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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 44296-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANN E. MILLS,

Appellant,

v.

PAUL E. WIERENGA

Respondent.

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

The Appellant assigns as error the courts failure to grant the motion to vacate the decree pursuant to CR 60.

Issue Pertaining to Assignment of Error No. 1:

Did the courts action in denying the motion constitute an abuse of discretion?

II. STATEMENT OF THE CASE

The parties were granted a divorce on November 10th, 2011. The decree provided that “the court intends to make an equal division of the assets of the parties”

The decree further provided that “Paul Wierenga made deposits totaling \$28,149.23 to his IRA account after separation and that amount should be returned to him before any division is calculated.” *Clerks Papers #149* (attached decree).

Months after the divorce Mr. Wierenga admitted for the first time that he had withdrawn monies from the IRA accounts in violation of the restraining orders prohibiting such action. His email stated that he withdrew \$13,500.00 in 2009 and \$37,831 in 2010. *Clerks Papers #149*.

Mrs. Mills filed a declaration concerning the \$28,149.23 that Mr. Wierenga represented to the court that he had deposited into the IRA account. The court required reimbursement of \$28,149.23 to him of this amount in the decree prior to division of the rest of the account. Her declaration stated that two checks, one for \$2,125.00 and the other for \$4,024.23, were not deposited into the IRA account that was supposed to

be divided between the parties, but were instead deposited into the Arc Analysis account which was an account solely in Mr. Wierenga's name. *Clerks Papers #149.*

Mrs. Mills also contended that the other check for \$22,000.00 was also not deposited into the IRA account and was instead deposited into Mr. Wierenga's own separate account. Mr. Wierenga refused to provide Ann Mills with the Schwab retirement account statements when Ann Mills requested proof of said deposit.

Mrs. Mills filed a motion to vacate the decree after discovering that Mr. Wierenga had withdrew and concealed \$51,331.00 in violation of their restraining order and that Mr. Wierenga misrepresented to the court that he had deposited \$28,149.23 into a community IRA. Ann Mills cited Rule 60(b)(1), (4) and (11).

As part of her motion to vacate she filed as exhibits two emails from Mr. Wierenga in which he admitted taking monies out of the account while the restraining order existed by withdrawing \$13,000.00 in 2009 and \$37,831.00 in 2010. *Clerks Papers #149.*

Her declaration stated that the three checks that totaled \$28,149.23 were not actually deposited into the Schwab community IRA, but instead deposited into the Arc Analysis account, which is his separate account. Thus no credit should have been granted to Mr. Wierenga for these alleged deposits. *Clerks Papers #149.* Mrs. Mills filed copies of the Schwab IRA account reflecting that Mr. Wierenga made no deposits into the account in September or October of 2010 the months the checks were written. The

check for \$2125.00 was written on September 13th, 2010 and the check for \$4,024.32 was written on the same date. *Clerks Papers #177*.

Mr. Wierenga filed no response denying that Ann Mills' contention that the \$28,149.23 was deposited into his personal IRA instead of the community Schwab IRA. He further filed no response denying Ann Mills' contention that he withdrew \$51,331.00 from the community IRA in violation of the restraining order and without telling either Ann or the court.

The motion to vacate the decree cited Rule 60(b)(1) mistakes, inadvertence, excusable neglect or irregularity in obtaining the judgment; and 60(b)(4), fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; and 60(b)(11) any other reason justifying relief from the operation of the judgment.

After argument the court denied the motion to vacate the decree. *Clerks Papers #179*. This appeal followed.

III. SUMMARY OF ARGUMENT

The trial court abused its discretion by denying the motion to vacate the decree that here was obtained by fraud, misrepresentation, or other misconduct of an adverse party as established by CR 60(b)(4).

IV. ARGUMENT

In the present case the decree that was entered contemplated an equal division of the parties' property. The decree specifically provided that

“The court intends to make an equal division of the assets of the parties.”

Clerks Papers 149.

Here the community accounts were divided equally at the time of the entry of the decree. Unfortunately neither Mrs. Mills nor the court were aware that during the divorce action that Mr. Wierenga had taken over \$51,331 out of these accounts for his own use in violation of the then existing restraining order. *Clerks Papers* #31. Proof of this was presented to the court in the CR 60 motion and Mr. Wierenga filed nothing to dispute this.

Further, the decree provided that Mr. Wierenga was to receive a credit of \$28,149.23 for deposits he claimed he made into the community IRA account after separation. In the CR 60 motion Mrs. Mills presented photo copies of two checks totaling \$6,149.23 which indicated on their face that they were not deposited into the community IRA accounts that was to be divided, and in fact had the account number indicating it was deposited into Mr. Wierenga's separate account thus eliminating any need for a credit. Mrs. Mills also filed the monthly statements from the community Schwab IRA for the months the checks were written which showed they were in fact not deposited into the joint IRA account. Mr. Wierenga once again filed no account records to dispute Mrs. Mills'

claims, and he did not file a declaration disputing that he misrepresented these facts to Mrs. Mills and the court at the time the decree was entered.

In the present case Mrs. Mills' claims and documentary evidence provided was not denied or controverted by Mr. Wierenga concerning the crux of the CR 60 motion. It is clear that the actions of clandestinely taking monies out of accounts in violation of a restraining order, and also representing that you had deposited monies into a joint account when in fact you did not in order to obtain an unjustified credit in the decree constitutes a misrepresentation or other misconduct of an adverse party under CR 60(b)(4).

CR 60(b)(4) provides in relevant part that:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party

WA R SUPER CT CIV CR 60

Motions to vacate or for relief of judgment are addressed to sound discretion of trial court and will not be disturbed on appeal absent showing of manifest abuse of discretion.

Decisions reviewable only for an abuse of discretion include procedural matters such as... granting or denying a motion to vacate... 21 Wash. Prac., Fam. And Community Prop. L. § 51.27 citing to *Vaughn v. Chung*, 119 Wn.2d 273, 830 P.2d 668 (1992).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing *Washington State Bar Ass'n, Washington Appellate Practice Deskbook* § 18.5 (2d ed.1993)).

In the present case, when the trial court denied the CR 60 motion to vacate they made a decision that was manifestly outside the realm of acceptable choices given the factual record. Mrs. Mills put forth evidence of fraud or misrepresentation by Mr. Wierenga in obtaining a final decree for dissolution and property division with no evidence to the contrary. Furthermore, Ms. Mills put forth evidence that Mr. Wierenga perpetuated a fraud on the court and on Mrs. Mills when he alleged that he deposited money into a joint IRA when in fact he did not and when he clandestinely withdrew over \$50,000.00 from a joint account in violation of the court's

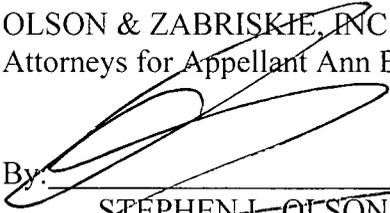
restraining order. The denial to vacate the decree which was based upon these facts not discovered until months after the decree was entered would be contrary to the range of acceptable choices.

V. CONCLUSION

Failure to vacate the Decree of Dissolution in this case constitutes and abuse of discretion, and the trial courts action of denying the motion to vacate the decree should be reversed and the matter be remanded for entry of an order vacating the decree, and further appropriate action..

RESPECTFULLY SUBMITTED this 4th day of March, 2013

OLSON & ZABRISKIE, INC.
Attorneys for Appellant Ann E. Mills.

By: 

STEPHEN L. OLSON, WSBA #7489

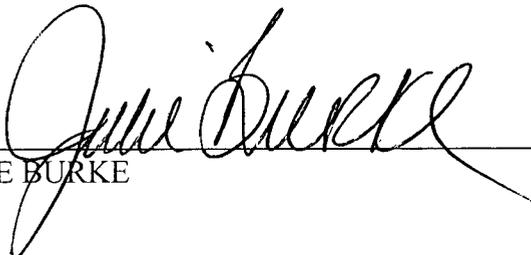
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ANN E. MILLS, vs. PAUL WIERENGA,	Appellant, Respondent.	TRIAL COURT NO. 09-3-00368- COA NO. 44296-5-II PROOF OF SERVICE [RAP 10.2(h)]
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JULIE BURKE, under penalty of perjury under the laws of the State of Washington, declares: I am regularly employed by the law firm of Olson & Zabriskie, Inc. On March 4, 2013, I duly served Jon Parker, attorney for Respondent, by mailing a true and correct copy of the Amended Brief of Appellant, via regular US Postal Service, proper postage affixed thereto on March 4, 2013 to: Jon Parker, Parker & Winkelman, Attorneys at Law, P.O. Box 700, Hoquiam, WA 98550.

DATED: March 4, 2013.



JULIE BURKE

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