

Nº. 39817-6-II

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

SHERRY KAY GARLINGTON,

Respondent,

v.

JAMES DALE GARLINGTON,

Appellant.

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BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Appellant James Garlington was ordered on January 25, 2008 to provide full answers to Respondent Sherry Garlington's discovery requests within 30 days and warned that if he did not do so, the court would hear a further motion by Ms. Garlington. Mr. Garlington did not comply with the discovery order.

He was ordered on April 18, 2008 to provide full answers to the discovery requests within one week and warned that if he did not do so, the court would enter an order striking his pleadings. Mr. Garlington did not comply with this second discovery order.

The court mailed a copy of the Order Amending Case Schedule, showing the trial date of October 21, 2008, to Mr. Garlington at the address provided by Mr. Garlington's attorney and affirmed by Mr. Garlington in open court. Mr. Garlington did not appear at trial.

On October 21, 2008, the Court struck Mr. Garlington's pleadings, entered an Order of Default, and entered Findings of Fact and Conclusions of Law and a Decree of Dissolution after hearing Ms. Garlington's testimony and receiving her evidence.

On September 28, 2009, Mr. Garlington filed a Notice of Appeal from the trial court's denial of his motion to set aside the Order of Default and Vacating the Decree of Dissolution and Findings of Fact/Conclusions

of Law. The trial court made no errors, and its decisions should be affirmed.

II. ASSIGNMENTS OF ERROR

Respondent assigns no errors to the trial court's decisions.

III. RESTATEMENT OF THE CASE

After 30 years of marriage, James Garlington "stood up" during dinner one evening in the week of June 11, 2007, and told Sherry Garlington "that he 'was done.' He was leaving me and wanted a divorce." CP 96. When Ms. Garlington attempted to pay her attorney's retainer with a credit card a few days later, it was declined. CP 97. She went immediately to her credit union, where she learned that Mr. Garlington had "maxed out the Visa." *Id.*

On June 18, 2007, Mr. Garlington removed all funds from the community checking and savings accounts, leaving Ms. Garlington and her dependent grandson with no money whatsoever. CP 96-97. On June 20, 2007, Sherry Garlington filed a Petition for Dissolution of Marriage. CP 89-92.

Although Ms. Garlington is disabled and receives Social Security Disability income of only \$817 per month (CP 112; CP 137), Mr. Garlington stated in his Response to Petition "[b]oth parties are able-bodied individuals and neither should receive an award of spousal

maintenance.” CP 104. Mr. Garlington admitted he had taken Ms. Garlington’s name off two credit cards (CP 107) and had “closed all of the credit card accounts.” CP 109. He asked the Court to order Ms. Garlington to pay “all credit card debts” listed on her Financial Declaration as well as “all of her other expenses,” and asked the Court to “order the home to be sold at this time.” *Id.*

A Temporary Order was entered on July 18, 2007, requiring Mr. Garlington to pay Ms. Garlington maintenance in the amount of \$2,000 per month and \$1,000 per month toward the first mortgage on the family home. CP 124.

On October 18, 2007, the Court entered an Order Setting Case Schedule, with trial to begin on June 17, 2008. CP 159. At this time, Mr. Garlington was represented by counsel. CP 160.

On November 8, 2007, Ms. Garlington filed a Motion/Declaration for an Order to Show Cause re Contempt. CP 161. Between entry of the Temporary Order in July and the time Ms. Garlington filed her Motion in November, Mr. Garlington had paid only \$6,279 of the \$12,500 he had been ordered to pay. CP 165.

On December 3, 2007, Mr. Garlington was found in contempt of court and judgment was entered in favor of Ms. Garlington in the amount of \$8,721 for back maintenance from July 2007 to December 31, 2007.

CP 181. Mr. Garlington's Motion for Revision of the November 8th Order finding him in contempt was denied. CP 195-196.

On January 14, 2008, Ms. Garlington filed a motion to compel responses to discovery requests served in November of 2007 (CP 197; CP 200-201), and on that same date, Mr. Garlington's counsel filed a Notice of Intent to Withdraw. CP 198-199. Mr. Garlington's counsel set out Mr. Garlington's address in his Notice of Intent to Withdraw as 601 166th St. S, Spanaway, WA 98387. CP 199. The trial court's order granting Ms. Garlington's motion to compel included the following language:

Responses to the discovery must be provided no later than 30 days from January 25, 2008. **If not received the court will hear further motion by Petitioner.**

...

Resp. address for service is set forth in the Notice of Withdrawal.

CP 203 (emphasis added).

Mr. Garlington appeared pro se at the hearing on the motion to compel and signed the Order re: Motion to Compel. CP 204. Discussing his address for notice, Mr. Garlington affirmed that his address was "the address Mr. Lopez put in" his Notice of Withdrawal, and the Court instructed Mr. Robinson "that's the address you will use to send notice to." Verbatim Report of Proceedings of January 25, 2008, page 5, lines 5-14.

On February 26, 2008, Ms. Garlington filed a Motion to Adjust Trial Date and a Note for Motion Docket for hearing on March 14, 2008. CP 205-207. A copy of the Motion for Adjustment of Trial Date and Note for Motion Docket was mailed to Mr. Garlington at the address set forth in his former counsel's Notice of Intent to Withdraw. CP 208-209.

On March 7, 2008, Plaintiff filed a second Motion to Compel Discovery and/or Strike Pleadings and for Award of Attorney's Fees. CP 210-212. Mr. Garlington had delivered incomplete and insufficient answers and had not responded to Ms. Garlington's Supplemental Request for Production of Documents. CP 211. Ms. Garlington asked the court "to enter an Order striking Mr. Garlington's pleadings and/or to compel that he provide all the documents in his possession pursuant to the Request for Production of Documents and to answer all questions set forth in the interrogatories as completely as possible." *Id.*

At the March 14th hearing on Ms. Garlington's Motion to Compel Discovery and/or Strike Pleadings, the Court entered an Order stating:

This matter shall be continued to April 18, 2008 to determine Resp. compliance in providing discovery.

Resp. shall provide all documents in his possession in compliance with the discovery requests of Petitioner immediately.

CP 218.

Mr. Garlington was not present at the March 14th hearing. CP 68. Following the March 14, 2008 hearing, an Order Amending Case Schedule was entered by the Court, setting trial for October 21, 2008. CP 73. Contrary to Mr. Garlington's assertion at page 11 of his Brief that "[t]here is no indication in the record that notice was ever provided to the husband that the trial was going to proceed on the October 21, 2008 date," **the record shows that the Court mailed a copy of the Order Amending Case Schedule to Mr. Garlington.** CP 74.

Ms. Garlington's counsel sent to Mr. Garlington at the address in the court file, and he received, a copy of the Note for Motion Docket *renote from the March 14th hearing date. CP 220; Brief of Appellant, pages 3-4.

Mr. Garlington was present at the April 18, 2008 hearing on Ms. Garlington's Motion to Compel, but refused to sign the Order re: Motion to Compel (CP 223), in which the Court stated:

All answers to discovery in full shall be provided to Petitioner's attorney's office no later than noon April 25, 2008. **If they are not the Court will enter an order striking Respondent Husband's pleadings.**

CP 222 (emphasis added).

Mr. Garlington was informed of the "harsh" sanction that would be imposed after the court had previously imposed monetary sanctions two

times, \$250 on January 25, 2008 (CP 203) and \$500 on April 18, 2008 (CP 222), which had proved ineffective in compelling Mr. Garlington to comply with discovery orders.

On May 22, 2008, a Settlement Conference was held. The presiding Commissioner wrote: "Mr. Garlington was antagonistic, uncooperative, and unrealistic in his position. . . . The Respondent is behind on his temp orders – contempt action contemplated." CP 224.

On May 30, 2008, Ms. Garlington filed another Motion/Declaration for an Order to Show Cause re Contempt, seeking a judgment for delinquent spousal maintenance and mortgage payments under the Temporary Order. CP 225-228. Ms. Garlington requested imprisonment because Mr. Garlington had not complied with the Temporary Order, had not provided discovery, and financial records subpoenaed by Ms. Garlington showed that while he had made no payments on an American Express account during January – April of 2008, he had charged \$5,000 to pay his former attorney, made a \$2,883.18 purchase from Jared's Jewelry, taken numerous large cash withdrawals and taken trips to various places. CP 232.

In addition, although he had been ordered to pay the second mortgage on the family home, he told Ms. Garlington and her attorney that

he had paid only interest on the second mortgage and the loan was going into foreclosure. *Id.*

Finally, although Mr. Garlington had repeatedly insisted to the Court that he had no income from his landscaping business, Ms. Garlington presented declarations by individuals who had witnessed Mr. Garlington performing landscaping work over the preceding few months. CP 233.

On July 1, 2008, the Court entered judgment against Mr. Garlington in the amount of \$11,000 for maintenance and support for the period of January 2008 through July 2008, and \$1,500 in attorney's fees. CP 237. The Court found that Mr. Garlington had intentionally failed to comply with three orders regarding payment of spousal maintenance and the mortgage, but continued the issue of contempt until August 5, 2008 in order to appoint an attorney to represent Mr. Garlington because incarceration had been requested. CP 238.

At the August 5, 2008 hearing on contempt, the Court found that Mr. Garlington had failed to pay spousal maintenance and mortgage payments pursuant to the Temporary Order while he had funds and income to do so. CP 276. The Court entered a judgment against Mr. Garlington for back maintenance for the month of August 2008 in the amount of \$2,500, and an award of \$7,500 for attorney's fees. *Id.*

On August 29, 2008, the Order re Contempt was revised, requiring Mr. Garlington to bring all spousal maintenance current pursuant to three court orders: (1) December 3, 2007, in the amount of \$8,721; (2) July 1, 2008, in the amount of \$11,000; and (3) August 5, 2008, in the amount of \$2,500, totaling \$22,221, no later than close of business on September 20, 2008. CP 285. The Order re: Revision also stated that if Mr. Garlington did not pay the arrearage by close of business on September 20, 2008, “he must report to the Pierce County jail by noon September 21, 2008 for an indefinite period of time until he pays said spousal maintenance in full.”

Id.

After spending five days in jail, Mr. Garlington was present in court on September 26, 2008 for a review hearing on the conditions of his incarceration and purge conditions, during which time Mr. Robinson stated on the record, “This case is set for trial in October. I don’t know if we are even going to get out, but I think it’s October 17th.” Verbatim Transcript of September 26, 2008 Review Hearing, page 10, lines 16-18.

Mr. Garlington did not appear at trial on October 21. Verbatim Transcript of Proceedings of October 21, 2008, page 23, lines 6-13. At that time, Ms. Garlington presented a Motion to Strike Pleadings (CP 16-18) and a Motion and Declaration for Default. CP 21-24. The following colloquy took place when the court called the case:

THE COURT: This is regarding the Marriage of Garlington 07-3-02-080-1. Came on today for trial.

It had been sent up to administration earlier this morning because we are in a criminal trial. Subsequently sent to Department 18 that recused themselves and then came back here. Throughout the morning and up until now, which is 2:40 p.m., apparently Mr. Garlington has not appeared. Mr. Robinson?

MR. ROBINSON: Jeffery Robinson on behalf of Sherry Garlington, 07-3-02080-1.

That is correct, Ms. Garlington and I showed up at 9:00 a.m. to administration, we waited until approximately quarter to 11:00 and we were instructed to return here at 2:30. Mr. Garlington did not make an appearance at any time during the morning and obviously isn't here today. I have prepared, during the lunch hour, some motions. I have a Motion and Declaration for Default and Order of Default. I also have a Motion to Strike Pleadings and an Order to Strike Pleadings, if I may pass those up to you for your consideration.

I think that Mr. Garlington is in default for failing to appear. As the court may recall, there was a prior order that you entered, I believe it was in April of this year, where if he did not comply with discovery requests you would consider striking his pleadings, and I think that his failure to appear today also warrants that order.

THE COURT: Do you have any idea where he is, or has there been any communication with him? He's been pretty vocal, at least the last couple of appearances, that he wanted to be here and intended to defend and –

MR. ROBINSON: I have no idea.

THE COURT: Not in the hospital, to your knowledge?

MR. ROBINSON: No.

MRS. GARLINGTON: No.

MR. ROBINSON: No.

THE COURT: Does appear that Mr. Garlington has not supplemented the appropriate discovery requests. **I will, based upon prior rulings, strike his pleadings. Also enter the Order of Default.**

Verbatim Report of Proceedings of October 21, 2008, page 23, lines 6-25; page 24, lines 1-21 (emphasis added).

The trial court then proceeded to hear Ms. Garlington's testimony and received her documentary evidence, following which it stated:

Do you have your proposed findings so I can review them?

...

Well, I think it is apparent from both this record and also prior dealings with Mr. Garlington that his way to defend in this case was to create an economic bankruptcy situation for Ms. Garlington and either force her to come to his terms, which was to sell the house and/or minimize her need for spousal maintenance or he would effectively create economic ruin, and he's done that for the most part.

I think that supports the finding that his intransigence has caused significant escalation and the costs of his dissolution. It's always frustrating to see the costs of dissolution so high when the assets are minimal. Basically, you – whether or not there is even any equity in the home remains to be seen, but through no fault of your own, you were put in this position by him, so I recognize that.

I recognize how some may look at this and say this is patently unfair to Mr. Garlington, but the reality is, he has

come up with assets when he needed to come up with assets. He's come up with payments when he's needed to come up with payments. He has the means to produce more than just his stated income on the VA benefits.

...

He has had an ongoing business that he's owned for a number of years that there is not being a specific value attached to except for the assets that you believe that he's taken from the community and I'll adopt those numbers.

I will adopt the proposed Findings and Conclusions and the proposed divisions of assets and liability and the proposed judgments as indicated. I would also find the marriage to be irretrievably broken. Also find that Mr. Garlington has the ability to pay spousal maintenance and that there clearly is a need for spousal maintenance.

Verbatim Transcript of October 21, 2008, page 51, lines 12-13 and 15-25; page 52, lines 1-17 and 19-25; page 53, lines 1-4.

The court entered Ms. Garlington's proposed Findings of Fact and Conclusions of Law (CP 27-33) and the Decree of Dissolution. CP 34-42.

On September 4, 2009, Mr. Garlington filed a "Motion to Vacate Order of Default, Decree of Dissolution, And, Findings of Fact and Conclusion of Law." CP 49-59. At the hearing on the Motion, Mr. Garlington's counsel argued that the Order to Strike Pleadings, Order on Motion for Default, Findings of Fact and Conclusions of Law, and Decree of Dissolution should be vacated for three reasons: (1) Mr. Garlington did not receive notice of the motion for default; (2) enforcement of the decree

would be inequitable; and (3) Mr. Garlington's failure to appear at the trial was the result of mistake, inadvertence, irregularity or excusable neglect. Verbatim Report of Proceedings of September 18, 2009, page 59, lines 16-22.

At the hearing on the motion to vacate, Mr. Garlington's counsel argued that Mr. Garlington "did not receive a copy of the case schedule." *Id.*, page 59, lines 4-5. Ms. Garlington's attorney responded,

The first problem is right out of the box the clerk's print-out of the case schedule shows courtesy copy was sent to Mr. Garlington at the address that was on the notice of intent to withdraw that James Lopez filed January 14, 2008. That would be the clerk's notice of where to send materials. And Mr. Garlington knew that that was the address that at least Mr. Lopez believed he lived at and had filed.

Id., page 62, lines 12-19. *See also* Verbatim Report of Proceedings of January 25, 2008, page 5, lines 5-14.

After hearing argument, the Court ruled:

Mr. Garlington, in my recent days as a – actually in my time on the superior court bench as a judge – is the only dissolution party that I have put in jail for contempt. Mr. Garlington made statements throughout while the case was pending that he would see that Ms. Garlington got nothing.

Mr. Garlington, when given opportunities to cooperate chose the other course, he chose to obfuscate, lie, manipulate. **There is nothing about Mr. Garlington's presentation at any point that I would find credible.** There's no declaration that he could sign that says, "Gee, I got a raw deal" that I would find credible.

During the course of this litigation, he did things such as spending about \$23,000 on an American Express card to take trips to the ocean, to buy jewelry for either a fiancée, girlfriend, or a relative, depending on which version you believe. But in the course of I think 60 days, basically, he incurred \$23,000 in debt and then walked away from it. That was just one of his escapades.

He wouldn't cooperate regarding the home issue. He made it as difficult as possible. I think he lied about his extra income. There are declarations that were filed that basically said he was working side jobs, one declarant said he paid him over \$10,000 working side jobs during the course of the dissolution when Mr. Garlington basically was saying he was disabled and unable to work.

Mr. Baldwin, you know, I very rarely would enter a default at the time of trial. Generally it's unnecessary. He didn't show up for the time of trial. **He was advised of the trial date. But previously in this case there was an order that said that if Mr. Garlington did not cooperate with outstanding discovery requests, any of his pleadings would be stricken. And, in effect, that's what happened.** He never cooperated.

Mr. Robinson was in here on a weekly or bi-weekly basis either trying to get discovery completed and/or for Mr. Garlington to pay maintenance, which he refused to do. I put him in jail, he finally came out, started making payments, but it was way below what he was ordered to do.

I don't find Mr. Garlington's declaration as to what his income would be based upon Ms. Garlington's award of maintenance and/or portions of spousal or of retirement to be credible. I think he has the ability to earn substantial income, even in a retired state, and if he wanted to protect his position, he should have done so at the trial.

I don't think you can be as difficult as Mr. Garlington was throughout the trial – or throughout the case, then say

afterwards that you got a raw deal. Like Saddam Hussein saying he was framed. The motion for relief is denied.

I know there's ongoing contempts. It's interesting, I just saw a note, I had never seen it before, but Commissioner Johnson apparently did a settlement conference. Commissioner Johnson is probably one of the most easy-going individuals on the bench, and Commissioner Johnson on his settlement conference memorandum said: Mr. Garlington was antagonistic, hostile and unrealistic in all of his positions.

He's still that way. And I am going to deny the request for relief.

Verbatim Report of Proceedings, September 19, 2009, page 65, lines 7-25; page 66, lines 1-25; page 67, lines 1-18 (emphasis added.)

Mr. Garlington appeals from the trial court's denial of his motion to set aside the order of default and vacate the Findings of Fact and Conclusions of Law and the Decree of Dissolution.

IV. ARGUMENT

A. There was no "default judgment" entered in this case.

Mr. Garlington filed a Declaration in Support of Motion to Vacate, in which he asserted that he "was unaware" of the October 21, 2008 trial date. CP 62. The trial court found that Mr. Garlington's presentation on the Motion to Vacate was not credible. *See* Verbatim Report of September 18, 2009, page 65, lines 15-16. The trial court stated that Mr. Garlington had received notice of the trial date (*Id.* at page 66, line 11),

and the documentary evidence confirms that a copy of the Order Amending Case Schedule, dated March 14, 2008, was sent directly to Mr. Garlington, who was not present at the March 14th hearing. *See* CP 215-216.

CR 40 governs the assignment of cases and provides that after notice of the trial has been given, either party may “proceed with his case” and receive a judgment despite the absence of the adverse party. CR 40(a)(5). 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 prior to the court’s entry of findings and conclusions.

In re Marriage of Daley, 77 Wn. App. 29, 32, 888 P.2d 1194 (1994).

Ms. Garlington did not seek a default judgment under CR 55(b), and no default judgment was entered. This case was “tried upon the facts” presented to the court at the time appointed for trial. *See* CP 15; Verbatim Transcript of October 21, 2008, pages 25-56.

Entry of a default judgment without notice under CR 55 should not be confused with the trial court’s authority under CR 52 to enter findings, conclusions, and judgment without notice to a party who has waived the right to notice by failing to appear at a hearing or trial. The latter is applicable only after the opposing party has proceeded to trial and presented evidence on the record.

Karl B. Tegland, 4 Washington Practice, Rules Practice CR 55 (5th ed.) (citing *In re Marriage of Daley*, 77 Wn.App. 29, 888 P.2d 1194 (1994)).

The standards set out in CR 55(b) and CR 60 related to entry and setting aside of a default judgment do not apply in this case.¹ Instead, because Ms. Garlington proceeded to trial and presented evidence on the record, the trial court “had the authority under CR 52 to enter findings, conclusions, and judgment without notice to [Mr. Garlington].” *Daley*, 77 Wn. App. At 32, 888 P.2d 1194. *See also* CR 52(c) (“Persons who have failed to appear at a hearing or trial after notice, may, in the discretion of the trial court, be deemed to have waived their right to notice of presentation or previous review of the proposed findings and conclusions.”).

The trial court neither committed error nor abused its discretion by trying this case on the facts presented at trial, and neither committed error nor abused its discretion by entering Findings of Fact and Conclusions of Law following Ms. Garlington’s testimony. Ms. Garlington neither sought nor was granted a “default judgment” under CR 55(b).

B. The trial court did not abuse its discretion by denying Mr. Garlington’s motion to vacate the Findings of Fact and Conclusions of Law and the Decree of Dissolution.

Mr. Garlington based his Motion to Set Aside Order of Default, Decree of Dissolution, And, Findings of Fact and Conclusion of Law on

¹ Thus, Mr. Garlington’s arguments and citations to authorities discussing default judgments at pages 10, 12, and 14-15 of his Brief are inappropriate and inapplicable in this case.

the position that the Findings of Fact and Conclusions of Law and Decree of Dissolution constituted a “default judgment.” See CP 54. As discussed above, there was no default judgment sought or entered in this case. The Findings of Fact and Conclusions of Law and the Decree of Dissolution were not entered under CR 55(b), but under CR 40(a)(5) and CR 52(c).

Mr. Garlington also argued in his Motion and on this appeal that “the respondent’s failure to appear at the trial was occasioned by mistake, inadvertence, irregularity or excusable neglect.” CP 58; Brief of Appellant, page 14. CR 60(b)(1) provides that a court may relieve a party from a final judgment on grounds of “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.”

A motion to vacate an order or judgment under CR 60(b) is “addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion, i.e., only when no reasonable person would take the position adopted by the trial court.” *In re Marriage of Burkey*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984) (citing *Griggs v. Averbek Realty, Inc.*, 92 Wash.2d 576, 584, 599 P.2d 1289 (1979); *Haller v. Wallis*, 89 Wash.2d 539, 543, 573 P.2d 1302 (1978); *Morgan v. Burks*, 17 Wn. App. 193, 197-98, 563 P.2d 1260 (1977)).

1. Neither Ms. Garlington nor her attorney had a duty to inform Mr. Garlington of the trial date.

In his Motion and supporting Declaration to vacate the Findings of Fact and Conclusions of Law and the Decree of Dissolution, Mr. Garlington asserted that he failed to appear at trial because he “was never served with a copy of the revised case schedule” (CP 61), and “he was led to believe by opposing counsel that the trial would not be happening anytime soon” (CP 51) because

On October 7, 2008, opposing counsel contacted me by phone and told me that I had until October 16, 2008 to produce documents or he would file a motion to compel. He further informed me that he would be scheduling his motion to compel for October 24, 2008. Opposing counsel sent me a confirmation letter of our conversation.

If the trial was scheduled for October 21, 2008, which presumably opposing counsel was aware, why would he tell me that he was going to schedule a hearing to compel discovery for October 24, 2008? That date would have been three days after the trial date. Since discovery was continuing, obviously I was led to believe the trial date was not at hand.

CP 62.

First, the trial court sent a copy of the Order Amending Case Schedule directly to Mr. Garlington. CP 215-216. Even after considering Mr. Garlington’s motion to vacate and his supporting declaration, the trial court found that Mr. Garlington had been advised of the trial date.

Verbatim Transcript of September 18, 2009, page 66, line 11.

Second, Mr. Garlington was present in court on September 26, 2008, when Ms. Garlington's counsel stated on the record, "This case is set for trial in October. I don't know if we are even going to get out, but I think it's October 17th." Verbatim Transcript of September 26, 2008, page 10, lines 16-18. If Mr. Garlington had any doubt or question about the actual trial date at that time, he should have taken steps to ascertain when trial was set to begin. He failed to do so.

Mr. Garlington blames Ms. Garlington's counsel for his failure to appear at trial. "As **between attorney and client**, there is a duty to keep the **client** informed of material developments in the matters being handled for the client 'to avoid misunderstanding.'" *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (emphasis added). However, Mr. Garlington was not a client of Ms. Garlington's counsel, and Ms. Garlington's counsel owed Mr. Garlington no duty to keep him informed of the trial date.

As a pro se litigant, Mr. Garlington had the duty to keep himself informed of material developments in the case. The *Burkey* Court noted in that dissolution case that Mr. Burkey was "not responsible for the quality of the attorney's advice given Mrs. Burkey." *In re Marriage of Burkey*, 36 Wn. App. 487, 490, 675 P.2d 619 (1984). In fact, no one but Mr.

Garlington was responsible for his failure to ascertain the trial date if, in fact, he did not know what it was.

Third, pro se litigants are bound to the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Attorneys are not entitled to wait for opposing counsel to inform them of a trial date. Attorneys in doubt of a trial date must search the court file, call a judicial assistant, or search LINX. They cannot wait passively for opposing counsel to inform them of their own client's trial date. Even if, as Mr. Garlington claimed, he did not receive the Order Amending Case Schedule, which was sent to him by the trial court, it was not the responsibility of Ms. Garlington's counsel to inform Mr. Garlington of the trial date. That was Mr. Garlington's own responsibility.

"[T]he incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028, 922 P.2d 98 (1996) (citing 47 Am.Jur.2d Judgments § 812 (1995); *Haller*, 89 Wash.2d at 547, 573 P.2d 1302; *see Winstone v. Winstone*, 40 Wash. 272, 274, 82 P. 268 (1905); *In re Marriage of Burkey*, 36 Wn. App. 487, 490, 675 P.2d 619 (1984)).

Mr. Garlington was acting as his own attorney when he failed to ascertain the trial date, and he was aware a new trial date had been set and had been present in court on September 26, 2008 when Mr. Robinson stated that he thought trial was set for October 17, 2008.

2. Mr. Garlington cannot establish that his failure to appear at trial was occasioned by mistake, inadvertence, irregularity or excusable neglect.

“Irregularities” that can be considered on a motion to vacate a judgment under CR 60(b)(1) are those relating to want of adherence to some prescribed rule or mode of proceeding. *Matter of Guardianship of Adamec*, 100 Wn.2d 166, 667 P.2d 1085 (1983). Although Mr. Garlington bases his appeal on the position that the trial court “erred” by entering “a default judgment” (Brief of Appellant, page 10), no default judgment was entered by the trial court. Rather, the court correctly and properly proceeded with trial at the scheduled time as authorized by CR 40(a)(5), then entered findings of fact and conclusions of law as authorized by CR 52(c). There was no “irregularity” that resulted in Mr. Garlington’s failure to appear at trial.

Mr. Garlington’s failure to ascertain the trial date must be characterized as negligence rather than “inadvertence” or “mistake,” because, as a pro se litigant, he had a duty to stay informed of “material developments” in this case, and failed to do so. There was no

“inadvertence” or “mistake” that resulted in Mr. Garlington’s failure to appear at trial.

A pro se litigant’s failure to take any steps whatsoever to ascertain his own trial date if unaware or unsure of that date cannot be characterized as “excusable neglect.” In the context of failure to name a party in an initial pleading, neglect is “inexcusable” if the parties were apparent, or were ascertainable upon reasonable investigation. *Woodward v. City of Spokane*, 51 Wn. App. 900, 906, 756 P.2d 156, review denied, 111 Wn.2d 1027 (1988). See also *Tellinghuisen v. King Cy.*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (no excuse where identity of omitted parties was a matter of public record). In this case, the trial date was a matter of public record and Mr. Garlington could easily have ascertained that date upon reasonable investigation. In fact, he had a duty to do so. His alleged reliance on opposing counsel to inform him of his own trial date does not support a finding of excusable neglect.

The trial court did not abuse its discretion in denying Mr. Garlington’s motion to set aside the order of default and vacating the findings of fact/conclusions of law and decree of dissolution because there was no mistake, inadvertence, irregularity, or excusable neglect that contributed to or caused Mr. Garlington’s failure to appear at trial.

C. The entry of the Order of Default, even if “erroneous,” did not affect the validity of the final orders and was a “harmless error.”

Mr. Garlington was warned that if he failed to provide full and complete discovery within one week from April 18, 2008, the court would strike his pleadings. Mr. Garlington failed to comply with that order, and on the day of trial, Ms. Garlington was forced to proceed without having received discovery from Mr. Garlington. The court accordingly struck Mr. Garlington’s pleadings. Mr. Garlington, in fact, does not assign error to the striking of his pleadings.

Mr. Garlington also failed to appear at trial. The court entered an order of default at that time.

An order (or, more accurately, a finding) of default is the official recognition that a party is in default, and is a **prerequisite** to the entry of judgment on that default.

Karl B. Tegland, 4 Washington Practice, Rules Practice CR 55 (5th ed.) (emphasis added).

An order of default is not the equivalent of a default judgment. As previously discussed, no default judgment was entered in this case. When a motion for default is filed **at trial**, there is neither time to give five days notice to the defaulting party nor reason to give such notice after the defaulting party’s pleadings have been stricken.

Even if this Court determined that the trial court erred in entering the Order of Default, the Findings of Fact and Conclusions of Law and the Decree of Dissolution are entirely independent of the Order of Default. The trial court properly entered the Findings of Fact and Conclusions of Law and the Decree of Dissolution after hearing the facts presented at trial as authorized under CR 52(c). Mr. Garlington is not aggrieved because an Order of Default was entered, but because Findings of Fact and Conclusions of Law and the Decree of Dissolution were entered.

In the circumstances of this case, if entry of the Order of Default was an error, it was a “harmless error,” i.e., “a trivial error which in no way affected the outcome of the case.” *Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 659, 794 P.2d 554 (1990). Even if the Order of Default had not been entered, the court would have entered the Findings of Fact and Conclusions of Law and the Decree of Dissolution.

D. Even if the Decree does not make an “equal” distribution of property, it is just and equitable.

1. The Decree makes a just and equitable division of property and an award of maintenance supported by the facts in this case.

Mr. Garlington asserts that the “final judgment” was “inequitable” (Brief of Appellant, page 12), and argues that the Decree “provides for an inequitable division of assets and liabilities, awarding the wife nearly

100% of the community property, 100% of the husband's civil service retirement." *Id.* at 15.

In considering these assertions, the Court should recall:

(1) Ms. Garlington is physically disabled and unemployable after a 30-year marriage and is raising her dependent grandson, who has lived with her and Mr. Garlington since birth. Mr. Garlington is gainfully employed, regularly earns overtime wages, and in addition, owns a landscaping business which was awarded solely to him in the Decree.

Although Mr. Garlington twice references the "inequality" of the Decree (*Id.*; *Id.* at 16), "the essential consideration is not whether a property distribution is equal, but whether it is just and equitable." *Glorfield v. Glorfield*, 27 Wn.App. 358, 360, 617 P.2d 1051, review denied, 94 Wn.2d 1025 (1980). Even Mr. Garlington acknowledged that the court's 60/40 split was not "outrageous." CP 66. Courts uphold disparate property divisions based on the facts of the case. *See Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966) (upholding award of 75 percent of net assets to wife where wife had not worked during 22-year marriage and there were three children still at home); *In re Marriage of Dessauer*, 97 Wash.2d 831, 650 P.2d 1099 (1982) (75 percent of community property value to wife; 25-year marriage); *In re Marriage of Donovan*, 25 Wn.App. 691, 612 P.2d 387 (1980) (two thirds of net assets to wife;

fourteen-year marriage); *In re Marriage of Rink*, 18 Wn.App. 549, 571 P.2d 210 (1977)(two-thirds of community property to wife; 24-year marriage).

(2) Mr. Garlington does not assign error to **any** of the findings of fact. Unchallenged findings of fact are verities on appeal, *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994), and an appellate court limits review to determining whether the findings of fact support the conclusions of law. *State v. Rodgers*, 146 Wash.2d 55, 61, 43 P.3d 1 (2002). Thus, **all** of the Findings of Fact entered by the trial court, including characterization of property and liabilities and the amount of maintenance, are “verities” on this appeal.

(3) The trial court found that Mr. Garlington’s assertions about the financial impact of the spousal maintenance award and property division were not credible. At the hearing on Mr. Garlington’s motion to vacate, the court stated:

I think he lied about his extra income.

...

I don’t find Mr. Garlington’s declaration as to what his income would be based upon Ms. Garlington’s award of maintenance and/or portions of . . . retirement to be credible.

Verbatim Report of September 18, 2009, page 66, lines 2-3 and 22-25.

“The fact finder measures witness credibility, and we do not review that determination on appeal.” *Miles v. Miles*, 128 Wn.App. 64, 70, 114 P.3d 671 (2005) (citing *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)).

Nevertheless, Mr. Garlington argues that the Decree of Dissolution “can hardly be considered equitable and should be vacated” (Brief of Appellant, page 14), asserting that it “award[s] the wife nearly 100% of the community property, 100% of husband’s civil service retirement.” *Id.*, page 15.

In fact, the Decree awarded 100% of Mr. Garland’s Federal Civil Service System retirement accrued through October 31, 2008, or alternatively, if Ms. Garlington is unable under federal law to claim 100% of the federal retirement account through October 31, 2008, then 60% of the account accrued through Mr. Garlington’s date of retirement. CP 38.

If permitted to receive 100% of Mr. Garland’s Federal Civil Service System retirement accrued through October 31, 2008, Ms. Garlington would get “about \$3,000 to \$4,000.” Verbatim Transcript of October 21, 2008, page 34, lines 18-24. Mr. Garlington provided no information that this amount was not correct in his motion to vacate. This is roughly the same amount that Mr. Garlington took from the community bank account when he separated from Ms. Garlington. *Id.* at page 32,

lines 9-19. In addition, Mr. Garlington took an estimated \$35,000 worth of community-owned equipment utilized in his landscaping business before trial. *Id.* at page 32, lines 20-25; page 33, lines 1-21.

To arrive at the figure of “nearly 100% of the community property” being awarded to Ms. Garlington, Mr. Garlington presented the following calculation:

On the last page of my wife’s trial brief, she lists a proposed property split of essentially a 60/40% split. According to that distribution, I would receive \$37,727.40 of the net assets. This of course did not include my civil service retirement, which she was awarded 100%.

When one looks strictly at the percentages a 60/40 split is not outrageous. However, the **practical effect** of the Decree was not to award me 40% of our community assets. On the one hand, I was to receive \$37,727.40 of our community property (41%); but on the other hand, the Decree granted my wife a **judgment for back maintenance and home payments in the sum of \$30,385.43. The Decree further awarded her attorney’s fees in the total amount of \$34,343.00.**

CP 65-66 (emphasis added).

On appeal, Mr. Garlington parrots the assertion that “The Decree provides an inequitable division of assets and liabilities, awarding the wife nearly 100% of the community property, 100% of the husband’s civil service retirement.” Brief of Appellant, pages 14-15. This assertion is simply not true, either factually or legally. The judgment for back spousal

maintenance and mortgage payments that Mr. Garlington was ordered but failed to pay **were not part of the community property.**

2. Mr. Garlington sought “equity” with unclean hands.

“[A] person must come into a court of equity with clean hands.” *Buchanan v. Buchanan*, 150 Wn. App. 730, 737, 207 P.3d 478 (2009) (citing *Pierce County v. State*, 144 Wn. App. 783, 832, 185 P.3d 594 (2008) (citing *Income Investors, Inc. v. Shelton*, 3 Wash.2d 599, 602, 101 P.2d 973 (1940)). Mr. Garlington was found in contempt of court several times for failure to comply with orders requiring him to pay spousal maintenance and make mortgage payments. Because he failed to comply with discovery orders, Mr. Garlington’s pleadings were stricken. He did not come into court with clean hands when he sought to have the Decree vacated. The Decree’s “practical effect” about which he complains is the result of his own willful violations of previous court orders.

3. Mr. Garlington’s argument that he was “misled” by Ms. Garlington’s counsel about the trial date is disingenuous at best.

At page 5 of his Brief, Mr. Garlington refers to a “confirmation letter” regarding a CR 26(i) conference, then states, “[c]ontrary to the attorney’s representations that the trial would be sometime after October 24, 2008, the trial was held on October 21, 2008.” The letter from Ms. Garlington’s counsel to Mr. Garlington stated:

Pursuant to our correspondence sent to you dated September 3, 2008, in accordance with CR 26(i) I called you on the morning of October 7, 2008, to discuss our supplemental request for production. In that conversation, you indicated that you were presently in the Aberdeen region and requested an extension to provide the discovery responses.

While I indicated that your responses were already overdue, I agreed to delay a motion to compel for approximately one week. Accordingly, please be advised that should we not receive the requested materials by 12:00 noon on October 16, 2008, I will file the necessary motion. Pursuant to Civil Rule we will also request an award of attorney's fees to reimburse our client for the expense that your conduct will have generated. I anticipate scheduling that motion for October 24, 2008.

Should you have any questions feel free to contact our office.

CP 73.

There were no "representations that the trial would be sometime after October 24, 2008" in the "confirmation letter" to Mr. Garlington, nor was there any "informing husband that discovery would be continuing through October 24, 2008" (Brief of Appellant, page 11), nor could this letter have "caus[ed] in part, the husband's misunderstanding of when the trial was to occur" (*Id.*, page 12), because there is no mention of a trial date in the letter. The telephone CR 26(i) conference did not "notify him that discovery was still continuing through October 24, 2008." *Id.* page 13. And as discussed above, Ms. Garlington's counsel owed no duty to

Mr. Garlington to “cause the entered order of continuance or new case schedule to be served on the husband.” *Id.* This Court should reject Mr. Garlington’s attempt to make someone else responsible for his own failure to ascertain his trial date.

E. Ms. Garlington requests attorney’s fees on appeal.

RAP 18.1(a) authorizes an award of reasonable attorney’s fees and expenses on review provided (1) applicable law grants the party the right to recover them and (2) the party devotes a section of its opening brief to the request for fees and expenses.

1. Applicable law grants Ms. Garlington the right to recover reasonable attorney’s fees and costs on appeal.

RCW 26.09.140 provides, in pertinent part:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.

“Upon a request for fees and costs under RCW 26.09.140, courts will consider ‘the parties’ relative ability to pay’ and ‘the arguable merit of the issues raised on appeal.’ *In re Marriage of Muhammad*, 153 Wn.2d 795, 785, 108 P.3d 779 (2005) (citing *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998)).

2. The parties’ relative ability to pay favors an award of costs and fees to Ms. Garlington.

Ms. Garlington's ability to pay litigation costs has not changed since this case was filed in 2008. She is permanently disabled and unable to work. She is wholly dependent upon her Social Security Disability benefit in the amount of \$817 per month and the spousal maintenance that has been ordered, but not paid. In addition to her own needs, Ms. Garlington is raising her grandson in her home, who is dependent upon her for all of the necessities of life.

Mr. Garlington is gainfully employed, frequently earns overtime, and owns a landscaping business which brings in additional income.

3. The issues raised by Mr. Garlington on this appeal lack merit.

First, Mr. Garlington's appeal is based on the incorrect legal position that the trial court entered a "default judgment" in this case. No default judgment was entered.

Second, Mr. Garlington asserts he did not receive notice of the October 21, 2008 trial date, but the record indicates that the court mailed such notice directly to Mr. Garlington. Further, Mr. Garlington was present in court when Ms. Garlington's counsel stated on the record that he believed trial was scheduled for October 17, 2008.

Third, Mr. Garlington asserts that he didn't appear at trial because Ms. Garlington's counsel failed to inform him of the trial date, and

affirmatively misled him regarding the trial date through a letter memorializing a CR 26(i) conference. Mr. Garlington was a pro se litigant who had the duty to keep himself informed of the trial date: Ms. Garlington's counsel owed him no such duty. The letter confirming the telephonic CR 26(i) conference between Mr. Garlington and Ms. Garlington's counsel did not mention the trial date, so could not have misled him.

Fourth, Mr. Garlington argues that the property division and spousal maintenance provisions of the Decree are "inequitable," but failed throughout discovery and on his motion to vacate to provide full and complete information about his actual income. The trial court found his assertions regarding the impact of the Decree provisions on his financial condition to be not credible.

Based on the parties' relative ability to pay and on the merits of the issues raised by Mr. Garlington on this appeal, Ms. Garlington requests that the Court award her reasonable attorney's fees and costs incurred in responding to this appeal, including the costs of Clerk's Papers and verbatim reports of proceedings that are necessary for this Court's review but were not provided by Mr. Garlington.

V. CONCLUSION

The record shows that the court mailed an Order Amending Case Schedule to Mr. Garlington, and he was present in court when Ms. Garlington's counsel stated on the record that he thought trial was scheduled for October 17, 2008.

There was no entry of a default judgment in this case: instead, the trial court properly entered findings of fact, conclusions of law and a decree of dissolution after trying the case on the facts presented as authorized by CR 40(a)(5) and CR 52(c).

Mr. Garlington had a duty to keep himself informed of "material developments" in the case, which included the trial date, but failed to do so. Ms. Garlington's counsel was not responsible to inform Mr. Garlington when to appear for trial. His failure to appear at trial did not constitute a "mistake," an "irregularity," "inadvertence," or "excusable neglect" under CR 60(b)(1). Rather, his failure to ascertain the trial date was inexcusable neglect.

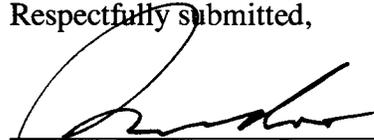
If entry of the Order of Default at the time of trial was erroneous, it was a harmless error and does not impact the validity of the Findings of Fact and Conclusions of Law and the Decree of Dissolution.

Mr. Garlington's assertions of inequitable property and spousal maintenance provisions are based on statements regarding his income that the trial court found were not credible.

This Court should affirm the trial court's decisions and award Ms. Garlington her reasonable costs and attorney's fees incurred in responding to this appeal. Ms. Garlington will comply with RAP 18.1(c) by providing an affidavit of financial need no later than 10 days prior to the date this case is set for oral argument. She will also comply with RAP 18.1(d) by serving and filing an affidavit of fees and expenses within 10 days of filing of a decision awarding her the right to reasonable attorney fees and expenses.

DATED this 14 day of May, 2010.

Respectfully submitted,



Scott A. Candoo, WSBA No. 7815
Attorney for Respondent

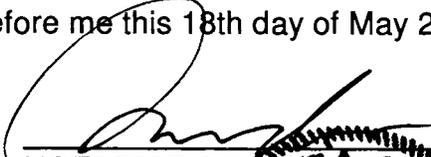
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5. That on the 18th day of May 2010, I mailed, via regular, first class mail service, postage pre-paid, US Postal Service, a true and accurate copy of the Brief of Respondent and this proof of service to the following:

James D. Garlington
14107 "C" Street, Apt. #9
Tacoma, WA 98444


MARIANN FLETCHER, Certified PLS

SUBSCRIBED AND SWORN before me this 18th day of May 2010.


NOTARY PUBLIC in and for the State of
Washington. Residing in Tacoma
My commission expires 02/14/2012

