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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

Court of Appeals No. 340503
Spokane County Superior Court No. 14-3-00278-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In re:

MELODY SECCO (a.k.a. HAYNES),

Petitioner-Appellee,

and

GORDON SECCO,

Respondent-Appellant.

APPELLANT'S OPENING BRIEF

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1. The trial court erred in permitting Haynes to serve Secco by mail while they remained living together, a fact which was not disclosed to the ex parte court in the supporting affidavits.

2. The trial court erred in finding that Haynes' declarations in support of her motion to serve by mail showed that Secco intended to avoid service of process.

B. The trial court abused its discretion when it applied the incorrect legal standard to Secco's motion to vacate a void judgment.

C. The trial court abused its discretion in denying Secco's motion to vacate when Haynes' default decree was ultimately obtained through misconduct and due to him being incarcerated on criminal charges brought by Haynes at times relevant to her obtaining her default decree (for which he was found not guilty).

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Haynes had obtained personal jurisdiction over Secco via service by mail.

2. The trial court erred in denying Secco's motion to vacate when Haynes had not made diligent efforts to personally serve him.

3. The trial court erred in finding that the declarations in support of Haynes' contained evidence sufficient to show that Secco had intended to avoid service of process.

4. The trial court erred when it applied the incorrect legal standard to a motion to vacate a void judgment.

5. The trial court erred when it found that Haynes default decree was not obtained through fraud, misrepresentation, or misconduct.

6. The trial court erred when it denied Secco's motion to vacate when he was unable to defend himself due to being incarcerated on Haynes' criminal charges for which he was found not guilty.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. To ultimately obtain personal jurisdiction through service by mail, a party must satisfy the requirements to serve by publication. The trial court permitted Haynes to serve Secco by mail when they lived together. Did the trial court err in finding that Haynes obtained personal jurisdiction service by mail under these circumstances?

   1. The trial court erred in finding Haynes made reasonably diligent efforts to effectuate personal service prior to seeking alternative service; and

   2. The trial court erred in finding that Haynes provided sufficient evidence to show that Secco's intent was to avoid service.

B. There is no time limit imposed on bringing a motion to vacate a void judgment. Did the trial court err in finding that Secco failed provide a compelling reason for a nine-and-a-half-month delay in bringing his motion to vacate for lack of personal jurisdiction?

C. A default judgment should be vacated if obtained through a party's misconduct. Haynes filed a declaration with the court to satisfy the publication requirements of RCW 4.28.100 which asserted to the ex parte court that Secco could not be found within the state, but omitted the fact that she and Secco remained living together at the time. Did the trial court abuse its discretion when it failed to vacate the default judgment due to this misconduct?

D. A judgment may be vacated when unavoidable casualty or misfortune prevents a party from defending. Secco was incarcerated on Haynes' criminal charges for which he was found "not guilty" for five months which directly prevented him from defending him in the divorce proceedings. Should the default judgment be vacated under these circumstances?

III. STATEMENT OF THE CASE

This case revolves around a decade-long marriage between Haynes and Secco, which suffered a familiar fate: dissolution.

The parties were married in 2003 (CP 207.) They purchased a house that same year, which was located at 8010 East August Avenue, Spokane Valley, Washington 99212 ("house"). (CP 264-265.) The house was the most valuable asset that they had acquired during their marriage. (CP 264.) They both made improvements to the house. (CP 264-265.) Haynes had intentions of selling the property all along, but Secco did not want to sell it. (CP 265.)

Beginning in the summer of 2013, Haynes indicated that the marriage had gradually "kind of fell apart [because they] didn't really have anything in common." (CP 258-259.)

Haynes consulted a divorce attorney early in 2014. (CP 261.) Haynes divorce attorney recommended that she remain living at the house for reasons strategic to the distribution of the house. (CP 266.) Until August 22, 2014, Haynes and Secco remained living together at the house. (CP 35; 87; 208; 266). Haynes formally filed an action to dissolve her marriage with Secco on February 4, 2014. (CP 1.)

Mark Cavadini, who is a friend of Haynes, provided a sworn declaration that that he "[t]r[ied] to serve paper" at the house three times at approximately the same time on three consecutive days starting February 18, 2014. (CP 15.) He stated that "at every attempt he could hear noise inside the house, but no answer." (CP 15.) The declaration contained no information about who he was serving, what documents he was attempting to serve, what kind of noise it was that he heard inside the house or who or what was making it. (CP 15.) The sheriff's office made five attempts to serve Secco at the house with the dissolution paperwork, which contained the bare language "unable to serve..." (CP 17.) The sheriff's affidavit references neither the dates nor times of the attempted service. (CP 17.)

The declarations make no mention of any attempted phone calls to arrange service or any attempts at Secco's work. (CP 17.)

On April 2, 2014, Haynes' attorney filed a motion to serve Secco by mail alleging that "Secco cannot be found within the state" and that "[he] has concealed himself to avoid service of summons." (CP 13-14.) The only declarations supporting the motion were her attorney's, Mark Cavadini's, and the sheriff's. (CP 13-18.) The parties remained living in the same house and Haynes knew Secco's work schedule and knew that he had recently got a job. (CP 87; 160.)

Commissioner Anderson granted Haynes' motion to serve Secco by mail on April 7, 2014. Secco was defaulted ex parte without notice on July 9, 2014. (CP 30.)

Up until August 22, 2014, there had never been any legal issues between Haynes and Secco at any point during their marriage. (CP 208.)[1] However, that day Secco was arrested at work and immediately thereafter incarcerated due to Haynes' criminal allegations stemming from an incident that morning. (CP 208.) Although he remained in jail until January 21, 2015,

[1] As a matter of fact, Secco had never been arrested for any allegations of domestic violence, assault, or any other crime against another. He only has on prior misdemeanor on his record and that was negligent driving from 1998. (CP 86.) Additionally, Secco has never intentionally injured Haynes, nor has he ever wanted to. (CP 89.)

he was found not guilty of all of Haynes' allegations and thereafter released. (CP 86.)

Secco never received process. (CP 86; 208-209.) As a matter of fact, Secco did not learn about, or receive any notice of, Haynes filing for a divorce (or that she was even considering doing so) until on or about October 16, 2014. (CP 208-209.) That day, Secco received a copy of the proposed final orders while he was incarcerated with a notice of presentment indicating that a hearing regarding their entry would be in the ex parte department of the Spokane County Courthouse on October 27, 2016 at 9:30 a.m. (CP 35-72.)

He spent the eleven days between receiving the proposed orders and entry of the same contacting two separate attorneys. (CP 209.) Secco first contacted John Stine via letter who called him at Geiger as soon as he received it. (CP 209.) In that phone call Mr. Stine recommend that Secco call Teresa Border who specialized in family law and would be better suited to help him. (CP 209.) Ms. Border required a $5,000.00 retainer which he was unable to afford. (CP 209.) He also contacted friends who were ultimately able to obtain funds for him to pay for an attorney or to post a bail bond. (CP 209.) However, given that Secco was a Canadian citizen facing felony charges none of the bondsmen that his friends contacted were willing to sell him a bond because he was considered a flight risk. (CP 209.)

With Secco unable to adequately defend himself, Haynes was awarded the entirety of the community property home in the default decree. (CP 70.) Pursuant to that decree, not only was she able to sell the house as she had intended to all along, but she was able to do so almost two full weeks prior to Secco being released from jail. (CP 209.)

Upon Secco's release from jail, he had no place to live and, no money and had to find a job. (CP 89.) Due to this entire situation, he had lost among other things, his wife, his home, his possessions, and a relationship with his grandson. (CP 89.)

Secco first sought to vacate the default decree commencing August 14, 2015, which specifically references CR 60(b)(5). (CP 74-113.) This motion was denied by Commissioner Anderson on October 30, 2015 when the court found that "service was properly effectuated and Respondent failed to present a compelling reason as to why the matter should be vacated." (CP 166.) The court's oral findings explained further that "[u]nder CR 60, you have to make an argument explaining why there was a delay in asking to set aside these orders…" and that "there has to be a compelling reason, and, in fact… nothing spoke to the length of time that it took for Mr. Secco to come back to court and ask for this matter to be vacated." (CP 185.) A motion for revision followed which was denied on

December 14, 2015. (CP 206.) That denial was appealed to the Court of Appeals on January 13, 2016.

Secco brought another motion to vacate which was filed on June 29, 2016, specifically arguing that the underlying default decree should be vacated under CR 60(b)(4) and CR 60(b)(9). (CP 218.) This second motion was ultimately heard on August 17, 2016, and denied. (CP 290.) In denying the motion, Judge Clary in essense found that the arguments being made in the second motion to vacate pursuant to CR 60(b)(4) and CR 60(b)(9) and facts supporting those arguments were covered in the prior motion to vacate. (August 17, 2016, RP 20-27.) The denial was appealed to the Court of Appeals on August 26, 2016 under Court of Appeals case number 346986, and consolidated with the first appeal.

IV. SUMMARY OF THE ARGUMENT

This appeal revolves around the following four basic arguments:

First, the trial court should not have permitted Melody Haynes (formerly known as Melody Secco)("Haynes") to obtain personal jurisdiction over her then-spouse, Gordon Secco ("Secco"), by allowing her to serve him with dissolution paperwork via mail when the affidavits she submitted in support thereof did not disclose to the court that she was at the time living in the same house with Secco. These circumstances, where

personal service is possible, do not justify the expansion of narrow statutory exceptions to Washington's preference for personal service.[2]

Second, the trial court erred when it denied Secco's motion to vacate a judgment he alleged was void for lack of personal jurisdiction based on the incorrect legal standard.

Finally, Haynes obtained a default judgment against Secco which awarded her the entirety of the community property house when: (1) the misconduct of omitting the material fact that the parties were living together lead to Haynes serving Secco by mail (mail which he never received), and (2) Secco being incarcerated for almost five months because of Haynes' criminal charges (for which he was found not guilty by a jury) prevented him from defending himself in the dissolution. Secco was unaware of the dissolution proceedings until he received the proposed final dissolution paperwork two months after being incarcerated.

Ultimately, the default decree allowed Haynes to obtain the sole substantial community property asset, their house. She was then able to sell the house pursuant to the decree and retain all equity prior to Secco being found not guilty and released from jail. This effectively operated like a civil

[2] Despite diligent efforts, counsel for the Appellant has been unable to locate any case law covering a situation where a party has been permitted to serve a co-resident while they remained living together, full or part time.

forfeiture: a substantial asset was taken from him while he was incarcerated for almost five months on charges for which he was found not guilty.

Considering the above, Haynes should not be permitted to take advantage of courts to retain Secco's share of the equity in their community property home.

V. ARGUMENT

A. The judgment is void because there was no personal jurisdiction.

A trial court "may relieve a party… from a final judgment, order, or proceeding" under certain circumstances. CR 60(b). Generally, an order granting or denying a motion to vacate will not be disturbed unless the trial court abused its discretion. *In re: Marriage of Hughes*, 128 Wn.App. 650, 657, 116 P.3d 1042 (Div. 3 2005). However, "[b]ecause courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo. *Dobbins v. Mendoza*, 88 Wash.App. 862, 871, 947 P.2d 1229 (Div. 3 1997).

1. The Court erred when it found that service by publication was proper to effectuate personal jurisdiction over Secco.

In the underlying case, Secco sought to vacate Haynes' default decree which Haynes obtained through avoiding personal service. She

instead used the court to serve him with process through mail service while she was living with him.

"First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process." *In re Marriage of Logg,* 74 Wash.App. 781, 786, 875 P.2d 647 (Div. 3 1994) (quoting *Painter v. Olney,* 37 Wash.App. 424, 427, 680 P.2d 1066, review denied, 102 Wash.2d 1002 (1984)) (vacating an order to pay child support due to an affidavit in support of service by publication being insufficient to properly accomplish personal jurisdiction).

Washington law favors personal service. Service by other means (i.e., substitute service) is in derogation of the common law and cannot be used when personal service is possible. *Rodriguez v. James-Jackson* 127 Wn.App. 139, 143, 111 P.3d 271 (2005). As a narrow exception to general personal service requirement, the publication statute authorizes service by publication when a defendant cannot be found in the state ***and***, with the intent to avoid service of a summons, he either conceals himself within the states or leaves the state. RCW 4.28.100 (emphasis added). The plaintiff must also show reasonably diligent efforts at personal service. *Charboneau Excavating, Inc., v. Turnipseed*, 118 Wn.App. 358, 362, 75 P.3d 1011 (2003).

As a narrow alternative to service by publication, CR 4(d)(4) allows the court to permit a party to serve by mail but must first satisfy the requirements of service by publication. *Lepeska v. Farley*, 67 Wn.App. 548, 553 (Div. 1 1992); *Kent v. Lee*, 52 Wn.App. 576, 579 (Div. 2 1988). "Strict compliance with the statute is required for jurisdiction to attach when a summons is served by publication." *Bruff v. Main*, 87 Wn. App. 609, 612, 943 P.2d (Div. 1 1997). The court decides on a case-by-case basis whether there has been the requisite strict compliance. *Boes v. Bisiar*, 122 Wn.App. 569, 576, 94 P.3d 975 (Div. 3 2004).

Since jurisdiction is so important to afford a party due process, challenges to jurisdiction can be brought up at any time. *In re Marriage of Leslie*, 112, Wn.2d 612, 618-19, 772 P.2d 1013 (1989) (mandates the court vacate a void judgment upon motion of a party, irrespective of the lapse of time). Haynes' judgment is void because the failure to serve Secco properly deprived the court of jurisdiction to hear the dissolution action.

1. The Court erred in denying Secco's motion to vacate as Haynes' did not make reasonably diligent efforts at personal service under the circumstances.

A party claiming jurisdiction pursuant to RCW 4.28.100 must show that service by publication was proper. *Charboneau Excavating, Inc., v. Turnipseed*, 118 Wn.App. at 362. "Washington courts have held that where a plaintiff possesses information that might reasonably assist in determining

defendant's whereabouts, but fails to follow up on that information, the plaintiff has not made an honest and reasonable effort necessary to allow for service by publication." *Brenner v. Port of Bellingham*, 53 Wash.App 182, 187, 765 P.2d 1333 (Div. 1 1989).

In *Dobbins v. Mendoza*, the Court dealt with a real estate foreclosure action where a defaulted party was served by publication. *Dobbins v. Mendoza*, 88 Wn.App. at 864. The appellate court reversed the trial court and vacated the default judgment, finding that plaintiff's failure to attempt service on the defendant at an address in the tax records, which both readily available and was public information relevant to the underlying foreclosure suit, did not constitute a reasonable effort. *Id.* at 871.

Similarly, in *Parkash v. Perry*, the court dealt with a car accident case wherein the party failed to attempt service the defendant at the address contained in the accident report, which was the defendant's proper address. *Parkash v. Perry*, 40 Wash.App. 849, 853-854, 700 P.2d 1201 (Div. 3 1985). The court found, and the appellate court upheld, that dismissal was proper due to plaintiff did not show due diligence because a car accident victim failed to look into the address provided in the accident report. *Parkash v. Perry*, 40 Wash.App. at 854.

Analogously, the underlying case here is a dissolution which includes a very narrow scenario where a spouse sought to serve dissolution

paperwork on their spouse via mail while they contemporaneously remained living together at their community property home. That they remained living together at the community property home, at least part time, is not disputed. It is not the fact that Haynes sought service on Secco solely at the home (which she alleges was conducted on seven occasions), it is the fact that she failed to act reasonably in these circumstances. Haynes service serving Secco was not possible, but easily effectuated. She was a co-resident with easy access to the home where both she and Secco lived. She also had access to the mail.

Reasonable efforts to personally serve Secco in under these circumstances (to ensure proper notice and court jurisdiction) would include that Haynes wait until they were both home, then notify a process server (or her friend, Mark Cavadini, or a neighbor) to come to the house and she could simply let him/her in the front door to serve him.

The trial court erred in denying Secco's motion to vacate when Haynes did not show that she made a reasonable diligent effort to serve Secco when they remained living together.

2. The Court erred in denying Secco's motion to vacate since Haynes's declarations in support thereof failed to show that Secco intended to avoid service of process.

As previously stated, the requirements of the RCW 4.28.100 must be strictly followed. *Bruff v. Main*, 87 Wn. App. at 612. This is a question of law that is reviewed de novo. *Id.* at 611.

In addition to showing diligent efforts to serve, a party must also clearly facts to sufficient to meet the required conditions in an affidavit in support of a motion to serve by publication, merely repeating the requirements of the statutory requirements is insufficient to make that showing. *Charboneau Excavating, Inc., v. Turnipseed*, 118 Wn.App. 358 at 362.

The declarations of Haynes' attorney, Ozzie Knezovich, and her friend, Mark Cavadini, were the only affidavits before the court in support of Haynes' application.[3]

Although the declarations show that personal service was attempted at the house seven times, Haynes' declarations provide little more. There was no mention of what papers Cavadini attempted to serve. Cavadini makes no mention what kind of noise was heard. It could have been a television, or a dishwasher, or any other noise that could be heard within a

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[3] In response to Secco's motion, Haynes did attempt to supplement the record to buttress her claim that service by mail was proper on Secco. However, the court in *Pascua v. Heil* ultimately found that an order permitting substitute service is reviewed only on the information before the court at the time of issuance. *Pascua v. Heil*, 126 Win. App. 520, 527, 108 P.3d 1253 (Div. 2 2005). It went on to conclude, as a matter of law, that such additional information could not cure deficiencies in Pascua's initial motion to serve by mail and determined that mail service was improper. *Id.*

house. Knezovich's declaration fails to indicate what dates and times the sheriff's office attempted service. No phone calls were attempted. No service was attempted at Secco's place of employment. Haynes' attorney's declaration in support of the motion to serve by mail simply reiterates the statutory language within RCW 4.28.100.

The trial court erred when it found that Haynes' declarations in support of her motion to serve by mail showed that Secco was avoiding service.

B. The trial court applied the incorrect legal standard when it denied Secco's motion to vacate based on his claim that the judgment was void. [4]

Generally, a trial court granting or denying motions to vacate will not be disturbed unless trial court abused its discretion. *In re: Marriage of Hughes*, 128 Wn.App. 650, 657, 116 P.3d 1042 (2005). An "[a]buse of discretion occurs only when a trial court's decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 20, 330 P.3d 168 (2014). "A discretionary decision rests on 'untenable grounds' or is based on

[4] Appellant recognizes that the arguments in this appeal are somewhat redundant in that the relief sought from the underlying judgment pursuant to CR 60(b)(5) is based on two separate yet related arguments: (1) that the judgment is void, (2) and that the incorrect legal standard was applied when the court denied the original motion based on the judgment being void.

'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is manifestly unreasonable if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.* An abuse of discretion is less likely to be found when a default judgment is set aside. *Griggs v. Averbeck Realty Inc.*, 92. Wn.2d 576, 582, 599 P.2d 1289 (1979).

When a party moves to vacate a judgment on the basis that said judgment is void, timeliness is not a consideration. *In re Marriage of Markowski*, 50 Wn.App. 633, 635, 749 P.2d 754 (Div. 3 1988) (vacated a decree of dissolution under CR 60(b)(5) and rejecting the argument regarding the motion's untimeliness); *In Re Marriage of Hardt*, 39 Wn.App. 493, 496, 693 P.2d 1386 (Div. 3 1985) (finding that vacating a five-year-old dissolution decree which did not conform to the parties' stipulation was proper).

The Division III Court of Appeals recently upheld these principles in *Servatron v. Intelligent Wireless Products*, finding again that a motion alleging that a judgment is void may be brought at any time. *Servatron v. Intelligent Wireless Products*, 186 Wn.App. 666, 678-679, 346 P.3d 831 (2015) (court vacated a void default judgment in excess of a year from its entry).

Here, Secco's original motion to vacate specifically argued that the default decree was void under CR 60(b)(5) for lack of personal jurisdiction.[5] Trial court denied Secco's motion in finding that he had to "make an argument explaining why there was a delay in asking to set aside these orders" and that "[t]here has to be a compelling reason and, [that] in fact… nothing spoke to the length of time that it took Mr. Secco to come back to court and ask for this matter to be vacated." (CP 185.)

Secco's original motion sought relief from the default decree nine and a half months after its entry, and only seven months after he was found not guilty of Hayne's allegations and released from jail. With the passage of time being irrelevant to his motion to vacate a judgment he contends is void, the trial court abused its discretion in denying Secco's motion for him not providing a compelling reason for any delay.

C. The erred denying Secco's motion to vacate because the fact that Haynes and Secco remained living together when she sought permission to serve by mail was disclosed to the ex parte court. Additionally, Secco's inability to defend himself was occasioned by being incarcerated for five months on charges brought by Haynes (for which he was found not guilty) while Haynes obtained the default judgment.

[5] The Court denied Secco's second motion to vacate pursuant to CR 60(b)(4) and CR 60(b)(9) in finding that res judicata applied because the original motion to vacate included arguments under, and addressed facts relevant to, CR 60(b)(4) and CR 60(b)(9).

A proceeding to set aside a default judgment is equitable in its character and "the relief sought or afforded is to be administered in accordance with equitable principles and terms." *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). When deciding a motion to vacate the court "should exercise its authority liberally, as well as equitably, to the end that substantial rights are preserved and justice between the parties be fairly and judiciously done. *Id.* The overriding reason when the court is determining whether vacating an order is appropriate "should be whether or not justice is being done... and [w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." *Calhoun v. Merritt*, 46 Wn.App. 616, 619, 731 P.2d 1094 (Div. 3 1986).

In the underlying case, Secco argued that the default decree should be vacated for two reasons in addition to those above: (1) based on CR 60(b)(4) that Haynes' decree was obtained through a declaration that was either false or contained a material misrepresentation, and (2) based on CR 60(b)(9) that his inability to adequately defend himself was due to being incarcerated at all times relevant to his knowledge of the existence of the dissolution action.

Timeliness: Motions pursuant to CR 60(b)(4) and CR 60(b)(9) must be made within a reasonable time. CR 60(b). The facts and circumstances

of the particular case are considered in determining whether a movant has failed to bring its 60(b) motion within a reasonable time. *Dalton v State*, 130 Wash.App. 653, 663, 124 P.3d 305 (Div. 3 2005). The critical period is between when the moving party became aware of the reason to vacate and when the motion was filed. *Id.* The court considers whether the delay has prejudiced the nonmoving party and whether the moving party has a good reason for the delay. *Id.*

By the time Secco was released from jail, the house had been sold and Haynes had obtained all community property equity. Secco on the other hand did not have a place to live. He did not have a job. He did not have any money. Attorneys are not free. He needed time to find a job to save some money to be able to hire someone to attack the entry of Haynes' decree. This resulted in some unavoidable and good reason for the delay between his release and the filing of his motion to vacate.

Additionally, there is no prejudice to Haynes in vacating the decree, at least as to the the disposition of the house. It was sold by the time he was release. It remains sold. There is nothing to do but have Haynes pay to Secco his portion of the community property home. There is no real prejudice to Haynes in her paying to Secco his portion of their community property home.

1. **The trial court abused it discretion in denying Secco's motion to vacate when Haynes's attorney filed a sworn affidavit claiming that Secco could not be found within the state for the purposes of personal service while Haynes remained living with him.**

A trial court is authorized to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. CR 60(b)(4). The moving party must prove the assertion by clear and convincing evidence. *Dalton v State*, 130 Wash.App at 665. Since the rule targets judgments that were unfairly obtained… the conduct must have prevented the party from fully and fairly presenting its case or defense. *Id.* As such, there must be a connection between the conduct and the party's failure to respond. *Id.* at 666.

Our Supreme Court in *In re the Marriage of Hime*s upheld the trial court's finding that Himes filed a false affidavit in support of a motion to serve by publication in his underlying dissolution action and reinstated the trial court's order vacating the decree under CR 60(b)(4). *In re the Marriage of Himes*, 136 Wn.2d 707, 726, 965 P.2d 1087 (1998).

Additionally, the professional rules provide that a lawyer shall inform an ex parte tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, even if the facts are adverse. RPC 3.3(f).

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should

> consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. RPC 3.3, Comment 14.

This case is similar to *In re the Marriage of Himes*. The evidence here also shows that Haynes' filed a declaration with the court in support of the motion to serve Secco by mail that claimed that Secco could not be found within the state for purposes of personal service while she remained living together with Secco. Either Haynes' counsel failed to disclose this fact in his declaration (or he failed to do an adequate investigation by asking Haynes where she resided) or Haynes failed to disclose this fact to her attorney, which was then not disclosed to the ex parte court when there was a duty to disclose such a fact under the circumstances.

Haynes' living together with Secco renders her assertion that Secco could not be found within the state false. Haynes declaring that Secco could not be found within the state is a requirement of RCW 4.28.100 which must be true before the court can order service by mail. Since Secco could be

found within the state, it was error for the trial court to deny Secco's motion to vacate under CR 60(b)(4).

2. **The trial court abused its discretion in denying Secco's motion to vacate when being incarcerated on Haynes allegations (for which he was found not guilty) prevented him from defending in the dissolution proceedings once he received notice of the same.**

The court has authority to vacate a judgment when an unavoidable casualty or misfortune prevented a party from defending. CR 60(b)(9). However, showing an unavoidable casualty or misfortune alone is insufficient. *Stanley v. Cole*, 157 Wn.App. 873, 882, 239 P.3d 611 (2010). The party seeking relief must also establish that the unavoidable casualty or misfortune prevented them from defending the case. *Id.* Case law warrants relief under this rule when an event that is beyond a party's control – such serious illness, accident, natural disaster, or similar event – prevents them from taking actions to defend their case. *Id.*

The court in *Stanley v. Cole* provides guidance for when a trial court should grant a motion to vacate pursuant to CR 60(b)(9). Referring to two prior cases, *Adams v. Adams* and *Swasey v. Mickelson*, the *Stanley* court effectively bookends what constitutes unavoidable casualty or misfortune. *Stanley v. Cole*, 157 Wn.App. 873, 882-883, 239 P.3d 611 (Div. 1 2010). In *Adams v. Adams*, the court considered a defendant's serious case of influenza which left him "delirious and mentally incapacitated until after

the default order was entered justified relief from the order.[6] *Adams v. Adams*, 181 Wash 192, 193, 42 P.2d 787 (1935). Conversely, our Supreme Court in *Swasey v Mikkelsen* denied a motion to vacate where a party claimed that a wife's prolonged illness prevented him from appearing and defending himself in the case. *Swasey v. Mikkelsen,* 65 Wash. 411, 415, 118 P. 308 (1911). The *Swasey* Court reasoned that "his attendance at this wife's bedside was no so constant, nor his duties there so exacting, that he could have found time to employ counsel." *Id.* Although considered an unavoidable misfortune, the court found that the defendant failed to show that the misfortune actually caused his inability to defend himself. *Stanley v. Cole*, 157 Wn.App. at 883.

Like in Adams, here Secco was incarcerated for almost five months on Haynes's conveniently timed domestic violence charges for which he was found not guilty.[7] Having been defaulted in July, Secco first received notice of the dissolution action when he received Haynes' proposed final

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[6] Although most of CR 60 follows its Federal counterpart, Civil Rule 60(b)(9) was taken from and replaced RCW 4.72.010, which allowed the superior court to vacate a judgment "[f]or unavoidable casualty, or misfortune preventing a party from prosecuting or defending." *Stanley* at 881.

[7] It is worth noting that Haynes had at least two avenues of legal recourse against Secco actions she alleges Secco did: criminal and civil actions. He was found not guilty of the domestic violence allegations (which necessarily require the highest burden of proof) and Haynes never brought a civil action for any of her claims. Any claims Haynes has regarding any indiscretions remain claims that have not been subject to any burden of proof and Haynes has made no additional efforts to do so. As such, Secco should be afforded the protection of "innocent until proven guilty" from any of Haynes unproven allegations.

orders during his incarceration. He was provided with eleven days' prior notice of the proposed final orders being entered. In that short time, he was unable to obtain representation despite attempts to do so and contacting his friends in Canada to help him obtain funds so he could post his own bail.

Being incarcerated for charges for which one is found not guilty undoubtedly qualifies as an unavoidable misfortune. Given that Secco was unable to obtain counsel while incarcerated (while contact to the outside was limited by Geiger) despite numerous efforts to do prevented him from defend himself in the dissolution proceedings. Had Secco not been incarcerated, contacting an attorney or proceeding pro se would not have been an issue.

Ultimately, Secco being incarcerated on criminal charges brought by Haynes at material times during Haynes' dissolution proceedings constituted an unavoidable misfortune which directly prevented him from defending himself therein.

VI. CONCLUSION

For the foregoing reasons, Appellant Gordon Secco requests that the Court of Appeals reverse the trial court's denial of his motion to vacate and remand to the trial court with instructions to void the judgment, along with further proceedings consistent therewith.

Submitted this 19th day of December, 2016.

SCHNEIDER LAW, PLLC

By: _____

Evan C. Schneider, WSBA #41920
Attorney for Appellant, Gordon Secco.

CERTIFICATE OF SERVICE

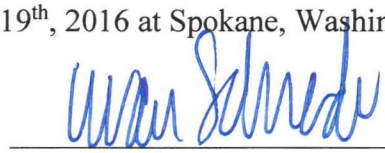
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On December 19th, 2016, I served the document to which this is annexed by the following means:

By personal service:

Gary Stenzel
Stenzel Law Office
1304 W. College Avenue, Lower Level
Spokane, WA 99201

Signed on December 19th, 2016 at Spokane, Washington.



Evan C. Schneider