

65937-5

65937-5

No. 65937-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KRISTOPHER SCOTT MYERS,

Appellant,

v.

MELANIE ELAINE MYERS,

Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Kristopher Myers has received the amended response brief of respondent Melanie Myers.¹ Nothing in Melanie's brief should dissuade this Court from reversing the trial court order vacating the order of default and the default judgment dissolving the parties' marriage. While Melanie's brief is long on impassioned jury-type arguments, it is short on legal analysis. She misstates the record below, ignores a judicial determination that she was competent, and relies on non-binding precedent to plead her case to this Court. Her efforts fall far short of the mark.

Melanie was competent to handle her legal affairs during the divorce and her failure to respond was inexcusable. The Oregon probate court deemed her competent to administer her father's estate during the time she now claims she was incapacitated for purposes of timely responding to the dissolution petition. She cannot have it both ways and be simultaneously competent to handle her legal affairs in one court, but incompetent to handle them in another. She should not be permitted to claim a debilitating mental illness when it suits her needs.

Where there was no equitable basis to vacate the default judgment, the trial court erred in doing so. Accordingly, this Court should reverse and award Kristopher his attorney fees and costs on appeal.

¹ As in the opening brief, the parties will be referred to by their first names to avoid confusion. No disrespect is intended.

B. RESPONSE TO THE RESTATEMENT OF THE CASE

Melanie's introduction and restatement of the case contain a number of misstatements and suffer from a number of conspicuous omissions. Yet they also contain several crucial admissions.

Melanie claims Kristopher manipulated her out of a quarter million dollars from her father's estate and that he had already pocketed an initial quarter million dollars from that inheritance. Br. of Resp't at 1, 5, 9. But the record reflects that Melanie and Kristopher entered into a property settlement agreement whereby Melanie gifted Kristopher \$206,000 and promised him an additional \$207,000, representing the value of a TD Ameritrade account. CP 22, 39-41, 43-45, 189. Although Melanie paid Kristopher \$206,000, she never gave him the funds from the Ameritrade account. CP 22-23. Kristopher sought, and the trial court awarded, only the funds Melanie had not paid to him and nothing more. CP 22, 189.

Melanie seems to insinuate that Kristopher surreptitiously obtained the default judgment because he promised not pursue the divorce and she did not learn of his change of heart or the default until after-the-fact. Br. of Resp't at 7. Kristopher was under court order to file the motion for default to keep the case on track. CP 70. In any event, he provided Melanie with ample notice of both the dissolution proceedings and the motion for default. CP 10-11, 249, 252. Rather than timely respond,

Melanie turned a blind eye to those pleadings and their expressed intent and simply chose not to appear. CP 284.

Melanie maintains that the death of her father while the dissolution was pending partially justifies her failure to timely respond to the dissolution petition. Br. of Resp't at 1, 4-5. But her father died several months before Kristopher filed the petition. CP 5, 95.

Melanie next claims the trial court found that she had established prima facie a meritorious defense. Br. of Resp't at 8. The trial court made no such finding. Instead, the court merely found that "there is significant and substantial dispute over factual issues that cannot be resolved short of an evidentiary hearing or trial on the merits of the matter." CP 335. That is not the same things as finding she established a meritorious defense.

Melanie casts further aspersions on Kristopher by mistakenly contending he continued to use her money to finance his litigation efforts, contrary to the agreed temporary restraining order. Br. of Resp't at 9. Kristopher did no such thing, CP 516-29, which is why the trial court denied her request to place any money she had gifted to him in her attorney's trust account. CP 536-37. Later in her brief, she then criticizes him for not defending the fairness of the property distribution. Br. of Resp't at 15. But a vacatur proceeding is not the appropriate venue for making such an argument.

For obvious reasons, Melanie intentionally omits critical facts that undermine her claim of incompetence. For example, she fails to mention that she filed a *pro se* declaration in the dissolution action one week after being declared competent to administer her father's estate. CP 8-9. Melanie clearly understood what she needed to do to respond to the dissolution petition if she disagreed with Kristopher's proposed distributions.

The most glaring omission from Melanie's restatement of the case is any discussion of the probate proceedings in Oregon. Melanie petitioned the Oregon probate court to be appointed personal representative of her father's estate one month after Kristopher filed the dissolution petition. CP 23, 53-55. She stated *under oath* that she was competent to serve in that capacity.² CP 54, 318. On December 21, 2009, the probate court determined she was competent to serve by appointing her the estate's personal representative. CP 56. This determination was made *after* the divorce was filed, but *before* the default proceedings.

Melanie's studied refusal to address the implications of her *pro se* declaration or the probate court's determination that she was competent to administer her father's estate is understandable. Connecting all of the

² Melanie specifically attested that she "[was] not disqualified to serve under the provisions of [Oregon Revised Statute ("ORS")] ORS 113.095." CP 54. ORS 113.095(1) prohibits an incompetent person from serving as a personal representative.

missing dots makes clear that she was mentally competent during the dissolution proceedings, but chose not to act.

Despite these irregularities, Melanie makes several crucial admissions. For example, she admits she was not hospitalized when Kristopher filed the dissolution petition. Br. of Resp't at 4-5. Rather, she had already been discharged and was stabilized on medication. *Id.* She tacitly admits she had no hospitalizations from October 2009 to March 2010 when the divorce was pending. *Id.* She also admits that she participated in litigation involving her children and that she attended at least half of the criminal proceedings relating to her abuse of Kristopher. *Id.* at 26.

Melanie also concedes that not a single treating physician considered her to be incompetent or even implied that she was incompetent during the dissolution proceedings, although such experts were available. *Id.* at 4. While she may have been suffering from depression, there is no evidence that it impacted her ability to understand or respond to the dissolution petition.

C. ARGUMENT IN SUPPORT OF REPLY

(1) Standard of Review

Kristopher and Melanie agree on the applicable standard of review. *Compare* Br. of Resp't at 10 *with* Br. of Appellant at 14. But they

disagree about the appropriateness of default judgments. Melanie fails to recognize that justice might, at times, require a default. *See Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (an orderly system of justice requires compliance with judicial process and finality to judicial proceedings; it is not dependent on the whims of those who participate in it).

The trial court abused its discretion in vacating the order of default and the default judgment where the adversary process had been halted because of Melanie's non-responsiveness. *See Gage v. Boeing Co.*, 55 Wn. App. 157, 160-61, 776 P.2d 991, *review denied*, 113 Wn.2d 1028 (1989) (default judgments are appropriate when the adversary process has been halted because of an essentially unresponsive party; the diligent party must be protected to prevent interminable delay and continued uncertainty as to that party's rights).

(2) The Trial Court Had No Tenable Grounds on Which to Grant Relief Under CR 60(b)³

a. Relief was not warranted under CR 60(b)(1) or (2)

A party against whom a default judgment has been entered may move to vacate that judgment under CR 60(b). As Kristopher noted in his opening brief at 16, the trial court considers two primary and two

³ CR 60(b) provides in relevant part that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" for any one of eleven reasons.

secondary factors that vary in dispositive significance when deciding whether to grant such relief.⁴

Melanie first contends that only CR 60(b)(1) requires an inquiry into the four *White* factors. Br. of Resp't at 12. Her reliance on *Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999), *review denied*, 140 Wn.2d 1026 (2000), is misplaced. While the *Luckett* court decided the four *White* factors were more appropriately applied to determining whether sufficient grounds exist for vacating a default judgment under CR 60(b)(1), the *White* court did not limit application of those factors only to CR 60(b)(1). *See White*, 73 Wn.2d at 352 (citing *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 P. 1158 (1917)). *See also*, 4 Karl B. Tegland, Wash. Prac. Series, *Rules Practice*, CR 55 at 344 (5th ed.) (noting the governing considerations). Even if Melanie's contention is true, she failed to sustain her burden.

To support her claim of a meritorious defense below, Melanie argued Kristopher improperly used the third property settlement agreement to obtain an additional \$207,000 judgment against her and that

⁴ Those factors are: (1) that there is substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) that the moving party's failure to timely appear and answer the 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 the opposing party will not suffer substantial hardship if the default judgment is vacated. *See, e.g., White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

this “mistake” warranted vacating the default judgment. CP 275. But now, she makes an elaborate argument that CR 60(b)(1) warrants relief because the distribution accomplished in the default judgment is unfair. Br. of Resp’t at 13-15. She never raised this argument below. CP 88-93, 274-79. Accordingly, this Court should decline to consider it for the first time on appeal. RAP 2.5(a). *See also, Boeing Co. v. State*, 89 Wn.2d 443, 451, 572 P.2d 8 (1978) (declining to consider an argument raised for the first time on appeal); *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990) (declining to consider arguments or theories not presented to the trial court).

Melanie did not present evidence to establish a prima facie defense. Although she does not want to admit it, she was personally served with the summons and the petition, which described Kristopher’s proposed property division. CP 187. The plain language of the summons required Melanie to appear and answer the dissolution petition within 20 days. If she believed Kristopher was seeking a property distribution in excess of what the parties contemplated with their settlement agreement, she could have challenged it in her response or during the default proceedings. She did not. Likewise, she was properly served with notice of the motion for default. CP 249, 252. Her negligent disregard of process is not a basis for setting aside the default judgment. *See*

Commercial Courier Serv., Inc. v. Miller, 13 Wn. App. 98, 105, 533 P.2d 852 (1975).

Melanie argues that the panoply of unfortunate circumstances with which she was afflicted during the divorce is sufficient to excuse her failure to answer Kristopher's petition. Br. of Resp't at 17. If that is not enough, she also argues she was persuaded by Kristopher that he was suspending prosecution of the divorce. *Id.*

Relief under CR 60(b)(2) is not warranted. Melanie's reliance on *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431 (1985) and *Brothers v. Brothers*, 71 Mont. 378, 230 P. 60 (1924) to argue that mental illness may support a finding of excusable neglect is misplaced. *Id.* at 18. Cases from other jurisdictions are not controlling precedent because decisions from other states are not binding on this Court. *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008); *State v. Yelle*, 7 Wn.2d 443, 450-51, 110 P.2d 162 (1941). In any event, the cases are distinguishable.

In *Brothers*, the only question presented was the defendant's excusable neglect. The Montana Supreme Court held that the defendant's erroneous belief that her appearance before a notary public was the only appearance required of her would not warrant setting aside the default. *Brothers*, 71 Mont. at 382. The *Brothers* court went on to hold, however,

that these facts coupled with the fact that the defendant had recently spent some time in a state hospital because of her insanity warranted excusable neglect. The critical distinction is that unlike the defendant in *Brothers*, Melanie has never been adjudged mentally incompetent or insane.

Even the *Stirm* court recognized that not all persons who suffer emotional disturbances are entitled to relief from judgments duly entered. 107 Idaho at 1051. There, there defendant's mental illness was so serious that it would have interfered with his capacity to stand trial in a criminal prosecution. *Id.* Medical records reported that he lacked the capacity to understand the legal proceedings against him and to assist in his own defense. *Id.* Such is not the case here.

Melanie claims she was incompetent and incapable of responding to the dissolution action. But she does not claim that she was of unsound mind at all times and in all situations. She admits she participated in litigation *pro se* without the protection of a guardian ad litem. She made a declaration under oath declaring herself to be of sound mind. To prove her incapacity at the time of the divorce, she offered her declaration and her medical records. But her medical records contain no psychological or psychiatric expert opinion regarding her state of mind while the dissolution action was pending, although she had experts available. The medical providers at Fairfax Hospital and Harborview Medical Center

could have provided such evidence. None of them submitted affidavits or declarations in support of Melanie's claim that she had no reasonable perception or understanding of the nature of the dissolution proceedings. There is simply no evidence that Melanie's alleged mental illness interfered with her ability to understand and to comply with the requirements of the judicial system.

The critical flaw in Melanie's argument is that the Oregon probate court determined she was competent to handle legal matters during the time she now claims she was incapacitated for purposes of timely responding to the divorce. She cannot have it both ways and claim a debilitating mental illness simply to suit her needs. Her failure to address the probate court's competency determination in her brief does not make it any less determinative or binding.

Even if Kristopher lead Melanie to believe he was suspending prosecution of the divorce, which he disputes, that is not enough. He gave her ample notice of both the dissolution action and the motion for default sufficient to put her on notice of his intent and her responsibilities. The relief Kristopher requested was clearly stated in the respective pleadings. But rather than timely respond, Melanie turned a blind eye and simply chose not to appear. CP 284. Her failure to read what was clearly expressed in Kristopher's pleadings is not excusable neglect. *Hwang v.*

McMahill, 103 Wn. App. 945, 952, 15 P.3d 172 (2000), *review denied*, 144 Wn.2d 1011 (2001) (failure to read a document does not constitute a tenable basis for vacating a judgment).

b. Relief was not warranted on any other basis under CR 60(b)

Melanie next argues multiple other bases exist to grant the motion to vacate. Br. of Resp't at 21. What is interesting about this argument is that Melanie feels the need to argue that this Court can affirm on any grounds raised in the trial court. Br. of Resp't at 12. Obviously, she feels the trial court's decision rests on indefensible grounds, in particular the trial court's determination of excusable neglect and unsound mind. She is correct in that belief.

While an appellate court can affirm a trial court judgment on any theory established by the pleadings and supported by the proof, even if a trial court did not consider that theory, a party must present proof on that theory in the trial court. *See LaMon v. Butler*, 112 Wn.2d 193, 201 n.6, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989) (party raised issue not addressed by trial court in its summary judgment brief); *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995) (case was resolved on motion and motion pleadings raised various grounds for resolution of case;

Supreme Court affirmed on one of those other grounds than the one employed by the trial court). Again, Melanie fails to sustain her burden.

Melanie first argues relief is warranted under CR 60(b)(4) because Kristopher induced her to take no action in the divorce. Br. of Resp't at 24-25. Relief is not warranted under CR 60(b)(4). Again, even if true, which Kristopher disputes, that is not enough. To successfully vacate the decree under this rule, Melanie was required to show by clear and convincing evidence that the default was procured by Kristopher's fraud, misrepresentation or misconduct. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991). As Kristopher recited in his opening brief, *Swasey v. Mikkelsen*, 65 Wash. 411, 118 P. 308 (1911), is dispositive of Melanie's claim under CR 60(b)(4). Melanie had ample notice of both the dissolution action and the motion for default sufficient to put her on notice of Kristopher's intent and her responsibilities. She simply chose to ignore what was before her.

Melanie next argues she has suffered unavoidable casualty and misfortune justifying relief under CR 60(b)(9). Br. of Resp't at 25-26. But she fails to fully analyze the rule. While Melanie's mental illness might qualify as an "unavoidable casualty or misfortune," she fails to recognize that unavoidable casualty or misfortune alone is insufficient to allow relief under the rule. *See Stanley v. Cole*, 157 Wn. App. 873, 882,

239 P.3d 611 (2010). The rule further requires the moving party to establish that the casualty or misfortune “prevent[ed] the party from prosecuting or defending the case.” *Id.* This language further limits the circumstances that warrant relief under the rule. *Id.* at 883.

As this Court recognized in *Stanley*, *Swasey* is dispositive. There, Mikkelsen moved to vacate a judgment based on his wife’s extended illness. *Swasey*, 65 Wash. at 415. The trial court denied his motion and the Supreme Court affirmed, reasoning that “his attendance at his wife’s bedside was not so constant, nor his duties there so exacting, that he could not have found time to employ counsel.” *Swasey*, 65 Wash. at 415. Despite the existence of an unavoidable misfortune, Mikkelsen was not entitled to relief from the judgment because he failed to show that the misfortune actually prevented him from defending against the lawsuit. *Stanley*, 157 Wn. App. at 883.

Like in *Swasey*, Melanie fails to show that unavoidable misfortune prevented her from opposing Kristopher’s dissolution petition. Instead, she admits that she appeared for at least half of the criminal proceedings relating to her assault upon Kristopher. Br. of Resp’t at 26. She also concedes that she was able to retain an Oregon probate attorney and that she represented herself during the modification action involving her children with her first husband. *Id.*; CP 95. Notably, she fails to explain

why she was unable to take minimal steps to protect her interests during the dissolution, such as moving for a continuance, or why she had insufficient opportunity to employ counsel in this case. Indeed, the undisputed record demonstrates that Melanie understood what was required of her in the dissolution action when she filed her *pro se* declaration. Her so-called “cascade” of misfortunes did not make it impossible for her to defend the divorce. She simply chose not to act.

While Melanie’s mental illness may be an unavoidable casualty or misfortune, it cannot be said that her *illness* prevented her from defending against the dissolution petition. There is no evidence to support a finding that her illness, which was the basis for her motion, prevented her from hiring an attorney or filing a *pro se* objection to the petition.

Melanie’s last argument is that extraordinary circumstances warrant relief under CR 60(b)(11). Br. of Resp’t at 27. Despite its broad language, the use of CR 60(b)(11) is reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b) and relating to irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings. *In re Marriage of Furrow*, 115 Wn. App. 661, 673-74, 63 P.3d 821 (2003) (citing *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367

(1985)). As Melanie admits, the rule cannot be invoked when other provisions of CR 60(b) apply.

Here, the circumstances surrounding the entry of the default were anything but extraordinary. Kristopher filed a petition for dissolution informing Melanie that he was seeking a fair and equitable distribution of all of their separate and community property. Melanie failed to respond and the court entered a default judgment against her. Based on Kristopher's final pleadings, which Melanie failed to oppose, the court made an equal distribution of the parties' assets and liabilities. Nothing in these proceedings rises to the level of "extraordinary circumstances" that courts have required in the past. Again, Melanie could have objected to the proposed distribution but chose not to do so.

(3) Melanie Is Not Entitled to Her Attorney Fees and Costs on Appeal

Melanie claims she is entitled to attorney fees and costs on appeal, arguing Kristopher's appeal is frivolous and a disparity in financial resources exists. Br. of Resp't at 29-30. She should not be awarded attorney fees and costs under either theory.

a. Kristopher's appeal is not frivolous

An appeal is not frivolous if the issues presented are at least debatable. See *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 808, 929

P.2d 1204 (1997). Any doubts must be resolved in favor of the appellant. *See Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 706, 740 P.2d 370 (1987). An appeal that is affirmed merely because the arguments are rejected is not frivolous. *See Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). Resolving all doubt in favor of Kristopher, his appeal raises debatable issues upon which reasonable minds could differ. He cited relevant case law to support the issues under review and offered a meaningful analysis of those issues to permit the Court to reverse the trial court order vacating the default judgment. His appeal is not frivolous. Melanie's request for fees and costs on this basis should be denied.

b. Melanie has sufficient assets to cover her attorney fees and costs on appeal

As Kristopher will demonstrate in his financial affidavit, he does not have the ability to pay his fees or Melanie's fees on appeal. By contrast, Melanie has sufficient assets to pay her own attorney fees. Although she claims to be receiving only Social Security benefits, br. of resp't at 31, she fails to acknowledge that she is a beneficiary of her father's estate, which she herself valued at a minimum of \$1 million. CP 54. Melanie has the financial resources to pay her attorney fees. Melanie's request for fees and costs on this basis should also be denied.

(4) Kristopher Is Entitled to His Attorney Fees and Costs on Appeal

Kristopher requests his reasonable attorney fees and costs on appeal pursuant to RAP 18.1 and RCW 26.09.140. He satisfied the requirements of RAP 18.1(b) by devoting a portion of his opening brief to this request. Br. of Appellant at 38.

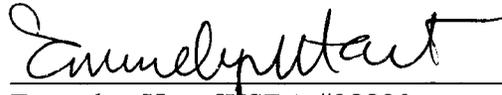
D. CONCLUSION

Melanie's flimsy motion to vacate falters under close scrutiny. Substantial evidence demonstrates that she was competent to handle her legal affairs during the divorce. The Oregon probate court deemed her competent during the time she now claims she was incapacitated for purposes of timely responding to the divorce. She cannot have it both ways and claim a debilitating mental illness simply to suit her needs. She had full and frequent opportunity to submit her case on the merits before the default, but failed to avail herself of that opportunity.

The trial court had no tenable grounds on which to grant the relief Melanie requested under CR 60(b). The trial court abused its discretion by granting the motion to vacate the default judgment. This Court should reverse and award Kristopher his attorney fees and costs on appeal pursuant to RAP 18.1 and RCW 26.09.140.

DATED this 28th day of April, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Reply Brief of Appellant in Court of Appeals Cause No. 65937-5-I to the following:

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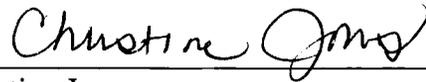
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 28, 2011, at Tukwila, Washington.



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