors for discretionary review mandated by RAP 13.4(b), likely because none apply. Nor does Dr. Thorn assign error to the decision of the Court of Appeals. Dr. Thorn instead seeks another hearing to have the child support order, which was entered in 2012 and with which he has never complied, vacated.

Ms. Cromer also respectfully requests an award of attorney fees and costs pursuant to RAP 18.1(j).

2. STATEMENT OF THE ISSUES

2.1. Whether a Petition for discretionary review satisfies the requirements for acceptance of review when it fails to name a single factor required by RAP 13.4(b).

2.2. Whether the Court of Appeals correctly required the moving party under CR 60(b)(4) to show that the judgment was "unfairly obtained" and that alleged fraud or misrepresentation "prevented [it] from fully and fairly presenting its case or defense" as set forth in *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989) *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989), rather than simply being "factually incorrect."

3. STATEMENT OF THE CASE

Debra Cromer and Dr. Thomas Thorn commenced a relationship in August 2008. Clerk's Papers (CP) 358-95. Dr. Thorn is a physician. *Id.* In March 2010, Ms. Cromer gave birth to the couple's daughter E.L.C. *Id.* On July 16, 2012, Dr. Thorn gave Ms. Cromer a black eye and head trauma requiring an emergency room visit and a hospital stay. *Id.* at 180-82. On July 17, 2012, authorities arrested and charged Dr. Thorn with domestic violence assault, felony harassment, and unlawful imprisonment. *Id.* On July 19, Ms. Cromer procured a protection order against Dr. Thorn. *Id.*

On October 5, 2012, while still in the Grant County Jail, Dr. Thorn was properly served with notice of Ms. Cromer's Petition for Residential Schedule/Parenting Plan and Child Support. CP 18. Dr. Thorn was released from jail on October 12, 2012. CP 183-85. Dr. Thorn never responded to the petition and default was entered over a month later, on November 12, 2012. *E.g.,* Verbatim Report of Proceedings for Hr'g, 2 Nov. 16, 2012.

The court order entered November 16, 2012 requires Dr. Thorn to pay the standard calculated rate of child support without deviation. CP 39-54. In a child support worksheet filed in support of her application for child support, Ms. Cromer listed Dr. Thorn's gross monthly income as $13,000. *Id.* She inserted this number, as being the wages and salary of Dr. Thorn, on line 1.a. of the "Gross Monthly Income" section of the worksheet. CP 50.

Ms. Cromer left blank line 1.f., a line devoted to imputed income, in the same section. *Id.* Ms. Cromer should have listed the $13,000 figures as imputed income since she based the number on Dr. Thorn's past earnings as a physician. Ms. Cromer did not then know Dr. Thorn's current income. Ms. Cromer also declared at the end of the worksheet, that she imputed Dr. Thorn's income because he was voluntarily unemployed or his income was unknown. In a section at the end of the worksheet titled "Other Factors for Consideration," just before the commissioner's signature, Ms. Cromer wrote:

> The father's income is imputed as he is voluntarily unemployed and/or his income is unknown. He has been imputed based upon the last known rate of pay according to the petitioner which is at $75.00 per hour at full-time hours (40 hrs per week).

CP 53. Dr. Thorn has never challenged this rate of pay nor has he declared the amount of child support that should have been ordered.

The court commissioner denied Dr. Thorn's motion to vacate the default judgment finding that (1) he was time barred because more than a year had passed, (2) there was no fraud on the part of petitioner, and (3) Dr. Thorn had failed to demonstrate that he met the factors listed in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). CP 233-38.

On May 8, 2014, Judge Sperline affirmed the Commissioner's ruling but vacated the default order under CR 60(b)(4) on the ground that

Ms. Cromer had committed fraud because she entered Dr. Thorn's imputed income on the "Wages and Salaries" line of the child support worksheet instead of the "Imputed Income" line. *Id.* Judge Sperline also found that the one year limitation for vacating a default judgment did not apply because of fraud. *Id.* Judge Sperline made this finding on his own. It has never been argued by Dr. Thorn until this Petition for Review.

On September 22, 2014, Ms. Cromer filed a petition for review by the Court of Appeals. The Court issued its unpublished opinion on August 11, 2015, holding that there was no fraud, that Judge Sperline had abused his discretion, and that the order of child support should be reinstated. Unpublished Opinion, 1-2. The Court of Appeals held that "the trial court misapplied the law" because "a showing of procedural fraud or misrepresentation is needed to vacate a judgment under CR 60(b)(4)." *Id.* Because the Court of Appeals based its finding on a lack of fraud, it did not provide an opinion regarding Dr. Thorn's other arguments.

4. ARGUMENT

The Court should deny Dr. Thorn's Petition for Review because he does not meet (or even argue) any of RAP 13.4(b)'s criteria for review by this Court. Dr. Thorn fails to assign error to the Court of Appeals' holding that fraud or misrepresentation must be procedural to vacate an order on default under CR 60(b)(4).

4.1. Dr. Thorn's Motion does not meet RAP 13.4's requirements for the Supreme Court to accept review.

Understandably, Dr. Thorn has not argued that the Court should accept this case under any of the criteria set forth in RAP 13.4(b) since he cannot make this argument. The Court of Appeals opinion follows the long precedent established by the Supreme Court of Washington State regarding a motion to vacate based on fraud and imputation of income. Consequently, the decision does not "conflict with a decision of the Supreme Court" in any respect. RAP 13.4(b)(1). Nor does the Court of Appeals' decision that CR 60(b)(4) requires a finding of procedural fraud or misrepresentation "conflict with another decision of the Court of Appeals." RAP 13.4(b)(2). Dr. Thorn has not pointed to, nor can he point to, any "question of law under the Constitution of the State of Washington or of the United States" that this case involves. RAP 13.4(b)(3). Finally, Dr. Thorn's Petition does not "involve an issue of substantial public interest that should be determined by the Supreme Court" because case law has long established that CR 60(b)(4) requires a showing of fraud in the procurement of a judgment rather than in its factual basis as the Court of Appeals correctly held. RAP 13.4(b)(4).

To determine whether a case involves sufficient public interest, the court considers "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide

future guidance to public officers; and (3) the likelihood that the question will recur." *In re McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444, 448 (1984). The Court has found that questions of correct procedure have substantial public interest. *See*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005)("The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue."); *In re Interest of M.B.* 101 Wn. App. 425, 3 P.3d 780 (2000)(clarifying the due process requirements of a court's contempt powers in juvenile status offense case). The Court has also found substantial public interest in clarifying statutory interpretation. *See*, *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)(clarifying civil commitment procedure); *McLaughlin*, 100 Wn.2d at 838 (addressing concerns with due process in civil commitment), *In re Labelle*, 107 Wn.2d 196, 200, 728 P.2d 138, 142 (1986)(interpreting the "gravely disabled" standard in civil commitment); *In re Marriage of Horner*, 151 Wn.2d 884, 891-93, 93 P.3d 124, 128-29 (2004)(interpreting RCW 26.09.520 to require a finding of fact on every on every statutorily required factor for relocation); *In re Interest of J.L.*, 140 Wn. App. 438, 443, 166 P.3d 776, 779 (2007)("But the issue of whether a truant can constitutionally be incarcerated under

RCW 28A.225.090 is a continuing issue of substantial public interest.").

Here, Dr. Thorn does not argue for a clarification of the law regarding a motion to vacate based on fraud. Nor does he ask the Court to change the procedure regarding the imputation of income for fathers. Dr. Thorn instead merely asks the court to apply existing law and precedent to his particular facts so that he does not have to pay child support arrears under the 2012 order. [1] Granting the relief that Dr. Thorn asks (vacation of a 2012 child support order) ultimately affects only Dr. Thorn.

Thus, because Dr. Thorn's Petition does not propose any issue that would affect any case but his own, the Court should deny Dr. Thorn's Petition as not involving any of the considerations required under RAP 13.4.

4.2. Dr. Thorn fails to assign error to the Court of Appeals' holding that CR 60(b)(4) requires a showing of procedural fraud or misrepresentation.

The Court of Appeals held that CR 60(b)(4) requires a finding of procedural fraud or misrepresentation. Dr. Thorn does not address the requirements of CR 60(b)(4) in his Petition nor does he argue that the Court of Appeals erred in its determination of law.

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[1] As a father, Dr. Thorn will still have to pay child support regardless of the result of review by this or any court under Washington Law. The only effect will be on past child support that he owes. But Dr. Thorn has yet to declare his actual income or argue the correct amount of child support he has not paid but owes as father of E.L.C.

As the Court of Appeals held, Dr. Thorn must show that alleged misconduct "prevented [him] from a full and fair presentation of [his] case." *Dalton v. State*, 130 Wn. App. 653, 665-67, 124 P.3d 305, 311-12 (2005)(citing *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989) *review denied*, 113 Wn.2d 1029, 784 P.2d 530); *see also Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990); *Goodman v. Bowdoin College*, 380 F.3d 33, 48 (1st Cir. 2004), cert. denied, 543 U.S. 1055 (2005) (Extraordinary remedy of CR 60 relief requires clear and convincing evidence of misconduct that prevented a full and fair presentation or preparation of movant's case.). Dr. Thorn's Petition does not argue that the standard should change or is somehow unclear. He does not argue that the Court of Appeals erred in stating the law.[2]

Dr. Thorn knew of the proceeding to determine child support. Dr. Thorn failed to appear in any way until well over a year after the order of child support had been entered. Ms. Cromer proposed that Dr. Thorn's

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[2] Dr. Thorn's argument also fails to address RCW 26.19.071 (6), which requires the court to impute income when the parent is voluntarily unemployed based on "work history, education, health, and age." The only exceptions are exceptions when the parent is "gainfully employed on a full-time basis," the parent is "unemployable," or "unemployed due to the parent's efforts to comply with court-ordered reunification." Dr. Thorn does not make any of these arguments against imputing his income. He does not explain why being arrested is relevant to imputing income for a physician who possesses a medical license that has never been revoked, who could have found employment at the time, and who currently works as a physician.

wages be imputed at what she believed to be his historical rate of income. Dr. Thorn has never declared what his historical rate of income was or what his current income is. The Court of Appeals correctly found that Dr. Thorn failed to meet the requirements of CR 60(b)(4) and that income had been properly imputed to him based on these facts. The Court should therefore deny Dr. Thorn's Petition for Review.

5. CONCLUSION

The Court should deny Dr. Thorn's Petition for Review because it fails to assert any issue under RAP 13.4 for consideration of review. He does not indicate conflicts with either a decision of the Supreme Court or with a decision of another Court of Appeals. He does not argue a question of law under the Constitution of the United States or the State of Washington. Dr. Thorn's appeal does not involve an issue of substantial public interest because he asks the court to apply his facts to existing law rather than ask to reverse long standing precedent on how the court applies CR 60(b)(4).

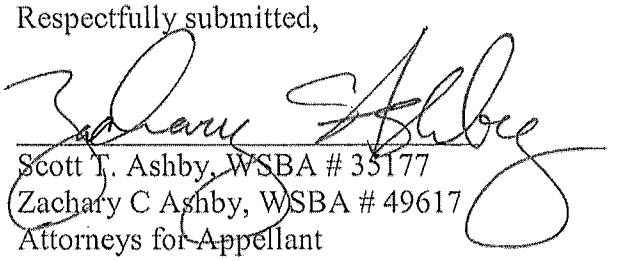
The Court of Appeals correctly applied the requirements for vacating an order under CR 60(b)(4). Dr. Thorn's allegations of fraud do not indicate anything Ms. Cromer did to prevent him from fully and fairly presenting his case. Dr. Thorn simply ignored the ongoing proceeding to establish child support for over a year after entry of the child support order.

Ms. Cromer therefore requests that the Court deny his Petition.

Attorney Fees and Costs: Ms. Cromer respectfully requests an award of attorney fees and costs pursuant to RAP 18.1(j).

DATED this 30th day of November, 2015.

Respectfully submitted,



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Subject: Case # 92494-5 - Debra Cromer v. Thomas A. Thorn

Good morning,

Attached for filing please find Ms. Cromer's Answer to Petition for Review. Please feel free to contact me with any questions.

Thank you,

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