Supreme Court No. 92494-5

Appellate Court No. 325857-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEBRA CROMER,

Appellant

v.

THOMAS THORN,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Dr. Thomas Thorn, respondent below, asks this Court to accept review of the Court of Appeals' decision referred to in Part B

B. COURT OF APPEALS DECISION

Respondent seeks review of the court of appeals decision in Parentage of ELC, 32585-7-III, filed August 11, 2015, attached as an appendix to this petition, and the Order Denying Reconsideration filed October 1, 2015.

C. ISSUES PRESENTED FOR REVIEW

A. Did Appellant/Petitioner commit fraud in the entry of the default orders?
B. Did Dr. Thorn satisfy all of the White factors, or did the trial court did not abuse its discretion in granting the Motion to Vacate?
C. Is Dr. Thorn time-barred from asserting grounds to vacate under CR 60(b)(1), (2), or (3)?
D. Is Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(11)?
E. Did Dr. Thom present "good cause" under CR 55(c) to vacate the default order of child support?

D. STATEMENT OF THE CASE

Dr. Thomas Thorn, respondent, and Debra Cromer, appellant, were in a relationship from approximately August 2008,. until July 17, 2012, when Debra Cromer made allegations of felony domestic violence against Dr. Thorn, of which is was not only acquitted of, but a special verdict was entered with a finding that he had acted in self defense from the physical assault received from Debra Cromer. Emmaline Leona Cromer-Thorn was born to the parties on March 23, 2010.

Due to the false accusations, coupled with the loss of a new job and his detention in Grant County Jail, Dr. Thorn was in a state of duress which rendered him unable to respond to the petition. Dr. Thorn was not served with a Proposed Findings of Fact and Conclusions of Law, Proposed Judgment & Order for Support/Residential Schedule, Proposed Residential Schedule, or Proposed Order of Child Support prior to their entry on November 16, 2012.

Ms. Cromer filed a parentage case against Dr. Thorn while he was in jail, and a default was entered against Dr. Thorn on November 16, 2012 (Grant County Cause Number 12-3-00611-3). On January 6, 2014, Ms. Cromer filed a notice of intended relocation from Moses lake to Cheney. That motion was granted. We then filed a motion to vacate the default order and accompanying pleadings on March 27, 2014. On revision, Judge Evan Sperline found that the order was entered by fraud, and vacated the default and the order of child support.

The superior court properly vacated the default order, findings of fact and conclusions or law, judgment and order determining parentage, order of child support and child support worksheet, all of which were entered by the court on November 16, 2012.

The court properly applied CR 60(b)(4), as appellant/petitioner misrepresented the income of the petitioner and the basis for imputation of income.

Dr. Thorn's motion was found to be properly brought under CR 60, and the court, by entering an order vacating the default judgment and accompanying orders, has demonstrated it's desire to make a determination on the merits of the case.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Appellant/Petitioner committed fraud in the entry of the default orders

The superior court properly vacated the default order, findings of fact and conclusions or law, judgment and order determining parentage, order of child support and child support worksheet, all of which were entered by the court on November 16, 2012.

The Elements of Fraud Are Established by Clear, Cogent and Convincing Evidence.

As stated in the Brief of Appellant, to recover for fraud, the following elements must be proved by clear, cogent and convincing evidence:

(1) a representation of an existing fact;
(2) its materiality;
(3) its falsity;
(4) the speaker's knowledge of its falsity or ignorance of its truth;
(5) his intent that it should be acted on by the person to whom it is made;
(6) ignorance of its falsity on the part of the person to whom it is made;
(7) the latter's reliance on the truth of the representation;
(8) his right to rely upon it;
(9) his consequent damage.[1]

Each of these elements has been met in this case.

1. A representation of an existing fact

As was found by Judge Sperline at the trial court, the appellant/petitioner represented to the court that Dr. Thorn was either

[1] *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166, 273 P.3d 965,970 (2012).

voluntarily unemployed or was capable of making in excess of $13,000 per month. RP 11. There is no evidence on the record of such, and Dr. Thorn has specifically denied such in his declaration. CP 181. In fact, at the time the judgment was entered, the false allegations of domestic violence precluded Dr. Thorn from practicing medicine. Id.

2. Its Materiality

The statement that Dr. Thorn was making, or was capable of making, in excess of $13,000 per month, was the basis of not only a judgment for child support from the date of filing through the date of judgment, but resulted in an accrued balance of over $50,000 before the motion to vacate was filed. CP 204. The balance grew due to Dr. Thorn's inability to find work because of Ms. Cromer's false allegations. CP 181.

3. Its Falsity

Dr. Thorn was unemployed when the order was entered, and he was incapable of making income as set forth in the order of child support entered by the court on November 16, 2012. CP 181.

4. The Speaker's Knowledge of its Falsity or Ignorance of its Truth

Ms. Cromer knew that Dr. Thorn was just released from jail on bail when the default judgment was entered. Dr. Thorn was never served with a proposed order of child support prior to its entry, so he never had an opportunity to dispute those facts prior to entry. CP 180.

Ms. Cromer knew not only that Dr. Thorn was not making $13,000 (and never did make that income), but that he was incapable of working as a physician when the order of child support was entered on November 16, 2012. Dr. Thorn was involuntarily unemployed due to the actions of Ms. Cromer. CP 181.

5. His Intent that it Should be Acted On by the Person to Whom it is Made

The false statements made by Ms. Cromer resulted in a judgment for child support which grew to over $50,000. CP 181. It did not take into consideration any deviations Dr. Thorn was entitled to under law. CP 39-54. The judgment was being executed on by the Division of Child Support, with full enforcement garnishing his wages once he did find employment in 2014, as well as threats to suspend his license to practice law.

6. Ignorance of its Falsity on the Part of the Person to Whom it is Made

The court had no basis to know that Dr. Thorn was not only incapable of making the income alleged in Ms. Cromer's order of child support, but had no basis to establish any income on his behalf.

7. The Latter's Reliance on the Truth of the Representation

Due to the statements made by Ms. Cromer, and her prior actions which caused Dr. Thorn to be involuntarily unemployed, the court entered an order of child support which accrued a balance due of over $50,000, causing not only threat of license suspensions, fees for garnishments, and employment issues. CP 181.

8. His Right to Rely Upon It

The court should be able to rely on the statements made in a sworn declaration, especially when it is uncontroverted. The court did rely on the statements made by Ms. Cromer in entering its Order of Child Support on November 16, 2012.

9. His Consequent Damage

The court entered an order of child support which accrued a balance due of over $50,000, causing not only threat of license

suspensions, fees for garnishments, and employment issues. He had no ability to pay that balance as he was unemployed due to the actions of Ms. Cromer. CP 182.

These factors cannot reasonably be disputed by Ms. Cromer. They are truly established clearly, cogently, and convincingly. This was considered by Judge Sperline, who considered those factors and found them to have been met. CP 308.

The decision upon which this matter is on appeal found that relief was proper under CR 60(b)(4), not under CR 60(b)(11). Hence, this section is irrelevant to this analysis and will not be addressed in this brief.

The Motion to Vacate was Brought Within a "Reasonable Time"

With regard to the secondary issue of whether the motion to vacate was brought within a "reasonable time", the court in *Marriage of Maddix*, 703 P. 2d 1062, 41 Wash. App. 248 (1985), viewed this issue in the context of a CR 60(b)(4) motion as a laches issue. That court wrote, "Laches is composed of two elements: proof of lack of diligence and prejudice to the party asserting the defense.[2] Mr. Jensen has failed to assert any prejudice he might sustain should the motion be granted, nor does the record disclose any prejudice."

Because there is no black-and-white deadline for the filing of a CR 60(b)(4) motion, the court considers the "reasonable time" element on a case-by-case basis. As the court wrote in *Morin v. Burris*, 161 P. 3d 956, 964 (2007):

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[2] *Bull v. Fenich*, 34 Wn. App. 435, 438, 661 P.2d 1012 (1983); *LaVergne v. Boysen*, 82 Wn.2d 718, 513 P.2d 547 (1973).

> As the majority recognizes, default judgments are disfavored. Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 581, 599 P.2d 1289 (1979). This is so because of our long standing preference that controversies be determined on the merits rather than by default. Id. (citing Dlouhy v. Dlouhy, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)). "A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles." Id. Equity favors substance over form. To that end, when a trial court hears a motion to vacate, it must make its determination on a case-by-case basis.
>
> > Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.
>
> Id. at 582, 599 P.2d 1289 (quoting *Widicus v. SW. Elec. Co-op., Inc.*, 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960)). Thus, principles of equity inform our consideration of what acts may constitute an appearance.

Appellant cites several cases in which a few months or even weeks were considered "unreasonable". As the court wrote in

Suburban Janitorial v. Clarke American, 863 P. 2d 1377 72 Wn. App. 302 (1993):

> Neither section contains any explicit time limitation so the courts have required that application for relief be made within a reasonable time. The critical period in determining whether a time is reasonable is the time between learning of the default judgment and filing the CR 60 motion. Here, Clarke applied for relief promptly upon learning that judgment had been taken against it. Nor does the time of 17 months from judgment and 13 months from the last letter preclude relief. Accordingly, we hold that Clarke's application was made within a reasonable time under both subsections.[3]

In the case of *United States v. Williams*, 109 F. Supp. 456, 461-462 (Arkansas 1952), the federal court in Arkansas held that a 22-year delay when the delay did not result in prejudice to the nonmoving party and when there was a basis for the delay.

In the present cased, Dr. Thorn was under a state of duress, brought upon by the direct actions of Ms. Cromer. CP 181, CP 184. He certainly presents a strong case for not only the fraud upon which her orders are based, but that the delay in filing his motion was not "unreasonable" under the circumstances.

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[3] Id. at 307-308, citing *United States v. Karahalias*, 205 F.2d 331 (2d Cir.1953) (applying Fed. R. Civ. P. 60(b)(6), court found 17-year delay not unreasonable); *Marquette Corp. v. Priester*, 234 F. Supp. 799 (E.D.S.C. 1964) (15-month delay not unreasonable); *United States v. Williams*, 109 F. Supp. 456 (W.D. Ark. 1952) (3-year delay not unreasonable).

B. Dr. Thorn satisfies all of the White factors, and the trial court did not abuse its discretion in granting the Motion to Vacate

The factors of *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968), were fully briefed and considered by the trial court prior to the order vacating the orders entered on November 16, 2012. CP 182, CP 282.

Dr. Thorn's declaration filed on March 27, 2014, fully addresses each of these White factors as follows:

> 2. A default order was entered against me on November 16, 2012 were entered at a time that I was dealing with the loss of my practice, and with false accusations lodged against me, resulting my by incarceration for two months based on false allegations. I was served in jail, and due to my despondent state of mind at the time, was unable to respond prior to entry of the default judgment and subsequent final orders. Although I did not respond, I did have a prima facie defense to the claim. I was the primary parent of our daughter, Emmaline Leona Cromer-Thorn. Because I was unemployed at the time of the orders, I could have continued caring for her full-time. I had a stronger bond with our daughter, and I was responsible for the day-to-day parenting for our daughter.
>
> 3. With regard to child support, I was unemployed when the orders were entered, due primarily to actions taken by the Petitioner against me. I was not making the income claimed in the order of child support. Those orders were entered with full knowledge that I was unemployed and unable to work at that time.
>
> 4. Because of the situational depression I was experiencing in late 2012, I was unable to timely appear and answer. My failure was the result of excusable neglect. This is supported by the Declaration of Steven Juergens, MD, filed herein.
>
> 5. I was recently acquitted of the false accusations made against me after a trial in October 2013. I acted with due diligence after my situational depression had ended

and after the jury acquitted me with a special verdict of self defense.

6. There would be no substantial hardship if the default judgment is vacated.

CP 180-181. As stated in *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007), "The first two factors are 'primary,' and the latter two are 'secondary.'"

On the same day the motion to vacate was filed, respondent filed a response to the petition establishing his prima facia defenses to the claims. These are addressed in several pleadings. It cannot be seriously disputed that the orders entered were disputed and that there is a good basis for Dr. Thorn's positions to be adopted by the court. Not only did a jury determine that Ms. Cromer lied to the court and made false allegations of domestic violence, but entered a special verdict of self defense, ordering that Grant County reimburse Dr. Thorn for his attorney's fees in defending in the false allegations made against him. CP 149. These allegations were the primary basis for the parenting plan, and the resulting loss of employment and involuntary unemployment were not disclosed to the court by Ms. Cromer. CP 32.

C. Whether Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(1), (2), or (3), is irrelevant to this appeal.

The decision upon which this matter is on appeal found that relief was proper under CR 60(b)(4), not under CR 60(b)(1), (2), or (3). RP 11. Hence, this section is irrelevant to this analysis and will not be addressed in this brief.

The irrelevance of this section notwithstanding, CR 60(b) states, "If the party entitled to relief is a minor or a person of unsound mind,

the motion shall be made within 1 year after the disability ceases." The Declaration of Steven Juergens, MD, supports Dr. Thorn's incapacity. CP 183. Hence, if the decision were made based on CR 60(b)(1), (2), or (3), they should not be time-barred.

D. Whether Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(11) is irrelevant to this appeal

This issue is address in Section A, above, and will not be repeated here. The decision of Judge Sperline was based on the fraudulent statements by Ms. Cromer. RP 11.

E. Dr. Thom did present "good cause" under CR 55(c) to vacate the default order of child support

The court wrote in *Canam Hambro Systems v. Horbach*, 655 P. 2d 1182, 33 Wn. App. 452, 454-55 (1982):

> The decision to set aside an order of default is generally within the discretion of the trial court, subject to the good cause requirement of CR 55(c). "Where the decision or order of the trial court is a matter of discretion, it will not 454*454 be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

In this case, petitioner asserts a general statement that this low burden is not met, in contrast to all other legal authority throughout this memorandum. The *Canam* court further distinguished the issues as follows, "[i]n contrast with CR 60(e), which requires that a defendant seeking to vacate a default judgment show a meritorious defense to

the action, a party seeking to set aside an order of default under CR 55(c) prior to the entry of the judgment need only show good cause." *Canam*, 33 Wash.App. at 453, 655 P.2d 1182.

This argument was fully discussed in Section A, above, and will not be repeated here.

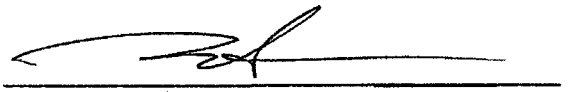
F. There is no basis for Vacating the Order of Default

This issue was fully discussed in Section E, directly above, as well as in Section A, and will not be repeated here.

F. CONCLUSION

The court should reverse the court of appeal's decision to vacate the Order on Motion to Vacate dated June 20, 2014. The trial court has shown that it would like to make a determination on the merits of the case by entering the order, and orders concerning children should always be made with all information before the court whenever possible.

Respectfully submitted this 2nd day of November, 2015.



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Appendix

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re the Parentage of:	)	
	)	No. 32585-7-III
E.L.C.	)	
	)	
DEBRA A. CROMER,	)	
	)	
Appellant,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
THOMAS ALLAN THORN,	)	
	)	
Respondent.	)	

FEARING, J. — We address whether writing the right number on the wrong line constitutes fraud in obtaining a judgment. When obtaining a default judgment against Thomas Thorn for child support, Debra Cromer erroneously listed Thorn's last known rate of pay under the "wages and salaries" line of the standard child support worksheet, rather than on the "imputed income" line.

One year and three months after entry of the default judgment, Thomas Thorn moved to vacate the default judgment. The superior court granted the motion on the ground that vacation of the default judgment was proper under CR 60(b)(4) because Debra Cromer engaged in fraud when obtaining the judgment. We reverse and reinstate

the default judgment for child support.

FACTS

Debra Cromer and Thomas Thorn commenced a committed relationship in August 2008. Thorn is a physician. In March 2010, Cromer gave birth to the couple's daughter, E.L.C. On July 16, 2012, Debra Cromer suffered a black eye and head trauma during an altercation with Thorn. On July 17, 2012, authorities arrested and charged Thorn with domestic violence assault, felony harassment, and unlawful imprisonment. On July 19, Cromer procured a protection order against Thorn.

PROCEDURE

On October 5, 2012, Debra Cromer filed a petition for a residential schedule, parenting plan, and child support for E.L.C. She served Thomas Thorn, then residing in jail, with the summons and petition through the Grant County Sheriff. On October 9, Thorn left jail on bail. Thorn never responded to Cromer's petition.

Debra Cromer moved for a default judgment against Thomas Thorn more than one month after Thorn left jail. On November 16, 2012, a court commissioner approved Cromer's proposed residential schedule and parenting plan. Due to Thorn's alleged willful abandonment of the child, refusal to perform parenting functions, and a history of acts of domestic violence, the commissioner limited Thorn's visitation to supervised visitation with E.L.C. every other weekend.

In a child support worksheet filed in support of her application for child support, Debra Cromer listed Thomas Thorn's gross monthly income as $13,000. She inserted this number, as being the wages and salary of Thorn, on line 1.a. of the "Gross Monthly Income" section of the worksheet. Clerk's Papers (CP) at 50. Cromer left blank line 1.f., a line devoted to imputed income, in this same section. Cromer should have listed the $13,000 figure as imputed income since she based the number on Thorn's past earnings as a physician. Cromer did not then know Thorn's current income. Cromer, however, declared, at the end of the worksheet, that she imputed Thorn's income because he was voluntarily unemployed or his income was unknown.

In the child support worksheet, Debra Cromer listed her own gross monthly income as $3,039.83 on line 1.c. under "Business Income." CP at 50. Cromer calculated that Thorn would be responsible for $1,585.08 per month in child support payments. In a section at the end of the worksheet titled "Other Factors for Consideration," 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 at 53.

A court commissioner entered an order directing Thomas Thorn to pay $1,585.08 in child support each month. Section 3.2 of the child support order stated:

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.

CP at 41.

Debra Cromer served Thomas Thorn with all final orders, including the child support order and order of default, on November 21, 2012. On August 27, 2013, a jury acquitted Thorn of the criminal charges against him. The jury found that Thorn employed lawful self-defense.

On January 6, 2014, Debra Cromer filed a petition to relocate E.L.C. from Grant County to Cheney, Washington, so that Cromer could attend Eastern Washington University. E.L.C. then approached her second birthday. Thorn had not exercised any visitation rights with E.L.C. and had only made one child support payment.

Thomas Thorn objected to Debra Cromer's petition to relocate. On March 27, 2014; Thorn also moved to vacate the orders entered against him in November 2012. Thorn alleged he defaulted on the initial petition because of a "state of duress" engendered by the charge of domestic violence, and, therefore, his lack of response constituted excusable neglect. CP at 181. Thorn offered no apologetic for why he failed

move to vacate the default following his acquittal in August 2013. Thorn declared that he was unemployed at the time of entry of the default orders. In his motion to vacate, Thomas Thorn does not disclose the amount of child support he believes the court should have ordered in November 2012. Thorn did not deny that, as of November 2012, his last known rate of pay was $75.00 per hour as declared by Debra Cromer in her child support worksheet filed in 2012.

In a declaration in support of Thomas Thorn's assertion of duress, Dr. Steven Juergens, a psychiatrist, stated that he had treated Thorn for major depression and attention disorder since August 2008. Juergens saw Thorn for a regular checkup on July 16, 2012, the date of Thorn and Debra Cromer's altercation, and, according to Juergens, Thorn "was doing well overall." CP at 184. Dr. Juergens treated Thorn again on November 29, 2012, a month after Thorn left jail. According to Juergens, Thorn, in late November, was devastated and depressed about his circumstances.

Dr. Steven Juergens continued in his declaration:

> I am writing because [Thorn] tells me that he is preparing a petition to address the default judgments that were granted to Debra Cromer on November 16, 2012. He has described to me that when, he was released on bail on October 9, 2012, after being jailed on July 16, 2012, that he was in a state of anguish and despair. He was not able to deal with his life circumstances, especially being served with child custody and support papers while he was in jail on October 5, 2012. These papers alleged willful abandonment, extended neglect, nonperformance of parenting functions and the lack of existence of emotional ties between him and his daughter. He recounted that he was facing 10 years in prison and describes himself as "quite literally was traumatized and in a daze."

> . . . .
>
> Though[] I did not see him during that time, I do believe that it is credible that Dr. Thorn was not dealing with his circumstances in a very organized and competent manner because of the emotional crisis being brought on by his being jailed for three months and the threat of facing years of prison. He describes himself as being depressed, anxious, angry, withdrawn, indecisive, and feeling helpless. He iterates to me that he was facing prison for something he did not do, threatened with not seeing his daughter again, the potential loss of his medical license, and the possibility of not working as a physician again. I do not believe that he was acting effectively at that time, which I think is understandable from a psychiatric standpoint.

CP at 184-85.

On April 18, 2014, a court commissioner denied Thomas Thorn's motion to vacate the default child support order. The commissioner entered detailed findings of fact, including:

> 11. More than one year has passed between entry and service of the orders entered by the court on November 16, 2012 and Respondent's Motion.
>
> 12. Respondent had the ability to bring a motion to vacate the default at all times after entry of the default.
>
> 13. Petitioner's allegations of domestic violence against Respondent did not prevent Respondent from answering the Summons and Petition.
>
> 14. Respondent's arrest and incarceration in 2012 did not prevent the Respondent from appearing and responding to the Summons and Petition.
>
> 15. Respondent's alleged "state of duress" did not prevent Respondent from appearing and responding to the Summons and Petition.
>
> . . . .
>
> 18. Respondent did not file his Motion for an Order to Show Cause in this matter until after Petitioner filed her notice of relocation and motion for temporary orders.

CP at 234-35. The court commissioner also entered conclusions of law, including:

> 3. Respondent's Motion fails to provide any evidence of fraud, let alone clear, cogent and convincing evidence.
>
> 4. Respondent's Motion fails to establish fraudulent conduct on the part of the Petitioner.
>
> 5. Respondent's Motion fails to establish any fraud or misrepresentation that caused the entry of the November 16, 2012 orders, or that prevented the Respondent from fully and fairly presenting his case or defense.

CP at 226. The court commissioner awarded Debra Cromer attorney fees and costs in the amount of $2,619.

Thomas Thorn moved the superior court to revise the court commissioner's findings of fact, conclusions of law, and order denying his motion to vacate. Thorn added the argument that vacation of the default judgment was proper under CR 60(b)(5) or (11) because the judgment granted relief not requested in the petition, thereby rendering the judgment void and capable of being vacated at any time.

The Grant County Superior Court denied Thorn's request for relief under CR 60(b)(5) or (11). The trial court, nonetheless, vacated the default judgment under CR 60(b)(4) on the ground that Debra Cromer committed fraud in obtaining the judgment since she imputed income on the "Wages and Salaries" line of the child support worksheet instead of the "Imputed Income" line. In so ruling, the trial court noted that the one year limitation for moving to vacate a default judgment did not apply because of the fraud. The trial court upheld the default parenting plan.

LAW AND ANALYSIS

Default Order

Debra Cromer contends that the trial court erred in: (1) finding that Thomas Thorn made a prima facie showing that she fraudulently obtained the default judgment and order for child support, (2) failing to bar Thorn's motion to vacate as untimely, and (3) failing to consider the factors in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), in determining whether vacation of the default judgment was proper. We agree with her first assertion and so do not address the other two arguments.

This court reviews a trial court's decision on a motion to vacate an order of default or default judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); *Yeck v. Dep't of Labor & Indus.*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Morin*, 160 Wn.2d at 753. A trial court that misunderstands or misapplies the law bases its decision on untenable grounds. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). We conclude that the trial court misapplied the law. The trial court based its decision on Debra Cromer allegedly providing false information to the trial court, rather than Cromer engaging in fraud to obtain the judgment, when a showing of procedural fraud or misrepresentation is needed to vacate a judgment under CR 60(b)(4).

Thomas Thorn contends that he provided sufficient evidence of fraud because Cromer knew that Thorn did not earn $13,000 per month, never earned that income, and

was incapable of employment as a physician when the order of child support was entered on November 16, 2012. Thorn claims he was involuntarily unemployed due to the actions of Cromer. We do not address these arguments because Thorn does not allege that Cromer fraudulently prevented him from responding to the petition.

CR 60, upon which the trial court relied, applies to all judgments, not only judgments obtained by reason of a default by the defendant. CR 60 provides, in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On 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;
>
> . . . .
>
> The motion shall be made within a reasonable time.

A review of case law shows that CR 60(b)(4) addresses fraud in procuring the judgment rather than fraud or misrepresentation in providing false information to the court at the time of entry of the judgment. Stated differently, CR 60(b)(4) concerns itself with procedural, rather than substantive, fraud.

CR 60(b)(4) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). For this reason, a party seeking vacation of a judgment under CR 60(b)(4) must demonstrate that the fraud or misrepresentation caused the entry of the

judgment such that the losing party was prevented from fully and fairly presenting its case or defense. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990); *Peoples State Bank v. Hickey*, 55 Wn. App. at 372; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719 (1923); *Atchison, Topeka & Santa Fe Ry. Corp. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957); *Plattner v. Strick Corp.*, 102 F.R.D. 612, 615-16 (N.D. Ill. 1984). The alleged fraud or misrepresentation must be established by clear and convincing evidence. *Peoples State Bank v. Hickey*, 55 Wn. App. at 372.

Peoples State Bank v. Hickey, 55 Wn. App. 367 (1989) controls our decision. Carol Hickey appealed the trial court's denial of her motion to set aside a default judgment and a decree of foreclosure that were entered against her in favor of Peoples State Bank. Over a strenuous dissent, this court affirmed the judgment. The bank foreclosed on property owned by Hickey's former husband, but on which Hickey held a lien superior in interest to the interest of the bank. In the complaint, Peoples State Bank named Carol Hickey as a person claiming an interest in the mortgaged property. The bank falsely alleged that the interest of Carol Hickey was inferior, subordinate and subject to the lien of the bank. The bank then possessed a title report showing Hickey's lien to hold priority of the bank's mortgage. The bank served Hickey with the summons and complaint for mortgage foreclosure. Hickey failed to appear and an order of default was entered against her. Thereafter, Hickey sought to vacate the default judgment. She

averred that she possessed limited understanding of the law and that, when she received the summons and complaint, she was unaware of the meaning of the word "subordinate." The trial court denied Hickey's motion to set aside the judgment, emphasizing that she had ample opportunity to challenge the position of the bank that her lien was inferior to the bank's mortgage.

In *Peoples State Bank v. Hickey*, this court noted that Carol Hickey established that the bank misrepresented facts regarding Hickey's lien. We reasoned that it was immaterial whether the bank's misrepresentation was innocent or willful. Although default judgments are not preferred, balanced against that principle is the necessity of having a responsive and responsible system that mandates compliance with judicial process and is reasonably firm in bringing finality to judicial proceedings. We noted that Fed. R. Civ. P. 60(b)(3) was the federal counterpart to CR 60(b)(4) and we looked to federal decisions to reach the correct conclusion. Courts interpreting the federal rule stated that one who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. Thus, vacation of the default judgment was not warranted. Although Peoples State Bank misrepresented the status of Hickey's lien, there was no connection between the bank's misrepresentation and Hickey's failure to respond to the complaint or employ an attorney. Hickey did not rely on the misrepresentation, nor was she misled by the bank's statements in the complaint.

The trial court found that Thomas Thorn met his burden of proof under CR 60(b)(4) because Debra Cromer listed Thorn's gross monthly income as "wages and salaries" rather than as "imputed income" on the child support schedule worksheet she submitted to the court. We question whether Cromer misrepresented the facts when she elsewhere disclosed to the court commissioner that she did not know Thorn's income but was imputing income to him based on her latest information. We need not resolve, however, whether Cromer misrepresented facts or even fraudulently stated facts. Thorn did not rely on any misrepresentation. Debra Cromer's imputation of Thomas Thorn's income did not prevent him from appearing or fairly presenting his case.

Thomas Thorn claims that he went temporarily to jail due to the conduct of Debra Cromer and his jailing created duress that disabled him from answering the petition for child support. Nevertheless, he does not argue that his residing in jail is the type of fraud that qualifies for vacation under CR 60(b)(4). Anyway, Cromer did not seek the default judgment until Thorn's release from jail.

Attorney Fees and Costs

Debra Cromer requests appellate attorney fees and costs under RCW 26.09.140. That statute provides, in relevant part:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs

> incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

In determining whether to award fees under RCW 26.09.140, this court examines the arguable merit of the issues on appeal, and the financial resources of the respective parties. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). The party seeking fees on appeal must serve on the other party and file a financial affidavit, no later than ten days before the date the case is set for oral argument or consideration on the merits. RAP 18.1(c). Debra Cromer has fulfilled this requirement.

Debra Cromer brings a meritorious appeal. She shows minimal income. Thomas Thorn concedes in his response brief that he found employment in 2014. Therefore, he should be able to pay some or all of Cromer's attorney fees. We grant Cromer's request for attorney fees and costs in an amount to be determined by the commissioner of this court pursuant to RAP 18.1(d).

CONCLUSION

We reverse the trial court's vacation of the order of default for child support, as well the findings of fact, conclusions of law, judgment, order for support/residential schedule, order granting attorney fees, and order of child support signed by the court commissioner in November 2012. We remand with instructions that the trial court reinstate the original default judgment and orders entered on November 16, 2012. We

award appellate attorney fees and costs to Debra Cromer to be determined by our court commissioner.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

FILED
OCTOBER 1, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re the Parentage of:	)	
	)	No. 32585-7-III
E.L.C.	)	
	)	
DEBRA A. CROMER	)	
	)	ORDER DENYING
Appellant,	)	MOTION FOR
	)	RECONSIDERATION
v.	)	
	)	
THOMAS ALLAN THORN,	)	
	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of August 11, 2015, is denied.

DATED: October 1, 2015

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY
Chief Judge

SUPERIOR COURT OF WASHINGTON
COUNTY OF GRANT

In re the Parentage of EC:	
DEBRA CROMER,	**Appeal No.** 325857
Petitioner,	**Return of Service (Optional Use) (RTS)**
v.	
THOMAS THORN,	
Respondent.	

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.

2. I served the following documents to Ashby Law PPLC

   - Petition for Review

3. The date, time and place of service were:

   Date: November 2, 2015 Time: 4:30 p.m.

4. Service was made:

   - via email to sta@pnwfamilylaw.com and to tsa@ashbylawpllc.com on November 2, 2015

Couture & Albright
Attorneys at Law, PLLC
406 W. Broadway Ave., Suite D
Moses Lake, WA 98837
509-765-0911/Fax 509-765-0411

- and via USPS, postage prepaid to Scott T. Ashby, Attorney at Law 8900 W Tucannon Ave, Kennewick, WA 99336

5. Service of Notice on Dependent of a Person in Military Service.

Does not apply.

6. Other:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Moses Lake, Washington this 2nd day of November, 2015.

Nathan Albright

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