

No. 46794-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

AERAN MURSCH,
Appellant,

v.

RICHARD L. MURSCH,
Respondent.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

An order denying Ms. Mursch's Motion to Vacate Decree of Dissolution underlies this appeal. CP 222.

Factual background

Mr. and Ms. Mursch met in 1991 and married in the summer of 1992. Verbatim Report of the Proceedings 9/29/14 (VRP) at 66. At the time of marriage both parties spoke Korean and Ms. Mursch had limited English proficiency. VRP at 65. The parties resided in the United States for the duration of their marriage.

During the marriage Mr. Mursch was employed with Boeing Company and Ms. Mursch was largely a homemaker. VRP 66. Ms. Mursch did take an English as a second language course and 2-3 years of English courses in Korea. VRP 67. Ms. Mursch immersed herself in the day-to-day activities associated with raising a family. These activities included obtaining a driver's license, doing the grocery shopping, attending parent-teacher conferences, and doing other activities independently in the community. VRP 68.

During the course of the marriage Mr. and Ms. Mursch shared a joint bank account. VRP 68. Ms. Mursch struggled with management of money throughout the marriage. VRP 68-69. Ms. Mursch obtained credit

cards in her sole name in addition to the use of the joint bank account.

VRP 68-69.

In approximately 2010 the parties physically separated with Mr. Mursch moving out of the family home and into his parents' home. VRP 19. On 07/13/11 Ms. Mursch was personally served with a summons and petition for legal separation along with a letter from Mr. Mursch's attorney and additional pleadings. CP 89-92. Ms. Mursch does not deny that she was properly served the documents provided for in the return of service. CP 25.

Ms. Mursch did not properly appear or respond to the documents served upon her. VRP 27-28. Mr. Mursch obtained an Order of Default on 08/12/12 along with entering the final orders. CP 97-98.

The final orders entered by the court provided for Mr. Mursch to pay spousal maintenance in the amount of \$700 along with \$1,800 in child support. CP 108, 132. The Order of Child Support included a voluntary upward deviation of child support. CP 111. Mr. Mursch's attorney inadvertently signed the election for enforcement services by DSHS on behalf of Ms. Mursch during entry of the final orders. CP 117.

Mr. Mursch requested that Ms. Mursch execute the direct deposit authorization form to allow DCS to directly deposit money from his paycheck into Ms. Mursch's bank account. VRP 73. Ms. Mursch

declined to set up direct deposit into her account and instead insist that the money be deposited into a joint account. VRP 73. Mr. Mursch paid Ms. Mursch the spousal maintenance directly. Mr. Mursch routinely provided Ms. Mursch \$1,100 a month, \$400 more than ordered, to help assist Ms. Mursch. VRP 74.

Per the Decree of Dissolution Ms. Mursch was awarded the family home with approximately \$187,000 in equity along with the underlying indebtedness of approximately \$87,000. CP 134-35. Mr. Mursch continued to pay the mortgage and most of the utilities on Ms. Mursch's home with child support funds placed into the joint account. VRP 74.

On 05/20/13 Mr. Mursch filed a motion to convert the Decree of Legal Separation into a Decree of Dissolution. CP 138. On 06/11/13 the court entered an order converting the Decree of Legal Separation into a Decree of Dissolution. CP 139. Ms. Mursch appeared at the hearing through counsel and raised no opposition to the validity of the final orders entered in 2011. CP 168-176.

Ms. Mursch took no further action until 02/27/14 at which time she filed a motion to vacate the Decree of Dissolution. CP 144-153. The trial court initially denied Ms. Mursch's motion and set the matter for an evidentiary hearing with oral testimony. CP 197. Mr. Mursch's attorney motioned the court for an order clarifying his role in representation due to

the scrivener's error on the child support order where he accidentally signed the DCS enforcement provision on behalf of Ms. Mursch. CP 291. Ms. Mursch opposed the motion indicating that she may wish to call Mr. Mursch's attorney, Robert Helland, as a witness at the time of the evidentiary hearing. Based upon this representation the trial court disqualified Mr. Helland's office from representing Mr. Mursch at the evidentiary hearing and required him to obtain outside counsel. CP 198-99.

On 09/29/14 this matter proceeded to an evidentiary hearing in front of the trial judge where both parties testified. On 10/02/14 the court issued its oral ruling denying Ms. Mursch's motion..

Ms. Mursch now appeals.

Procedural Background

A Decree of Legal Separation was entered on 08/12/11. CP 132. The Decree of Legal Separation was converted to a Decree of Dissolution on 06/11/13. CP 139. Ms. Mursch filed a motion to vacate the Decree of Dissolution on 02/27/14. CP 144. An evidentiary hearing occurred on 09/29/14 and the court entered an order denying the motion to vacate on 11/21/14. CP 222.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR DENYING THE APPELLANT'S MOTION TO VACATE THE DECREE OF DISSOLUTION.

Standard of Review Pertaining to Vacating Judgments.

A trial court's decision on a CR 60(b) motion is reviewed for an abuse of discretion. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn.App. 803, 821, 225 P.3d 280 (2009), review denied, 169 Wn.2d 1012 (2010). A trial court abuses its discretion where its decision "is manifestly unreasonable or based upon untenable grounds or [untenable] reasons." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). In reviewing a CR 60(b) motion, the court reviews only the decision of the trial court and not the underlying judgment. *Bjurstrom v. Campbell*, 27 Wn.App. 449, 450-51, 618 P.2d 533 (1980). Because a CR 60(b) motion is "addressed to the sound discretion" of the trial court, this court does not address arguments that were not made to the trial court. *Jones v. City of Seattle*, 179 Wn.2d 322, 337-38, 314 P.3d 380 (2013).

A CR 60 motion to vacate is not a substitute for an appeal.

Washington courts have defined the limits of authority to vacate under CR 60(b):

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not

intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion."

In re Jones' Estate, 116 Wash. 424, 428, 199 P. 734 (1921) (quoting Henry Campbell Black, 1 *Law of Judgments* § 329, at 506 (2d ed. 1902)); see *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 758-59, 415 P.2d 501 (1966).

VIII. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO VACATE THE DECREE OF DISSOLUTION BASED UPON CR 60(b)(1).

The respondent asserted at the evidentiary hearing that the decree of legal separation should be vacated based on CR 60(b)(1). CP 144. The Respondent concedes in their brief that the trial court did not err in the denial of the motion to vacate under CR 60(b)(1) and therefore Respondent does not brief this issue. Appellant's Brief at 13.

IX. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO VACATE THE DECREE OF DISSOLUTION BASED UPON CR 60(b)(4).

CR 60(b)(4) provides that the trial court may set aside a judgment for "Fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party.” A motion under CR 60(b) must be “made within a reasonable time.” CR 60(b). What is “reasonable” depends on the facts of the case. *In re Marriage of Thurston*, 92 Wn.App. 494, 500, 963 P.2d 947 (1998). “Major considerations that may be relevant in determining timeliness are whether the nonmoving party is prejudiced by the delay and whether the moving party has a good reason for failing to take action sooner.” *Id.*

Clear, cogent, and convincing evidence is required to support the trial court's finding of fraud. *Williams v. Joslin*, 65 Wash.2d 696, 697, 399 P.2d 308 (1965). The nine elements of fraud are (1) representation of an existing fact, (2) materiality of the fact, (3) falsity of the fact, (4) the speaker's knowledge of the falsity of the fact, (5) the speaker's intent that the fact should be acted on by the person to whom the fact was represented, (6) ignorance of the fact's falsity on the part of the person to whom it is represented, (7) reliance on the truth of the factual representation, (8) the right of the person to rely on the factual representation, and (9) the person's consequent damage from the false factual representation. *Sigman v. Stevens-Norton, Inc.*, 70 Wash.2d 915, 920, 425 P.2d 891 (1967). Ms. Mursch fails to address any of the elements necessary to establish fraud in her brief.

In the present case Ms. Mursch waited over three years to take any action to correct the alleged fraud. Ms. Mursch testified that she received the summons and petition in 2011. VRP 25. Ms. Mursch further testified that she is able to read English and knew that she needed to take some action based upon the paperwork she received. VRP 24, 27. Yet, when asked why she did not act, Ms. Mursch simply states:

Because I didn't know I had to be in court. I didn't know what day I was supposed to be in court.

Ms. Mursch provides no explanation as to why she did not contact the court or anyone else to assist her.

Even if the court is inclined to believe that Ms. Mursch's inaction was excusable, Ms. Mursch contacted an attorney in 2012 through the use of a Korean magazine and again contacted a second attorney in 2013. VRP 49, 52. Despite contacting two attorneys and stating that she received and understood the paperwork served on her, Ms. Mursch took no action until February 2014.

The court has traditionally defined fraud as egregious actions. For example, a court may vacate a marriage dissolution that was obtained by fraud, in that the husband falsely claimed that he did not know the whereabouts of his wife at the time he obtained the dissolution. *Himes v. MacIntyre-Himes*, 136 Wn.2d 707, 965 P.2d 1087 (1998). Or, where

husband had concealed the existence of community property during dissolution proceedings, wife would be allowed to bring action for partition of property concealed. *Seals v. Seals*, 22 Wn. App. 652, 590 P.2d 1301 (1979).

The fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.' *Lindgren v. Lindgren*, 58 Wn. 588, 596, 794 P.2d 526. The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation or other misconduct by clear and convincing evidence. *Lindgren*, 58 Wn. App. at 596.

A misrepresentation requires specific knowledge and intent by the wrongdoer. *Sarvis v. Land Resources, Inc.*, 62 Wn. App. 888, 815 P.2d 840 (1991), review denied, 118 Wn.2d 1020, 827 P.2d 1012 (1992). The respondent has not provided clear and convincing evidence to support a motion under CR 60(b)(4).

Ms. Mursch appears to allege that Mr. Mursch committed fraud by allegedly trying to conceal the finality of the dissolution action. Appellant's Brief 14. Ms. Mursch provides no explanation as to why she would view the dissolution as incomplete when she received spousal maintenance and child support with an upward deviation. The parties were living separate and apart through the entire dissolution proceeding.

Ms. Mursch provides no explanation as to why she never checked the status of the dissolution case or took other efforts to inquire as to what was occurring.

Ms. Mursch further alleges that Mr. Mursch committed fraud through the payment of child support to DSHS after entry of the 2011 final orders. Appellant's Brief at 17. Ms. Mursch fails to provide any legal basis supporting how alleged fraud occurring after the entry of final orders would have any impact on the actual entry of the orders in 2011 per the court's ruling in *Lindgren*.

Ms. Mursch further alleges that Mr. Mursch committed fraud through the act of his attorney accidentally signing the DCS Support Enforcement election on behalf of Ms. Mursch. Appellant's Brief at 19. Ms. Mursch concedes that either party may elect for support enforcement through DCS. Again, this alleged act of fraud has no impact on the court's entry of the final orders in 2011.

Ms. Mursch reaped the benefits of the decree by accepting spousal maintenance and elevated levels of child support and a home with considerable equity. Ms. Mursch does not present clear and convincing evidence that any fraud occurred during the proceedings and as such the trial court did not abuse its discretion in denying the motion.

X. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO VACATE THE DECREE OF DISSOLUTION BASED UPON CR 60(b)(11).

CR 60 (b)(11) authorizes a court to vacate a judgment for "any other reason justifying relief from the operation of the judgment." CR 60(b)(11) is confined to situations involving extraordinary circumstances not covered by any other section of this rule. *Gustafson v. Gustafson*, 54 Wn. App. 66, 772 P.2d 1031 (1989). CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1). *Friebe v Supancheck*, 98 Wn.App. 260, 267, 992 P.2d 1014 (1999). When a motion to vacate is brought more than one year after entry of the default judgment, such that CR 60(b)(1) is no longer available to the moving party, an argument for vacation of the judgment due to mistake, inadvertence, or excusable neglect cannot be made under CR 60(b)(11).

CR 60(b)(11) applies only in situations involving "extraordinary circumstances" relating to "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247. The respondent fails to provide any evidence as to how the proceeding was improper or irregular (emphasis added).

CR60(b)(11) is not a proper basis for vacating a decree when a party challenges the overall alleged fairness of a decree or agreement.

Yearout v. Yearout, 41 Wn. App. 897, 707 P.2d 1367 (1985). In *Yearout*, the court held that an unfair decree even when coupled by an unstable emotional condition of a party does not constitute extraordinary circumstances that would justify vacation of judgment. The current case does not begin to rise even close to the level of *Yearout*, which was still not enough for the court to vacate the judgment under CR 60(b)(11).

Ms. Mursch puts great weight on *White v. Holm*, 73 Wn.2d 348 to support her position that the trial court erred by denying her motion to vacate. Ms. Mursch's reliance on this case is misplaced, as the case is not analogous to the present case. The court in *White* determined that the defendant acted in due diligence and believed that they secured legal representation for the matter. In the present case, Ms. Mursch received the summons and took no action whatsoever to respond. Similarly, in *White*, the defendant moved to vacate the default judgment within weeks of entry. In the present case Ms. Mursch took no action for over three years. Even if the court is inclined to believe Ms. Mursch's testimony that the first time she learned of the default judgment was when Mr. Mursch moved to convert the Decree of Legal Separation to a Decree of Dissolution, Ms. Mursch provides no compelling testimony as why she waited another nine months to take any action.

Unlike the *White* case, vacating the Decree of Dissolution would create considerable hardship for Mr. Mursch. The parties actively relied on the provisions in the Decree of Dissolution for over three years. It would be impossible to financially return the parties to their respective positions from three years earlier. Likewise, records and assets that were in existence when the decree was entered no longer exist. The present case is not analogous to vacating a judgment entered mere weeks earlier.

Ms. Mursch has not demonstrated an extraordinary circumstance as to justify vacation of the decree. Ms. Mursch took no action when properly served with the summons and petition and opted to sit on her rights for over three years. Ms. Mursch raises questions regarding the overall fairness of the distribution of assets and liabilities in decree; however, many of the issues that Ms. Mursch raises are not part of the record before this court and as such Mr. Mursch respectfully requests that this court not consider unsupported argument. Ms. Mursch has not provided sufficient evidence to supporting vacating the decree under CR 60(b)(11) and as such the trial court did not abuse its discretion and her motion was properly denied.

XI. MS. MURSCH'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Ms. Mursch cites *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Win.2d 418, 422, 511 P.2d 1002 (1978) for her assertion that she was denied due process rights. Ms. Mursch's brief is unclear as to exactly what due process rights she asserts were violated and a legal basis to support the alleged violations.

Appellant concedes in their brief, "Aeran is not without blame, and she should have filed a response in this case or made contact with the court in some manner." Brief of Appellant at 23. Ms. Mursch never asserts that she was improperly served or did not receive notice of the proceeding. Ms. Mursch admits that she received notice and failed to act appropriately. Ms. Mursch does not advance any legal argument to support a proposition that the notice of the hearing provided does not satisfy due process requirements.

XII. APPELLANT'S REQUEST FOR FEES ON APPEAL SHOULD BE DENIED AND RESPONDENT SHOULD BE AWARDED ACTUAL FEES AND COSTS DUE TO APPELLANT BRINGING A FRIVOLOUS APPEAL.

RCW 26.09.140 provides:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

RAP 18.9 provides, in pertinent part:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

“An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

None of Ms. Mursch’s arguments have any basis in the law or in the record below. Reasonable minds cannot differ as to the issues presented by Ms. Mursch; nor can reasonable minds differ as to the propriety of Judge Culpepper’s numerous rulings. Therefore, this Court should deem Ms. Mursch’s appeal to be frivolous and should award Mr. Mursch his reasonable attorney’s fees for having to respond to it. In finding that Mr. Mursch is a prevailing party under RAP 14.2 and in finding that Ms. Mursch’s appeal is frivolous, there is no basis to award her fees and costs as requested.

XIII. CONCLUSION

Ms. Mursch does not deny receiving proper notice of the dissolution proceedings, yet she failed to take any action in the matter.

Ms. Mursch's fails to provide any basis to establish that the trial court abused its discretion in denying her motion to vacate. The trial court's ruling is well support in fact and law and as such this court should affirm the trial court. Ms. Mursch's appeal is frivolous and as such Mr. Mursch should be awarded his actual attorney fees and costs for the necessity of responding to same.

DATED this 20th day of July 2015.

RESPECTFULLY SUBMITTED,



Andrew Helland, WSBA #43181
Attorney for Richard Mursch, Respondent

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DIVISION II

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Declaration of Transmittal

STATE OF WASHINGTON

Under penalty of perjury under the laws of the State of Washington

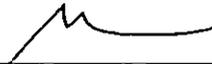
DEPUTY

I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II, by personal service and delivered a copy of this document via personal service to the following:

Law Office of Kathleen Forrest
P.O. BOX 88702
Steilacoom, WA 98388

Signed at Tacoma, Washington on this 20th day of July 2015.



Robert Helland