96201-4

SUPREME COURT FOR THE STATE OF WASHINGTON

TIMOTHY P. MERRIMAN, Petitioner, v. WHATCOM COUNTY, Respondent.	Court of Appeals No. 76860-3-I PETITION FOR DISCRETIONARY REVIEW OF COURT OF APPEALS DECISION TERMINATING REVIEW Skagit Superior Court No. 09 2 01956 1 Clerk's action required

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Part 1. Identify of Moving Party

This motion is brought by Timothy P. Merriman, the Appellant who is Pro Se and asks for the relief designated in Part 8.

Part 2. Citation to Court of Appeals Decision

Merriman v. Whatcom County, No. 76860-3-I (Wash. Ct. App. June 18, 2018). App. A Motion for Reconsideration denied July 18, 2018. App. B

Part 3. Issues Presented for Review

Note: Merriman will be using the term "substantive fraud" to refer to an attorney giving false information to the court in pleadings, declarations and other evidence, discovery and oral argument; or failing to give information to the court when under a duty to do so in the same circumstances and the court relies on the information or lack of it in rendering judgment. Peoples State Bank v. Hickey, 55 Wn. App. 367, 371; 777 P.2d 1056 (1989) says, "It is immaterial whether the misrepresentation was innocent or willful. The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate."

This appeal was filed with the Supreme Court for direct review based on RAP 4.2(a)(3) because there were conflicting decisions from the Court of Appeals as to whether CR 60(b)(4) or CR 60(b)(5) applied to motions to vacate judgments based on substantive fraud on the trial court. The Supreme Court sent it to the Court of Appeals.

The instant Opinion of the Court of Appeals did nothing to resolve the conflict among its decisions and those of the Supreme Court. It applied CR 60(b)(4) which is in contradiction to the Court of Appeals and Supreme Court decisions indicating CR 60(b)(5) applies. A ruling by the

Supreme Court is still needed to settle the law that applies to vacating a judgment obtained by substantive fraud on the court.

Where the claim is substantive fraud on the court, is the application of CR 60(b)(4) to the instant case by the Court of Appeals because it mentions "fraud" based on an erroneous view of the law?

Must the Court of Appeals follow the guidance of the Supreme Court and the Court of Appeals that fraud on the court makes the judgment a "nullity" and therefore void, or void because when there is fraud on the court the judgment is not the judgment of the court?

Must each CR 60(b) motion for relief claimed by the moving party in the trial court which is properly appealed be considered by the Court of Appeals until all possibilities of granting relief are exhausted?

Is CR 60 the sole mechanism to guide the balancing between finality and fairness unless CR 60(b)(5) applies, making the finality of judgments doctrine inapplicable?

Should the Court of Appeals have reviewed the motion to vacate de novo?

Can a party be estopped from asserting fraud on the court or waive his right to do so?

Has Merriman received due process where the trial court said it had "largely digested" the vacation pleadings and there is no record of the summary judgment proceedings?

Should the Court of Appeals have examined all the documentary evidence of fraud de novo regardless of which section of CR 60(b) applied?

Part 4. Statement of the Case

Merriman has been Pro Se at all times except for the summary judgment and appeal thereof.

In 2009, Merriman started suit against Whatcom County (County). By the time of the summary judgment the claims were wrongful discharge, and failure to accommodate caused by disability discrimination. The trial court dismissed these claims on summary judgment, and the Court of Appeals affirmed.

Using RAP 12.2 Merriman moved under CR 60 for relief from judgment obtained through fraud on trial court. The trial court denied his motion and Merriman's motion for reconsideration. The Supreme Court denied direct review. The Court of Appeals affirmed and denied his motion for reconsideration. Merriman seeks discretionary review by the Supreme Court.

Part 5. Argument

The motions Merriman filed in the trial court were captioned "Motion for Relief from Judgment or Order Pursuant to CR 60(b)(4) Due to Fraud, Misrepresentation, or Other Misconduct and/or CR 60(b)(5) Because the Order is Void and/or CR 60(b)(11) Any Other Reason Justifying Relief from the Operation of the Judgment and/or the Inherent

Powers Of The Court". CP 1282 The only reason for vacation argued by Merriman was substantive fraud on the trial court. (CP 1284)

Merriman appealed the CR 60(b)(5) motion to the Supreme Court because he had become convinced it was the proper subsection; and included the CR 60(b)(4) in his appeal because he was concerned about how the conflicting cases from the Court of Appeals would be resolved.

In the instant case the Court of Appeals decisions applied CR 60(b)(4) apparently because it contains the word "fraud". However, the Court of Appeals 60(b)(4) approach to fraud on the court cases was inconsistent with at least one of its cases, saying such judgements were void and another one of its cases indicating CR 60(b)(4) did not apply to substantive frauds on the court.

The County never argued the CR 60(b)(5) motion. The County only opined that CR 60(b)(5) did not apply (Opposition to Motion to Vacate Pg. 3 (CP 1389)) and said it did not matter in its Response on Appeal. Pg. 7

Wilson v. Henkle, 45 Wn. App. 162, 168-169; 724 P. 2d 1069 (1986) involved a court commissioner who had been tricked into signing a judgment due to counsel's failure to disclose relevant facts. The trial court said "judgment was procured fraudulently so that it was void".

There are also Supreme Court decisions consistent with CR 60(b)(5) being the proper subsection to apply. Notwithstanding the adoption CR 60(b) in 1967 Reeploeg v. Jensen, 81 Wn.2d 541, 547; 503 P. 2d 99 (En Banc., 1972), *Petition for rehearing denied,* January 23, 1973

states that fraud on the court renders the judgment a "nullity"; Kosten v. Fleming, 17 Wn.2d 500, 506; 136 P.2d 449 (1943) referred to by Reeploeg v. Jensen, says, “In contemplation of law, an order obtained upon false suggestion is not the order of the court and may be treated as a nullity.”

Each of these cases say substantive fraud on the court makes the judgment a “nullity” and therefore void, or void because the judgment is not the judgment of the court.

Then there is Peoples State Bank v. Hickey, 55 Wn. App. 367, 372; 777 P.2d 1056 (1989) that holds that CR 60(b)(4) does not apply to substantive frauds on the court.

Three judges of the Court Appeals did their own case law survey of the types of fraud covered by CR 60(b)(4). “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).” In Re Parentage of ELC, No. 32585-7-III (Wash. Ct. App. August 11, 2015) (unpublished). App. C, Pg. 9.

Petitioner cites this unpublished opinion as a public record that three judges of the Court of Appeals, after their own research, have

recently concurred that is the state of the law on the meaning of fraud as used in CR 60(b)(4).

Merriman became convinced that substantive fraud on the court was an egregious type of fraud that was not intended to be covered by the "fraud or misrepresentation" in CR 60(b)(4), and that CR 60(b)(5) does.

The instant panel of the Court of Appeals deftly declined to address the holding from Peoples State Bank v. Hickey, 55 Wn. App. at 372, that CR 60(b)(4) did not apply to substantive frauds by saying, "the court did not mention the case in either its oral ruling or in its written order denying Merriman's motion. Even if the case is distinguishable, there is no indication that the court relied on the case." Opinion Pg. 4 Fn. 1

Actually, the trial court mentioned no cases in its oral ruling nor written order. Using the reasoning the Court of Appeals used to avoid dealing with Peoples State Bank v. Hickey, the Court of Appeals should not have used any cases in its opinion.

When a party makes multiple motions under CR 60(b) the court evaluates each motion individually without exception until it finds one which is an independently adequate ground for vacation of the judgment or exhausts all of the motions. It was sections 1, 4, 5 and 11 in Bergren v. Adams County, 8 Wn. App. 853, 855-857; 509 P. 2d 661 (1973). There are many other cases like this so this case is cited as an example.

Here, the Court of Appeals twisted the rule and only examined the one that it chose of the two motions before it by saying "CR 60(b)(4) would be an independently adequate ground for vacation of the judgment.

Even if CR 60(b)(5) applied, its application would be superfluous to CR 60(b)(4), and thus unnecessary. The trial court did not err in declining to address CR 60(b)(5).” Opinion Pgs. 3-4 It then affirmed on 60(b)(4).

The proper use of the Court of Appeals approach is found in In re Adamec, 100 Wn.2d 166, 178, 667 P.2d 1085 (1983) The Supreme Court concluded the trial court did not abuse its discretion in refusing to vacate the order under CR 60(b)(4) due to a fraud claim that had been litigated in the trial court, because it is not a proper use of CR 60(b). It concluded that the argument on CR 60(b)(5), (6), and (11) were essentially restatements of those already considered improper under CR 60(b)(4) and required no additional discussion.

Merriman’s fraud on the court claim under CR 60(b)(4) and CR 60(b)(5) were based on the same facts (two sham letters relied on by the trial court in rendering judgment) that had never been litigated prior to the motion to vacate. Even though the facts are the same the standard of review is different. CR 60(b)(5) motions are reviewed de novo. "Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate ... is reviewed de novo." Ahten v. Barnes, 158 Wn. App. 343, 350; 242 P. 3d 35 (2010). Had the Court of Appeals used CR 60(b)(5) with the higher standard then it might be reasonable for it to say CR 60(b)(4) would be superfluous to CR 60(b)(5), and thus unnecessary.

The Court of Appeals approached its analysis of CR 60(b)(4) with the hypothetical assumption that there had been substantive fraud on the

trial court by saying “if the fraud alleged by Merriman indeed occurred here” on Pg. 3 of its opinion. Using only 60(b)(4) it concluded it would uphold the trial court because it said there was no abuse of discretion. Opinion Pg. 6

If the Court of Appeals had applied the same assumption that there had been fraud on the trial court to Merriman’s CR 60(b)(5) motion, then it would have had to find the order was a nullity and therefore void, or void in which case vacation is mandatory. Leen v. Demopolis, 62 Wn. App. 473, 478; 815 P. 2d 269 (1991); *review denied*, 118 Wn.2d 1022 (1992). Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323, 877 P.2d 724 (1994) says, "[A] court has a nondiscretionary duty to vacate a void judgment".

In its oral ruling the trial judge cited the judicial policy favoring finality of judgments. This was within minutes of when Merriman noted for the court that "time doesn't matter at all" under CR 60(b)(5). 07/15/16 RP Pg. 13 The trial court also noted the “issues raised today were either raised earlier or should have been in the normal course of the process”. The latter being a statement that Merriman had waived the fraud on the court or should be estopped from asserting it. The trial judge then concluded that Merriman’s “motions for relief here have no significant merit” on those bases. 07/15/16 RP 15

Under CR 60(b)(5) finality is a nonissue. A motion based on CR 60 (b)(5) can never be untimely. Allstate Ins. Co. v. Khani, at 75 Wn. App. 323-24 says, "A motion to vacate under CR 60(b)(5) (footnote

omitted) 'may be brought at any time' after entry of judgment". Likewise, Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991). Brenner v. Port of Bellingham, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989) says, "motions to vacate under CR 60(b)(5) are not barred by the `reasonable time' or the 1-year requirement of CR 60(b)" (footnote omitted). Void judgments may be vacated regardless of the lapse of time. In re Marriage of Leslie, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989). Consequently, not even the doctrine of laches bars a party from attacking a void judgment. Leslie, 112 Wn.2d at 619-20." "Brenner provides a striking example of how meaningless the passage of time (16 years) is in the context of a void judgment." Allstate Ins. Co. v. Khani, 75 Wn. App at 324.

The Court of Appeals only took on the issue of finality by saying "three years after this court affirmed summary judgment, Merriman moved under CR 60 for relief". Opinion Pg. 2 Even under CR 60(b)(4) "[C]ircumstances arise where finality must give way to the even more important value that justice be done between the parties. CR 60 is the mechanism to guide the balancing between finality and fairness." Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. 302, 313; 863 P.2d 1377 (1993), Review denied at 124 Wn.2d 1006 (En Banc, 1994) Ten years after the occurrence of the event on which the motion was based could have constituted a reasonable time with a showing of good reason for failing to file the motion sooner. In re Det. of Ward, 125 Wn. App. 374, 381; 104 P.3d 747 (2005) Merriman made such a showing with his

motion to vacate (CP 1077-CP 1142) and the County has demonstrated no prejudice from delay. Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner. Luckett v. Boeing Co., 98 Wash. App. 307, 312-13; 989 P. 2d 1144 (1999) The prospect of trial itself cannot constitute a substantial hardship. "If the law were otherwise, a judgment would never be set aside, for that always generates the prospect of trial." Pfaff v. State Farm Mutual Auto. Ins. Co., 103 Wn. App. 829, 836; 14 P. 3d 837 (2000).

There is no indication either court engaged in weighing the interests of the parties from Luckett v. Boeing Co., or used CR 60 from Suburban Janitorial Servs. v. Clarke Am. instead of the doctrine on finality of judgments. Regarding waiver and estoppel, the Court of Appeals says about fraud due to the sham letters and the discovery violations, “these facts were known at the time of trial and could have been resolved factually at that time.” Opinion Pg. 5

The fact that Merriman's attorney did not call the trial court's attention before the summary judgment to the numerous fraudulent statements and omissions in the two letters the trial court judgment relied on, or to the discovery violations that were being used to perpetrate a fraud upon it does not change the fact that fraud was perpetrated on the court by the County’s attorney.

The courts have inherent power to "supervise, and to correct the errors or abuses of, their officers and subordinates ... to investigate charges of acts having a direct tendency to obstruct or prevent the administration of justice, or charges of misconduct on the part of their officers". Dike v. Dike, 75 Wn.2d 1, 5; 448 P. 2d 490 (1968)

The fraud claim belongs to the court and not Merriman. Since it is not Merriman's claim he cannot waive it or be estopped from calling it to the attention of the court and asking for relief because of it. To refrain from engaging in fraud on the court is solely the responsibility of the County and it should be at its peril not Merriman's.

The U. S. Supreme Court says, "[T]ampering with the administration of justice... 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 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, 246, 88 L.Ed. 1250, 64 S.Ct. 997 (1944), overruled on other grounds in Standard Oil Co. v. United States, 429 U.S. 17, 18, 50 L.Ed.2d 21, 97 S.Ct. 31(1976).

When litigants do bring fraud on the court to the attention of the court, the court should not shut them down with avoidance theories like

estoppel and waiver or for CR 60(b)(4) finality without weighing the interests of the parties. When it does, the court is making itself a mute and helpless victim of deception and fraud and rewarding rather than deterring the perpetrator in the process.

Merriman suggested in his brief that the court should adopt reasoning similar to this: A fraud on the court claim for vacation under Fed.R.Civ.P. 60(b) is directed towards protecting the integrity of the judicial system itself. Public policy demands that the fraud on the court claim remain viable even where an adverse party knows it is being committed and does not bring it to the attention of the Court earlier. A party cannot waive fraud on the court or be estopped from asserting there was fraud on the court because of that party's knowledge that fraud was being committed on the court. Vacation is a necessary remedy to preserve the integrity of the court and serve public policy. In re MTG, Inc., 400 BR 558, 568-569 and Fn. 19 and 20; 51 Bankr.Ct.Dec. 14 (ED Michigan sitting as an appellate court 2009) - a Memorandum Opinion and Order. App. D

Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance, though such analysis will be followed only if the reasoning is found to be persuasive. American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank, 115 Wash.2d 307, 313, 796 P.2d 1276 (1990).

Neither court indicated that it had considered whether a fraud on the court claim remains viable even where an adverse party knows it is being committed and does not bring it to the attention of the court earlier.

Merriman questioned whether he received due process in the trial court. "Due process guarantees the right to a full and fair hearing." Baxter v. Jones, 34 Wn. App. 1, 3; 658 P.2d 1274 (1983) The Court of Appeals said of this, “he contends that the trial court made conflicting statements by stating that it had ‘largely digested’ the relevant pleadings, but also had ‘reviewed at length’ the relevant materials. But, the trial court's word choice in these instances does not demonstrate error or abuse of discretion.” Opinion Pgs. 5-6

Merriman has always been concerned that the courts would not give a detailed reading of his pleadings regarding the two letters that the trial court relied on in granting summary judgment, which were very convincingly written shams and require a very detailed and careful reading of the evidence contradicting them in order to reveal that.

When the trial judge says he has “largely digested” the pleadings, Merriman wonders which portions of the pleadings he gave his attention to; and that does not sound like a detailed reading was given to whatever the judge did give his attention to.

The oral ruling had focused on finality, waiver and estoppel. He said nothing about whether there had been fraud on the court or the evidence of it. He may not have given much attention to it.

Overall, Merriman was left with the impression that the trial judge had not given due consideration to CR 60(b)(5) or the evidence of fraud.

Eventually the Court of Appeals abandons its hypothetical assumption that there was fraud on the court in favor of a cursory review of the evidence of that fraud using an abuse of discretion standard concluding that "Rejecting the claim of fraud was not an abuse of discretion by the trial court." (Opinion Pg. 5) The trial court had not indicated it rejected the claim of fraud nor the evidence of it. It simply applied the doctrines of finality, waiver and estoppel in its oral ruling.

Assuming the Court of Appeals is properly reviewing the evidence of fraud where it has already concluded that it was upholding the trial court on CR 60(b)(4) on the assumption that the evidence existed, not dealing with CR 60(b)(5) and the trial court had not indicated the evidence of fraud was part of its decision, there are only two pieces of evidence that matter which are the two letters that Merriman claims were shams.

The trial judge wrote the summary judgment order (CP 850-851) solely on the false belief in the bona fides of those two letters. CP 838-840 and 845 That is proven by Narrative RP 2, Declaration of Timothy P Merriman Regarding the Summary Judgment Hearing (CP 836-837), and by the Clerk's Minute Entry. (CP 835)

There was no contemporaneous recording or verbatim reporting of the summary judgment proceeding made for some reason. This by itself may be a denial of due process by a review on appeal stemming from the inadequacy of the record before the appellate court if there is disagreement

among the parties as to what should have been in the record had it been made.

The Court of Appeals only gave a cursory, inaccurate, incomplete and downplayed description of the two letters that the trial judge stated his decision on summary judgment was based on. Opinion Pg. 3

Merriman's contention was that the letters were shams consisting of a series of misrepresentations and omissions of the County's written personnel policies. Those personnel policies were contained in resolutions of the County Council. The two letters also contained conspicuous omissions and misrepresentations of Merriman's rights under the WA FLA and FMLA and under the WLAD and ADA regarding leave as accommodation and accommodation in the workplace. The County took on the duty to be comprehensive when the letters said "all the options available" for Merriman to retain his employment were contained therein. CP 839 The misrepresentations and omissions could have only been intentional under the circumstances, although it is actually "immaterial whether the misrepresentation was innocent or willful. The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate". Peoples State Bank v. Hickey, 55 Wn. App. at 371

The Court of Appeals saying, "The letters were written years before the original complaint was filed, not in response to it." (Opinion Pg. 5) indicates it missed the significance of when the fraud on the court occurred. The letters could have lain dormant for hundreds of years and

never committed fraud on the court. It also ignores that the Human Relations (HR) Employee Relations Manager wrote the letters and HR's in-house counsel participated in having these letters written as part of their loss prevention duties. In-house counsel received copies of the two letters.

Had the County wanted to retain Merriman the two letters were a lot of wasted effort. Merriman had asked the County to approve the unpaid medical leave provided for in Unrepresented Resolution 6.9[1]. CP 897-898 The County could have processed that request and obtained the mutual consent of the department head and the Executive's Office because at HR's Keeley's deposition she admitted that Unrepresented Resolution 6.9[1] requires no medical documentation (Keeley deposition, pg. 86, lines 16-17 (CP 892)), for the unpaid medical leave specified in it.

If the County wanted to retain Merriman it would have simply told Merriman the leave was approved instead of engaging in loss prevention efforts with these sham letters. Approving the leave would have been its best loss prevention tactic.

When the letters were presented to the trial court a few years after they were written to prove that Merriman stubbornly refused to return to

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[1] Unrepresented Resolution 6.9 is the County's personnel policy applicable to Merriman's leave for illness or injury and says:

6.9 Leave for Illness or Injury. Non-represented employees may request leave for major illness or injury utilizing Family/Medical Leave, accrued leaves, and unpaid leaves, as appropriate, Total time for the leave, which will include all time away from work, may be extended up to a maximum of twelve (12) months with the mutual consent of the department head and the Executive's Office. An employee who returns to work will be credited for length of return time within the twelve (12) month limit if the employee must go back on disability for the same illness or injury. (CP 872)

work it was with the knowledge of the County's attorney that they did not correctly reflect the County's written personnel policies, the WA FLA and the FMLA. That is when the fraud on the court occurred. He should have known they didn't reflect the ADA/WLAD on leave as an accommodation.

All of the evidence regarding the many misrepresentations and omissions of County policies in the two letters was documentary consisting of the two letters themselves and the County's written personnel policies adopted by resolutions of the County Council. Review of documentary evidence is de novo regardless of which section of CR 60(b) is used. Lindgren v. Lindgren, 58 Wn. App. At 595 There is no evidence of a de novo review by the Court of Appeals where the Court of Appeals says "Rejecting the claim of fraud was not an abuse of discretion by the trial court." Opinion Pg. 5

The legislative body of a local government may act by resolution or by ordinance. LaMon v. Westport, 22 Wn. App. 215, 219; 588 P.2d 1205 (1978) citing State ex rel. Sylvester v. Superior Court, 60 Wash. 279; 111 P. 19 (1910). The Court is not bound by an agency's own interpretation of legislation (Hale v. Wellpinit School Dist. No. 49, 165 Wn.2d 494, ¶ 22, 198 P. 3d 1021 (2009)); and here there was no effort by the Court of Appeals to construe and compare the policies as misrepresented by the County in the letters to those adopted by the County Council.

Two tables take HR's misrepresentations and omission of the County Council's personnel policies in the letters (CP 838-840 and 845) and compares them to the written personnel policies adopted by the County Council primarily in the Unrepresented Resolution and to federal and state laws. CP 1309 - CP 1310 and CP 1313 - CP 1315 The exhibits referred to in the tables are in CP 816 - CP 1706. The Employee Handbook's leave and benefits sections did not apply to Merriman as an unrepresented employee (Section 103.2 on CP 873), whose leave and benefits are provided for in the Unrepresented Resolution. CP 874.

Merriman told Randall J. Watts, the County's Chief Civil Deputy and the County's attorney at Merriman's deposition and summary judgment, at Merriman's deposition that the two letters did not accurately reflect Whatcom County's written personnel policies, the WA FLA\FMLA. Also, that the letters were incomplete in failing to offer the Unrepresented Resolution section 6.9 unpaid leave[1] Merriman had requested (CP 897 – CP 898), and that the second letter was written after Merriman was no longer employed. CP 936 - CP 943

HR Representative Melissa Keeley testified that she was always aware that Merriman wanted to return to work. Keeley deposition, Pg. 73, lines 6-12. CP 910

Nonetheless attorney Watts offered both of the letters to the court anyway to show that Merriman refused to return to work and the court accepted them as such. That is when the fraud on the court occurred.

The second letter (CP 845) easily proves fraud. It is dated the same day that Human Resources (HR) processed Merriman out of County employment at 8:29 AM (CP 862) in order to fill his position after Merriman's department head accepted his resignation. CP 857 Therefore, it cannot be said to contain offers for Merriman to retain his employment. The County gave that letter to the trial judge to prove it offered continued employment, even though Merriman was no longer a County employee when it was written and the letter was not mailed until the day after it was dated, after Merriman was processed out of County employment. CP 856 Regardless of that letter's content, that alone was a fraud on the court because it could not have offered Merriman continued employment while Merriman was no longer employed by the County and the County was in the process of filling his position.

The letters themselves offered Merriman no way to return to work contrary to the tone of the letters.

HR's Keeley also testified that "it's just not in our practice to call out a policy". Keeley deposition pg. 87, lines 23-24 (CP 918) referring to unpaid leave for illness or injury under section 6.9 of the Unrepresented Resolution[1]. In the case of the letters, (CP 838-840 and 845) HR did not call out unpaid leave for illness or injury as provided for in section 6.9 of the Unrepresented Resolution[1], which was the only County policy that would have worked and the only one that Merriman had requested. (CP 897-898)

Part 6. Conclusion

Merriman wants the Supreme Court to settle the law regarding whether CR 60(b)(4) or CR 60(b)(5) applies to vacating a judgment when there is fraud on the court and whether estoppel or waiver can be applied to block consideration of fraud on the trial court.

If CR 60(b)(4) is found applicable he wants his motion subjected to the "Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner." test of Luckett v. Boeing Co., 98 Wash. App. 312-13 and the exclusivity of "CR 60 is the mechanism to guide the balancing between finality and fairness." from Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. at 313.

Merriman wants some court to thoroughly review the evidence of fraud on the court, particularly the tables.

He wants his motions decided based on the results of those deliberations and the summary judgment vacated.

DATED this 17th day of August, 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIMOTHY P. MERRIMAN, Appellant, v. WHATCOM COUNTY, Respondent.	No. 76860-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 18, 2018

APPELWICK, C.J. — Merriman argues that the trial court abused its discretion in denying his motion for relief from judgment. We affirm.

FACTS

Timothy Merriman resigned from his employment at Whatcom County (County). The resignation followed a lengthy history of paid leave and accommodation generally related to Merriman's disability. In 2009, Merriman filed suit alleging a hostile work environment, wrongful discharge, and disability discrimination, among other claims. The County successfully moved to dismiss under CR 12(c).

The trial court then permitted Merriman to amend his complaint, and Merriman added claims for failure to accommodate and constructive discharge. The trial court dismissed these added claims on summary judgment, and this court affirmed. This court discussed the substantive facts in detail in a prior opinion,

Appendix A

Merriman v. Whatcom County, No. 69295-0-I (Wash. Ct. App. Sep. 9, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/692950.pdf.

In 2016, three years after this court affirmed summary judgment, Merriman moved under CR 60 for relief from judgment obtained through fraud. The trial court denied this motion and Merriman's motion for reconsideration. Merriman appeals.

DISCUSSION

Merriman makes one overarching argument: that the trial court erred in denying his motion for relief from judgment. He makes a number of additional arguments that do not go directly to the validity the denial.

I. CR 60(b)

CR 60(b) provides various grounds for a trial court to set aside a judgment. Under CR 60(b), motions under sections (b)(1), (b)(2), and (b)(3) must be brought within one year of the judgment. Merriman brought his CR 60(b) motion over one year after judgment. Therefore, these forms of relief are unavailable to him. Of the remaining options, he argues for relief under CR 60(b)(4), and CR 60(b)(5).

CR 60(b)(4) authorizes a trial court to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. The fraudulent conduct or misrepresentation must cause 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).

The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence. Lindgren, 58 Wn. App. at 596. And, on appeal, a trial court's disposition of a motion

to vacate will not be disturbed unless it clearly appears that it abused its discretion. Id. at 595. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. Id.

Merriman alleges the County committed fraud in at least two ways. First, he argues that the County inadequately responded to a public records request that he submitted for any records discussing Merriman, and also wrongfully withheld certain other documents. The County produced only a limited amount of records in response to a public records request from Merriman, because it deemed much of the responsive records exempt from public disclosure. This, Merriman claims, was fraud.

Second, he argues that Whatcom County introduced "sham" letters sent to Merriman regarding the availability of paid leave. He claims that these letters were substantively inaccurate regarding the amount of leave available to Merriman, and that Merriman in fact had more leave available than the County led him to believe. He also claims that the letters downplayed Merriman's willingness to return to work, and exaggerated the County's generosity.

Merriman argues that the trial court did not adequately address CR 60(b)(5), which allows a trial court to vacate a judgment that is void. Merriman cites authority holding that judgments obtained through fraud are void. Therefore, he argues that CR 60(b)(5), like CR 60(b)(4), allows for vacation of judgments obtained through fraud. But, if the fraud alleged by Merriman indeed occurred here, CR 60(b)(4) would be an independently adequate ground for vacation of the judgment. Even if

CR 60(b)(5) applied, its application would be superfluous to CR 60(b)(4), and thus unnecessary. The trial court did not err in declining to address CR 60(b)(5).

Merriman also contends that the trial court failed to adhere to a policy of deterring discovery abuses, and cites a federal case, Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978) in support.[1] In July 2016, Merriman provided a declaration from a County employee who attested to the amount of responsive documents that that employee possessed. The County did not produce some e-mails, because many of those records came from the judicial branch, and thus were exempt. Production of records under the public records act is not the same as discovery under the civil rules, and thus does not amount to discovery fraud. See Limstrom v. Ladenburg, 136 Wn.2d 595, 614 n.9, 963 P.2d 869 (1998) ("[T]he public records act was not intended to be used as a tool for pretrial discovery.").

Merriman also makes a brief reference the County's withholding of certain e-mails in response to requests for production in discovery as a basis for finding fraud. In his motion below, he alleged that a public records request proved that the County had hundreds of e-mails pertaining to Merriman, but it produced only six in response to his discovery request. The six documents produced had footers that Merriman argued below, from personal knowledge, meant they were the result of a search of a limited data base that didn't include the contents of desktop

[1] Merriman further argues that the trial court erred by relying on Peoples State Bank v. Hickey, 55 Wn. App. 367, 777 P.2d 1056 (1989). That case involved vacation of a default judgment. Id. at 370. He argues that his case, which did not involve a default judgment, is inherently different. But, the court did not mention the case in either its oral ruling or in its written order denying Merriman's motion. Even if the case is distinguishable, there is no indication that the court relied on the case. This argument therefore fails.

machines. He asserts that the County's attorney should have recognized this alleged deficiency in the search and production. Therefore, he argues, it was a fraud on the trial court to certify the discovery produced.

But, these facts were known at the time of trial and could have been resolved factually at that time. Merriman identifies nothing that prevented him from doing so at the time. The mere possibility of a discovery violation does not prove discovery fraud.

The same is true for his argument regarding fraudulent letters. The letters were written years before the original complaint was filed, not in response to it. If, as Merriman claims, the letters were substantively erroneous, he knew of the alleged inaccuracies at the time of the initial summary judgment and had the opportunity to respond to them. Inaccuracies in the letters, standing alone, do not prove a fraud on the trial court under CR 60(b)(4).

Rejecting the claim of fraud was not an abuse of discretion by the trial court.

II. Remaining Arguments

Merriman argues that the trial court used word choices three separate times during the hearing below that amount to error. First, he contends that the trial court erred by referring to the "issues" before it, rather than an "issue" before it. Second, he contends that the trial court erred, because the trial court referred to the issue before it as "motions for relief." Third, he contends that the trial court made conflicting statements by stating that it had "largely digested" the relevant pleadings, but also had "reviewed at length" the relevant materials. But, the trial

court's word choice in these instances does not demonstrate error or abuse of discretion.

Finally, Merriman argues that the trial court erred by making no mention in its order of whether a fraud occurred, or whether Merriman timely brought his CR 60(b) motion. But, CR 52(a)(5) states the general rule that a trial court need not enter findings of fact and conclusions of law in deciding a motion. Merriman cites no authority instructing that this case is an exception. The trial court's order is sufficient.

Merriman has failed to establish that the trial court abused its discretion in holding that relief under CR 60(b) was not warranted.

We affirm.

WE CONCUR:

FILED
7/18/2018
Court of Appeals
Division I
State of Washington

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

TIMOTHY P. MERRIMAN, Appellant, v. WHATCOM COUNTY, Respondent.	No. 76860-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Timothy Merriman, has filed a motion for reconsideration. The respondent, Whatcom County, has not filed a response. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

Appendix B

FILED
AUG. 11, 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,	)	
	)	
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

Appendix C

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.

Timothy P Merriman

From: Roberts, Joyce [Joyce.Roberts@courts.wa.gov]
Sent: Friday, June 17, 2016 8:31 AM
To: timothy.p.merriman@gmail.com
Subject: Emailing - 325857.unp_1439313059.pdf
Attachments: 325857.unp_1439313059.pdf

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CONVERSATION RECORD

I, Tim talked with: JOYCE

Of: Ct. OF APPEALS, Div 3 Date: 6/17/16 Time: 8 : 36 Phone: (509)456 3082

☒ I placed call ☐ Party called me ☐ Party Left message ☐ Met with party

RE:

My ☐ message ☐ question ☐ reply: REQUEST FOR COPY OF IN RE E.L.C.

Party's ☐ message ☐ question ☐ reply: She'll E-MAIL it

400 B.R. 558
United States District Court,
E.D. Michigan,
Southern Division.

In re M.T.G., INC. d/b/a/ Matrix Technologies Group, Debtor.
Charles J. Taunt, Plunkett & Cooney, P.C., Comerica Bank, and
Miller, Canfield, Paddock & Stone, P.L.C., Appellants/Appellees,
v.
Guy C. Vining and Todd M. Halbert, Appellees/Appellants.

Civil Case No. 07–11831.
|
U.S. Bankruptcy Case No. 95–48268–G.
|
Jan. 14, 2009.

Synopsis

Background: Chapter 7 trustee filed disbursement motion, to which creditor objected and moved to vacate settlement order as fraudulently obtained. The Bankruptcy Court, Ray Reynolds Graves, J., rejected fraud on court claim, and creditor appealed. The District Court affirmed the Bankruptcy Court's decision not to vacate settlement order, rejected creditor's fraud on the court arguments, and remanded. On remand, creditor again requested relief on fraud on the court theory, and the Bankruptcy Court, Jeffrey R. Hughes, J., denied relief. On further appeal, the District Court, 291 B.R. 694, recalled its previous mandate and remanded again to the Bankruptcy Court for specific consideration of fraud upon the court claim. On remand, debtor and successor trustee moved for summary judgment. The Bankruptcy Court, Thomas J. Tucker, J., 366 B.R. 730, granted motion in part and denied it in part. Appeal was taken.

Holdings: The District Court, Anna Diggs Taylor, J., held that:

[1] law of the case doctrine did not preclude bankruptcy court from considering claim raised by Chapter 7 debtor and successor trustee that initial trustee had committed fraud on the court by failing to disclose fee arrangement with secured creditor;

[2] failure on part of Chapter 7 trustee and trustee's attorneys, as officers of bankruptcy court, to disclose to court an agreement with secured creditor for payment of any fees that trustee's counsel incurred in disposing of creditor's collateral, at the same time that trustee was representing in verified statement of disinterest that he did not have any connection to any creditors in case, was in nature of “fraud on the court,” of kind warranting relief from court order approving settlement between trustee and creditor; and

[3] any knowledge which movant possessed of information that trustee withheld in alleged fraud on the court, prior to entry of orders purportedly obtained by means of this alleged fraud, did not estop movant from seeking relief from these orders on “fraud on the court” theory.

Affirmed.

Appendix D

West Headnotes (12)

[1] **Bankruptcy** Conclusions of law;de novo review

Bankruptcy Clear error

Bankruptcy court's findings of fact must be upheld unless clearly erroneous, while bankruptcy court's conclusions of law are reviewed de novo. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

Cases that cite this headnote

[2] **Courts** Previous Decisions in Same Case as Law of the Case

Issues decided at earlier stage of litigation, either explicitly or by necessary inference from the disposition, constitute law of the case.

Cases that cite this headnote

[3] **Courts** Previous Decisions in Same Case as Law of the Case

Law of the case doctrine has developed to maintain consistency and avoid reconsideration of matters once decided during the course of single, continuing lawsuit.

Cases that cite this headnote

[4] **Bankruptcy** Determination and Disposition;Additional Findings

Law of the case doctrine did not preclude bankruptcy court from considering claim raised by Chapter 7 debtor and successor trustee that initial trustee had committed fraud on the court by failing to disclose fee arrangement with secured creditor, despite bankruptcy judge's prior statement that initial trustee did not intend to mislead, where judge's opinion did not expressly consider whether elements of "fraud on the court" claim had been established, and subsequent district court opinion remanded for specific consideration of "fraud on the court" issue.

Cases that cite this headnote

[5] **Judgment** Nature and requisites of former recovery as bar in general

Doctrine of res judicata applies if the following are present: (1) final decision on merits by a court of competent jurisdiction; (2) subsequent action between same parties or their privies; (3) issue in subsequent action which was litigated, or which should have been litigated in prior action; and (4) identity of causes of action.

Cases that cite this headnote

[6] **Judgment** Judgment vacated or reversed

Lack of any final judgment on "fraud on the court" issue, as evidenced by district court order remanding matter to bankruptcy court for ruling thereon, foreclosed any argument that bankruptcy court was barred on res judicata grounds from addressing this "fraud on the court" issue, the very issue on which district court had remanded.

Cases that cite this headnote

[7] **Federal Civil Procedure** Fraud;misconduct

Federal Civil Procedure Fraud;misconduct

"Fraud on the court," of kind which may warrant relief from prior order or judgment of court, is conduct (1) on part of officer of court; (2) that is directed at judicial machinery itself; (3) that is intentionally false, willfully blind to the truth, or in reckless disregard of the truth; (4) that is in nature of positive averment or, when one is under duty to disclose, of concealment; and (5) that deceives court. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[8] **Federal Civil Procedure** Fraud;misconduct

For relief from judgment to be warranted on a "fraud on the court" theory, the individual accused of perpetrating the fraud must have directly interacted with court to prevent an adversary from presenting his case fully and fairly. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[9] **Bankruptcy** Judgment or Order

Failure on part of Chapter 7 trustee and trustee's attorneys, as officers of bankruptcy court, to disclose to court an agreement with secured creditor for payment of any fees that trustee's counsel incurred in disposing of creditor's collateral, at the same time that trustee was representing in verified statement of disinterest that he did not have any connection to any creditors in case, was in nature of "fraud on the court," of kind warranting relief from court order approving settlement between trustee and creditor, without regard to whether trustee or his counsel had any intent to deceive in withholding this information; duty to disclose was so clear that the withholding evidenced a recklessness sufficient to warrant a finding of fraud on the court. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[10] **Bankruptcy** Judgment or Order

Any knowledge which movant possessed of information that trustee withheld in alleged fraud on the court, prior to entry of orders purportedly obtained by means of this alleged fraud, did not estop movant from seeking relief from these orders on "fraud on the court" theory; public policy demanded that this "fraud on the court" claim remain viable regardless of what movant knew. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[11] **Federal Civil Procedure** Fraud;misconduct

Necessary element for "fraud on the court" claim is that the alleged wrongdoer be officer of court.

Cases that cite this headnote

[12] **Bankruptcy** Judgment or Order

Request for punitive damages and attorney fees was premature at summary judgment stage, based upon movants' success in obtaining vacation of previous order of bankruptcy court on "fraud on the court" theory, while it was still unclear how claims would be finally decided.

Cases that cite this headnote

560** ***MEMORANDUM OPINION AND ORDER

ANNA DIGGS TAYLOR, District Judge.

I.

This matter has come before this court on a cross-appeal, challenging the Bankruptcy court's Opinion and Order issued on April 16, 2007. Appellants/Appellees Charles J. Taunt, Plunkett & Cooney P.C. ("Plunkett & Cooney") and Comerica Bank ("Comerica") challenge the Bankruptcy court's finding that Taunt committed fraud on the court. [1] Additionally, Comerica challenges the Bankruptcy court's decision vacating three Comerica Orders, which the court found had been obtained by fraud on the court. Appellees Todd M. Halbert and Guy C. Vining argue that the Bankruptcy court erred when it found that Comerica did not commit fraud on the court. Further, they argue that the Bankruptcy court should have done the following: (1) disallowed Comerica's claims; (2) compelled Comerica to disgorge monies obtained by fraud; (3) awarded punitive damages and; (4) awarded attorney's fees. For the reasons fully outlined below, the decision of the Bankruptcy court is affirmed.

II.

Procedural background

On August 6, 1995, Matrix Technology Group ("M.T.G."), represented by Halbert, filed a petition for relief under Chapter 11. *In re M.T.G., Inc.* 366 B.R. 730, 733 (Bkrtcy.E.D.Mich., 2007). M.T.G.'s primary creditor was Comerica. *Id.* On February 8, 1996, the case was converted to a Chapter 7 proceeding and Taunt was appointed as the trustee. *Id.* The day after Taunt's appointment, he began discussions with Comerica about compensating his firm, Charles J. Taunt & Associates, P.C. ("Charles J. Taunt & Associates") for the liquidation of Comerica's collateral. *Id.* This agreement (hereinafter the "Comerica Fee Agreement") was consummated by ***561** March 1996. [2] However, on February 12, 1996, Taunt filed a "Verified Statement of Disinterest for Trustee to Employ Counsel," attesting that his law firm, Charles J. Taunt & Associates, was disinterested and could act as counsel for the trustee. [3] *Id.* Taunt did not modify this statement to reveal the Comerica Fee Agreement. *Id.*

On June 26, 1996, Taunt, now a shareholder at the law firm of Plunkett & Cooney, P.C. filed a new "Verified Statement of Disinterest for Trustee to Employ Counsel." *In re M.T.G., Inc.* 366 B.R. at 738. Again, the statement did not mention the Comerica Fee Agreement. *Id.* On August 21, 1996, the Bankruptcy court entered an Order substituting the Plunkett & Cooney firm for Charles J. Taunt & Associates as counsel for the trustee. *Id.* Appellants argue that while it is true that Taunt failed to disclose the fee agreement in any of the statements of disinterest, Taunt did disclose these agreements in the following three documents: (1) the April 9, 1996 Order Granting Trustee's Motion For Authority To Conduct Public Auction Free And Clear Of Liens, And To Transfer Liens To Proceeds Of Sale, Except For Millutensil Machine;

(2) Taunt's April 15, 1996 Application for Authority to Compromise Claims Against the Becker Group, Inc.; and (3) paragraph 13 of the December 18, 1996 Joint First Interim Fee Application.

On August 29, 1996, the Bankruptcy court entered an Order Granting Application to Compromise Causes of Action Against Comerica Bank (the "Comerica Settlement Order."). *In re M.T.G., Inc.,* 366 B.R. at 738. The Order authorized Taunt to compromise any and all claims that the estate had against Comerica in exchange for a payment of $10,000.00 by Comerica. *In re M.T.G., Inc.* 366 B.R. at 738. Taunt did not mention the Comerica Fee Agreement in his Application to Compromise Causes of Action Against Comerica Bank. *Id.* On November 26, 1997, Taunt filed a motion, in which he "proposed a disbursement which would pay his and his attorneys' fees in full and then pay the balance to Comerica on account of the Section 507(b) "super-priority" damages it claimed." [4] *Id.* at 740.

***562** On February 26, 1998, Halbert filed pleadings in the Bankruptcy court, arguing against a request that Taunt pay Comerica's super-priority claim. Further, he argued that the Comerica Settlement Agreement should be set aside pursuant to FRCP 60(b)(4). With respect to the settlement agreement, Judge Tucker framed Halbert's argument as follows:

> Mr. Halbert's argument for setting aside the Comerica Settlement Order was based upon the agreement Mr. Taunt had made with Comerica at the outset of the Chapter 7 proceeding whereby Comerica agreed to compensate Mr. Taunt and his attorney for services associated with the liquidation of Comerica's collateral. Mr. Halbert contended that Mr. Taunt's fee arrangement with Comerica represented a clear conflict of interest which should have been disclosed both as part of the appointment process for Mr. Taunt and his counsel as well as in connection with Mr. Taunt's motion for authority to settle the estate's lender liability claims against Comerica. *In re M.T.G.,* 366 B.R. at 741.

On February 4, 1999, Bankruptcy Court Judge Ray Reynolds Graves issued an Opinion and Order holding:

> .... that Mr. Taunt and his attorney failed to disclose the Comerica Fee Agreement in violation of Rule 2014 and ordered that they be sanctioned by reducing their fees by 25%. Judge Graves also determined that Comerica was entitled to a Section 507(b) claim in the amount of $444,475.17 and that Mr. Taunt "did not breach his fiduciary duty by not bringing any Chapter 5 cause of action." *In re M.T.G., Inc.,* 366 B.R. at 742.

The court's Opinion and Order, however, did not address Mr. Halbert's argument that "Comerica's entire claim should be disallowed and that the Comerica Settlement Order should be set aside." *In re M.T.G., Inc.,* 366 B.R. at 742. Moreover, the Opinion did not address the fraud on the court issue.

On March 3, 1999, Halbert appealed the Bankruptcy court's decision to this court and on September 7, 2000, the parties appeared before this court for oral arguments. [5] On October 10, 2000, this court issued an Order reversing the Bankruptcy court in-part by:

> (i) denying 100% of attorney fees to Appellee counsel, (ii) disqualifying the current Trustee [Taunt] for it's failure to disclose it's conflict of interest and (iii) vacating the settlement agreement ordered by the bankruptcy court. [6]

On October 19, 2000, Comerica filed a Motion to "Correct Order and Judgment or in the Alternative for Reconsideration" and, on November 1, 2000, Halbert filed a similar motion. [7] Oral arguments were heard on December 11, 2000. [8] This court refused ***563** to reconsider its prior ruling but agreed to clarify its earlier Order and issued an Order modifying its previous Order as follows:

> On September 7, 2000, after hearing arguments of counsel, for the reasons stated on the record this Court reversed, in part, the U.S. Bankruptcy Court by: (1) denying 100% of attorney fees to Appellee Taunt's counsel, (ii) disqualifying Charles a Taunt as Trustee for the reasons stated on the record, and (iii) vacating the order allowing the 507(b) super-priority claim of Appellee Comerica Bank. As to part (iii), the 507(b) claim is remanded to the U.S. Bankruptcy Court for further proceedings consistent with the Court's opinion from the bench on September 7, 2000. This Court affirmed the U.S. Bankruptcy Court's order and decision not to vacate the settlement order. [9]

Although this court found that there were conflicts of interest and a breach of fiduciary duties, this court never held that there was a fraud upon the court. [10] Moreover, this court did not vacate the Settlement Order because it was of the opinion that the request for vacation was untimely. *Halbert v. Taunt (In re M.T.G. Inc.)* 291 B.R. 694, 698 (E.D.Mich.2003). Indeed, with respect to this point this court stated:

> I am concerned that a sanction such as this [denial of fees] doesn't rectify the injustices that might have been done by a Trustee in such conflict of interest and in constant breach of his fiduciary duty. However, because the request to reverse the settlement order has been untimely in the law, and I don't see a satisfactory explanation for that untimeliness, I cannot take action against the settlement, the approval of the settlement itself. *In re M.T.G.,* 366 B.R. at 744.

Following this court's remand to the Bankruptcy court, Halbert filed pleadings with the Bankruptcy court requesting that: (1) the Comerica Claim Allowance Order, Comerica Relief from Stay Order and the Comerica Settlement Order be vacated because they were procured by fraud on the court; (2) Comerica's secured claim be disallowed because of such fraud; (3) Comerica be compelled to return monies acquired as a result of its fraud to the estate; and (4) attorneys' fees be awarded for committing the fraud upon the court. *Halbert,* 291 B.R. at 697, See also *In re M.T.G.,* 366 B.R. at 745.

On January 29, 2002, Bankruptcy Court Judge Jeffrey R. Hughes issued an Opinion and Order rejecting Halbert's fraud on the court arguments for several reasons. First, the Bankruptcy court stated that this court's September 7, 2000, ruling —in which this court held that Halbert's motion to vacate the Comerica Orders was time barred—was the law of the case and, therefore, precluded any finding to the contrary. *In re M.T.G.,* 366 B.R. at 746. Second, Judge Hughes concluded that Judge Graves had implicitly rejected Halbert's fraud on the court arguments on the merits in his February 4, 1999 Opinion and Order. *Id.* Finally, the Bankruptcy court held that in its previous ruling it had "arguably assessed the propriety of approving the Comerica Settlement Order under the more stringent standard imposed when the trustee is disinterested." *Id.*

Halbert appealed this decision and on April 10, 2003, this court issued an Opinion and Order, in which it recalled its previous mandate and remanded the fraud upon the court claim to the Bankruptcy court for specific consideration. *Halbert,* 291 B.R. at 704.

***564** Upon remand, the Bankruptcy court ordered the parties to file motions for summary judgment regarding the fraud on the court issues and, during this same period of time, Vining was elected as the successor Chapter 7 trustee. *In re M.T.G.,* 366 B.R. at 747. On April 16, 2007, Bankruptcy court Judge Thomas J. Tucker court issued an Opinion, where he concluded that Taunt and his counsel had committed a fraud upon the court. *Id.* at 748–753. As a result of this finding, the court vacated the April 19, 1996 Comerica Claim Allowance Order, the April 30, 1996 Comerica Relief From Stay Order, and the August 29, 1996 Comerica Settlement Order because these orders were procured by a fraud upon the court. *Id.* The court, however, did not conclude that Comerica had committed fraud on the court. With respect to this point, the court stated:

> On the present record, and at this summary judgment stage, the Court is unable to make such a determination. Such claims are the subject of an adversary proceeding filed by Vining, on behalf of the estate and against Comerica, Taunt, their respective attorneys, and others, entitled *Vining v.*

> *Comerica Bank,* Case No. 03–4950. The Court concludes that such claims should be litigated and determined in the pending adversary proceeding. *In re M.T.G.,* 366 B.R. at 757.

Moreover, the Bankruptcy court found Halbert's and Vining's request for attorney's fees and punitive damages was premature at this stage in the litigation. Taunt, Comerica, Plunkett & Cooney, Halbert and Vining appealed the Bankruptcy court's April 16, 2007 decision. On October 11, 2007, pursuant to Joint Motion for Consolidation and Scheduling Order, this court entered an Order consolidating all the appeals.

III.

Standard of Review

Jurisdiction and Standard of Review

[1] This Court has jurisdiction under 28 U.S.C. § 158(a) to hear Bankruptcy appeals. A Bankruptcy court's findings of fact must be upheld unless clearly erroneous. *In re Downs,* 103 F.3d 472, 476–77 (6th Cir.1996). A Bankruptcy court's conclusions of law are reviewed *de novo. Stephens Indus., Inc. v. McClung,* 789 F.2d 386, 389 (6th Cir.1986).

IV.

Discussion

The law of the case

[2] **[3]** **[4]** The law of the case doctrine mandates that issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case. *Halbert,* 291 B.R. 694 at 697 (citations omitted). The doctrine has developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Id.* Here, it is clear that in this court's April 10, 2003 Opinion, it held that there had ***not*** been a clear determination regarding the fraud on the court issue, thus, warranting a remand specifically for a determination on that issue. Indeed, this court stated:

> Because it is in the best position to determine whether fraud was committed upon it, the Bankruptcy Court should address a claim of fraud upon the court on remand.... For the reasons outlined above, therefore, this Court does recall its previous mandate and will remand again to the Bankruptcy Court for its specific consideration of the fraud upon the court claim. *Halbert,* 291 B.R. at 704

***565** Moreover, when this court recalled its previous mandate, this court made it unequivocally clear that a fraud upon the court claim cannot be time-barred. Regarding the timeliness issue, this court stated:

> ... a claim of fraud upon the court is not subject to the time limitations of Rule 60(b). To the extent that this Court may have previously ruled that the issue of fraud upon the court was time-barred under Rule 60(b), that contention would rely on "an incorrect legal standard, or appl[y] the law incorrectly." *Halbert,* 291 B.R. at 700.

Accordingly, at the time of remand, the law of this case was that a fraud on the court claim was not time-barred and that there had not been a determination as to whether Taunt's actions constituted fraud on the court.

[5] **[6]** On Appeal, Appellants argue that the Bankruptcy court erred in addressing the fraud upon the court claim because it had been previously litigated and barred by the doctrine of *res judicata.* The doctrine of *res judicata* applies if the following are present:

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which *578 should have been litigated in the prior action; and (4) an identity of the causes of action. *Winget v. JP Morgan Chase Bank, N.A.* 537 F.3d 565, 577–578 (6th Cir.2008).

Here, the doctrine does not apply. On remand, this court mandated that the Bankruptcy court give specific consideration to the fraud on the court issue. At the time of remand, there simply was no final judgment on this issue. Consequently, the argument that the Bankruptcy court erred when it considered this issue is without merit and must be rejected.

Fraud on the Court

Appellants argue that the Bankruptcy court's finding of fraud on the court should be reversed because the elements to establish such a claim are not present. [11] They further argue that even if the elements are present, the doctrines of waiver and estoppel bar this claim. This court disagrees and, for the ensuing reasons, affirms the Bankruptcy court.

[7] **[8]** Regarding a claim for fraud on the court in relevant part, FED.R.CIV.P. 60(b) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party....

The Sixth Circuit has held that 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, wilfully 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. ***566** *Workman v. Bell* 227 F.3d 331, 336, (6th Cir.2000) [citing *Demjanjuk v. Petrovsky,* 10 F.3d 338, 348 (6th Cir.1993)]. In *Computer Leasco, Inc. v. NTP, Inc.* 194 Fed.Appx. 328, 338 (6th Cir.2006), the Sixth Circuit stated that these elements require "that the individual accused of perpetrating the fraud must have directly interacted with the court to prevent an adversary from presenting his case fully and fairly." A lawyer is an officer of the court while preparing her client's case. *Id.*

[9] In the instant case—as the Bankruptcy court noted—it is undisputed that Taunt, the lawyers at Charles J. Taunt & Associates and the lawyers at Plunkett & Cooney at all relevant times were officers of the court. Therefore, the first element is satisfied. Further, the Bankruptcy court reasoned that when Taunt obtained Orders from the court without disclosing the Comerica Fee Agreement, this act was "directed to the judicial machinery itself" and not a private party. *In re M.T.G.,* 366 B.R. at 749. Hence, the court found that this element was also met. This court is in accord with this finding.

With respect to the third element, the bankruptcy court could not make a finding of intent and "for the purposes of its decision concluded that neither Taunt or his attorney's intended to deceive [the] court." *In re M.T.G.,* 366 B.R. at 750. The court, however, held that the conduct of Taunt and his attorneys was "in reckless disregard for the truth and in reckless disregard for their disclosure of duties." *In re M.T.G.,* 366 B.R. at 750. This conclusion is consistent with this court's prior conclusions and the findings of Judge Graves and Judge Hughes.

In Judge Graves' February 4, 1999 Opinion, he stated that Taunt made a "conscious decision, after researching the issue not to disclose the fee agreement. [12] " In this court's September 7, 2000 bench opinion—referring to Taunt's failure to

disclose the Comerica Fee Agreement this court stated that the conduct was a "serious, egregious conflict of interest and breach of fiduciary duty. [13] " Judge Hughes, in his January 24, 2002 Opinion, wrote:

> .... while I am satisfied that Mr. Taunt's conduct in connection with the entry of the three Comerica orders is sufficient to set aside all these orders on the basis that there has been a fraud on the court, I am nonetheless compelled to let each of these orders stand because of prior court rulings..... However, were it not for the district court rulings, I would set aside these two orders as being procured by fraud on the court..... [14]

Moreover, Judge Tucker in his Opinion explained why he found the non-disclosure of the Comerica Fee Agreement to be particularly reckless:

> A stark illustration of Taunt's undisclosed conflict of interest is that under the Comerica Fee Agreement, Taunt's firm was to be paid on an hourly-rate basis by Comerica to review and analyze Comerica's secured claim against the estate. This aspect of the fee agreement alone destroyed Taunt's disinterestedness ... *In re M.T.G.,* 366 B.R. at 751. Then, after making the undisclosed fee agreement, Taunt and his counsel signed a stipulation and obtained from the Court the Comerica Claim Allowance Order. *In re M.T.G.,* 366 B.R. at 751. That Order allowed Comerica's $5.3 million secured claim and determined that Comerica had a "valid and properly perfected ***567** security interest in and lien on all property of Debtor's estate" except Chapter 5 causes of action. At a minimum, it was "reckless" of Taunt and his counsel not to fully disclose the Comerica Fee Agreement before he obtained this Order. *Id.*

Appellants argue that it was inappropriate for the Bankruptcy court to make a finding of reckless disregard in the summary judgment context. This court disagrees. In *U.S. v. West,* 520 F.3d 604, 611 (6th Cir.2008), the Sixth Circuit held that an affidavit prepared by an affiant, that does not accurately reflect the facts known to him at the time the affidavit is sworn, evinces a reckless disregard for the truth. Here, it is undisputed that, when Taunt signed each statement of disinterest, he failed to reveal the Comerica Fee Agreement. Indeed, Judge Hughes found that Taunt knew of this agreement when he participated in the entry of each of the Comerica Orders, but nonetheless chose not to disclose the agreement to the court as part that process. [15] Thus, it's clear that there is sufficient evidence in the record to support a finding that Taunt and his attorneys acted with a reckless disregard for the truth.

Further, Appellants argue that Taunt's disclosure of the agreement in other court documents precluded a finding that he had a reckless disregard for the truth. In addressing this argument, the Bankruptcy court stated that this argument was "plainly without merit." *In re M.T.G.,* 366 B.R. at 754. Specifically, the court stated:

> The Court has described each disclosure by Taunt upon which Respondents rely, in Parts I(D) through I(F) and I(J) of this opinion. As that discussion shows, Taunt's disclosures disclosed virtually nothing, and they certainly fell far short of properly disclosing the Comerica Fee Agreement and its terms. And the last of these disclosures, buried in the first interim fee application that Taunt's counsel filed on December 18, 1996, came almost four months after the last of the three orders in question was entered. *In re M.T.G.,* 366 B.R. at 754.

Judge Hughes also thought that total disclosure was necessary as illustrated by the following:

> Had Mr. Taunt made this disclosure and had I been the presiding judge, I would not have given him the benefit of the business judgment rule. Rather, I would have required Mr. Taunt to actually establish to my satisfaction that his decision to settle the lender liability claims with Comerica under the terms reached was in fact reasonable. Therefore, Mr. Taunt's failure to disclose this conflict would have caused me to improperly assess the propriety of entering the proposed Comerica Settlement Order and it is for this reason I come to the conclusion that a fraud has been perpetrated. [16]

Thus, it is clear that, even assuming that Taunt had made prior disclosures, these revelations did not put the court on adequate notice of the Comerica Fee Agreement. Accordingly, this court agrees with Judge Tucker's finding that the conduct of Taunt and his attorneys was, at a minimum, in reckless disregard for the truth and that this third element has been met.

Moreover, the fourth element, requiring concealment when one is under a duty to disclose, is also met. Judge Graves found that Taunt's failure to disclose was in violation of his duties under ***568** FED R.BANK.P. 2014 and § 327. [17] Indeed, Judge Graves stated that Taunt was duty bound to file an amended verified statement, fully disclosing the terms of fee application. Therefore, this court agrees with the Bankruptcy court that this element has also been satisfied.

This court is also convinced Taunt and his attorneys deceived the court, which fulfills the fifth element for establishing a fraud on the court claim. Judge Graves stated that "the court can determine disinterestedness only if all potential conflicts are fully disclosed." Hence, based on that alone, this court can conclude that the Bankruptcy court was deceived, since it made rulings on motions and rendered Orders without full knowledge of Taunt's actual conflicts of interests. In considering this element, Judge Tucker wrote:

> Taunt and his attorneys did deceive the bankruptcy court, when they obtained the three orders in question without disclosing the fee agreement, because each of the orders benefitted Comerica. When he sought the orders in question, Taunt failed to disclose to the bankruptcy court that he was acting under a "serious, egregious conflict of interest." Judge Graves certainly did not know this when he entered the orders in question, nor did he know about the Comerica Fee Agreement or the terms of that agreement. It seems inconceivable that Judge Graves would have entered any of these orders at all, much less without a hearing, had Taunt fully disclosed his fee agreement with Comerica. Thus, the bankruptcy court was deceived when it entered these orders. *In re M.T.G.* 366 B.R. at 752–753.

Hence, evidence in the record clearly shows that this fifth element has also been met.

Another argument that Appellants make is that there can be no fraud on the court, when Appellees were not deprived of an opportunity to fully litigate their claims. As stated *supra,* in *Computer Leasco, Inc.,* 194 Fed.Appx. at 338, the Sixth Circuit stated the elements of fraud on the court "require that the individual accused of perpetrating the fraud must have directly interacted with the court to prevent an adversary from presenting his case fully and fairly." This court is persuaded that there is ample evidence in the record supporting the fact that Appellees were denied an opportunity to fully and fairly present their case. Despite Halbert's efforts, the Bankruptcy court did not know of the Comerica Fee Agreement. Hence, the court was put in a position where it made decisions and issued orders without being fully informed of Taunt's actual conflicts. Indeed, Judge Hughes stated that "Mr. Taunt's failure to disclose this conflict would have caused me to improperly assess the propriety of entering the proposed Comerica Settlement. [18] " It is likely that had the Bankruptcy court known about the Comerica Fee Agreement, that the Comerica Settlement Order, which the Bankruptcy court has now vacated, would not have been entered. Consequently, this court is not persuaded by Appellants' argument and affirms Judge Tucker's finding that Taunt and his attorneys committed a fraud on the court.

[10] Appellants also contend that Halbert knew about the Comerica Fee Agreement and is, therefore, estopped from bringing a fraud on the court claim. This court does not find this argument to be convincing. Like Judge Tucker, this court is also in agreement with Judge Hughes' ***569** analysis of this issue. Judge Hughes stated:

> I also conclude that Mr. Halbert is not estopped from bringing this motion because he had consented to the entry of the three orders notwithstanding his prior knowledge of the surcharge

> agreement between Mr. Taunt and Comerica Bank.... The issue which Mr. Halbert raises is directed towards protecting the integrity of the judicial system itself. [19]

Therefore, public policy demands that the fraud on the court claim remained viable regardless of what Halbert knew or fully explained that he understood. Moreover, public policy is also served by the Bankruptcy court's vacation of the three Orders that it found to be procured by fraud on the court. [20] Although this remedy may seem harsh, as Comerica submits, this is a necessary remedy to preserve the integrity of the court.

Appellees' Halbert's and Vining's Arguments on Appeal

[11] **[12]** Appellees argue that this court should reverse the Bankruptcy court and hold that Comerica committed fraud on the court. This court is unpersuaded by Appellees' argument. A necessary element for a fraud on the court claim to exist is that the alleged wrongdoer be an officer of the court. *Workman,* 227 F.3d at 336. Here, it is undisputed that Comerica is not an officer of the court. Indeed, as Judge Tucker explained, the duty to disclose the Comerica Fee Agreement was a duty owed by Taunt and his appointed counsel. *In re M.T.G.,* 366 B.R. at 757. Even given these facts, the bankruptcy court reserved its determination of the viability of these claims. Hence, this court will not disturb the Bankruptcy court's ruling on this issue and agrees that these claims should be the subject of the adversary proceeding filed by Vining. *In re M.T.G.,* 366 B.R. at 757. Likewise, the court agrees that Appellees' request for punitive damages and attorney fees was premature at the summary judgment stage and is in accordance with the Bankruptcy court's decision to deny this request, subject to renewal at a later time and date. *Id.* at 758.

V.

Conclusion

IT IS ORDERED that for the foregoing reasons, the decision of the Bankruptcy court is **AFFIRMED.**

IT IS SO ORDERED.

All Citations

400 B.R. 558, 51 Bankr.Ct.Dec. 14

Footnotes

1 On May 23, 2008, the court entered a Stipulated Order Dismissing Claims Against Miller Canfield Paddock & Stone, P.L.C., Without Prejudice and Without Costs or Attorney Fees.

2 The Bankruptcy Code allows for a trustee to enter into a surcharge agreement. In pertinent part 11 U.S.C. § 506(c) states:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all *ad valorem* property taxes with respect to the property.

3 Taunt was required to disclose his relationship with Comerica pursuant to the Federal Rules of Bankruptcy Procedure, Rule 2014, which in pertinent part provides:

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in

interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

4 Section 507(b) of the Bankruptcy Code provides that a creditor who has been granted adequate protection in connection with its collateral shall have a priority claim over all other administrative claims for any loss resulting from the debtor's use of the collateral which was not compensated by the grant of adequate protection. In the context of a converted Chapter 11 proceeding, such a "super-priority" claim is prior in right to all other Chapter 11 administrative expenses but subordinate to all Chapter 7 administrative expenses. The court calculated the amount of Comerica's Section 507(b) claim in conjunction with Halbert's objection to Taunt's proposed distribution. It determined that Comerica was entitled to a Section 507(b) claim in the amount of $444,475.17. *In re M.T.G., Inc.* 366 B.R. at 740 n. 53.

5 Case No. 99–71031, Entry No. 1 and Document No. 42

6 Case No. 99–71031, Document No. 42

7 Case No. 99–71031, Document Nos. 43 and 45

8 Case No. 99–71031

9 Case No. 99–71031 Document No. 58.

10 Tr. December 11, 2000, at 23.

11 Plunkett & Cooney argues that it should be dismissed from this case because the allegations constituting fraud on the court were in motion before Taunt became associated with the firm. This court rejects this argument, given the fact that Taunt's second statement of disinterest, in which he again failed to disclose the Comerica Fee Agreement, was filed while he was a member of the firm.

12 Judge Graves' February 4, 1999 Opinion at 14.

13 Tr. September 7, 2000, at 35.

14 Judge Hughes' January 24, 2002 Opinion at 16, 18.

15 Judge Hughes' January 24, 2002 Opinion at 10.

16 Judge Hughes January 24, 2004 Opinion at 12–13.

17 Judge Graves February 4, 1999 Opinion at 10.

18 Judge Hughes January 24, 2004 Opinion at 12–13.

19 Judge Hughes January 24, 2004 Opinion at 19 n. 25.

20 Appellants' waiver argument must fall for the same reasons.

TIMOTHY MERRIMAN - FILING PRO SE

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