

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In Re the Marriage of:

MICHAEL LEVITZ,
Appellant,

vs.

INESA LEVITZ,
Appellee.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

- 1) The trial court erred in finding the parties should have engaged in a second discovery conference between June and October 2010.
FF4,¹ CP927.
- 2) The trial court erred in finding that Dr. Levitz either was not provided with the October 18, 2010 order to compel or had “no time to respond or comply.” FF5, CP927, FF10, CP31.
- 3) The trial court erred in finding that a default was taken without notice. FF6, CP928.
- 4) Judge Fleck² erred in finding that Judge Spearman did not consider those lesser discovery sanctions. FF6, CP928.
- 5) The trial judge erred in failing to find that Dr. Levitz’s failures to comply with virtually all of the court’s orders were willful.
- 6) The trial court erred in finding that because petitioner’s initial filing was a “generic” petition that did not specify relief, default was inappropriate.

¹ “FF” stands for Findings of Fact.

² There were two King County Superior Court judges who entered orders in this case. Appellant specifically names each in order to avoid confusion where appropriate. Generally, the “trial court” refers to Judge Fleck.

- 7) The trial court erred in finding that “there was no basis upon which to make the determination that the relief being requested [in the default orders] is with the prayer for relief” in the Petition.
- 8) The trial court erred in finding that Michael failed to provide notice as to what he was seeking with respect to the parenting plan. FF8, CP930.
- 9) The trial court erred in finding that there was no basis to make a specific award of assets and liabilities, spousal maintenance or attorney’s fees. FF9, CP930.
- 10) The trial court erred in concluding that “the petitioner’s failure to provide any notice required by due process of what he was seeking” makes the entry of the default orders “inequitable.” CP932.
- 11) The trial judge erred in excusing the Dr. Levitz’s failure to comply with the discovery on the grounds that she was acting pro se.

Issues Relating the Assignments of Error

1. Did Judge Fleck err as a matter of law when she held that the default orders were void under CR 60(b)(5) because there was no showing that the King County Superior Court did not have jurisdiction over the Levitz dissolution?

2. Did Judge Fleck err as a matter of law and abuse her discretion when she vacated the orders entered when Dr. Levitz's defaulted when there was no showing of "extraordinary circumstances" as required by CR 60(b)(11)?
3. Did Judge Fleck abuse her discretion under CR 60(b)(1) when she found that there were "irregularities" in obtaining final orders even though Dr. Levitz had defaulted by failing to pay child support and maintenance, failing to provided discovery and failing to appear for the scheduled hearings after she had actual notice of her obligations?
4. Did Judge Fleck abuse her discretion in vacating the orders entered after Dr. Levitz's default when there was no showing that the orders were inequitable to her as required by CR 60(b)(6)?
5. Even if there were some technical errors in the entry of the final orders after Dr. Levitz's default, were those errors were harmless when the final orders did not differ in any material degree from the temporary orders that had been entered during the pendency of the proceedings?
6. Is Michael entitled to attorney's fees and costs in this appeal?

B. STATEMENT OF THE CASE

Michael D. Levitz [Michael] married Dr. Inesa Levitz [Dr. Levitz] in 1993. During their early marriage both were in school and living on

Michael's funds. K.L., their only child, was born on September 15, 2006.

Dr. Levitz returned to work as a physician. Michael became a full-time homemaker and caregiver for K.L. In 2009, Dr. Levitz's income exceeded \$193,000. CP 785-86.

The parties separated in June 2009. CP 2. On August 20, 2009, Michael filed a Petition for Dissolution of Marriage. Michael stated: "There is community property owned by the parties. The Court should make a fair and equitable division of all property." Id. The petition also sought maintenance for Michael. Id. He stated that he had been "out of the competitive labor market for seven years."

Dr. Levitz responded through counsel. She admitted that there was property to be divided. CP6. She noted that Michael was receiving \$5,500 per month in child support and temporary spousal maintenance. Id. But, she asserted that he was employable and argued that "Petitioner has been voluntarily unemployed for the pendency of the marriage." Id. Dr. Levitz also asked for a restraining order, award of a tax exemption for K.L. in alternating years and "an equitable division of the property." CP7.

On February 24, 2010, the trial court entered a Temporary Parenting Plan [Temporary Plan]. CP8-29. The plan was an edited version of that proposed by Dr. Levitz. It is on her counsel's pleading paper. The plan provided that Michael would have primary residential

care with visitation for Dr. Levitz on alternate weekends. CP9. It provided for joint decision-making by the parents. The Court also entered an order awarding maintenance to Michael until he became employed.

When the Commissioner entered the Temporary Order of Support he found that Dr. Levitz was making \$8,833.00 a month after paying taxes and maintenance. CP112-119. Michael was primary caregiver for the child and made nothing. Thus, the court ordered a transfer payment from Dr. Levitz to Michael of \$1,057.00.

Dr. Levitz moved to Hawaii in April, 2010. CP 788. She took a job at Kaiser Permanente and made a salary of \$12,400 per month. Her employer paid for her housing and her vehicle. *Id.* Her lawyer wrote to Michael's lawyer affirming that Dr. Levitz intended that K.L. remain with Michael. The letter stated: "Primary placement of K.L. would be with Mr. Levitz." CP806. And, Dr. Levitz's lawyer stated that Dr. Levitz would pay for K.L.'s travel to Hawaii for visitation.

On June 14, 2010, an amended case schedule was entered and trial was set for November 8, 2010. CP29.

Thereafter Dr. Levitz failed to provide timely discovery. CP31-99. Dr. Levitz also failed to pay child support and maintenance. By the fall of 2010 she was \$12,900 in arrears. CP100-129. Much of the parties'

property had been liquidated and Michael's lawyer was holding the \$50,000 in proceeds in his trust account. CP102.

Between April 2010 and October 27, 2010, Dr. Levitz visited K.L. for a total of six hours. CP791-92. Throughout this period her behavior was erratic. CP794-98.

On September 23, 2010, Michael filed a Motion to Compel Answers to Interrogatories and Response to Requests for Production of Documents and for Sanctions and Terms [hereinafter Motion to Compel]. CP33-90.³ He specifically pointed out that trial was scheduled for November 8, 2010 and that there was missing discovery related to Dr. Levitz's employment, child support, maintenance, distribution of property, maintenance and attorney's fees – in short everything at issue in the upcoming trial. Without discovery from Dr. Levitz he did not even know what witnesses to call at trial. He argued that his ability to have a fair and timely trial was being compromised by Dr. Levitz's intransigence. Michael provided proof that his lawyer conducted a LR 37 conference with Dr. Levitz's lawyer on June 23, 2010. CP99.

³ Dr. Levitz had previously provided some incomplete and inadequate answers. For example, to many requests she responded "ask Michael" or "Michael has it." CP445, 464, 467, 448, 474. Many of the answers were simply accusations of wrongdoing against Michael. *See e.g.*, 481, 483, 489.

These materials were mailed to Dr. Levitz at 875 Ainako Ave, Hilo, Hawaii. CP131.

On September 25, 2010 Dr. Levitz signed a declaration in “Hilo, Hawaii.” CP526.

On October 1, 2010, Michael’s lawyer, David Ordell, emailed Dr. Levitz at inesainesa5@gmail.com. CP829-31. In that email Mr. Ordell detailed his objections to her answers and stated that he did not have a telephone number for Dr. Levitz. He asked that she contact him to schedule a conference. Dr. Levitz answered Mr. Ordell’s email on October 5, 2011 from inesainesa5@gmail.com. She did not respond regarding the discovery conference except to say “send all Michael interrogatories to me ASAP.” CP829. She did not respond to Mr. Ordell’s request to confer. Id. She asserted: “Judge Spearman has everything she needs to finally tell Michael to get a job.” CP831.

On October 7, 2010, Michael filed a Motion for Adjudication of Unpaid Child Support and Maintenance, Award of Attorneys Fees and Costs, Distribution of Funds [hereinafter Motion for Adjudication]. Michael provided evidence that Dr. Levitz owed him \$12,900 in back support and maintenance. CP650-679. The Motion for Adjudication was noted on the Family Law Motions calendar for October 25, 2010. Mr. Ordell also mailed a copy of the Motion to Dr. Levitz. CP131.

On October 11, 2010, Mr. Ordell again emailed Dr. Levitz at inesaines5@gmail.com. He attached the Motion to Compel and a copy of the Motion for Adjudication and a note for motion without oral argument for October 19, 2010. CP878. The motion to compel requested the following relief:

[I]f respondent fails to provide said answers and responses to requests for production and applicable documents, on or before 5:00 p.m. on the 20th day of October, 2010, that her pleadings will be stricken, and Petitioner Michael Levitz shall be entitled to an order of default ex parte for failure to comply with the discovery rules.

Sixteen minutes later, Dr. Levitz responded to Mr. Ordell and stated:

I'll be in Seattle on November 6. Michael will need to pay. He is a healthy man and must work. I submitted my parenting plan. I will never agree to a parenting plan you submitted.

On October 15, Judge Spearman, on her own motion, ordered Dr. Levitz to appear on Friday, October 22, 2010 for a pretrial status conference. CP132.

Under the local rules, Dr. Levitz's response to the motion to compel was due at noon on October 15, 2010. She did not file a response.

On October 18, 2010, Judge Marianne Spearman ordered Dr. Levitz to provide discovery no later than 5:00pm on October 21, 2010. CP134-36. The Order to Compel clearly stated that if Dr. Levitz did not

comply “her pleadings will be stricken and Petitioner Michael Levitz will be entitled to an order of default ex parte, as a result of Respondent’s failure to comply.” CP135. Judge Spearman entered the order early in order to give Dr. Levitz more time to respond. CP774. Trial was scheduled to begin in two weeks. At 4:16 p.m. that day Judge Spearman’s clerk sent a copy of the order to Dr. Levitz at inesaines5@gmail.com. CP834.

On October 22, 2010, Dr. Levitz sent correspondence directly to Judge Spearman on Kaiser Permanente letterhead. CP140. The first page states that it is from: “Inesa Levitz, respondent, case # 09-3-05615-7 SEA, 875 Ainako Ave, Hilo, HI 96720.” In that correspondence Dr. Levitz stated that she could not afford a lawyer and was “practically homeless.” She complained that Michael had been abusive and, for the first time, also complained that he had been abusive to K.L. and her mother. She complained that Michael had stolen all her money. She said that Michael had forced her to sign the temporary custody paperwork. For the first time she alleged that she had “serious health problems.” She alleged that despite all this, in February 2009, she and Michael had agreed to move to Hawaii and sell their Seattle properties – although she acknowledged that the Seattle home was in foreclosure proceedings. She asked that the trial

court “stop the madness” and order Michael to “show how the money I made for the last 10 years has just disappeared.”

Although Dr. Levitz sent a letter to the judge, she did not appear in person or on the telephone as ordered on October 22, 2010. The transcript indicates that Dr. Levitz even refused to respond to any telephone calls from Judge Spearman’s bailiff regarding pending matters. Judge Spearman stated on the record: “We have tried in vain to get in touch with Ms. Levitz. She’s not responded to any phone calls from the Bailiff.” And the judge goes on to state: “Right and she’s not responding to any further emails.” CP1090-1092.

Judge Spearman ordered that Dr. Levitz’s pleading be stricken and gave Michael permission to seek final orders ex parte. She specifically found that an order to compel was entered on October 18, 2010. CP138. But Dr. Levitz “has not contacted [Michael’s] counsel nor has she provided further answers to interrogatories or requests for production nor any other documents subsequent to entry of said order.” Id. Further, Judge Spearman found that Dr. Levitz’s “willful refusal to obey the order of this Court...impacts each and every issue in the case and substantially prejudices [Michael’s] ability to prepare for trial.” CP139. The Judge also found that Dr. Levitz “failed to comply with the Order Setting Case Schedule, as revised, by refusing to participate in Alternative Dispute

Resolution, and to Provide Respondent's Witness and Exhibit list.”

CP138. The Court said:

This Court has considered lesser sanctions, but Respondent's failure to make even the most minimal effort to comply with the order of this Court, the scope of Respondent's failure to provide requested information and documents, which impacts every contested issue in this case, the fact that there are only eleven (11) court days until the trial date is scheduled to commence, and the fact that trial was previously continued at the request of the respondent, make it clear that no lesser sanction would suffice.

CP138.

On October 25, 2010, the family law Commissioner entered an Order Adjudicating Unpaid Support, Awarding Attorney Fees and Authorizing Distribution of Funds [Order Adjudicating]. In that order, the Commissioner made a specific finding that Dr. Levitz was “served and failed to respond or appear.” CP707-709.

That same day, Michael's lawyer wrote Dr. Levitz at inesaines5@gmail.com and informed her that the trial date was stricken. He specifically asked her if she had a new address and she responded: “I'm looking for a rental place to share with my friend in Pearl City. *For now send documents to Hilo.*” (Emphasis added). She also stated that she would sign a parenting plan as long as there was no provision for spousal

support, a reduced amount of child support and a provision that K.L. spend Thanksgiving, Christmas and New Year's with her. CP847.

On October 27, 2010, Michael presented orders of default to the Court Commissioner. He filed a list of community and separate property and a proposed division of that property. CP157.

Findings of Fact and Conclusions of Law dissolving the marriage divided the community and separate property were also entered. CP 156-165. The order provided for maintenance because the "wife is a licensed physician with substantial income and work history and the ability to pay spousal maintenance to the husband." CP158. In addition, the order provided that Michael had "been a full-time homemaker and caregiver for the parties child." It noted that: "Despite husband's efforts to return to the competitive job market, he as been unable to obtain employment in his traditional field of employment or otherwise." Id. The order also noted that Michael had supported his wife while she pursued her medical degree.

The Final Parenting Plan [hereinafter Parenting Plan] determined that K.L.'s primary residence was with his father. CP167. Dr. Levitz was provided with extensive visitation – greater visitation than that provided for in the Temporary Plan. CP167-170. Each parent was permitted to make day-to-day decisions when the child was residing with that parent. Because the father was named the primary residential, and because the

parties had problems cooperating in decision-making and because of the lack of geographical proximity, he was given the authority to make major decisions for the child. CP171. The plan also ordered Dr. Levitz to post a \$5,000 bond with Michael's lawyer in order to insure his return from extended out-of-state visits with Dr. Levitz.

The Final Child Support Order [hereinafter Support Order] found that Michael had no income and Dr. Levitz earned \$8,833.00 per month. It set the support payment at \$1,238.00 per month. CP184-191. This was slightly higher than the temporary amount because Dr. Levitz had not been providing medical insurance for K.L. as she had been ordered to do.

On November 1, 2010, Dr. Levitz acknowledged receipt of Michael's documents. She stated that she would file "a petition to eliminate" some of her support obligations "tomorrow." CP859. On November 17, 2011, she acknowledged receiving the decree and mentioned appealing. CP862. Both of these acknowledgements came from her at inesaines5@gmail.com.

Dr. Levitz again wrote to the Superior Court on December 1, 2010 to "beseech" the court to consider "a reduction of monthly spousal support." CP718.⁴ She said she was "still in shock regarding the news that

⁴ During the pendency of these proceedings Dr. Levitz sent Michael an email stating: "You will not get a penny of spousal support while I live." CP880.

the judge in this case granted permanent custody of my 4 year old son K.L. to a man who repeatedly abused me over 16 years.” Id.

On May 11, 2011, Dr. Levitz moved to vacate the default orders. CP211. She alleged that on September 28, 2010 she moved and notified Michael’s attorney of her new address.⁵ CP211. She asserted that she had never received the Motion to Compel filed on October 07, 2011. Id. She asserted she didn’t receive the Motion for Adjudication of Unpaid Child Support. In her declaration in support of her motion to vacate Dr. Levitz went into significant detail regarding her change of address and asserted that she never received the Motion to Compel, the Motion to Adjudicate or Judge Spearman’s orders.

But, after receiving Michael’s response which included Dr. Levitz’s emails, Dr. Levitz admitted that she received opposing counsel’s emails and attachments. Supp. CP __, Declaration of Dr. Levitz, Sub. No. 139, filed 6/1/11. Dr. Levitz’s new excuse was that she did not understand the court rules, she did not speak English well and she did not get adequate notice that Michael would be entitled to the entry of final orders because of her default.

The motion to vacate should have been renoted before Judge Spearman. Contrary to the King County Superior Court Local Rules, LCR

60(e)(1)(A), the motion was heard by Judge Fleck. Judge Fleck held that the order striking pleadings and granting a default, the order adjudicating unpaid support, the final parenting plan and the final order of child support should be vacated under CR 60(b)(1), irregularities in obtaining the orders, they were void under CR 60(b)(5) and they were not equitable under CR 60(b)(6) and “any other reason justifying relief, CR 60(b)(11). CP936-946.

The timely appeal followed. CP936.

C. ARGUMENT

As an overriding consideration in evaluating Judge Fleck’s decision to vacate the final orders in this case, it is important to note that in many ways, Judge Fleck was in the same position as an appellate court as to Judge Spearman’s decisions. Despite the local rule requiring that the moving party return to the judge who entered the order striking Dr. Levitz’s pleadings and authorizing a default, this matter was transferred to a different judge. Thus, Judge Fleck had not witnessed firsthand Dr. Levitz’s intransigence in complying with the discovery orders or her failures to appear. Viewed in that light, it is clear, as argued below, that Judge Fleck did not give the proper deference to Judge Spearman’s

⁵ Nowhere in her pleadings does Dr. Levitz identify her new address.

determinations, did not appreciate the extent of Dr. Levitz's intransigence and as a result abused her discretion in vacating the final orders entered after Dr. Levitz's default.

Moreover, Judge Fleck used the Motion to Vacate as substitute for an appeal. All of Dr. Levitz's communications make it clear that her primary concern was the Support Orders, not the residential placement of K.L. Until the fall of 2010, Dr. Levitz had *agreed* to that placement and had failed to regularly exercise her visitation. But, motions to vacate cannot be used as substitute for appeal or as a means to revise a final order. *Metropolitan Federal Sav. & Loan Asso. v. Greenacres Memorial Asso.*, 7 Wn. App. 695, 699, 502 P.2d 476 (1972). Dr. Levitz admits that she had notice of the entry of the orders of default well within the 30-day appeal period as well as knowledge of her right to appeal. Her remedy was to appeal rather than to bring a CrR 60 motion seven months later.

1. *JUDGE FLECK ERRED AS A MATTER OF LAW WHEN SHE HELD THAT THE ORDERS ENTERED AFTER DR. LEVITZ DEFAULTED WERE VOID UNDER CR 60(B)(5) WHEN THERE WAS NO SHOWING THAT THE KING COUNTY SUPERIOR COURT LACKED JURISDICTION OVER THE LEVITZ DISSOLUTION PROCEEDINGS.*

CR 60(b)(5) permits a trial court to vacate an order that is "void." Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b)(5) motion is

reviewed de novo. *In re Marriage of Wilson*, 117 Wn. App. 40, 68 P.3d 1121 (2003); *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131, *review denied*, 130 Wn.2d 1004, 925 P.2d 989 (1996).

A judgment is void only when issued by a court which ““lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved.”” *State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751, 754 (2005). The question of subject matter jurisdiction is a question of law that this court reviews de novo. Subject matter jurisdiction is “the authority of the court to hear and determine the class of actions to which the case belongs.” Superior courts are courts of general jurisdiction. They have “the power to hear and determine all matters, legal and equitable, ... except in so far as these powers have been expressly denied.” By statute, superior courts sit as family courts to resolve disputes under RCW Title 26. *In re Marriage of Thurston*, 92 Wn. App. 494, 497-98, 963 P.2d 947, 948-49 (1998).

The King County Superior Court had jurisdiction over this case. Thus, Judge Fleck erred as a matter of law when she vacated the orders entered on Dr. Levitz’s default on this basis.

2. *JUDGE FLECK ERRED AS A MATTER OF LAW AND ABUSED HER DISCRETION WHEN SHE VACATED THE ORDERS ENTERED AFTER DR. LEVITZ'S DEFAULT UNDER CR 60(B)(11) WHEN THERE WAS NO SHOWING OF "EXTRAORDINARY CIRCUMSTANCES."*

CR 60(b)(11) is a catchall provision, intended to serve the ends of justice in extreme, unexpected situations. To vacate a judgment under CR 60(b)(11), the case must involve "extraordinary circumstances," which constitute irregularities extraneous to the proceeding. A party can only move to vacate judgment under CR 60(b)(11) when her circumstances do not permit moving under another subsection of CR 60(b). Application of this provision is limited to "situations involving extraordinary circumstances not covered by any other section of the rule." *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947, 949 (1998). Such circumstances normally involve "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *Id.* at 499. A change in a party's financial circumstances will not justify application of CR 60(b)(11) to vacate a dissolution decree. *In re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681, 685 (2003).

Because Judge Fleck found other reasons to vacate the final orders in this case, relief under this subsection of the rule is inappropriate. And

she failed to identify and irregularity extraneous to the actions of the court or any extraordinary circumstances in this case.

3. *JUDGE FLECK ABUSED HER DISCRETION WHEN SHE FOUND THAT THERE WERE “IRREGULARITIES” IN OBTAINING FINAL ORDERS WHEN DR. LEVITZ HAD DEFAULTED BY FAILING TO PAY CHILD SUPPORT AND MAINTENANCE, FAILED TO PROVIDE DISCOVERY AND FAILED TO APPEAR FOR THE SCHEDULED HEARINGS AFTER SHE HAD ACTUAL NOTICE OF HER OBLIGATIONS*

CR 60(b)(1) permits a trial court to vacate a final order when there are “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” Judge Fleck appeared to find two irregularities in the proceedings. First, she found that Michael failed to give Dr. Levitz proper notice of the proceedings. Second, she found that Judge Spearman erred in entering CR 37 sanctions. Both were an abuse of discretion.

- a. Michael gave Dr. Levitz actual notice of all of his motions.

On this issue Dr. Levitz was simply dishonest in her representations to the court in the motion to vacate. She consistently used her Hilo address throughout October, 2010. She consistently checked her email at inesaines5@gmail.com. She responded to the court and to counsel when she felt like it. She ignored the other communications she was receiving from both Judge Spearman and opposing counsel. Certainly,

Judge Spearman had no reason to misrepresent her efforts to get Dr. Levitz to respond.

It is also important to note that Dr. Levitz has never denied that she knew trial was set for November 8, 2010. And she has never disputed that she failed to provide complete discovery. She has never denied that in October 2010 her email address was inesainesa5@gmail.com.

When caught in her lies, she admitted to receiving the documents but changed her excuse. She claimed that she did not read the documents or that she did not understand them. Those excuses are incredible. It is simply not possible that Dr. Levitz, a board certified physician, would not understand the risk she was running in ignoring the trial court and counsel when trial was less than two weeks away.

And, Dr. Levitz's claim that she did not have enough money to hire counsel should not be credited. She was making an extraordinary amount of money per month. Her failure to seek assistance was either extremely ill advised or a strategic ploy to manipulate the proceedings.

Moreover, as long as the party has a meaningful opportunity to be heard and adequate time to prepare, any technical deviation from proper procedure is inconsequential. *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526, 530-31 (1990). The fact that Dr. Levitz did not receive the mailed copies of Michael's pleadings is irrelevant. She had actual

notice via email and responded to those emails. She clearly knew about the October 22, 2010 hearing because she sent Judge Spearman a pleading regarding the proceedings. In addition, the trial court clerk called and emailed her.

b. Judge Spearman's CR 37 orders were entirely proper and justified.

CR 37 sets forth the rules regarding sanctions when a party fails to make discovery. CR 37(d) authorizes a court to impose the sanctions in CR 37(b)(2), which range from exclusion of evidence to granting default judgment when a party fails to respond to interrogatories and requests for production. *See Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583-84, 220 P.3d 191, 197 (2009); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002). A trial court's reasons for imposing discovery sanctions should "be clearly stated on the record so that meaningful review can be had on appeal." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion. *Mayer*, 156 Wn.2d at 684. An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record. *See Ermine v. City of Spokane*, 143 Wn.2d

636, 650, 23 P.3d 492 (2001) (noting that a reasonable difference of opinion does not amount to abuse of discretion).

Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009)

Parties may not simply ignore or fail to respond to discovery requests—they must answer, object, or seek a protective order. CR 37(d); *Magaña*, 167 Wn.2d at 583. “Trial courts need not tolerate deliberate and willful discovery abuse.” *Magaña*, 167 Wn.2d at 576. If a party fails to comply with a motion to compel discovery, trial courts may impose sanctions under CR 37. To dismiss a case under CR 37(b), “the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed.” *Magaña*, 167 Wn.2d at 584.

Clearly Dr. Levitz’s failures to comply with the court’s orders were willful. She admits she did not answer or appear at the hearings. As argued above, her complaints about her inability to understand the process are simply not credible. Although English may not have been her birth language, she completed medical school and her residency and passed her

medical boards in the United States. She has always worked in English speaking hospitals.

Dr. Levitz's complaints that she did not have enough money to hire a lawyer, was "practically homeless" and did not understand the court rules are clearly not credible. As a medical doctor she made more than \$8,000 a month. That is sufficient for a person to both hire counsel and find an apartment. She simply did not want to spend money on competent counsel. Her choice to represent herself may have been unwise, but a trial court must hold pro se parties to the same standards to which it holds attorneys. *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187, 1190 (2010), *review denied*, 170 Wn.2d 1024, 249 P.3d 623 (2011); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Otherwise, litigants like Dr. Levitz can manipulate the system by hiring and discharging lawyers – and then claiming ignorance of the law – as a matter of litigation strategy.

Despite Judge Fleck's finding to the contrary, Judge Spearman made a specific finding that lesser sanctions were inappropriate. The record fully supports that finding. In October 2010 Dr. Levitz was not paying court ordered child support or maintenance. Dr. Levitz refused to provide discovery. Dr. Levitz decided to represent herself. Dr. Levitz received emails from opposing counsel and the court but did not respond

appropriately. Dr. Levitz did not appear – even telephonically – at the pretrial status conference. On the date the Order to Compel entered, trial was 11 days away. There was simply nothing Judge Spearman could do to get Dr. Levitz’s attention.

4. *JUDGE FLECK ABUSED HER DISCRETION IN VACATING THE ORDERS ENTERED AFTER DR. LEVITZ'S DEFAULT UNDER CR 60(B)(6) WHEN THERE WAS NO SHOWING THAT THE ORDERS WERE INEQUITABLE TO HER.*

CR 60(b)(6) permits a court to vacate an order of default when “it is no longer equitable that the judgment should have prospective application.” Decisions involving CR 60(b)(6) are few, and no Washington cases appear to have arisen in the family law context.

a. The final orders are not inequitable to Dr. Levitz.

There was nothing inequitable about the “prospective application” of the orders. Although Dr. Levitz waited seven months after the final orders were entered before filing her motion to vacate she did not identify any change in circumstances that had rendered the final orders inequitable. She certainly did not present any evidence to demonstrate how the orders might be inequitable in the future.⁶ Both before and after entry of the default orders, K.L. remained in Seattle with Michael. It is extremely

unlikely that any family law judge would remove K.L. from the only home he has ever known and approve his transfer to Hawaii. This is particularly true in light of Dr. Levitz's failure to regularly exercise her liberal visitation with her son. It was not inequitable for the Commissioner to keep K.L.'s living situation stable and predictable. It was inequitable for Judge Fleck to destabilize matters three years after the dissolution was filed and seven months after the final orders were entered.

Judge Fleck's order appears to find that the final orders in this case were inequitable because "the caretaking of a young child was at issue" and there had been no parenting evaluation. But this finding was also an abuse of discretion under the facts of this case. K.L. had been living with Michael since June, 2009, when Dr. Levitz left the family home. Dr. Levitz proposed the temporary parenting plan that placed K.L. in Michael's residential care. The parties had been operating under the temporary parenting plan since February, 2010. The contours of the temporary plan had been fully litigated when Dr. Levitz was represented by counsel. The Commissioner determined the credibility of witnesses and the weighed the conflicting testimony. In her motion to vacate, Dr. Levitz did not identify any basis for Judge Fleck to conclude that the Final

⁶ Although Dr. Levitz's financial situation *may* have changed, her remedy in that regard was to file a motion to modify the support provisions of the order.

Parenting Plan, which actually gave Dr. Levitz more liberal visitation than she had under the temporary plan was inequitable.

The financial circumstances of the parties had also been fully litigated before the Temporary Orders of Support were entered. Dr. Levitz had refused to provide discovery. Thus, to the extent that her salary had changed, she had only herself to blame in failing to provide independent evidence of any material changes in her financial situation.

b. Michael's petition was not "generic", requested specific relief and there was ample evidence in the record to support the final orders entered after Dr. Levitz's default.

Michael's petition for dissolution was presented on the Washington Court's mandatory form. It contained a specific request for approval of a parenting plan and equitable distribution of the parties' property. This was more than sufficient to put Dr. Levitz on notice of the relief Michael was requesting. This is particularly true in a family law case where, unlike in some other causes of action, the parties are intimately aware of the issues that will be before the court, including the division of the family property and their unique child-rearing issues.

But if that were not enough, in this case the issues had been substantially fleshed out in the temporary orders of support, maintenance and parenting. It is simply disingenuous for Dr. Levitz to claim that she

was unaware that Michael would continue to have residential custody of K.L., and that she would have to pay child support and maintenance. This matter had been fully litigated and discussed.

Moreover, Michael did the best he could given Dr. Levitz's complete failure to comply with the Court's orders or the requested discovery. It is the height of hypocrisy for Dr. Levitz to claim that she was prejudiced by Michael's failure to more fully explain his requested relief on the issues when Dr. Levitz refused to provide the discovery that might have assisted the court in making its decision.

Finally, if this Court were to adopt Judge Fleck's rationale, most default orders entered in the trial courts of this state would be vulnerable to vacation. Virtually all requests for relief in initial pleadings are phrased generally. That is because subsequent pretrial discovery is necessary to flesh out the specifics of the relief that should be granted. Under Judge Fleck's interpretation of the rule, any default order entered on a "generic" request for relief could be vacated under CR 60(b)(6).

Judge Fleck conclusion that there was "no basis to make a specific award of assets and liabilities, spousal maintenance, attorneys fees or to enter a parenting plan is untenable. As argued above, these issues had been litigated in a contested hearing before the Commissioner when the Temporary Orders had been entered. The orders entered after Dr. Levitz's

default did not vary from those Temporary Orders in any material detail. And, if there was some deficit in the record, that was clearly the fault of Dr. Levitz. She had refused to participate in discovery and trial preparation in any meaningful way.

c. Granting relief to Dr. Levitz was inequitable to Michael.

In fact, Judge Fleck’s order vacating the final judgements was inequitable to Michael. Intransigence is “a recognized equitable ground.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). “[A] person must come into a court of equity with clean hands.” *Pierce County v. State*, 144 Wn. App. 783, 832, 185 P.3d 594 (2008) (citing *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940)). Dr. Levitz failed to comply with any of the trial court’s pretrial orders. Michael hired counsel, sought discovery and was preparing for trial – while Dr. Levitz did nothing. Finally, eleven days before trial, Judge Spearman was forced to act. Even then she gave Dr. Levitz one more chance to comply with the court’s orders. Not only did Dr. Levitz again fail to provide discovery, she also failed to appear at the status conference. Despite the fact that Dr. Levitz now complains that she did not understand the court proceedings, the facts demonstrate that she either

paid no attention to the looming trial date or treated the entire process with contempt.

Nonetheless, Judge Fleck rewarded her intransigence, manipulation and delay by granting her motion to vacate. The order vacating was plainly an abuse of discretion under these circumstances.

5. *EVEN IF THERE WERE SOME TECHNICAL ERRORS IN THE ENTRY OF THE FINAL ORDERS AFTER DR. LEVITZ'S DEFAULT, THOSE ERRORS WERE HARMLESS BECAUSE THE FINAL ORDERS DID NOT DIFFER IN ANY MATERIAL DEGREE FROM THE TEMPORARY ORDERS THAT HAD BEEN ENTERED DURING THE PENDENCY OF THE PROCEEDINGS*

In her pleadings in support of her motion to vacate, Dr. Levitz concentrated her argument on her position that Michael had not given her proper notice of the possibility of the default or of his requested relief. But, even after seven months, she failed to provide any evidence that could possibly change the final orders entered after her default. As to residential custody of K.L., Michael has always been the custodial parent. At the time of the entry of the final orders he was not working outside the home. Dr. Levitz, on the other hand, has always been able to find very lucrative employment. Throughout the marriage, Dr. Levitz was always the primary breadwinner. As to the property division, the parties' real property is in foreclosure. Michael was awarded title to the property. But

in reality all that means is that he can now seek to prevent the foreclosure without the need to involve Dr. Levitz in those legal proceedings.

6. *MICHAEL IS ENTITLED TO ATTORNEYS FEE AND COSTS ON APPEAL.*

Under RCW 26.09.140, this Court has discretion to order a party to pay for the cost of appeal and attorneys fees. In this case, Dr. Levitz is a board-certified physician who makes a very good salary. Yet she has failed to pay child support, failed to pay maintenance, failed to comply with the court rules and delayed the proceedings by waiting seven months to bring her motion to vacate the final orders. This Court should grant Michael relief and grant him costs and attorneys fees on appeal.

A court's award of attorney fees is also justified on the recognized equitable ground of intransigence. *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Delay tactics and obstructionism will also support a finding of intransigence. *Id.* Once intransigence is established, the financial resources of the party seeking attorney fees are irrelevant. *Id.* The record is replete with evidence that Dr. Levitz caused delay and disregard of the trial court orders in this matter. Therefore, Michael is entitled to an award of attorney fees and costs on appeal without regard to his need or Dr. Levitz's ability to pay. *Id.*

D. CONCLUSION

It is true that in family law matters, the trial court “sits in equity.” But there was nothing inequitable about the final orders entered after Dr. Levitz’s default. The inequity occurred when Judge Fleck ignored Dr. Levitz’s intransigence, dishonesty and manipulations and granted an order vacating the matter three years after Michael initially sought the dissolution. Failing to reverse Judge Fleck thereby requiring Michael to essentially begin the litigation (with its attendant costs and delays) again would compound the inequity.

Respectfully submitted this 27th day of February, 2012.



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CERTIFICATE OF SERVICE

I certify that on February 27, 2012, I served one copy of the foregoing pleading by First Class United States Mail, postage prepaid on:

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