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STATE OF WASHINGTON
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**COURT OF APPEALS**
**DIVISION II**
**OF THE STATE OF WASHINGTON**
**Case No. 39074-4-II**

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JONI HONG,
Respondent,
and

JERRY HONG,
Appellant.

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# BRIEF OF RESPONDENT, JONI (HONG) SEAMAN

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BOYD S. WILEY, WSBA #18817
of Campbell, Dille, Barnett, Smith & Wiley, PLLC
317 South Meridian
P.O. Box 488
Puyallup, WA 98371
(253) 848-3513
Attorneys for Appellant

Herbert Gelman, WSBA #1811
Attorney at Law
1101 Fawcett Ave., Ste. 300
Tacoma, WA 98402-2015
Attorneys for Respondent

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## 1. INTRODUCTION

Joni (Hong) Seaman request the Court affirm the trial court's entry of the Findings of Fact and Conclusions of Law and also affirm the Dissolution Decree.

## 2. STATEMENT OF THE CASE

### A. *Procedural History*

This appeal stems from the underlying dissolution action.

Joni Hong – now Joni Seaman – filed for dissolution in October, 2006. CP 1. The parties reconciled for a time; Jerry Hong eventually moved out of the family residence in November 2007. CP 7. The trial was scheduled for October 21, 2008. Joni Hong appeared and testified, CP 53; Jerry Hong did not appear. CP 62. The Court entered the Dissolution Decree October 21, 2008. CP 62.

Following the entry of the decree, Mr. Hong moved for relief from judgment under CR 60. CP 67. The grounds for relief under CR 60(b) were as follows:

> "(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity In obtaining a judgment or order;
>
> * * *
>
> (4) Fraud , misrepresentation, or other misconduct of an adverse party;
>
> (5) The judgment is void;

* * *

(11) Any other reason justifying relief from the operation of the judgment."

The Court considered the arguments, and entered the order dated February 27, 2009. CP 115. In that order, the Court ordered that the Decree would remain in effect with the exception that the provision awarding Joni 50% of the Northwest Airlines Pension Plan for Contract Employees would only apply to the period commencing March 7, 1981 through November 1, 2007 and ordering a new Qualified Domestic Relations Order to be prepared. CP 115.

The Notice of Appeal was then filed March 25, 2009.

## 3. STATEMENT OF FACTS

Joni and Jerry Hong were married March 7, 1981 in Missoula Montana. CP2. Jerry worked for Northwest Airlines during the marriage. Joni had worked for Northwest, but gave up her career at Jerry's urging. She struggled to find equivalent employment, and eventually returned to school. She is working in a medical office as a medical assistant. CP 7.

Joni Hong filed an amended Petition for Dissolution on December 12, 2006. The petition stated as follows:

¶1.8 There is community or separate property owned by the parties. The court should make a fair and equitable division of all the

property.[1]

¶1.9 . . . The court should make a fair and equitable division of all debts and liabilities. . . .

¶1.10 There is a need for spousal maintenance as follows: The wife has the need for spousal maintenance and the husband has the ability to pay. The amount and duration should be determined by the court at a later date.

CP 5.

Joni continued living in the family home after Jerry moved out. The mortgage payment was $1,648. Joni asked for spousal maintenance based on the difference between her net monthly income of $1916.74 and Jerry's net income monthly income of $3,770.93. Based on those amounts, she asked for $1407 maintenance per month. CP 2-3.

The court entered a temporary order of $1000.00 per month maintenance on January 24, 2008. CP 25.

Joni submitted documents for trial by way of an ER 904 submission on September, 17, 2008 for the trial scheduled October 21, 2008. Those documents included a residential appraisal report; Northwest Airlines Pension Plan for Contract Employees documents; Northwest Pension Plan for Salaried Employees documents; and Northwest Airlines Employees Retirement Savings Plan documents. CP 30-52.

The trial was scheduled for October 21, 2008. The court took

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1. Mr. Hong answered "Admitted" to this paragraph. CP 15.

testimony from Joni on the day of trial and entered the Dissolution Decree. CP 53. Jerry Hong did not appear for trial. By at least October 28, 2008, he knew that he had missed the trial date. CP 71. Jerry Hong does not deny that he received proper notice of the trial that occurred on October 21, 2008. CP 71. He acknowledges that his failure to appear at trial was nothing but his mistake as to the date; he noticed that date when he was gathering his paperwork, CP 71 and he had received notice of the trial. CP 91.

Jerry Hong then emailed the court concerning the missed trial date. The Judicial Assistant responded in pertinent part as follows: "[Judge Grant] signed the final documents provided by Ms. Holmes. I cannot give out legal advice and cannot tell you how to proceed with an appeal. . . ." The Judicial Assistant went on to provide Mr. Hong with the telephone numbers for the Domestic Facilitator and Lawyer Referral for further assistance. CP 75-76.

Nonetheless, no further action was taken until the notice of appearance was filed by Jerry Hong's new attorney on December 18, 2008. CP 66.

In the interim, Joni took substantial actions in reliance on the Decree:

* She changed her name from Joni Hong to Joni Seaman;
* She changed her social security card, her drivers license, her bank;

account information and ordered new checks;

* She changed her passwords at work;
* She had her debit and credit cards reissued in her proper name.
* She was in the process of changing her health license;
* She changed her phone;
* She notified her 401K Plan to have her statements changed;
* She updated her various bills including telephone, cell phones, gas, electric, water, sewer, and other basic utilities have all been updated.
* Northwest Airlines was notified and Northwest Airlines was processing two separate Qualified Domestic Relations Orders;
* She changed her beneficiary designations;
* She intended to file her taxes as a single person for the year 2008 and anticipated that under all circumstances her divorce would be final during the year 2008;
* She also relied on the finality of the dissolution for her mental well-being. She found his behavior morally objectionable; she wanted the marriage to be over for both moral and religious reasons.

CP 93-94.

## 4. ARGUMENT

### A. *Standard of Review*

The decision whether to grant a motion to vacate a judgment under CR 60(b) is directed to the discretion of the trial court and will not be reversed absent a manifest abuse of that discretion. Gustafson v. Gustafson, 54 Wn. App. 66, 70, 772 P.2d 1031, 1034 (1989).

The primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision was just and equitable. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc, 140 Wn. App. 191,

200, 165 P.3d 1271 (2007).

**B. *The Court Properly Exercised its Discretion in Refusing to Vacate the Findings of Fact and Conclusions of Law and the Decree of Dissolution.***

The court property exercised its discretion in refusing to vacate the Findings of Fact and Conclusions of Law and the Decree of Dissolution. Jerry Hong does not deny that he received proper notice of the trial that went forward on October 21, 2008. He acknowledged that his failure to appear at trial was nothing but his own fault. He sought to vacate the Dissolution Decree entered on that date pursuant to CR 60(b). Absence from the trial, alone, is not a reason to vacate the ruling.

CR40 contemplates that an adverse party may not appear for trial and that the trial can go forward. Under CR 40(a)(5) the rule provides as follows:

> "Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and ***in the absence of the adverse party***, unless the court for good cause otherwise directs, may proceed with his case and take a dismissal of the action, or a verdict or judgment, as the case may require." [Emphasis supplied]

In In Re Marriage of Daley, 77 Wn. App. 29, 888 P.2d 1194 (1994) the husband failed to appear for trial in dissolution of marriage proceedings. The court acknowledged that the wife would have had the right to proceed

to trial in the absence of her husband. Daley, 77 Wn. App. at 32-33.

The court rules provide that "CR 52 then addresses the trial court's entry of judgment and findings and conclusions '[i]n all actions tried upon the facts . . . .' CR 52(a)(1). CR 52(c) in particular, provides that a defeated party who has failed to appear at the hearing or trial need not be given notice before the entry of findings and conclusions." Daley, 77 Wn. App. at 32. The Daley case went on to discuss that the wife made a procedural flaw in her case by deciding to take a default judgment pursuant to CR 55 to dispose of the case instead of proceeding to trial in the absence of the husband. The court commented as follows:

> "The situation would certainly have been different had Linda proceeded with her case, specifically, if she had proceeded to trial and presented evidence on the record, then the trial court would have had the authority under CR 52 to enter findings, conclusions, and judgment without notice to Dan."

Daley, 77 Wn. App. at 32.

In the case at bench, Joni Seaman did proceed to trial. By thus proceeding, the Findings of Fact, Conclusions of Law and Decree of Dissolution were properly entered.

### C. *Jerry Hong Cites Case Law Concerning Default Judgments That Were Vacated. Those Cases Are Distinguishable from Court Decisions Concerning Entry of Judgment after Trial.*

Jerry Hong cites case law concerning default judgments that were vacated. Those cases are distinguishable from court decisions concerning entry of judgment after trial. Jerry Hong cites several cases in his brief to support the notion that the court should vacate the Decree of Dissolution. The cases cited by Jerry Hong include Norton v. Brown, 99 Wn. App. 118, 992 P.2d 919 (1999), Shepard Ambulance v. Helsell, et al, 95 Wn. App. 231, 974 P.2d 1275 (1999), Dalgardno v. Trumbull, 25 Wash. 362, 65 P. 528 (1901) and Titus v. Larsen, 18 Wash. 145, 51 P. 351 (1897). All of these cases address the issue of vacating a default judgment.

The present case was not a default judgment. This was a trial on the merits under CR 40 with resulting findings and judgment. These cases are inapposite to the situation before this court as this trial court did not enter a default judgment.

Mr. Hong had notice of the trial date and had an opportunity to be heard. When Mr. Hong did not appear, the trial court heard Ms. Seaman's testimony and entered Findings and Conclusions based upon the evidence presented, which the court in Daley recognized was different from entering

a default judgment in a party's absence.

The proper remedy to be pursued is not a CR 60 motion but a CR 59 motion for a new trial or reconsideration. Consequently, the Court should affirm.

**D. *Errors of Law Are Not Correctable by a CR60 Motion***

Errors of law are not correctable by a CR 60 motion. The CR 59 motion is also the proper remedy because Jerry Hong argues that he believes that there are errors of law. The errors of law are not conceded and will be addressed below.

Assuming, arguendo, that there were such errors, those errors of law on issues such as the division of separate property, the termination of spousal maintenance, the characterization of property, or the ordering of fees are not subject to CR 60. Errors of law are to be raised on appeal and do not support a motion to vacate. In re Marriage of Moody, 137 Wn.2d 979, 992, 976 P.2d 1240 (1999).

Additionally, after a trial has been held, the court does not have the power to simply revoke the disposition of property. RCW 26.09.170 provides "The provisions as to property division may not be revoked or modified, unless the court finds existence of conditions that justify the

reopening of a judgment under the laws of this State." Again, a party's failure to appear at a trial where they were given proper notice, does not meet the standard to vacate an order.

### E. *Mr. Hong's Failure to Attend Trial Was Not Excusable Under CR 60(b)(1)*

Mr. Hong's failure to attend trial was not excusable under CR 60(b)(1). Mr. Hong rests his motion to vacate on, *inter alia,* CR 60(b)(1) "mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order . . . ."

His failure to appear without a plausible explanation does not meet this standard.

The Court in TMT Bear Creek Shopping Center v. Petco Animal Supplies, 140 Wn. App. 191, 165 P.3d 1271 (2007) addressed a similar factual scenario. The defendant, PETCO, filed a motion to vacate, which the trial court denied. TMT Bear Creek, 140 Wn. App. At 195.

PETCO received an amended complaint and 20-day summons in the office of its general counsel. A legal assistant failed to enter information regarding the documents into PETCO's calendaring system; nor did she notify the general counsel of the dispute. The assistant went on an extended vacation and was injured while she was on vacation. Thus, she

did not return to work for several weeks. After PETCO failed to timely respond to the amended 20-day summons, TMT moved the trial court for an order of default. The trial court granted the motion. TMT Bear Creek, 140 Wn.2d at 195. TMT entered a default judgment against PETCO December 21, 2005. PETCO received notice of the default judgment in January 2006 and filed a motion to vacate February 28, 2006. TMT Bear Creek, 140 Wn. App. At 198-99. The court held that the failure to respond was due to a breakdown in internal office procedures and, therefore, not excusable neglect. TMT Bear Creek, 140 Wn. App. At 213.

Mr. Hong's neglect was similarly inexcusable. He had notice of the trial. He had notice in more than one form, as he had received notice of the trial date and had also received Joni's ER 904 submission for trial. He offers no excuse for not attending the trial other than simply forgetting the correct day. That is not excusable neglect, and this Court should affirm the trial court's entry of the Findings of Fact, Conclusions of Law, and Decree of Dissolution.

### F. *CR 60(b)(4) Does Not Apply Because There Was No Fraud, Misrepresentation, or Other Misconduct of the Adverse Party*

CR 60(b)(4) does not apply because there was no fraud, misrepresentation, or other misconduct of the adverse party. Jerry Hong

also suggests that CR 60(b)(4) applies. That section addresses fraud, misrepresentation, or other misconduct of the adverse party. Although this is cited in the brief of Jerry Hong there is no support for such statement. Without argument or authority to support them, assignments of error are waived. Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Because Mr. Hong has failed to provide any evidence, argument, or authority, the Court should hold that he has waived this argument.

**G. *The Judgment Is Not Void, So CR(b)(5) Does Not Apply***

The Judgment is not void, so CR(b)(5) does not apply. Though Mr. Hong does not explicitly argue that the judgment was void, the issue is raised and will be addressed here. He relies on In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989) for the proposition that a default judgment cannot award more than is requested in the Petition. However, that case involved a default judgment and, therefore, is not applicable to the case at bench.

Even if that case were applicable, the petition noted that the parties have separate and community assets and debt. The petition requested a fair and equitable distribution of those assets and debt. The Petition also requested maintenance. Consequently, the relief granted mirrored the relief

requested, and there was not error.

### H. *Mr. Hong's Failure to Appear for Trial Does Not Fall Within the Ambit of CR 60(b)(11)*

Mr. Hong's failure to appear for trial does not fall within the ambit of CR 60(b)(11). That section allows a judgment to be vacated for any other reason justifying relief from the operation of the judgment. The exception in CR 60(b)(11) is read narrowly and is to be "confined to situations involving extraordinary circumstances not covered by any other section of the rule." In Re Marriage of Yearout, 41 Wash. App. 897, 902, 707 P.2d 1367 (1985), quoting State v. Keller, 32 Wash. App. 135, 140, 647 P.2d 35 (1982). The only other reason cited by Jerry Hong are errors of law that are not correctable by CR 60, but to which CR 59 would apply if errors of law even existed. Consequently, there are no extraordinary circumstances and the trial court should be affirmed.

### I. *Assuming, Arguendo, That CR 60(b) Could Apply, Mr. Hong Fails to Satisfy the Four-part Test for Relief under CR 60(b)*

Assuming, *arguendo,* that CR 60(b) could apply, Mr. Hong fails to satisfy the four-part test for relief under CR 60(b). As noted above, this test should not apply in this case because judgment was not taken by default, but was taken following trial.

Assuming, *arguendo*, that CR 60(b) could apply in this case, the court then applies a four-pronged test: (1) That there is substantial evidence to support at least a *prima facie* defense to the claim asserted by the opposing party; (2) That the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise or excusable neglect; (3) That the moving party acting with due diligence after notice of the default judgment; and (4) That the opposing party will not suffer substantial hardship if the default judgment is vacated. Johnson v. Cash Store, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003).

**J. *Mr. Hong Failed to Assert a Prima Facie Defense***

Mr. Hong failed to assert a prima facie defense. The court made a ruling based upon the evidence to make and fair and equitable division of the property. The amended petition as well as the response requests that "The court should make a fair and equitable division of all the property."

Jerry Hong is arguing under this factor that the current division of assets by the court is somehow unfair. Pursuant to RCW 26.09.080, the court is to make a just and equitable distribution of marital property. Marriage of Rockwell, 141 Wn. App. 235, 243, 170 P.3d 572 (2007). The court's distribution is reviewed for manifest abuse of discretion. Rockwell,

141 Wn. App. at 242-43.

In this case, there was no abuse of discretion. The court amended it's order by ordering that the provision awarding Joni 50% of the Northwest Airlines Pension Plan for Contract Employees would only apply to the period commencing March 7, 1981 through November 1, 2007 and ordering a new Qualified Domestic Relations Order.

A financial disparity in the Decree is not a basis to vacate it.

### K. *Second Prong: Jerry Hong's Failure to Timely Appear Was Due Inexcusable Negligence*

Jerry Hong's failure to timely appear was due inexcusable negligence. The second prong is whether the moving party's failure to timely appear was due to mistake inadvertence, surprise, or excusable neglect. As argued above, Jerry Hong's failure to appear at trial was inexcusable and, therefore, he fails to meet this prong of the test.

### L. *Third Prong: Jerry Hong Failed to Act with Diligence After the Entry of the Dissolution Decree*

Jerry Hong failed to act with diligence after the entry of the dissolution decree. The third prong requires that the moving party act with diligence after notice of the default–or in this case, he argues, after notice of the judgment. Again there was no default judgment. If the issue of diligence

alone is analyzed, Jerry Hong waited over two months to act on this even though he acknowledges he discovered his error on or about October 28, 2008. This matter could have been noted and heard expeditiously, but instead he delayed his motion to vacate the Decree until almost two months after its entry.

### M. *Fourth Prong: Joni [Hong] Seaman Will Suffer Substantial Hardship If the Decree Is Vacated*

Joni [Hong] Seaman will suffer substantial hardship if the Decree is vacated. The final prong concerns whether the opposing party, Joni Seaman, will suffer substantial hardship if the Decree is vacated.

Joni Seaman relied upon the finality of the decree: She changed her name; she changed her social security card, her drivers license, her bank account information and ordered new checks. Her passwords at work had to be changed because all passwords at her employer involve the employee's first and last names. Her debit cards and credit cards had to be reissued in her proper name. She was in the process of changing her health license with the State of Washington due to her work in the nursing field. Her phone had been changed. She notified her 401K Plan to have her statements changed. All of her various bills including her telephone, cell phones, gas and electric, water, sewer, and other basic utilities were

changed. Northwest Airlines was notified and Northwest Airlines was processing two separate Qualified Domestic Relations Orders. She also changed all of her beneficiary designations on her various assets. She went forward with planning for her future. She intended to file her taxes as a single person for the year 2008 and anticipated that under all circumstances her divorce would be final during the year 2008.

She has also relied emotionally and psychologically on the finality of the decree: On a psychological level, the finality of the dissolution was essential due to Mr. Hong's engagement in morally objectionable behavior. Joni Seaman was insistent that she needed the dissolution to be final on both moral and religious levels.

**N. *Jerry Hong Attempts to Raise What Should Be Characterized as Findings of Fact That Are Supported By Substantial Evidence and Errors of Law That Are Not Subject to CR 60***

The court reviews findings of fact for substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The findings of fact are supported by substantial evidence.

1. Separation Date. The first area where Jerry Hong tries to create confusion is the issue of the date of separation. It is a factual determination by the court to determine the date of separation. Although

Ms. Seaman filed for divorce on December 13, 2006, the parties continued to cohabitate until on or about November 1, 2007. This was the reason for that being determined to be the date of dissolution. The date of filing a petition for dissolution does not equate to necessarily a finding that a marriage is defunct. It is a factual determination. In the present case, the parties continued to live together until November 1, 2007.

2. All Property Before the Court. Jerry Hong attempts to raise the issue that the court allegedly awarded retirement that could have been separate property of Mr. Hong to Ms. Seaman. Even if this happened, this is completely permissible and allowed by the court, RCW 26.09.080 provides that all property is before the court "either community or separate". Jerry Hong even cites RCW 26.16.140 that defines the community relationship as terminating when the parties are living separate and apart. Jerry Hong nowhere refutes that he moved out of the residence in approximately November 2007. If anything, Ms. Seaman should have had a community interest up to November 14, 2007 but chose to round the separation date to November 1, 2007 to make the dividing of retirement easier. Moreover, the court amended its order by limiting the award to Joni, stating that her 50% of the Northwest Airlines Pension Plan for

Contract Employees would only apply to the period commencing March 7, 1981 through November 1, 2007 and ordering a new Qualified Domestic Relations Order to be prepared.

The court had authority to divide all of the property. The petitioner plead for the court to make a fair and equitable division at a later date. This provided Jerry Hong notice that the petitioner would be asking the court to make this division at a later date. Jerry Hong had notice that the court would divide the community and separate property, divide debts and liabilities, and determine an award of spousal maintenance. The Decree did not exceed the relief requested. If the Decree did exceed the relief requested, the remedy still is a CR 59 motion and not a CR 60 motion.

3. Characterization of Property

Jerry Hong next cites that he does not agree with the characterization of some of the community and separate property. He claims the court mischaracterized his property. This again is not a basis to vacate. The failure to list, value or characterize property are wholly legal issues that are not be corrected by a CR 60(b) motion but should be raised on appeal. In Re Marriage of Tang, 57 Wn. App. 648, 654 - 56, 798 P.2d 118 (1990).

4. Maintenance

Mr. Hong claims that maintenance should not be paid beyond his death because this contrary to law. This is incorrect.

He incorrectly cites the law. RCW 26.09.170 specifically allows a court under subsection (2) that "Unless otherwise . . . . expressly provided in the Decree the obligation to pay future maintenance is terminated upon the death of either party . . ." In this specific case, Ms. Seaman extended the spousal maintenance to be paid until the wife is entitled to collect her share of the Northwest Airlines Pension Plan for Contract Employees and her share of the Northwest Airlines Pension Plan for Salaried Employees that provide her sufficient income to replace the spousal maintenance. There is nothing contrary to law as the court can specifically extend payments beyond a party's death if noted in the decree. Jerry Hong confuses this with a provision concerning nonmodifiable maintenance and cites cases addressing nonmodifiable maintenance. Nonmodifiable maintenance may not be ordered by a court unless the parties expressly consent in writing. This has nothing to do with this specific issue.

On the award of maintenance, the court did hear testimony concerning Ms. Seaman's financial need for spousal maintenance as well as Mr.

Hong's ability to pay spousal maintenance. Likewise, spousal maintenance was in line with the findings previously made by the court commissioners after a full hearing on January 24, 2008. After trial with Judge Grant, she also ordered spousal maintenance. These arguments also apply to the issue of attorneys fees and costs. Ms. Seaman presented testimony concerning these issues and the court made appropriate awards of attorneys fees and costs.

5. Inapplicable Cases: The cases cited by Jerry Hong are inapplicable to the facts of the present case.

In Re Marriage of Nuss, 65 Wn. App. 334, 828 P.2d 627(1992). This case has nothing to do with vacating a Decree. This case stands for the proposition that the separation date requires a renunciation of the marriage that can be evidenced by a party's conduct. Ms. Seaman addressed the issue of why November 1, 2007 was the actual date that the parties' marriage was defunct.

Norton v. Brown, 99 Wn. App. 118, 992 P.2d 1019 (1999). This is a personal injury case and not a divorce case. This case also did not involve a trial but involved a default. This case involved confusion between an insurance company and an insured in tendering a defense. It was inapplicable to the facts of this case where Mr. Hong does not suggest that

he had tendered his legal representation in this case to anyone but himself. He was appearing pro se.

Shepard Ambulance v. Helsell, 95 Wn. App. 231, 974 P.2d 1275 (1999). This is an attorney malpractice claim within a personal injury case. Again, it is not a divorce specific case. It also involves a default judgment and not a trial. This case is actually helpful to Ms. Seaman to the extent that in attempting to vacate a judgment Jerry Hong cannot merely state allegations and conclusions in his declaration but must state actual facts. Id. at 239. In this particular case, Jerry Hong's declaration is conclusory with no specific facts other than his own inexcusable neglect.

Titus v. Larsen, 18 Wash 145, 51 P. 351 (1897). Again, this is not a divorce case. It also involved a default judgment and not a trial. This case involved a default judgment that was entered despite the fact that the defending attorney attempted to communicate with plaintiff's attorney through local counsel, appearing at the actual attorney's law office on the day of default, and appearing in the courthouse on th day of trial. It is factually distinguishable and not relevant to the factual situation of Mr. Hong.

Dalgardno v. Trumble, 25 Wash 362, 65 P. 528 (1901). Again, this

was real estate mortgage case and not a divorce case. It also involved a default judgment and not a trial like in the present case. It actually includes an amusing set of facts where the defense attorney was walking to the courthouse to enter his notice of appearance on a case when the plaintiff's attorney drove past him presumably on horseback or carriage beating him to the courthouse and entering a default judgment. Mr. Hong in no way alleges that he appeared on the day of trial or attempted to appear on the day of trial.

Morgan v. Burks, 17 Wn. App. 193, 563 P.2d 1260 (1977). The final case cited is again a personal injury case and not a divorce case. It also had a very unique set of facts not applicable to the current case where the parties entered into a stipulated settlement agreement and the court vacated the settlement agreement finding that the plaintiff's attorney did not have authority to settle the case especially in light of the fact that plaintiff was now an adult and not a minor so his guardian in fact no longer had ability to settle for him. This case likewise is inapplicable to the Hong case.

**5. ATTORNEYS FEES**

Ms. Seaman should be awarded to reasonable attorneys fees and costs for responding to the appeal. She has had a financial need for assistance

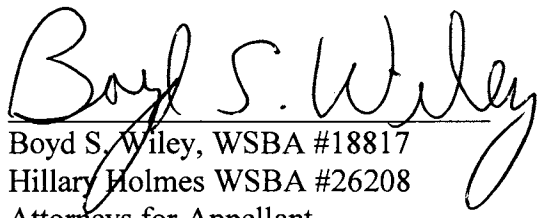
with her attorneys fees and costs throughout these proceedings. Attorneys fees are awardable on CR 60(b) motions in applying RCW 26.09.140.

If for any reason the court is inclined to reverse, then CR 60 does provide that this may only be granted "upon such terms as are just". This should require Mr. Hong to pay all of Ms. Seaman's legal fees concerning the preparation for the prior trial, the appearance at trial, and all legal fees associated with responding to this motion to vacate. In addition, he should post a sufficient bond that if he does not better himself at trial, Ms. Hong would be awarded substantial funds to compensate her for the costs of the new trial.

## 6. CONCLUSION

The court should affirm the trial court because Mr. Hong's failure to appear for trial was inexcusable and the trial court properly entered the Dissolution Decree.

**RESPECTFULLY SUBMITTED** this 2 day of October, 2009.



Boyd S. Wiley, WSBA #18817
Hillary Holmes WSBA #26208
Attorneys for Appellant

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STATE OF WASHINGTON
BY
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**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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|---|---|
| JONI HONG,<br>Respondent,<br>and<br><br>JERRY HONG,<br>Appellant. | Case No. **39074-4-II**<br><br>**AFFIDAVIT OF MAILING** |

MICHELLE A. LEA, being first duly sworn on oath, deposes and says:

That on the 2 day of ~~September~~ october, 2009, she placed a true copy of the **BRIEF OF RESPONDENT, JONI (HONG) SEAMAN** on file in the above-entitled matter, in an envelope addressed to below stated as follows:

Herbert Gelman
Attorney at Law
1101 Fawcett Ave., Ste. 300
Tacoma, WA 98402-2015

That she placed and affixed proper postage to the said envelope, sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Puyallup, County of Pierce, State of Washington.

Michelle Lea
MICHELLE A. LEA

**SUBSCRIBED AND SWORN** to before me this 2nd day of ~~September~~ October, 2009.

Printed Name: Toni M. Conway
**NOTARY PUBLIC** in and for the State of Washington residing at Puyallup
My commission expires: 9-6-12