NO. 45657-5-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

BRADLEY A. CARPENTER,
Appellant,

v.

LUCINDA B. CARPENTER,
Respondent,

RESPONSIVE BRIEF OF RESPONDENT
AND
CERTIFICATE OF MAILING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES

I. RESPONDENT'S STATEMENT OF THE CASE

This is an appeal of an order of the trial court refusing to vacate a Decree of Legal Separation entered on September 30, 2013. In this appeal Mr. Carpenter argues:

1. That he was entitled to notice of the motion for default because he had signed an Acceptance of Service which, he argues, constitutes an appearance;

2. That the decree should have been vacated because the relief granted exceeds the relief set forth in the Petition; and

3. That the trial court did not properly value all of the assets divided and that there is not substantial evidence to support the valuations in the record.

The only one of those three arguments that was even mentioned in the motion to vacate at the trial court was the claim that the relief granted in the Decree of Legal Separation exceeds the relief requested in the Petition for Legal Separation. The other arguments were only not raised below, Mr. Carpenter expressly admitted to the trial court in the motion to vacate that his signing an Acceptance of Service did not entitle him to notice of the motion for default. CP 50, lines 15-22).

Lucinda Carpenter filed a Petition for Legal Separation on June 13, 2013 (CP 20-22). On June 14, 2013 Lucinda Carpenter gave Mr. Carpenter the Summons and Petition for Legal Separation and an Acceptance of Service

(CP 25). When she provided the Acceptance of Service to him, she told him exactly what it meant. She told him that it meant only that he did not have to be served by a process server, and that accepting service had the same effect as would have occurred if he had been served by a process server. (CP 72, lines 6-10). Mr. Carpenter is very experienced in litigation. He was a defendant in a lawsuit related to a franchise purchase from him in February 2008 that was protracted litigation including an appeal to the Court of Appeals. (CP 72). He was a defendant in *Swensrud* litigation in Pierce County about another franchise sale in 2009. (CP 72). He was a defendant in *Latitude Development v. Carpenter* in King County in 2009 where he did not appear and a default judgment was entered. (CP 72). From that experience Mr. Carpenter knew that when he was served with a summons that he was required to appear in the action within 20 days of service or a default would be entered against him. (CP 72). He was sued in *Optimum Recovery Services v. Carpenter* in Pierce County in 2010. (CP 72). This time he knew what failing to appear could cause and he hired an attorney who appeared and defended. He was sued in *Sannathy Corp v. Carpenter* in 2010. (CP 73). He was sued again in *Optimum Recovery*

Services v. Carpenter in 2011. (CP 73). With the history of all of that litigation Mr. Carpenter became familiar with reading legal documents and understood the effect of being served and the need to appear within 20 days to avoid a default.

Mr. Carpenter consulted an attorney about the Petition for Legal Separation when he received it but did not hire an attorney. (CP 90). He claims he chose not to hire an attorney because he did not have the funds to do so. (CP 55). An order of default was taken against Mr. Carpenter on July 17, 2013, thirty-four days after he was served. (CP 31-32). The final papers were entered on September 30, 2013 (CP 37-42 and CP 42-46). After the final papers were entered, on the same date as they had been entered, Mr. Carpenter, who claims he borrowed money from his parents to hire an attorney, entered a Notice of Appearance through counsel. (CP 36). Counsel knew at the time the appearance was filed that the Order of Default had been entered and the final Decree had been entered.

The Petition for Legal Separation (CP 20-22) filed in this cause does not propose a particular property and debt division between the parties. Instead, it asks the Court to make a fair and equitable division of property and debt. Just

shortly before the Summons and Petition were given to Mr. Carpenter and he accepted service of them, Lucinda Carpenter had given Mr. Carpenter her proposed division of assets. (CP 73). In his declaration supporting the motion to vacate Mr. Carpenter admitted that the property division proposed by Ms. Carpenter had been provided to him (CP 55). The portion of the property and debt division Ms. Carpenter had presented to him that Mr. Carpenter disagreed with is payment of the Key Bank that was estimated In the Findings and Decree at $140,000.00 but has now been determined to be $112,373.00. (CP 55, 76).

The parties filed a Chapter 7 bankruptcy just prior to the filing of the Petition for Legal Separation and they have limited assets to divide. The community property divided between them is comprised of:

1. A 20% interest in Treos Café, a Washington company;
2. A 401(k) under the name of Bradley Carpenter;
3. A Whistler timeshare;
4. A residence in Gig Harbor;
5. A 401(k) through Allstate in Wife's name;
6. A 2011 Jeep Cherokee subject to a debt of $37,000 that has negative equity;
7. A 2005 Acura subject to a debt of $15,000 that has no equity; and

8. Two Havanese dogs.

The only debt that survived the bankruptcy was debt secured by the residence and vehicles of the parties.

Twenty-five days after the final Decree of Legal Separation had been entered, and more than three months after Mr. Carpenter was in default, he filed a motion to vacate. (CP 47). Three grounds were stated as the grounds for the motion to vacate.

The first ground asserted in the motion to vacate the decree was CR 60(b)(1). Applying that rule Mr. Carpenter argued that it was excusable neglect for him to have failed to appear because he did not know that he needed to do so. Mr. Carpenter's memorandum arguing that issue states:

> In the present case, the final separation documents should be vacated pursuant to CR 60(b)(1). Mr. Carpenter was not represented by counsel because he could not afford an attorney. He believed that the Acceptance of Service was notice to the court of his appearance and he mistakenly believed he would be notified of further court proceedings. Mr. Carpenter was operating under a misunderstanding. He had no intention of defaulting. This was a simple, understandable, mistake or alternatively, excusable neglect caused by his lack of financial resources to obtain an attorney sooner. (CP 50).

Mr. Carpenter's memorandum expressly admitted he was not entitled to a Notice of Default and it argued that CR 60(b)(1) constituted grounds to vacate because he

mistakenly believed that his acceptance of service constituted an appearance that required notice of default. (CP 50, lines 15-22). He also argued that his lack of funds to hire an attorney constituted excusable neglect. (CP 50, lines 15-22). In this appeal Mr. Carpenter has not argued that he is entitled to reversal of the trial court's order denying his Motion to Vacate the Decree under CR 60(b)(1) on the ground of mistake or excusable neglect. Whether or not the decree should have been vacated by the trial court under CR 60(b)(1) is not before this Court.

As his second ground to vacate the decree contained in his motion Mr. Carpenter argued that the Decree should be vacated under CR 60(b)(11). After quoting that rule, the entirety of his argument in the trial court as to why the Decree should be vacated under CR 60(b)(11) states:

> In the present case, the final separation documents, which were entered by default, do not result in a fair and equitable division of property and liabilities. For this reason, justice requires that the final separation documents should be vacated pursuant to CR 60(b)(11). (CP 51, lines 4 through 7).

In this appeal Mr. Carpenter has not argued that he is entitled to reversal of the trial court's order denying his Motion to Vacate under CR 60(b)(11). Whether or not the

decree should have been vacated by the trial court under CR 60(b)(11) is not before this Court.

In his last ground for relief in the trial court, Mr. Carpenter argued that the Decree should be vacated under CR 54(c) because the relief exceeded the amount prayed for in the demand for the judgment. (CP 51, lines 10-24).The trial court denied a request to vacate on that ground because the Petition expressly provided notice to Mr. Carpenter, informed him that if he did not appear in the action that the property division would be determined by further court action without input from him. Mr. Carpenter makes an argument similar to the argument made before the trial court on this ground in this court.

II. ARGUMENT

STANDARD OF REVIEW

A trial court's denial of a motion to vacate will not be overturned on appeal unless trial court manifestly abused its discretion in denying the motion. *Haley v. Highland*, 142 Wn.2d 235, 12 P.3d 119 (2000). In the trial court Mr. Carpenter asked the court to vacate the decree entered below on three grounds. They were:

1. Mistake or excusable neglect under CR 60(b) (1); or

2. Any other reason justifying relief from the operation of judgment under CR 60(b) (11); or

3. Because the relief granted in the Decree of Legal Separation exceeded the relief requested in the Petition violating CR 54(c).

Mr. Carpenter has abandoned the first two grounds as a basis for this appeal. He has not claimed that the decision on either of those grounds was error. The only issue properly before this Appellate Court is whether the trial court manifestly abused its discretion in refusing to vacate the Decree of Legal Separation because the relief exceeds that prayed for in the Petition. Mr. Carpenter does not explain how it was a manifest abuse of discretion for the trial court to deny the Motion to Vacate on the ground that the relief granted in the Decree of Legal Separation exceeds the request in the Petition for Legal Separation. He also does not explain how any of the trial court decisions were a manifest abuse of discretion. This court should apply the manifest abuse of discretion standard, find that the trial court did not manifestly abuse its' discretion in refusing to vacate the Decree of Legal Separation on the only ground argued here that was raised below, and affirm the trial court's decision.

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PRIMARY ISSUES ON APPEAL WERE RAISED FOR THE FIRST TIME IN THIS APPEAL

Mr. Carpenter raises three arguments in this appeal that are raised for the first time on appeal. In the arguments raised for the first time on appeal he claims first that his execution of an acceptance of service constitutes an appearance in the action thereby requiring notice of the Motion for Default to be given to Mr. Carpenter before an order of default can be entered against him. Second, Mr. Carpenter argues that the trial court erred in failing to assign values to each of the assets in this case. Finally, in an argument that is related to his second argument Mr. Carpenter argues that the evidence that supports value of the assets divided by the parties and the debts does not meet the substantial evidence test. None of those three arguments was raised as part of the motion to vacate. Washington law is clear that the appellate court normally will not review claims of error not raised in the trial court. *Washington Federal Savings v. Klein*, 177 Wn.App. 22, 311 P.3d 53 (2013), RAP 2.5(a). Since the three primary grounds for this appeal were raised for the first time on appeal, the Court should decline to consider any of those grounds for appeal set forth in Mr. Carpenter's opening brief.

MR. CARPENTER INVITED ERROR HE NOW CLAIMS TRIAL COURT MADE

Although he argues otherwise on appeal, Mr. Carpenter admitted in the trial court that his acceptance of service was not an appearance and he argued that his belief that it was an appearance was a misunderstanding that constituted excusable neglect. CP 50, lines 15-22, CP 90, lines 15-17. His counsel further admitted that at the hearing on the motion to vacate before Judge Arend (RP of November 15, 2013 hearing, page 7, lines 3-5) where she said:

> He had no way of knowing that signing an Acceptance of Service wasn't sufficient.

She admitted the acceptance of service wasn't an appearance again at page 15 where she said:

> My client did not understand that signing an Acceptance of Service also meant he had to file a pro se notice of appearance. Had he known that and filed it, we wouldn't be here.

She admitted except in the service was an appearance again at page 16 where she said:

> Understanding or hearing the words "it's the same as a process server" does not put him on notice that he also has to file a notice of appearance.

By admitting in the trial court both in the pleadings filed and in oral argument that filing an acceptance of service did not constitute an appearance requiring notice of a motion for

default to be given to Mr. Carpenter under CR 55(a) Mr. Carpenter invited what he now claims was error by admitting in the trial court that his acceptance of service was not an appearance and he was not entitled to notice of the motion for default. Even where constitutional issues are involved, invited error precludes review by the appellate court. *State of Washington vs. Carpenter*, 52 Wn. App. 680, 763 P.2d 456 (1988). In the instant case, RAP 2.5 precludes review of whether or not the acceptance of service constitutes an appearance because that issue was not heard by the trial court. The invited error doctrine precludes the Appellate Court from considering even those issues exempt from RAP 2.5 for the first time on appeal even if the errors affect a constitutional right. *Carpenter, supra.* Mr. Carpenter and his counsel repeatedly acknowledged in the trial court that signing an acceptance of service does not constitute an appearance requiring him to be given notice of default. He may not argue that issue on appeal both because of RAP 2.5 and because of the invited error doctrine.

Mr. Carpenter argues that because there was an error in the motion for default filed by Ms. Carpenter stating that his acceptance of service constitutes an appearance meaning that Mr. Carpenter had appeared below. Had Mr.

Carpenter raised the issue that the motion for default erroneously stated that Mr. Carpenter appeared by signing an acceptance of service, the error in the trial court, the erroneous language in the motion would have been corrected by filing a corrected document. The fact is, Mr. Carpenter did not appear in the action before the default was taken against him and his counsel admitted that he did not appear in the action in the Motion to Vacate. Mr. Carpenter argued in his declaration that he did not appear due to excusable neglect and his counsel repeated three times in oral argument that his acceptance of service did not constitute an appearance. Mr. Carpenter's argument that a mistake in a pleading filed by Ms. Carpenter somehow changes the facts that occurred and the result that should be reached in this case is without merit.

ACCEPTANCE OF SERVICE IS NOT AN APPEARANCE

There is no basis under Washington law for an argument that signing and acceptance of service constitutes an appearance in an action. The Washington Supreme Court severely limited what is sufficient to constitute an appearance after service of a summons and complaint in *Morris v. Burris*, 160 Wash.2d 745, 161 P.3d 956 (2007). In that case the court specifically held that a person who is

served with a summons must do more than show an intent to defend, they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences to "appear". Civil Rule 4(g) provides that a written acceptance of service is proof of service in an action. The rule treats acceptance of service exactly the same as service by a sheriff or other authorized process server. In order to appear in the action, Mr. Carpenter had to take some action to acknowledge the pendency of the lawsuit and the jurisdiction of the court after he signed the acceptance of service commencing the litigation. *Morris,* supra. It is not disputed that Mr. Carpenter did absolutely nothing to acknowledge the lawsuit after he signed the acceptance of service. He did not evidence an intent to defend, he did not acknowledge the jurisdiction of the court, and he made his decision not to appear based on his perceived lack of funds to hire an attorney. (CP 55). Mr. Carpenter was expressly told that signing an acceptance of service had the same effect as would have occurred had he been served by a process server. (CP 72) he did not deny that fact and his attorney acknowledged that he was so advised on the record. (RP September 15, 2013 page 16) His acceptance of service did not constitute an appearance and he was not

entitled to notice of a motion for default. This court should not vacate the Decree of Legal Separation entered in this action.

RECORD ESTABLISHES VALUE OF ASSETS

In his last two arguments raised for the first time on appeal Mr. Carpenter alleges that the trial court erred in failing to enter written findings as to the value of each of the assets and that the evidence in the record sustaining the value of those assets is not substantial evidence. As is previously argued in this brief, both of those arguments are made for the first time on appeal and the Court should decline to address them. *Washington Federal Savings v. Klein, supra, RAP 2.5.* Even, however, if the Court were to consider these arguments for the first time on appeal, the Court may look to the record before the trial court to determine the value of assets. *Green v. Green*, 97 Wn.App. 708, 986 P.2d, 144 (1999). There, the court said, at page 712:

> The trial court is required to value the property to create a record for appellate review. If the court fails to do so, the appellate court may look to the record to determine the value of assets. *(Citations omitted).*

Mr. Carpenter was in default at the time of the property division and, as a result, he presented no evidence. The parties to this action had filed bankruptcy the day before the

petition for legal separation was filed. It is undisputed that the non-exempt assets owned by the parties at the time of their filing bankruptcy was $5,000.00 comprised of personal property that was not exempt in the bankruptcy. (CP 92) The findings of fact and conclusions of law listed the community assets. Every one of those assets except the time share was valued by the declaration of Lucinda Carpenter supporting the decree of legal separation. (CP 34-35) In that declaration Ms. Carpenter valued the house owned by the parties at $475,000.00. She stated the value of her 401(k) account at $19,000.00 and she stated the value of her car was less than the $37,000 debt owed on it to Key Bank.

Ms. Carpenter testified that her husband's 401(k) plan exceeded $100,000.00. She did not have access to the account statements and could not provide an exact value. Mr. Carpenter did not dispute that value in his motion to vacate. Ms. Carpenter also testified that her husband's car was equal to the debt against it which was $15,000.00. She testified that Mr. Carpenter's interest in Treos Coffee net of debt was worth more than the debt to Key Bank which was listed in the findings as being a debt of $140,000.00. That debt later was established to be $112,000 in the documents

filed in connection with the motion to vacate. (CP 76). Other than the miscellaneous personal property that the parties owned and that was in the possession of each that Mr. Carpenter proved had a nonexempt value determined by the Bankruptcy Court at $5000, the only two assets of the parties not valued were the Whistler timeshare that was awarded to Mr. Carpenter and two Havanese dogs awarded to Ms. Carpenter. The undisputed record at the time of the entry of the decree of dissolution provided the value of every asset awarded to Ms. Carpenter other than miscellaneous household goods and furnishings and two Havanese dogs. The only community asset awarded to Mr. Carpenter that was not valued is the Whistler timeshare. The trial court is not required to value minor assets that are not significant to the overall property division. *Green, supra*. Further, Mr. Carpenter has not explained how he was damaged by being awarded an asset at without a finding as to its value. Even if Mr. Carpenter had properly raised this issue in the trial court to make it reviewable on appeal, the undisputed evidence before the trial court at the time of the entry of the decree establishes that the parties received the following net assets:

Lucinda Carpenter:

	Value	Net:
Residence	$475,000	$155,000

401(k)	$ 19,000	$ 19,000
2011 Jeep		Negative equity
Misc household goods and furnishings	Unvalued	Unvalued
Two Havanese dogs	Unvalued	Unvalued
TOTAL TO WIFE		$174,000

Mr. Carpenter received the following:

401(k) in his name	$100,000+	$100,000+
Treos Coffee	$140,000+	$140,000+
Whistler timeshare	Unvalued	Unvalued
Acura vehicle		0 EQUITY
TOTAL TO HUSBAND		240,000+

From that amount he was required to pay the key bank debt which turned out to be $112,373. The major assets held by the parties were valued. Ms. Carpenter could do nothing more to value Mr. Carpenter's 401(k) that she claimed was worth more than $100,000. Mr. Carpenter, who has access to the information regarding value of that account has failed to provide the court any evidence that the account did not exceed $100,000. The request of Mr. Carpenter to vacate the decree on appeal on the basis of a failure to value the assets, when the issue was not even raised in the trial court and the trial court record establishes the value of all significant property should be denied.

In his final argument of the three arguments raised in this Court but not raised below, Mr. Carpenter claims that the

findings regarding the assets and debts are not supported by substantial evidence. Ms. Carpenter signed a declaration stating the value of the major assets and verification under oath stating that the Findings of Fact and Conclusions of Law and Decree of Dissolution that contain the amount of each of the debts that remained after the bankruptcy are true, correct and accurate. (CP 33, 34-35). Property owners are permitted to testify as experts regarding the value of their property. *Worthington v. Worthington,* 73 Wash.2d 759, 440 2d 478, (1968). Mr. Carpenter admits in his brief at page 17 that there is evidence from Ms. Carpenter as to the value of the assets and the amount of the debts. There is simply no basis for an argument that a party's testimony that is admissible as to value does not constitute substantial evidence. Even if Mr. Carpenter had raised the argument that the court failed to adequately find as to value of the assets, or that the evidence supporting the value of the assets and debts was insufficient, the argument is without merit. Had the trial court addressed those issues, it would not have been a manifest abuse of discretion to deny the motion to vacate on those grounds. The trial court decision denying the motion to vacate should be affirmed.

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RELIEF GRANTED BY DECREE DID NOT EXCEED RELIEF REQUESTED IN PETITION

In the only argument raised in this appeal of the denial of the motion to vacate that was addressed in the Trial Court, Mr. Carpenter argues that the trial court erred in failing to vacate the decree because the relief taken exceeded the relief requested in the Petition for Legal Separation. In a two-paragraph argument at page 13 of his brief, Mr. Carpenter cites the basic rule that states that relief granted by default cannot exceed or substantially differ from that prayed for in a Petition. He does not, however, explain or even provide argument as to how the relief granted by the trial court differs from that prayed for in the Petition. The Petition asked the trial court to decide the property and debt division at a future hearing. It is not disputed that Cindy Carpenter filed both a declaration and a verification in support of property division she requested. The Court Commissioner reviewed the file electronically before adopting the proposed property distribution. Mr. Carpenter has presented no argument as to how the relief requested differed from the petition or how it was a manifest abuse of discretion for the Court to deny the motion to vacate on that ground. Having the Court determine the property division

without input from a party who is in default is expressly provided for by Civil Rule 55(b) (2). The rule states:

> When Amount Uncertain. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.

In this case the Petition left the property division for further court decision. Lucinda Carpenter filed a declaration in support of her proposed property division and a verification stating that the Findings of Fact and Conclusions of Law and the Decree of Dissolution are true and correct best of her knowledge. The Court considered the evidence supporting the property division and granted it. Mr. Carpenter simply cannot argue that the relief taken exceeded that requested in the Petition because the Petition asked the Court to make the decision. That is exactly what happened. Because Mr. Carpenter did not appear the court considered only Ms. Carpenter's evidence in making the decision. Mr. Carpenter cannot explain how the relief granted by the trial court exceeded that request in the petition because it does not. The trial court did not manifestly abuse its discretion in refusing to vacate the Decree based upon a claim that the

relief taken differed from the Petition. Petitioners appeal on that ground should be denied.

ATTORNEY'S FEES

Ms. Carpenter should be awarded her attorney's fees for the necessity of responding to this appeal. An award of attorney's fees need not be based on need and ability to pay where the attorney's fees are incurred as a result of intransigence. *Mattson v. Mattson*, 95 Wn.App. 592, 976 P.2d 157 (1999). In the instant case, Mr. Carpenter's appeal of issues not raised in the trial court, and his appeal claiming his signing an acceptance of service constitutes an appearance in the action when he specifically admitted that it did not constitute an appearance in the trial court constituting intransigence. Ms. Carpenter should be awarded all of her fees for processing this appeal.

As an alternate basis for attorney's fees, Ms. Carpenter should be awarded attorney's fees under RAP 18.9. Ms. Carpenter submits that an appeal of the primary issue in this case, whether Mr. Carpenter signing an acceptance of service constitutes an appearance, raised for the first time on appeal when his trial court counsel admitted the acceptance of service was not an appearance makes the

appeal frivolous. As an alternate ground attorney's fees should be awarded under RAP 18.9.

CONCLUSION

The Court should affirm the decision of the trial court refusing to vacate the decree entered in this cause. The Court should award Ms. Carpenter her attorney's fees for the necessity of defending this appeal to be determined by motion filed at the Appellate Court after the decision on this appeal is rendered.

RESPECTFULLY SUBMITTED this 17 day of June, 2014.

BART L. ADAMS, WSBA 11297
Attorney for Respondent

CERTIFICATE OF MAILING

STATE OF WASHINGTON)
) ss.
County of Pierce)

The undersigned, being first duly sworn on oath, deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 17th day of June, 2014, I mailed a true and correct copy of Responsive Brief of Respondent which is identical to the original thereof, which are on file with the Clerk of this Court addressed to:

Barbara McInvaille
Helland Law Group, PLLC
960 Market Street
Tacoma, Washington 98402

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.

Jeanne Gleim

SUBSCRIBED AND SWORN to before me this 17 day of June, 2014.

NOTARY PUBLIC in and for the
State of Washington,
Residing at Fox Is
My Commission Expires: 11-15-16