Appellate Court No. 325857-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

Division III

DEBRA CROMER,

Appellant

v.

THOMAS THORN,

Respondent

BRIEF OF RESPONDENT

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III. SUMMARY OF ARGUMENT

The superior court properly vacated the default order, findings of fact and conclusions or law, judgment and order determining parentage, order of child support and child support worksheet, all of which were entered by the court on November 16, 2012.

The court properly applied CR 60(b)(4), as appellant/petitioner misrepresented the income of the petitioner and the basis for imputation of income.

Dr. Thorn's motion was found to be properly brought under CR 60, and the court, by entering an order vacating the default judgment and accompanying orders, has demonstrated it's desire to make a determination on the merits of the case.

IV. ARGUMENT

A. Appellant/Petitioner committed fraud in the entry of the default orders

The superior court properly vacated the default order, findings of fact and conclusions or law, judgment and order determining parentage, order of child support and child support worksheet, all of which were entered by the court on November 16, 2012.

The Elements of Fraud Are Established by Clear, Cogent and Convincing Evidence.

As stated in the Brief of Appellant, to recover for fraud, the following elements must be proved by clear, cogent and convincing evidence:

(1) a representation of an existing fact;
(2) its materiality;
(3) its falsity;

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(4) the speaker's knowledge of its falsity or ignorance of its truth;
(5) his intent that it should be acted on by the person to whom it is made;
(6) ignorance of its falsity on the part of the person to whom it is made;
(7) the latter's reliance on the truth of the representation;
(8) his right to rely upon it;
(9) his consequent damage.[1]

Each of these elements has been met in this case.

1. A representation of an existing fact

As was found by Judge Sperline at the trial court, the appellant/petitioner represented to the court that Dr. Thorn was either voluntarily unemployed or was capable of making in excess of $13,000 per month. RP 11. There is no evidence on the record of such, and Dr. Thorn has specifically denied such in his declaration. CP 181. In fact, at the time the judgment was entered, the false allegations of domestic violence precluded Dr. Thorn from practicing medicine. Id.

2. Its Materiality

The statement that Dr. Thorn was making, or was capable of making, in excess of $13,000 per month, was the basis of not only a judgment for child support from the date of filing through the date of judgment, but resulted in an accrued balance of over $50,000 before the motion to vacate was filed. CP 204. The balance grew due to Dr. Thorn's inability to find work because of Ms. Cromer's false allegations. CP 181.

3. Its Falsity

[1] *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166, 273 P.3d 965,970 (2012).

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Dr. Thorn was unemployed when the order was entered, and he was incapable of making income as set forth in the order of child support entered by the court on November 16, 2012. CP 181.

4. The Speaker's Knowledge of its Falsity or Ignorance of its Truth

Ms. Cromer knew that Dr. Thorn was just released from jail on bail when the default judgment was entered. Dr. Thorn was never served with a proposed order of child support prior to its entry, so he never had an opportunity to dispute those facts prior to entry. CP 180.

Ms. Cromer knew not only that Dr. Thorn was not making $13,000 (and never did make that income), but that he was incapable of working as a physician when the order of child support was entered on November 16, 2012. Dr. Thorn was involuntarily unemployed due to the actions of Ms. Cromer. CP 181.

5. His Intent that it Should be Acted On by the Person to Whom it is Made

The false statements made by Ms. Cromer resulted in a judgment for child support which grew to over $50,000. CP 181. It did not take into consideration any deviations Dr. Thorn was entitled to under law. CP 39-54. The judgment was being executed on by the Division of Child Support, with full enforcement garnishing his wages once he did find employment in 2014, as well as threats to suspend his license to practice law.

6. Ignorance of its Falsity on the Part of the Person to Whom it is Made

The court had no basis to know that Dr. Thorn was not only incapable of making the income alleged in Ms. Cromer's order of child support, but had no basis to establish any income on his behalf.

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7. The Latter's Reliance on the Truth of the Representation

Due to the statements made by Ms. Cromer, and her prior actions which caused Dr. Thorn to be involuntarily unemployed, the court entered an order of child support which accrued a balance due of over $50,000, causing not only threat of license suspensions, fees for garnishments, and employment issues. CP 181.

8. His Right to Rely Upon It

The court should be able to rely on the statements made in a sworn declaration, especially when it is uncontroverted. The court did rely on the statements made by Ms. Cromer in entering its Order of Child Support on November 16, 2012.

9. His Consequent Damage

The court entered an order of child support which accrued a balance due of over $50,000, causing not only threat of license suspensions, fees for garnishments, and employment issues. He had no ability to pay that balance as he was unemployed due to the actions of Ms. Cromer. CP 182.

These factors cannot reasonably be disputed by Ms. Cromer. They are truly established clearly, cogently, and convincingly. This was considered by Judge Sperline, who considered those factors and found them to have been met. CP 308.

The decision upon which this matter is on appeal found that relief was proper under CR 60(b)(4), not under CR 60(b)(11). Hence, this section is irrelevant to this analysis and will not be addressed in this brief.

The Motion to Vacate was Brought Within a "Reasonable Time"

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With regard to the secondary issue of whether the motion to vacate was brought within a "reasonable time", the court in *Marriage of Maddix*, 703 P. 2d 1062, 41 Wash. App. 248 (1985), viewed this issue in the context of a CR 60(b)(4) motion as a laches issue. That court wrote, "Laches is composed of two elements: proof of lack of diligence and prejudice to the party asserting the defense.[2] Mr. Jensen has failed to assert any prejudice he might sustain should the motion be granted, nor does the record disclose any prejudice."

Because there is no black-and-white deadline for the filing of a CR 60(b)(4) motion, the court considers the "reasonable time" element on a case-by-case basis. As the court wrote in *Morin v. Burris*, 161 P. 3d 956, 964 (2007):

> As the majority recognizes, default judgments are disfavored. Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 581, 599 P.2d 1289 (1979). This is so because of our long standing preference that controversies be determined on the merits rather than by default. Id. (citing Dlouhy v. Dlouhy, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)). "A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles." Id. Equity favors substance over form. To that end, when a trial court hears a motion to vacate, it must make its determination on a case-by-case basis.
>
> > Justice will not be done if hurried defaults are allowed any more than if continuing delays are

[2] *Bull v. Fenich*, 34 Wn. App. 435, 438, 661 P.2d 1012 (1983); *LaVergne v. Boysen*, 82 Wn.2d 718, 513 P.2d 547 (1973).

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> permitted. But justice might, at times, require a default or a delay. What 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.
>
> Id. at 582, 599 P.2d 1289 (quoting *Widicus v. SW. Elec. Co-op., Inc.*, 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960)). Thus, principles of equity inform our consideration of what acts may constitute an appearance.

Appellant cites several cases in which a few months or even weeks were considered "unreasonable". As the court wrote in *Suburban Janitorial v. Clarke American*, 863 P. 2d 1377 72 Wn. App. 302 (1993):

> Neither section contains any explicit time limitation so the courts have required that application for relief be made within a reasonable time. The critical period in determining whether a time is reasonable is the time between learning of the default judgment and filing the CR 60 motion. Here, Clarke applied for relief promptly upon learning that judgment had been taken against it. Nor does the time of 17 months from judgment and 13 months from the last letter preclude relief. Accordingly, we hold that Clarke's application was made within a reasonable time under both subsections.[3]

[3] Id. at 307-308, citing *United States v. Karahalias*, 205 F.2d 331 (2d Cir.1953) (applying Fed. R. Civ. P. 60(b)(6), court found 17-year delay not unreasonable);

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In the case of *United States v. Williams*, 109 F. Supp. 456, 461-462 (Arkansas 1952), the federal court in Arkansas held that a 22-year delay when the delay did not result in prejudice to the nonmoving party and when there was a basis for the delay.

In the present cased, Dr. Thorn was under a state of duress, brought upon by the direct actions of Ms. Cromer. CP 181, CP 184. He certainly presents a strong case for not only the fraud upon which her orders are based, but that the delay in filing his motion was not "unreasonable" under the circumstances.

B. *Dr. Thorn satisfies all of the White factors, and the trial court did not abuse its discretion in granting the Motion to Vacate*

The factors of *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968), were fully briefed and considered by the trial court prior to the order vacating the orders entered on November 16, 2012. CP 182, CP 282.

Dr. Thorn's declaration filed on March 27, 2014, fully addresses each of these White factors as follows:

> 2. A default order was entered against me on November 16, 2012 were entered at a time that I was dealing with the loss of my practice, and with false accusations lodged against me, resulting my by incarceration for two months based on false allegations. I was served in jail, and due to my despondent state of mind at the time, was unable to respond prior to entry of the default judgment and subsequent final orders. Although I did not respond, I did have a prima facie defense to the claim. I was the primary parent of our

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Marquette Corp. v. Priester, 234 F. Supp. 799 (E.D.S.C. 1964) (15-month delay not unreasonable); *United States v. Williams*, 109 F. Supp. 456 (W.D. Ark. 1952) (3-year delay not unreasonable).

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daughter, Emmaline Leona Cromer-Thorn. Because I was unemployed at the time of the orders, I could have continued caring for her full-time. I had a stronger bond with our daughter, and I was responsible for the day-to-day parenting for our daughter.

3. With regard to child support, I was unemployed when the orders were entered, due primarily to actions taken by the Petitioner against me. I was not making the income claimed in the order of child support. Those orders were entered with full knowledge that I was unemployed and unable to work at that time.

4. Because of the situational depression I was experiencing in late 2012, I was unable to timely appear and answer. My failure was the result of excusable neglect. This is supported by the Declaration of Steven Juergens, MD, filed herein.

5. I was recently acquitted of the false accusations made against me after a trial in October 2013. I acted with due diligence after my situational depression had ended and after the jury acquitted me with a special verdict of self defense.

6. There would be no substantial hardship if the default judgment is vacated.

CP 180-181. As stated in *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007), "The first two factors are 'primary,' and the latter two are 'secondary.'"

On the same day the motion to vacate was filed, respondent filed a response to the petition establishing his prima facia defenses to the claims. These are addressed in several pleadings. It cannot be seriously disputed that the orders entered were disputed and that there is a good basis for Dr. Thorn's positions to be adopted by the court. Not only did a jury determine that Ms. Cromer lied to the court and made false allegations of domestic violence, but entered a special verdict of self defense, ordering that Grant County reimburse Dr. Thorn for his attorney's fees in defending in the false allegations made

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against him. CP 149. These allegations were the primary basis for the parenting plan, and the resulting loss of employment and involuntary unemployment were not disclosed to the court by Ms. Cromer. CP 32.

C. Whether Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(1), (2), or (3), is irrelevant to this appeal.

The decision upon which this matter is on appeal found that relief was proper under CR 60(b)(4), not under CR 60(b)(1), (2), or (3). RP 11. Hence, this section is irrelevant to this analysis and will not be addressed in this brief.

The irrelevance of this section notwithstanding, CR 60(b) states, "If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases." The Declaration of Steven Juergens, MD, supports Dr. Thorn's incapacity. CP 183. Hence, if the decision were made based on CR 60(b)(1), (2), or (3), they should not be time-barred.

D. Whether Dr. Thorn is time barred from asserting grounds to vacate under CR 60(b)(11) is irrelevant to this appeal

This issue is address in Section A, above, and will not be repeated here. The decision of Judge Sperline was based on the fraudulent statements by Ms. Cromer. RP 11.

E. Dr. Thom <u>did</u> present "good cause" under CR 55(c) to vacate the default order of child support

The court wrote in *Canam Hambro Systems v. Horbach*, 655 P. 2d 1182, 33 Wn. App. 452, 454-55 (1982):

> The decision to set aside an order of default is generally within the discretion

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> of the trial court, subject to the good cause requirement of CR 55(c). "Where the decision or order of the trial court is a matter of discretion, it will not 454*454 be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

In this case, petitioner asserts a general statement that this low burden is not met, in contrast to all other legal authority throughout this memorandum. The *Canam* court further distinguished the issues as follows, "[i]n contrast with CR 60(e), which requires that a defendant seeking to vacate a default judgment show a meritorious defense to the action, a party seeking to set aside an order of default under CR 55(c) prior to the entry of the judgment need only show good cause." *Canam*, 33 Wash.App. at 453, 655 P.2d 1182.

This argument was fully discussed in Section A, above, and will not be repeated here.

F. There is no basis for Vacating the Order of Default

This issue was fully discussed in Section E, directly above, as well as in Section A, and will not be repeated here.

V. CONCLUSION

The court should deny the mother's appeal of the Order on Motion to Vacate dated June 20, 2014. The trial court has shown that it would like to make a determination on the merits of the case by

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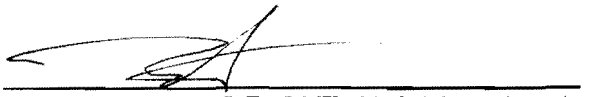
entering the order, and orders concerning children should always be made with all information before the court whenever possible.

Respectfully submitted this 18th day of December, 2014.



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