No. 32585-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DEBRA CROMER,

Appellant,

v.

THOMAS A. THORN,

Respondent.

REPLY BRIEF OF APPELLANT

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Appellant

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A. No Fraud Occurred in the Entry of the Default Orders

Dr. Thorn essentially argues that the information presented to the trial court by Debra Cromer was factually incorrect, and therefore, he argues, fraudulent.

For alleged fraud in obtaining a default judgment, this Court has held "The party requesting the relief must show misconduct that prevented a full and fair presentation of its case." *Dalton v. State*, 130 Wn. App. 653, 665-67, 124 P.3d 305, 311-12 (2005). Yet Dr. Thorn fails to allege any misconduct that prevented a full and fair presentation of his case. After being served, he simply failed to appear for more than one year. Had he appeared, he could have argued that Debra Cromer's facts were incorrect, and he could have presented his own case. Instead, Dr. Thorn argues that the trial court made its decision based on facts that he alleges were incorrect, when the time to do that passed two years ago. There is a big difference between disagreeing on the facts, and fraud in obtaining a judgment.

Importantly, the facts that Dr. Thorn discusses in his brief, and that he should have brought to the trial court's attention instead of defaulting, miss the mark. As set forth in the Appellant's Opening Brief, p.15, Debra

Cromer fully informed the trial court that she was imputing Dr. Thorn's income. Dr. Thorn defaulted. He was served and, without legal excuse, simply failed to show up.

At the time of the default, the trial court properly imputed Dr. Thorn's income under RCW 26.19.071(6). The Order of Child Support states:

> For purposes of this Order of Child Support, the support obligation is based upon the following income:
>
> C. The net income of the obligor is imputed at $9558.61 because:
>
> the obligor's income is unknown.
> the obligor is voluntarily unemployed.
>
> The amount of imputed income is based on the following information in order of priority. The court has used the first option for which there is information:
>
> Past earnings when there is incomplete or sporadic information of the parent's past earnings.

Order of Child Support p.3 (CP 39-54). The trial court acted with full knowledge, imputed Dr. Thorn's income based on his past earnings (which figure has never been disputed), and made proper findings in accordance with the statute, as it was required to do when faced with Dr. Thorn's failure to appear.

B. Dr. Thorn did not Act Within a "Reasonable Time" As Required By CR 60

There is no Washington case allowing a party to wait for more than sixteen months to file a CR 60 motion based on "a state of duress." Resp. Brief p.11. Respondent's cases do not help his position. Respondent cites *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) for the principle that equity favors "substance over form," but in *Morin,* the Washington Supreme Court concluded:

> [W]hen served with a summons and complain, a party must appear. There must be some potential cost to encourage parties to acknowledge the court's jurisdiction....In the cases before us, the respondents in *Morin* and *Matia* have failed to appear and have not shown other cause to set aside default judgment. The Court of Appeals is reversed in those cases and the default judgments are reinstated.

Id. 759-60, ¶ 30, 161 P.3d at 964. The *Morin* plaintiff obtained default on December 3, 2002, and the defendants filed a motion to vacate on February 4, 2004, just over fourteen months later. *Id.* 750-51, ¶ 7, 161P.3d at 959. In *Matia*, the motion was filed "[m]ore than a year later." *Id.* 752-53, ¶11-13, 161 P.3d at 960. The Supreme Court upheld the trial court defaults in both cases, and in both cases, the time that had passed since default judgment was entered was less than the time that passed in this case.

In *Suburban Janitorial v. Clarke American,* 72 Wn. App. 302, 863 P.2d 1377 (1993), *review denied*, 124 Wn.2d 1006 (1994), cited by

Respondents for the proposition that there is no time limitation under CR 60, Resp. Brief p. 13-14, Division 1 of this Court affirmed the trial court's vacation of a default judgment that was approximately seventeen months old when the defendant filed its CR 60 brief. But in *Suburban Janitorial,* unlike this case, the defendant "prima facie established valid defenses where counsel deliberately misled [the defendant] as to the status of the lawsuit." *Id.* 313, 863 P.2d at 1383-84. No such facts exist here and, as the *Suburban Janitorial* Court noted, "The finality of judgments is an important value of the legal system." *Id.*

C. Because Dr. Thorn fails on all *White* factors, the Trial Court Abused its Discretion in Granting the Motion to Revise Commissioner Chlarson's Order Denying the Motion to Vacate

The Respondent did not present the trial court with the evidence required by *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968). He did not offer evidence of a prima facie defense to the imputation of his income under Washington statutes. He did not excuse his failure to appear for well over one year, except to trumpet "duress" and "depression," although he does not say when those conditions started or ended, even if they were legal excuses to ignore valid personal service of process.

II. CONCLUSION

As set forth in Debra Cromer's Opening Brief, there are no tenable grounds for granting the Motion to Vacate the default orders entered against

Dr. Thorn over a year-and-half ago. Dr. Thorn throws up a thin smoke-screen, but nothing more. Commissioner Chlarson got it right when she denied the motion to vacate. Judge Sperline reached out and found "fraud" because, he believed, Debra Cromer did not tell the default court that her child support order included imputed income. Judge Sperline based that on a scrivener's error in the child support worksheets, even though the child support worksheets clearly indicate an imputation of income, and the Order of Child Support states that income was imputed. (CP 39-54).

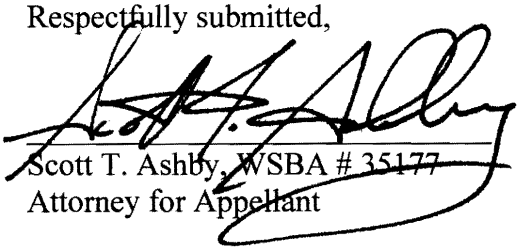
Because the trial court had no grounds to find fraud in the child support order, did not find any of the *White* factors, and there are no other grounds under CR 60 or 55 to vacate the default order; this Court should vacate the trial court orders vacating the trial court's original default judgment (CP 303-05), effectively restoring the orders for default and child support entered November 16th, 2012.

Attorney Fees and Costs: Ms. Cromer respectfully requests an award of attorney fees and costs pursuant to RCW 26.09.140. The appellate court has the discretion to order a party to pay the other party's attorney fees and costs associated with the appeal of a dissolution action. RCW 26.09.140. In exercising its discretion, the Court should consider the arguable merit of the issues on appeal and the parties' financial resources.

In re Marriage of King, 66 Wash.App. 134, 139, 831 P.2d 1094 (1992). Ms. Cromer will file her financial declaration at least ten days before the date of oral argument, as required by RAP 18.1(c).

DATED this 21st day of January, 2015.

Respectfully submitted,



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