No. 32585-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DEBRA CROMER,

Appellant,

v.

THOMAS A. THORN,

Respondent.

AMENDED APPELLANT'S BRIEF

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A. Assignments of Error

1. The trial court erred in failing to follow the factors set forth in *White v. Holmes* in granting Dr. Thorn's CR 60(b) motion to vacate the default judgment and default order of child support entered November 16th, 2012.

2. The trial court erred in finding Petitioner had committed fraud in imputing Dr. Thorn's income on the Washington State Standard Child Support Schedule submitted to the court.

3. The trial court erred by failing to find good cause to vacate the default order of child support under CR 55(c).

4. The trial court erred in failing to bar Respondent's CR 60(b) motion for being untimely filed.

B. Issues Pertaining to Assignments of Error

1. Under Washington case law, does a Superior Court err when it fails to follow the factors set forth in *White v. Holmes*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968), in determining whether to grant a CR 60(b) motion to vacate orders on default?

2. Under CR 60(b)(4), does a Petitioner for child support commit fraud when she, knowing that Respondent is presently unemployed, enters the imputed income on the Washington State Child Support Schedule

Worksheet on line a. "Wages and Salaries" instead of line f. "Imputed Income;" includes under Section 26 "Other Factors For Consideration" that the Respondent's income is imputed; and the court includes in the Order of Child Support at 3.2 "Person Paying Support" the finding that income is imputed?

4. Under CR 55(c), does a Respondent present good cause for failing to appear in court sufficient to permit the court to vacate a default order when he alleges "duress" due to being imprisoned on charges of domestic violence for which he was later acquitted?

4. Under CR 60(b), does a Respondent timely file his motion to vacate when he has had actual notice of an initial petition and waits one year, four months, and twelve days from the order on default to file the CR 60(b) motion to vacate the order?

II. STATEMENT OF THE CASE

Petitioner/ Appellant Debra Cromer and Respondent Dr. Thorn met in 2008 (CP 358-95). Two years later, ELC was born. (*Id.*). In 2012, Dr. Thorn received a job offer as a physician in Orofino, ID (CP 180-82). He returned without the job on July 16, 2012 (*Id., see also (CP 183-185*). Dr. Thorn blamed either his estranged wife, Nancy Thorn, or Debra for losing his job in Idaho and his resultant unemployment (CP 180-82).

On July 17, 2012, Dr. Thorn was arrested and held at the Grant County Jail on charges of domestic violence (*Id.* 1). He was later released on bail on October 12, 2012 (CP 183-85). A jury acquitted Dr. Thorn of Assault on August 5, 2013, finding that his use of force, which landed Ms. Cromer in the hospital, was lawful (CP 87-98).

On October 5, 2012, while still in the Grant County Jail, Dr. Thorn was served with notice of Debra's Petition for Residential Schedule/Parenting Plan and Child Support (CP 18). In her petition, Debra asks the court "to address child support" in its final order (CP 1-8). She also asks the court to enter a Parenting Plan "which will be filed with the court at a later date" (*Id.* at 1.8). Dr. Thorn never responded to the petition and default was entered November 12, 2012 (*E.g.,* Verbatim Report of Proceedings for Hr'g 2, Nov. 16, 2012).

The court ordered Dr. Thorn to pay the standard calculated rate of child support without deviation (CP 39-54). Because Dr. Thorn never responded, the court imputed his income at the rate of his "past earnings" (*Id.* at 3.2). The Washington State Child Support Schedule Worksheet included Dr. Thorn's imputed income on line a. "Wages and Salaries" instead of line f. "Imputed Income." (CP 39-54). However, under Worksheet Section 26 "Other Factors For Consideration" Ms. Cromer

explains that Dr. Thorn'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 [Debra Cromer] which is at $75.00 per hour at full-time hours (40 hrs per week)" (*Id.)* Dr. Thorn failed to make any child support payments as ordered by the court (CP 203-06). In his motion to vacate the order he confirms the necessity of imputing his income:

> With regard to child support, I was unemployed when the orders were entered, due primarily to actions taken by the Petitioner against me.[1] I was not making the income claimed in the order of child support. Those orders were entered with full knowledge that I was unemployed and unable to work at that time.

(CP180-82).

Due to a continuing restraining order entered by the trial court (CP 27-30), the residential schedule filed November 12, 2012, permitted supervised visitation with ELC (CP 31-38). The restrictions were put in place due to a finding of "Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions" and "a history of acts of domestic violence" (*Id.* at 2.1). The final order further finds that Dr. Thorn's visitation should be restricted due to

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[1] Dr. Thorn had lost his employment prior to his arrest and the charges of domestic violence brought by the Grant Country Prosecutor (*See* Responsive Decl. of Thomas Thorn 3:9).

"neglect or substantial nonperformance of parenting functions" and "the absence or substantial impairment of emotional ties between the parent and child" (*Id.* at 2.2).

Since the residential schedule was ordered Dr. Thorn has not attempted to exercise any form of visitation with ELC (CP 233-38). Dr. Thorn has given no reason for his failure exercise his visitation.

On January, 6 2014—one year, one month and fourteen days after default was entered, Debra gave notice of her intent to relocated ELC to Cheney Washington so that she could complete her degree in Geography at Eastern Washington University (CP 61-64). Surprisingly, as he has shown no interest at all in ELC, Dr. Thorn objected. (CP 81-98). On Dr. Thorn's objection, Ms. Cromer moved for a temporary order granting permission for relocation on March 20, 2014 (CP 115-38).

On March 27, 2014 Dr. Thorn also filed a motion for an order to show cause to vacate the orders entered November 16, 2012[2] (CP 176-79). In his declaration in support of that motion, Dr. Thorn made no argument regarding irregular procedures, findings or rulings. Instead, Dr. Thorn claimed that his neglect of over a year to ask the court to vacate default was done with both "due diligence" and "excusable neglect" because of a "state

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[2] One year, four months, eleven days after default had been entered.

of duress" he experienced while in the Grant County Jail after he was arrested for domestic violence (CP 180-82) although he had been released on October 12, 2012 (CP 183-85), well prior to the date that he was required to respond to the petition (he was served on October 5, 2012 (CP 18), and after he was served with the trial court's default orders on November 29, 2012 (CP 55-56).

In support of his alleged "state of duress," Dr. Thorn filed a declaration by Dr. Jorgenson, which states:

> 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, non-performance 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 [sic] traumatized and in a daze."

(CP 183-85). Dr. Juergens concludes:

> Though, (sic) I did not see him during [the time he was in the Grant County Prison and he failed to appear in the family court case], I do believe that it is credible that Dr. Thorn was not dealing with this 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 in prison. He describes himself as being depressed, anxious, angry, withdrawn, indecisive, and feeling helpless. He iterates [sic] 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 183-85). Dr. Thorn presented no other argument for failing to appear in court.

In addition to a "state of duress," Dr. Thorn asserted that the order should be vacated because he was never served "with any proposed orders, whether residential schedule, order of child support, or findings or decree" before these orders were entered (CP 180-82, 2:7). He asserts that he was only served with the petition and motion for default (*Id.*)

On March 28, 2014, the court signed the Temporary Order re: Relocation of Children, allowing Debra to relocate to Cheney with ELC to finish her education. In doing so, the Commissioner recognized that "almost all [of the factors for relocation] weigh in favor of allowing relocation" (CP 243-55). The court also noted that Dr. Thorn had done nothing to create or continue a relationship with ELC:

> These orders were entered not just a year ago but almost a year-and-a-half ago. There's been argument well orders—restraining orders and what have you made it difficult I don't know if those are still in effect or not I believe there is at least one but never has Mr. Thorn come before this court and said geez we need to amend one of these restraining orders that (sic) prohibiting me from being able to see my daughter without any kind of relief from the court we do that all the time. We amend restraining orders make (sic) it easier for visitation to occur and so long as the children aren't the ones

> protected in those restraining orders it happens on a weekly basis. That has never been done these orders were entered in November of 2012 and it's never been done relief has never been requested.

(*Id.*)

In a subsequent hearing held on April 14, 2014, the trial court commissioner denied Dr. Thorn's motion to vacate the orders entered on November 16, 2012. The court noted that the time between the orders on default and the motion was greater than allowed by statute, even assuming Dr. Thorn suffered a state of duress:

> But the question remains what were we doing from August of 2013 even until now? What we know is there's been no efforts whatsoever there were no attempts to see the child, there were no attempts to get before this court, there was absolutely nothing done. There's no excuse to why the time lapsed but we are one—almost a year-and-a-half out from entry of those orders.

(CP 256-72). It The Commissioner later remarked:

> Circumstances aside there was ample time to move and I will note that all of the orders were served on Dr. Thorn after they were entered all of them. So he had notice of what the court had done and so he had more than enough time to come in and vacate those orders.

(*Id.* at 13). The court failed to find any instance of fraud:

> I couldn't find any specific allegation of fraud again unless it stems into the criminal action which I don't think is relevant to these proceedings because that wasn't even really an issue before this court. . . .
>
> Again fraud I don't think was really set forth in the pleadings, I don't find that there was any fraud that was done on the court that caused entry of these documents

> erroneously. And while I agree that yes the preference is to enter these types of orders residential schedules, etecerta (sic), with all the information and both parties appearing the fact of the matter is we have one party who just didn't appear.

(*Id.* at 12-13).

On May 9, 2014, the Commissioner entered her order denying Dr. Thorn's motion to vacate (CP 233-38). The Commissioner held that Dr. Thorn had failed to demonstrate that he met the *White* factors (*Id.* 3:1): Dr. Thorn had no prima facie defense (*Id.* 3:2), his failure to appear "was not occasioned by mistake, inadvertence, surprise or excusable neglect" (*Id.*), he "did not act with due diligence" (*Id.*), and "substantial hardship will result to the opposing party if the Court were to grant the relief requested in the Motion" (*Id.*).

In addition, the Commissioner correctly found that Dr. Thorn failed to meet the requirements of CR 60, CR 54, Due Process, or any provision under the Washington Code to vacate a court order (*Id.* 3-5). Dr. Thorn's claims under CR 60(b)(1), (2), and (3) were "time barred" because "the one-year time limit is strictly enforced and the trial court may not extend the deadline" (*Id.* 4:A 2-3). Dr. Thorn failed to provide any evidence of fraud (*Id.* 4:B). The defaulted orders were those asked for in the petition and Dr. Thorn had sufficient notice of the proceedings (*Id.* 4-5:C).

On May 8, 2014, Dr. Thorn entered a Motion for Revision of the Commissioner's orders and scheduled a hearing for May 23, 2014. At the hearing on revision, the reviewing court affirmed that the relief given was the same as that asked for:

> ...[U]nder the domestic relations statutes the court is required to apply given a set of circumstances or factors to the determination of a parenting plan whether the other party is in default or not. . . . Even in default cases the aprty is required to make a showing under the statutory factors that the parenting plan being ordered by the court even on default is consistent with those factors and with the best interest of the child.

(CP 324-39). It also ruled that Dr. Thorn was subject to the time limitations of CR 60(b), which he failed to meet (*Id.* 11).

The court, however, reasoned that "[u]nder section 4 of Rule 60(b) . . . the circumstances with which Dr. Thorn was dealing would certainly extend what would be thought of as a reasonable time to bring a claim of fraud before the court" (*Id.*). The trial court, Judge Sperline, found fraud in the fact of imputed income based solely on a scrivener's error that was not argued by the respondent:

> Under these circumstances I actually think that the moving party has made a prima facie showing of fraud because a party who pretty clearly had knowledge to the contrary alleged that Dr. Thorn had income which she knew he did not have at that time. I have reason to believe that the court in the person of the commissioner didn't apply the statutory approach to determine child support but she did it based on a fraudulent representation as to what the other party's income

> actually was. And for that reason I believe that the relief from the order of child support should be granted.

(*Id.* at 12). The court did not hold the same for the parenting plan, leaving the default order in place (*Id.*)

On May 31, 2014, Ms. Cromer filed a Motion for Reconsideration, along with a brief highlighting the *White* factors and Washington state law regarding the imputation of income. The Motion also pointed out that the only basis for finding fraud was a scrivener's error on the child support worksheets and that Ms. Cromer fully and expressly disclosed that she was imputing Dr. Thorn's income at his historical rate in that same document. Judge Sperline denied the Motion for Reconsideration without comment on June 2, 2014. (CP 297).

III. ARGUMENT

Standard of Review

An appellate court reviews a trial court's decision to vacate a judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956, 960 (2007)(*citing 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. *Id.* (citing *Braam v. State*, 150 Wn.2d 689, 706, 81 P.3d 851 (2003)).

The trial court abused its discretion in vacating the default order of child support and its decision should be reversed. The trial court lacked a

basis for finding fraud in the child support worksheets because the nine elements of fraud were absent. There is also no other basis on which the trial court could have granted the relief requested.

First, Dr. Thorn failed to meet the requirements set by our Supreme Court in *White v. Holme*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968). Second, Dr. Thorn failed to meet the time constraints of CR 60(b) or act diligently or with excusable neglect under the rule. Third, Dr. Thorn's claim of mental illness is unsubstantiated and does not present "good cause" under CR 55 to vacate the default order. Fourth, the default order is not different from the relief requested in July 2012.

A. No fraud occurred in the entry of the default orders

Fraud under CR 60(b)4 requires "clear and convincing evidence" of *all* nine elements of fraud:

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

Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965, 970 (2012) (citing *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965)). "[A]ll the ingredients must be found to exist, since the absence of any one of them is fatal to recovery." *Beckendorf v. Beckendorf*, 76 Wn.2d

457, 462, 457 P.2d 603 (1969).

Here, Dr. Thorn did not make a specific plea of fraud nor does his motion conform to the particularized requirements of CR 9(b). While the word "fraud" is not necessary for a pleading, Dr. Thorn must plead facts "sufficient to present the question of fraud." *Pedersen v. Bibioff*, 64 Wn. App. 710, 722, 828 P.2d 1113, 1119 (1992)(citation omitted). He could have fulfilled this requirement by "describ[ing] the fraudulent conduct and mechanisms. *Haberman v. Wash. Pub. Power Supply Sus.*, 109 Wn.2d 107, 165, 744 P.2d 1032, 1069 (1988)(citation omitted). But he did not.

In the specific context of fraud on the court allegedly committed in a default judgment, this Court has held "The party requesting the relief must show misconduct that prevented a full and fair presentation of its case. *Dalton v. State*, 130 Wn. App. 653, 665-67, 124 P.3d 305, 311-12 (2005)(citing *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989) *review denied*, 113 Wn.2d 1029, 784 P.2d 530); *see also Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990); *Goodman v. Bowdoin College*, 380 F.3d 33, 48 (1st Cir. 2004), cert. denied, 543 U.S. 1055 (2005) (Extraordinary remedy of CR 60 relief requires clear and convincing evidence of misconduct that prevented a full and fair presentation or preparation of movant's case.).

Fraud, in context of CR 60(b)(4), must be used to "unfairly obtain" a judgment" and not be "factually incorrect" *Peoples State Bank v. Hickey*, 55 Wn. App. at 372. In *Peoples State Bank*, an ex-wife held a lien on property awarded to her ex-husband upon dissolution. *Id.* at 368. The ex-husband later mortgaged the property to a bank, but defaulted. *Id.* The bank foreclosed on the mortgage and mistakenly claimed a superior lien to the ex-wife. *Id.* at 369. The court denied the ex-wife's motion to vacate based on fraud, holding: "The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." *Id.* at 372.

When the trial court found fraud, it found it assuming that Debra had somehow misled the court as to Dr. Thorn's employment status. Under the rulings of the court, this is not the standard required to find fraud justifying vacation. As in *Peoples Bank*, the assumed fraud goes to only a factual circumstance of the case, not to Dr. Thorn's ability to present a case and be heard. There is nothing about informing the court as to Dr. Thorn's employment status that implicates his ability to fairly appear and correct any factual mistakes. There is no reason why Dr. Thorn could not have corrected any portion of the child support worksheet.

RCW § 26.19.071(6) allows the court to impute income to a parent based on "that parents work history, education, health, and age, or any other relevant factor." When it originally entered the default child support orders, the trial court acted with full knowledge that Dr. Thorn had been arrested and served with the petition while in jail. Ms. Cromer informed the court that he had previously been making $75 dollars on hour as a physician.[3] **That claim has never been refuted by Dr. Thorn.**

Dr. Thorn lost his job prior to being charged with domestic violence. While he has alternately blamed his estranged wife Nancy Thorn and Debra for losing his job, he has never explained the loss itself. It is impossible, however, that he lost his job because he was arrested for domestic violence, as he had no job at the time of the arrest. Nor has Dr. Thorn at any time asserted that he could not work as a physician after his arrest. To the contrary, he trumpets the fact that he beat the domestic violence charge and

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[3] In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:
(a) Full-time earnings at the current rate of pay;
(b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
....

RCW 26.19.071

is free to combat similar charges in the future. He chooses to attempt to knock out orders requiring him to care for his daughter, all the while crying his victimhood at the hands of his estranged wife and Ms. Cromer.

Because the trial court acted knowing that Dr. Thorn was unemployed, as it indicated on its order of child support, and Dr. Thorn was only denied the ability to respond because he refused to appear in court, there was no fraud justifying relief under CR 60(b)(4). Dr. Thorn should not be allowed to attack his obligation of child support based on fraud.

It is important to note that Dr. Thorn's allegations of fraud had nothing to do with the imputed income; rather, his allegation of fraud, which were rejected by the Commissioner and the Judge, were based on Ms. Cromer's police report for which he was arrested – NOT anything directed at the domestic relations court. The Commissioner rejected Dr. Thorn's arguments, and so did Judge Sperline on the Motion for Revision. However, the court (Judge Sperline) reached out and found fraud on his own based solely on the scrivener's error outlined above. This was never Dr. Thorn's argument below.

B. Because Dr. Thorn fails on all *White* factors, the trial court abused its discretion in granting the Motion to Vacate

The trial court also failed to first consider those factors the Supreme Court of Washington State requires before vacating a default order:

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968). *White* further explains "The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate." *Id.* at 352-53.

These factors allow a court to properly determine the scope of its discretionary authority to equitably vacate a default order: "Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion." *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345, 351 (2007). In other words, a court must consider *White* every time it considers a motion to vacate a default order.

As the court Commissioner recognized, Dr. Thorn fails all the *White* factors. He has no prima facie defense to the order of child support or the residential schedule. Although he argues that he failed to appear because he

suffered "duress, " the duress he claims is unsupported by evidence and not legally cognizable. Moreover, Dr. Thorn failed to act with due diligence when he ignored the proceeding (and his daughter) for more than a year from the time of entry of orders. Finally, substantial hardship will result to Debra and ELC because they have relied on the court orders in their mother-daughter relationship.

Dr. Thorn fails to present any defense to child support or the residential schedule

Dr. Thorn has not presented "substantial evidence extant to support, at least prima facie, a defense" to the claim for child support or for the imputation of income. *White*, 73 Wn.2d at 352. Dr. Thorn does not even address his imputed income nor claim that he did not make $13,000 per month as a medical doctor.

> To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the facts constituting a defense and cannot merely state allegations and conclusions. A court hearing a motion to vacate decides whether the affidavits presented set forth substantial evidence to support a defense to the claim.

Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 239, 974 P.2d 1275, 1281 (1999)(citations omitted).

Surprise of the amount of an award or that damages might have been less in a contested hearing do not constitute a prima facie defense. *Little*, 160 Wn.2d at 704-05(citing *Shepard Ambulance*, 95 Wn. App. at 242). In

Little, defaulted defendants argued that the tort damages awarded were excessive. *Id.* at 704. The court held, however, "Except in unusual circumstances, a party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages . . . It is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing. *Id.* at 704.

Here, Dr. Thorn does not even argue that the award amount is improper. He instead argues that he was somehow surprised that the court awarded child support at all. Like the defaulted defendants in *Little*, he wants another whack at the piñata. As the trial court observed, however, child support follows naturally on a parentage petition.

His unmitigated failure to appear and provide the court any indication of his income left the court with no choice but to impute his income according to statute. Imputation of income at Dr. Thorn's historical rate of pay was proper under the Washington Code:

> The court shall impute income to a parent when the parent is voluntarily unemployed . . . . In the absence of records of a parent's actual earnings, the court **shall** impute a parent's income in the following order of priority:
>
> (a) Full-time earnings at the current rate of pay;
>
> (b) **Full-time earnings at the historical rate of pay based on reliable information, such as employment**

security department data;

(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;

RCW § 26.19.071(6)(emphasis added). As noted previously, the court had no reason to believe that Dr. Thorn could not find work as a physician. Charges of domestic abuse notwithstanding (and he successfully knocked those charges out could) he still possessed a medical license, had his years of experience, and the ability to work as a physician. Because Dr. Thorn failed to appear or present any evidence of his income at any time, the court properly followed the statute in imputing his income at his historical, full-time rate.

It is similarly not a defense that Dr. Thorn was in jail when served with notice of the petition or that he was unemployed as a result of incarceration. The court has full discretion to find a parent voluntarily unemployed based on "work history, education, health, age, and other relevant factors." *In re Custody of B.J.B*, 146 Wn. App. 1, 14, 189 P.3d 800, 806 (2008, Div III)(citing *In re Marriage of Peterson*, 80 Wn. App. 148, 153 (1995)). Mere arrest is not enough to make him unemployable. He has proven this fact by finding work subsequent to arrest. Also, as noted previously, Dr. Thorn had managed to lose his job in Idaho days before he was charged with domestic violence.

Dr. Thorn failed to offer substantive evidence of a prima facie defense against imputing his income or the residential schedule. In fact, no defense exists since these orders follow naturally from their petition. The specifics may be a surprise to Dr. Thorn, but he has not explained why the specifics of the order surprise him when they follow the statutes and were based upon the facts before the court. Dr. Thorn had time and opportunity to supply the court with additional information, his incompetence does not constitute a defense.

Dr. Thorn willfully failed to appear

No "mistake, inadvertence, surprise or excusable neglect" occasioned Dr. Thorn's failure to appear to respond to the petition for child support. *White*, 73 Wn.2d at 352. No legal excuse exists for Dr. Thorn's failure to appear to address child support or the residential schedule. He was served by the sheriff while in prison and so, like many others, knew about the proceedings. Out of the myriad alleged drug offenders, alleged burglars, alleged murders, and alleged perpetrators of domestic violence, it is unclear why a man trained by the marines, educated and licensed to practice medicine could not fill out the standard forms to answer the petition. Dr. Thorn does not claim he erred in the court dates. And, despite his later claims that he was depressed at the time, he does not claim nor does he

provide evidence of incapacity constituting excusable neglect.

"When served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court's jurisdiction." *Morin v. Burris*, 160 Wn.2d 745, 759-60, 161 P.3d 956, 963-64 (2007). In *Morin*, the Washington Supreme Court rejected the argument that out of court communications constituted an attempt to appear. *Id.* at 761. Here, Dr. Thorn made no communication whatsoever. Nor does he now supply the court with information that would allow it to make correct any previous order. Instead, he offers empty excuses of feeling sad over the fact that he was in jail for his "lawful" use of force that resulted in a charge of domestic violence.

Moreover, the affidavit submitted by Dr. Juergens does not substantially corroborate Dr. Thorn's assertion of emotional distress. Dr. Jurgens did not evaluate Dr. Thorn at the time (and never, in fact, evaluated him for "duress"). *See Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000), *review denied* 144 Wn.2d 1011 (2001) (Tenant's claim that she was upset, did not understand what was happening, and could not understand the words that were used on statutory summons and complaint for unlawful detainer were insufficient to support finding of mistake, surprise, or excusable neglect required to vacate default judgment).

Dr. Juergens' letter is no more than a recitation of what Dr. Thorn told him. Dr. Juergens carefully avoids making any diagnosis.[4] Dr. Juergens walks a fine line to help a patient and not give a professional opinion by redundantly stating that "he believes it is credible" Dr. Thorn is telling the truth. Such an assertion fails to provide the support Dr. Thorn requires under the law to provide a legitimate "reasonable excuse" for his failure to appear in court. Dr. Juergens does no more than reveal confidential conversations that he might use to currently diagnose Dr. Thorn.

Further, it appears that Dr. Juergens must have misunderstood the conversations he had with Dr. Thorn. Dr. Juergens states that Dr. Thorn was "worried that he would never be able to see his daughter again." However, as Dr. Thorn's declaration, the Sheriff's affidavit of service, and the record of the case all reveal Dr. Thorn had no reason to suspect he would have restricted visitation of any kind at the time he was served in prison. The court issued an order restricting visitation to supervised visits only after Dr. Thorn ignored its authority over him. Whatever reason Dr. Thorn had for dismissing the court's summons, it was not out of fear of not being able to see his daughter.

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[4] Diagnosing someone's past state of mind using only present information and self-diagnosis, as Dr. Juergens relates, would constitute malpractice.

Moreover, the court specifically allowed him visitation with his daughter. It supported his rights as a father, only restricting his visitation based on a history of domestic violence, neglect, and abandonment. Dr. Thorn's actions after November 16, 2012 only corroborate the assertions of neglect and abandonment. He did nothing to visit his daughter for over a year—for almost a year and a half. This silence loudly confirms that fact of neglect and abandonment.

In addition, Dr. Thorn was not incarcerated at the time of default. Dr. Thorn was released on bail on October 9, 2012—more than a month before the orders on default were entered. Perhaps Dr. Thorn was busy with a criminal defense attorney, working out ways to pummel the charges of domestic violence into submission. This would account for his much proclaimed success.

Regardless of Dr. Thorn's actions after his release from jail, he has failed to give the court an explanation that would constitute mistake, inadvertence, or excusable neglect. Dr. Thorn fails the second *White* factor.

Dr. Thorn waited one year, four months, and twelve days before moving to vacate the default

Dr. Thorn did not act with "due diligence after notice of entry of the default judgment." *White*, 73 Wn.2d at 352. "Due diligence after discovery of a default judgment contemplates the prompt filing of a motion to vacate.

Due diligence in a given case depends upon the circumstances which gave rise to the default." *Shepard Ambulance*, 95 Wn. App. at 243 (citations omitted). When there is no due diligence, even misrepresentation in obtaining a judgment is not grounds to vacate that judgment. *See Peoples State Bank*, 55 Wn. App. at 371 (denying motion to vacate decree of foreclosure where two-and-a-half years had passed, even though the bank "misrepresented the status of [the defendant's] lien.")

Not only did Dr. Thorn wait until well after the statutory year banning motions to vacate default under CR 60(b)(1),(2), and (3); he disregarded the case for nearly a year-and-a-half.

An order of default demands a response. Eighty days of complete inaction is unreasonably long to wait to respond to an order of default. *Estate of Stevens*, 94 Wn. App. 20, 35 971 P.2d 58, 65 (1999). In *Gutz v. Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005), on the other hand, defendants attempted to negotiate with a defendant to set aside a default order after a miscommunication resulted in default. *Gutz*, 128 Wn. App. at 920. The defendants also found their own counsel and attempted to negotiate to set aside the default order. *Id.* A formal motion to set aside default was made 79 days later. *Id.* The appellate court held that this was due diligence because of the defendants' active attempt at negotiation. *Id.*

Here, Dr. Thorn disregarded the default order for one year, four months and twelve days—nearly five times as long as the beneficiary in *Stevens*. During the same time he turned a deaf ear to the order for child support or the residential schedule. During this long time he made no attempt to visit his daughter.

As the court Commissioner observed, there is no indication of what he was doing from August 2013 to March 2014—the time between his clobbering the charges of domestic violence and filing to vacate default. Dr. Thorn acted only after being served with Debra's Notice of Intended Relocation. He has paid zero dollars of child support. He has visited zero hours with his daughter. He acted with zero diligence in his obligations to the court and to his infant daughter.

Vacating the default orders will disrupt ELC's life

Dr. Thorn makes to attempt to meet his burden of showing that "no substantial hardship will result to the opposing party," *White*, 73 Wn.2d at 352, other than the offhand comment that it would not. For the past year-and-a-half Debra and ELC have lived their lives without Dr. Thorn. Their lives have a structure and meaning wholly independent from Dr. Thorn's existence. ELC does not know her biological father because he has so chosen. The fact that Dr. Thorn fails to financially support his daughter

also does not mean that dismissing the order will produce no harm. This would be like saying that since no one follows the speed limits, there should be no speed limits. Debra and ELC have lived knowing that Dr. Thorn was obligated to support his daughter and that they would be able to lawfully collect that debt one day. Dr. Thorn's motion to vacate child support and residential schedule place ELC's stable life in jeopardy. Vacating the orders of child support or the residential schedule He thus fails the fourth *White* factor.

C. Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(1), (2) and (3)

Pursuant to CR 60(b), "[t[he motion shall be made within a reasonable time and re reasons (1), (2) or (3) not more than 1 year after the judgment, order or proceeding was entered or taken." "A CR 60(b) motion must be brought within one year after the default order or judgment is entered. This one year time limit is strictly enforced and the trial court may not extend the deadline." *Trinity Unviersal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195, 312 P.3d 976, 982 (2013), *review denied*, 179 Wn.2d 1010, 316 P.3d 494 (2014). Moreover, CR 60(b) specifically prohibits the court from extending "the time for taking any action" under CR 60(b). More than one year has passed. Dr. Thorn's Motion to Vacate, so far as it is founded on CR 60(b)(1), (2) or (3), is absolutely time barred.

D. Dr. Thorn is not entitled to Relief Under CR 60(b)(11)

"The use of CR 60(b)(11) 'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367, 1371 (1985)(finding that a separation agreement's unfairness and a petitioner's unstable emotional condition at the time of the dissolution decree did not constitute extraordinary circumstances justifying relief under CR 60(b)(11)). "Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of thecourt's proceedings." *Id.* at 902. "Furthermore, CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)." *Friebe v. Supancheck*, 98 Wn. App. 260, 266-67, 992 P.2d 1014, 1017 (1999).

CR 60(b)(11) gives the trial court discretion to vacate an order or final judgment for "[a]ny other reason justifying relief" from judgment. The operation of CR 60(b)(11) is confined to situations involving 'extraordinary circumstances' not covered by any other section of CR 60(b). *Hammack v. Hammack*, 114 Wn. App. 805, 809, 60 P.3d 664, *review denied*, 149 Wn.2d 1033 (2003). A dissolution decree may be vacated for extraordinary circumstances to overcome a manifest injustice. *Id.* at 810. In *Hammack*, the court found an extraordinary circumstance permitting vacation of a

property settlement agreement because the agreement was void for violating public policy. *Id.* at 811.

Additionally, in *In re Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999), our supreme court found extraordinary circumstances where a wife was awarded one-half of her former husband's military retirement pay, and he later received an increase in his military disability pay (which she was not awarded) and a decrease in his retirement pay. The court found that the result was fundamentally unfair because it deprived the wife of her entitlement to one-half of a substantial community asset. *Jennings*, 138 Wn.2d at 627.

Here, the circumstances surrounding the entry of default were anything but extraordinary. Debra filed her petition, informing Dr. Thorn that she was seeking entry of an order that determines support, orders the respondent to pay past support, and adopts the residential schedule proposed by the petitioner, among other things.

Dr. Thorn failed to respond and the court entered default judgment against him. Nothing in these proceedings rises to the level of "extraordinary circumstances" that courts have required in the past; neither party has suffered a manifest injustice.

Dr. Thorn complains that he was not served with documents subsequent to the summons and petition. "After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him or her." RCW § 4.28.210. "In general, once a defendant has been adjudged to be in default, he is not entitled to notice of subsequent proceedings. *Conner v. Universal Utilities*, 105 Wn.2d 168, 172, 712 P.2d 849, 851 (1986) (citing *Pedersen v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960).

E. Dr. Thorn did not present "good cause" under CR 55(c) to vacate the default order of child support.

CR 55(c) allows that default may be set aside "for good cause shown and upon such terms as the court deems just." "To establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence. *Stevens*, 94 Wn. App. at 30 (citing *Seek Sys. V. Llincoln Moving/Global Van Lines*, 63 Wn. App. 266, 271, 818 P.2d 618, 619 (1991)).

As argued above, Dr. Thorn fails to demonstrate excusable neglect or due diligence. Thus, he fails to meet the lower standards required under CR 55(c).

G. Even if the Court Determines that it is Proper to Vacate the Order of Child Support, There is no basis for Vacating the Order of Default.

Even if the Court determines that it will vacate the child support order based on CR 60(b)(4), there is no reason to vacate the Order on Motion of Default entered November 16, 2012. There is no allegation of any irregularity in connection with this order. Dr. Thorn has shown no ground to vacate the order sixteen months after its entry. At most, Dr. Thorn should be allowed to present evidence relevant to entry of a final order of child support.

IV. CONCLUSION

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

Attorney Fees and Costs: Ms. Cromer respectfully requests an award of attorney fees and costs pursuant to RCW 26.09.140. The appellate court has the discretion to order a party to pay the other party's attorney fees

and costs associated with the appeal of a dissolution action. RCW 26.09.140. In exercising its discretion, the Court should consider the arguable merit of the issues on appeal and the parties' financial resources. *In re Marriage of King,* 66 Wash.App. 134, 139, 831 P.2d 1094 (1992). Ms. Cromer will file her financial declaration at least ten days before the date of oral argument, as required by RAP 18.1(c).

DATED this 31st day of October, 2014.

Respectfully submitted,

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