COA No. 59283-5-II

Supreme Court of the State of Washington

Alan Cutler,

Petitioner,

v.

Patti Wise,

Respondent.

Petition for Review

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Cases

Rules

1. Identity of Petitioner

Alan Cutler, Appellant at the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

In re Marriage of Cutler, No. 59283-5-II (April 8, 2025) (unpublished). Cutler filed a timely motion for reconsideration, which was denied on May 22, 2025. App. 12. The court failed to serve Cutler with the Order. App. 20. On June 30, 2025, the Court of Appeals issued the Mandate, which it also failed to serve on Cutler. App. 13, 20. When Cutler became aware of the Order and Mandate, he promptly filed a motion to recall the Mandate to allow him the opportunity to make this Petition for Review. App. 15. The Court of Appeals recalled the mandate by Ruling dated August 5, 2025. App. 22. This Petition, filed within 30 days after the ruling recalling the Mandate, is timely.

3. Issues Presented for Review

1. Did the trial court abuse its discretion by denying Cutler's CR 60(b) motion to vacate the divorce degree based on the breakdown of the attorney-client agency relationship as a result of South's mental illness, as evidenced by South's repeated pattern of neglect, e.g., withholding the true status of the case, failing to inform Cutler of the mistakes South was making, providing assurances to Cutler that were misleading at best, and, where South attended hearings - including the trial - being unprepared and providing ineffective representation, all of which effectively deprived Cutler of representation?

2. Does the Court of Appeals opinion create an undesirable chilling effect on the attorney-client agency relationship and foster poor public policy by penalizing a client for trusting in the assurances of his attorney and not immediately firing the attorney upon discovery of a mistake?

4. Statement of the Case

4.1 Introduction

In this divorce case, Alan Cutler's attorney, Timothy South, suffered from clinical depression, which caused him to neglect Cutler's case. South failed to respond to requests to update discovery responses

for months prior to trial and failed to attend a hearing. As a sanction for the discovery violation, the trial court barred South from presenting Cutler's case at trial. After Patti Wise presented her evidence at trial, the trial court entered a divorce decree that granted Wise everything she requested, including a community property interest, worth $367,500, in two properties that Cutler would have contended were his separate property.

Cutler moved to vacate the divorce decree under CR 60(b)(11) and *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003). In *Barr*, the court held that where an attorney's mental health condition effectively deprives a diligent but unknowing client of representation, there is no basis for attributing the attorney's conduct to the client, and extraordinary circumstances exist under CR 60(b)(11) to vacate a judgment that resulted from the attorney's misconduct.

The trial court here recognized the unjustness of the result but believed there was not grounds to vacate the decree. Cutler appealed, and the Court of Appeals affirmed the trial court's decision.

4.2 Alan Cutler hired attorney Timothy South to represent him in his divorce from Patti Wise.

Alan Cutler and Patti Wise were married in April 2017. CP 91. Both brought separate property into this marriage. *See* CP 2, 11, 80-85. The marriage lasted just short of three years, with the couple separating in March 2020. CP 91.

Cutler hired attorney Timothy South to represent him in the divorce proceedings. CP 8, 129. Wise propounded discovery requests in September 2020. CP 23. South, working with Cutler, provided responses in January 2021. CP 23, 304. In anticipation of a March 2022 settlement conference, South prepared and filed a "Trial Aid," signed by Cutler, that set forth Cutler's position on contested issues, including his assertion

that the two properties were his separate property and should be retained by him. CP 9, 10-16.

4.3 The death of South's mother caused South to neglect Cutler's case.

Trial was scheduled for September 12, 2022. CP 17. South requested a continuance of the trial "due to some urgent family matters." CP 18. South informed Cutler that South's mother was in the hospital. CP 285. The trial was rescheduled for the week of February 6, 2023. CP 19.

Wise had sent requests for updated discovery responses on August 18, 2022. CP 27-28. On Sept. 6, South indicated that his family emergency had prevented him from responding. CP 41. Wise made additional discovery requests on Sept. 12. CP 33. When South failed to respond, Wise sought to schedule a CR 26(i) conference. CP 35. South did not respond. Wise tried to follow up again on October 24 and December 15. CP 38, 41. Again, South failed to

respond. CP 24. There is no evidence that Cutler was informed that any of this was going on. See CP 129, 324. To the contrary, Cutler was led to believe that South "had everything under control." CP 129.

4.4 South falsely assured Cutler that all was well, even as the trial court barred Cutler from presenting his case at trial.

In January 2023, Wise filed a motion in limine and motion for default, both seeking orders preventing Cutler from participating in the upcoming trial due to South's failure to update discovery responses and failure to file a response to the petition. CP 22-24, 43-46. South received the motions and notice of a hearing set for January 24, 2023, as he was leaving the office one afternoon. CP 127, 285. He set the papers aside and never looked at them again. CP 127, 285. He did not file a response and did not appear at the hearing. CP 65, 129, 324.

The trial court granted the motions, ordering that Cutler would not be permitted to present his case or put on any testimony or other evidence at trial. CP 65, 67-71. South contacted Cutler and admitted he "screwed up." CP 285. Cutler did not understand the ramifications of South's mistake. CP 285. But South assured Cutler that he could "fix everything" if Cutler would sign some paperwork. CP 285. The paperwork turned out to be a response to the petition. CP 72-75. At this time, South was still reassuring Cutler that he had nothing to worry about and would not have to pay Wise anything in the divorce. CP 129, 324.

South attended the trial readiness hearing on January 31. CP 66. Cutler was unaware that this hearing was taking place. CP 324. At the hearing, South informed the trial court that he intended to file a motion to set aside the default. CP 66.

South filed the response to the petition that he had gotten Cutler to sign. CP 72. He did not file any

motion to set aside the default. *See* CP 228. South told Cutler that the upcoming February 10 court date was to discuss the default, that a new trial date would be set, and that Cutler did not need to appear in court on February 10. CP 285, 324.

4.5 South appeared at trial, without Cutler, was not allowed to present Cutler's case, and could only watch as the trial court granted Wise everything she asked for.

South appeared in court on February 10 and argued that the matter was not set for trial that day. CP 228. The trial court noted that South had not filed any motion to set aside the default, and held that the trial could proceed. CP 228. The trial court allowed Wise to present testimony and exhibits. CP 152, 228-29. South did not participate in the trial itself. CP 228-29.

Wise argued that one property, 232 Dusty Drive, had been Cutler's separate property but was converted to community property during the marriage. CP 80-82.

She argued that another property, 190 Jim's View, was purchased during the marriage, funded with Cutler's separate property, but with the intent of creating community property. CP 82-85.

Cutler's position, which he was prevented from presenting at trial, was that both properties were his separate property and should be retained by him, considering the financial situation of the parties and the short length of the marriage. CP 11. Cutler did not contest that Wise could retain her separate properties on Vista Drive. See CP 13, 80.

The trial court found, based on Wise's trial evidence, that 232 Dusty Drive and 190 Jim's View were community property. CP 90, 92. The trial court divided them equally, awarding title to Cutler but ordering him to make an equalization payment to Wise of $367,500. CP 95, 97. The trial court ordered Cutler to refinance the two properties to remove Wise from the debts, or the properties would be ordered to be sold.

CP 98. Final orders were entered on April 11, 2023. CP 90-100.

4.6 After learning of the outcome and of South's mental illness, Cutler moved to vacate the decree under *Barr v. MacGugan*.

South had promised to call Cutler on the afternoon of February 10 to update him on what happened that day. CP 129, 285, 324. South never called. CP 129, 285, 324. Cutler tried every day to contact South by phone and in person, but South was never there. CP 129, 285, 324. After six days, South called Cutler and admitted that he had "made a big mistake." CP 129, 285, 324. He admitted that February 10 was the trial and said that he "was not prepared for it." CP 285. South said his "mind was not in it" since his mother passed away. CP 285. South claimed that "this whole mess" could be fixed but some other attorney would need to do it. CP 129, 324.

Cutler filed a bar complaint against South. CP 284-85. He obtained a new attorney to seek relief from the final decree. CP 101.

South was nonresponsive to the bar grievance for a long time, finally providing a brief response by letter on August 22, 2023. CP 120-21, 125-27. Upon receiving this letter, Cutler learned for the first time that the breakdown in South's representation was caused not merely by grief, but by mental illness. CP 127; RP 14. South stated,

> The recent passing of my mother, whom I had been caring for the past three years affected me more than I realized. The clinical depression of which I have been diagnosed for many years, reoccurred in a devious way. I very irresponsibly buried my head in the sand and hoped this would all blow over, knowing well that it would not.

CP 127.

Cutler filed his motion to vacate the decree just over one month later, on October 5, 2023. CP 103. Cutler argued that, based on CR 60(b)(11) and *Barr v.*

MacGugan, 119 Wn. App. 43 (2003), the trial court should vacate the decree where South's clinical depression had caused him to avoid his responsibilities in the case and mislead Cutler about the case's status, to the point that the attorney-client relationship had disintegrated and Cutler was no longer truly being represented and should not, in fairness, be held responsible for South's actions. CP 106-07.

4.7 The trial court denied Cutler's motion to vacate.

The trial court denied the motion to vacate. CP 339-40. The trial court understood the inequity of the outcome for Cutler:

> Clearly, as I stated, I think it's a it's a – "unfortunate" is probably not even a strong enough word of an outcome for Mr. Cutler as far as relying on his attorney and feeling like there was a relationship there that he could be trust – entrusted to give him – relay information, tell him what he needed to do, where he needed to be.

RP 25. Nevertheless, "as sad as this situation is" for both Cutler and South, the trial court believed there were not grounds to vacate the decree. RP 25.

4.8 The Court of Appeals affirmed the trial court's denial of the motion to vacate.

The Court of Appeals affirmed the trial court's denial of the motion to vacate. The court recognized *Barr*'s rule that a client can be relieved of responsibility for their attorney's acts when the attorney-client agency relationship had "disintegrated to the point where as a practical matter there was no representation." Opinion at 7. Nevertheless, the court chose to follow the more strict rule of *Marriage of Olsen*, 183 Wn. App. 546 (2014), which only excuses a client in cases of "near-total abandonment" by the attorney. Opinion at 8. Applying the *Olsen* rule, the court held that South's continued participation and appearance at the trial meant that he had not abandoned Cutler's case. Opinion at 8.

The court also questioned whether Cutler was a "diligent but unknowing client." Opinion at 9. The court faulted Cutler for not seeking new counsel after South's first admission that he had made a mistake. Opinion at 9.

5. Argument

A petition for review should be accepted when the Court of Appeals decision conflicts with a decision of the Supreme Court or the Court of Appeals or if the case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

The Court of Appeals (Division II) decision here conflicts with the prior published decision of Division I in ***Barr v. MacGugan***, 119 Wn. App. 43, 48, 78 P.3d 660 (2003), in which the court held that extraordinary circumstances exist for vacating a judgment under CR 60(b)(11) when an attorney's mental health or gross

negligence "effectively deprives a diligent but unknowing client of representation," thus making it equitable to allow the client to escape the consequences of the attorney's failed representation.

The court here instead followed the Division III decision in ***In re Marriage of Olsen***, 183 Wn. App. 546, 557, 333 P.3d 561 (2014), in which that court adopted a more stringent standard, holding that a client is only excused from their attorney's actions if there has been "near-total abandonment" of the attorney client relationship. The court here minimized the impact of South's failures and held that they did not constitute "near-total abandonment" under the *Olsen* standard. The Court of Appeals decision was error in conflict with *Barr*. This Court should accept review.

Even if this Court finds no conflict with *Barr*, the issues presented in this case are issues of substantial public interest that should be decided by this Court. The Court of Appeals decision creates bad policy that is

harmful to the relationship of trust that must exist between lawyer and client. If a client must fire their attorney at the first sign of a possible mistake, or else be found "not diligent," how can a client ever trust their attorney to act in the client's place? And how can an attorney ever feel comfortable in honestly revealing a mistake to their client, even when there is a reasonable solution that the attorney can offer?
The Court of Appeals decision forces clients into hypervigilance and encourages attorneys to hide their mistakes. This Court should accept review and restore the relationship of trust that should exist between lawyer and client.

5.1 The Court of Appeals decision conflicts with *Barr*.

The Court of Appeals decision conflicts with ***Barr***, 119 Wn. App. 43 (2003). In *Barr*, Division I of the Court of Appeals held that extraordinary circumstances exist for vacating a judgment under CR 60(b)(11) when an

attorney's mental health or gross negligence "effectively deprives a diligent but unknowing client of representation," thus making it equitable to allow the client to escape the consequences of the attorney's failed representation. Under the *Barr* standard, proof of a mental health condition is not required; rather, the court's focus is on the breakdown of the agency relationship between attorney and client. *See* ***In re Marriage of Lehman & Lehman***, 198 Wn. App. 1015, 2017 WL 991936, at *7 (Div. III, 2017) (unpublished, cited under GR 14.1) (following *Barr*, not *Olsen*).

Barr's attorney failed to respond to discovery requests for many months, including failing to comply with an order compelling responses. ***Barr***, 119 Wn. App. at 45. Due to the attorney's noncompliance, Barr's complaint was dismissed with prejudice as a discovery sanction. ***Id.*** Barr had provided her attorney with timely responses to the discovery requests but then heard nothing more from him. ***Id.*** She called him

occasionally to check the status of the case but never received any response. ***Id.*** She had no knowledge of the motion to compel or the motion to dismiss. ***Id.*** She only learned for the first time months later that her case had been dismissed and that her attorney suffered from clinical depression that had caused him to neglect his practice. ***Id.***

Barr hired new counsel to seek to vacate the order of dismissal. ***Barr***, 119 Wn. App. at 45. MacGugan argued that, under the law of agency, an attorney's acts—including negligent acts—are binding on the client, and therefore not sufficient grounds to justify relief from judgment against the client. ***Id.*** at 46 (citing ***Haller v. Wallis***, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978)). The *Barr* court acknowledged this general rule but found it inapplicable in a case where the attorney's conduct was the result of mental illness, not intentional misconduct or ordinary negligence. ***Id.*** at 46-47.

The Barr court looked to federal cases, which held that an attorney's gross negligence justified relief from judgment where the attorney's conduct undermines the agency relationship between lawyer and client. ***Barr***, 119 Wn. App. at 47 (citing, *e.g.*, ***Cmty. Dental Servs. v. Tani***, 282 F.3d 1164 (9th Cir. 2002)).

In *Tani*, the attorney reached agreement with the plaintiff for an extension of time to file an answer to the complaint, but then failed to sign and file the stipulation, failed to timely file the answer, failed to serve the answer on the opposing party, and failed to participate in a court-ordered settlement conference. ***Tani***, 282 F.3d at 1166-67. When the plaintiff moved for default, the attorney appeared at the hearing but failed to file an opposition. ***Id.*** at 1167. Through all of this, the attorney, on several occasions, told Tani that the litigation was proceeding smoothly. ***Id.*** Tani did not learn of the attorney's misconduct until after a default judgment was entered. ***Id.***

The Ninth Circuit found that the attorney "was grossly negligent in his handling of Tani's defense and he deliberately deceived Tani…," causing Tani to believe everything was under control. *Tani*, 282 F.3d at 1171. The court reasoned that such conduct by the "client's alleged representative" resulted in the client "receiving practically no representation at all," and "vitiat[ed] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Id.* The court held that these were extraordinary circumstances that merited relief from judgment. *Id.* In such circumstances, the client "may not be held accountable for his attorney's misconduct," and the trial court abused its discretion in denying the client's motion to vacate the judgment. *Id.* at 1172.

The Barr court emphasized, "The point … that is most pertinent here is that there is no basis for attributing the attorney's 'acts' to the client when the agency relationship has disintegrated to the point

where as a practical matter there is no representation." ***Barr***, 119 Wn. App. at 48. The court also noted "that Barr diligently provided information to her attorney and made appropriate follow-up inquiries, but through no fault of her own was unaware of her attorney's disability. The irregularities that affected the proceedings below were entirely outside the control of the plaintiff, the defendant, and the court." ***Id.*** The court concluded that extraordinary circumstances exist justifying relief under CR 60(b)(11) "where an attorney's condition effectively deprives a diligent but unknowing client of representation." ***Id.***

The *Barr* rule recognizes that where an attorney fails to take actions essential to the representation—even if they occasionally appear in court—and hides their failures by falsely assuring the client that everything is under control, the result is that the agency relationship is destroyed and the client receives "practically no representation at all." Where, as a

practical matter, the attorney is no longer acting for the benefit of the client, the client should not be held responsible for the attorney's actions.

But under the *Olsen* rule, as applied by the Court of Appeals in this case, so long as the attorney is still taking actions in the case, there is no "near-total abandonment," and therefore the client must still suffer the consequences of the actions of a grossly negligent attorney, even when that attorney is actively concealing their misdeeds from the client. Under *Olsen*, as applied by the Court of Appeals here, only abandonment suffices; gross negligence and deception of the client are not enough.

The Court of Appeals decision here conflicts with *Barr*. This Court should accept review to clarify the standard under which a client may, in equity, be relieved of the consequences of their attorney's actions.

Here, as a practical matter, Cutler had no real representation in the final months of his case. Under

the *Barr* standard, he should have been relieved of the judgment that was entered without his participation and without any real representation of his interests.

Cutler was unaware of the discovery requests or South's failure to respond. Cutler was unaware of the motion for default and motion in limine. South received the motion paperwork as he was leaving the office one afternoon, "set it aside and never looked at it again." CP 127. South told Cutler about this mistake for the first time on January 23, 2023, the day before the scheduled hearing. CP 285. South did not tell Cutler about the hearing and did not appear himself. CP 65, 129, 285, 324. South did not disclose the grounds for the motions or his failure to respond to discovery. CP 285. Even if Cutler had pressed South for more information, it was already too late to prevent the motions from being granted. Cutler, through no fault of his own, was unaware of South's failures until it was too late.

At this point, South began misleading Cutler, just as the attorneys in Tani. South falsely claimed that he could "fix everything." CP 285. He had Cutler sign a defective response to the divorce petition. CP 72-75. He never informed Cutler of the January 31 hearing. CP 66, 324. He filed the defective response to petition but never filed a motion to set aside the default. See CP 228. He falsely informed Cutler that the February 10 court date was about the default and Cutler did not have to be there. CP 285. All the while, South was falsely reassuring Cutler that "everything [was] under control," and that Cutler "had nothing to worry about and ... should not owe anything to [Wise]." CP 129. Cutler reasonably believed these reassurances, not knowing that South was not actually doing anything that could fix the problem.

While Cutler learned on January 23 that South had failed to respond to a motion, Cutler did not know the nature of the order that the trial court would enter

the next day. South had set the motion papers aside and never looked at them again—he did not provide copies to Cutler. CP 127. Cutler did not know that he would be barred from presenting his case at trial. He only knew that South said he could fix things. And even if Cutler had known what might happen at the January 24 hearing, he did not have enough time to do anything to prevent it.

At all times that mattered, Cutler was a diligent but unknowing client who was, as a practical matter, effectively deprived of representation. Cutler was entitled to relief under *Barr* and CR 60(b)(11).

The Court of Appeals decision here conflicts with *Barr*. This Court should accept review, reverse, and vacate the dissolution decree that was entered as a result of South's gross negligence.

5.2 This case involves issues of substantial public interest that should be decided by this Court.

The Court of Appeals questioned whether Cutler was a "diligent but unknowing client" and ultimately held that he was not because he did not terminate South after South's first confession of a mistake. This decision creates bad policy that harms the relationship of trust that must exist between lawyer and client. It pushes clients to hypervigilance and encourages lawyers to hide their mistakes from their clients. This Court should accept review and restore the relationship of trust that should exist between lawyer and client.

The attorney-client relationship "is one of the strongest fiduciary relationships known to the law." ***In re Beakley***, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940). "The relation of attorney and client has always been regarded as one of special trust and confidence." ***Id.*** An attorney owes "the highest duty of fidelity and good

faith" to the client. ***In re Estate of Larson***, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985). A client must be able to trust their attorney to diligently represent the client's interests at all times, to honestly report to the client on the status of their case, and to work to correct any errors or undesirable results.

The Court of Appeals decision undermines the trust that must exist between lawyer and client. Under the court's decision, a client should never trust their attorney once the client becomes aware of a single misstep. According to the Court of Appeals, the client cannot believe an attorney's assurance that a mistake can be fixed. Rather, the client must immediately take matters into their own hands and either be ready to handle their case pro se or to engage a new attorney for a second opinion or to take over the case.

This should not be so. A client should be able to trust their attorney, even after a single mistake. A

client should not be penalized for trusting their attorney's reassurance that the mistake can be fixed.

If a client must fire their attorney at the first sign of a possible mistake, or else be held responsible for the consequences of the attorney's mistakes, attorneys will be incentivized to make sure to never confess a mistake. Instead the attorney will, as South did here, conceal the mistake for as long as possible and lie to their client that all is well when, in fact, it is not. This only magnifies the harmful consequences to the client of an attorney's negligence. The Court of Appeals decision creates bad policy that undermines the trust that is necessary in an attorney-client relationship.

If the attorney says he or she made a mistake and can fix it, good policy says he or she should be trusted to do so without penalty to the client. The lack of trust and the resulting loss of candor in the attorney-client agency relationship is harmful to both the attorney, in jeopardy of being fired upon confession or discovery of

any mistake, and the client potentially suffering the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention, as happened to Cutler.

As the *Tani* court pointed out, this bad policy will also harm the judicial system itself: "When an attorney is grossly negligent, as counsel was here, the ***judicial system loses credibility as well as the appearance of fairness,*** if the result is that an innocent party is forced to suffer drastic consequences." ***Tani***, 282 F.3d at 1170 (emphasis added).

The Court of Appeals decision here involves an issue of substantial public interest that should be determined by the Supreme Court. This Court should accept review, reverse the trial court decision, vacate the decree, and remand for a new trial on the distribution of property.

6. Conclusion

The Court of Appeals decision conflicts with the prior published Court of Appeals decision in *Barr*. The *Barr* standard, which recognizes practical realities, should be favored over the Court of Appeals' application of the "near-total abandonment" standard of *Olsen*. This Court should accept review to clarify the standard.

The Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court. The decision stands to do grave harm to the trust that should exist in attorney-client relationships. This Court should accept review and restore that relationship of trust.

I certify that this document contains 4,704 words.

Submitted this 4th day of September, 2025.

/s/ Kevin Hochhalter

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7. Appendix

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of PATTI ELMER CUTLER, Respondent, and ALAN GERALD CUTLER, Appellant.	No. 59283-5-II UNPUBLISHED OPINION

GLASGOW, J.—Timothy South represented Alan Cutler in marriage dissolution proceedings where there was a disputed issue about two pieces of real property, and Cutler asserted they should be characterized as his separate property. After South's mother passed away, South's grief prevented him from promptly responding to discovery requests and he failed to attend a hearing. As a result, the trial court entered a default order against Cutler and eventually held a trial where South was prevented from presenting Cutler's case. Despite his failures, South maintained contact with Cutler and actively represented Cutler until after trial. The trial court found the disputed properties were community property and ordered Cutler to pay his spouse for her share of their value. Months after the trial, Cutler, represented by different counsel, filed a motion to vacate the final dissolution order, which the trial court denied.

Cutler argues that the trial court erred by denying his motion to vacate the final dissolution order under CR 60(b)(11) because South's depression was an extraordinary circumstance that

deprived Cutler of representation. Because South continued to take actions as Cutler's representative throughout the case, Cutler was not diligent despite his awareness that South was making mistakes in his case, and Cutler signed a response agreeing that the real property at issue was community property, we affirm.

FACTS

In May 2020, Patti Wise (formerly Cutler) filed for dissolution of her marriage to Alan Cutler. Cutler was served with a summons and petition stating that a response was due within 20 days.

In June 2020, Cutler hired Timothy South as his attorney for the dissolution proceedings. In a statement of issues that South submitted to the court, Cutler contended that two contested pieces of real property were his separate property.

The trial court scheduled a trial readiness hearing and trial for September 2022. Before this hearing, South informed Cutler that South's mother was in the hospital and Cutler said he understood the resulting delay. At the trial readiness hearing, South requested a continuance "due to some urgent family matters." Clerk's Papers (CP) at 18 (capitalization omitted). The trial court granted South's motion for a continuance. The trial court eventually set the new trial date for February 2023.

Initially, South was responsive to discovery requests from Wise. However, in August 2022, Wise's counsel sent South additional requests for discovery and asked whether South planned to file a response to Wise's dissolution petition. In early September, after Wise's counsel sent a follow-up email, South told Wise's counsel that he had a family emergency but would file a response. Between September and December, Wise's counsel reached out to South four more times

without an answer. South did not file a response nor did he respond to the pending discovery request.

On January 5, 2023, Wise sought default judgment against Cutler. The same day, Wise filed a motion in limine requesting that South be prohibited from presenting Cutler's case at trial for failure to respond to discovery requests. The trial court scheduled a hearing for these motions on January 24. South later said he received a document with the date of the hearing as he was leaving his office one afternoon but "set it aside and never looked at it again." CP at 127. South called Cutler a day before the hearing and said that he had "screwed up" by failing to file a response. CP at 285.

South did not appear at the hearing, and the trial court granted both of Wise's motions. The trial court found Cutler in default and ordered that the court "may sign orders and hold hearings in this case without notice to the defaulted party." CP at 71. The trial court also entered an order in limine ordering that Cutler could not present testimony or evidence at trial, nor could he "present his case at trial" because he had not filed a response to the dissolution petition. CP at 68. The trial court did not strike the upcoming trial readiness hearing for the February trial date.

On January 31, the trial court held the previously scheduled trial readiness hearing. South attended this hearing but did not inform Cutler about it. During this hearing, South said he would file a motion to set aside the default order. The trial court stated that it would address the motion to set aside default on the trial date. The next day, South told Cutler that he could "fix every[]thing" if Cutler signed the response to the petition. CP at 285. South also assured Cutler that "he had everything under control." CP at 129.

On February 3, 2023, South filed the response to Wise's 2020 dissolution petition, but did not file a motion to set aside the default order. In the response, South checked a box indicating that Cutler agreed with Wise's description and characterization of the real property stated in her petition. The petition characterized the disputed properties as community property. Cutler signed the response.

South assured Cutler that Cutler need not attend court on February 10, the day set for trial, because the trial court would only "talk about the default notice" and would set a different trial date. CP at 285. In her pretrial memorandum, Wise argued that the contested properties were community property.

Cutler did not attend court on February 10. South appeared and argued that the case was not set for trial that day. South also argued that the trial court improperly entered findings in the default order that were not included in Wise's petition, but the trial court disagreed and allowed the trial to go forward. Applying the order in limine, the trial court prohibited South from presenting any testimony or other evidence at trial. Wise called witnesses and presented exhibits in support of her trial memorandum requests. The trial court orally granted Wise's proposed property division. In a final dissolution order, the trial court determined that the contested properties were community property and ordered Cutler to pay Wise a $367,500 monetary judgment for her share of the value of these properties. The court also ordered Cutler to pay $5,000 of Wise's attorney fees.

Cutler claimed that he tried to contact South several times on the day of trial without a response. Six days later, South called Cutler and admitted he had "made a big mistake" and "his mind was not in it since his [m]other passed away." *Id.* South stated that February 10 "was the

actual court trial and that he was not prepared for it." *Id.* South said that the situation "could be fixed" but that Cutler would have to "find another attorney to fix this whole mess." *Id.*

On February 26 Cutler filed a grievance against South with the Washington State Bar Association (WSBA). Cutler hired a new attorney who filed a notice of substitution in May 2023.

South initially failed to respond to the grievance or attend the mandatory WSBA deposition. In August, South responded with a letter and explained his performance on Cutler's case:

> The recent passing of my mother, whom I had been caring for the past three years affected me more than I realized. The clinical depression of which I have been diagnosed for many years, reoccurred in a devious way. I very irresponsibly buried my head in the sand and hoped this would all blow over, knowing well that it would not.

CP at 127.

In October 2023, Cutler's new counsel moved to vacate the final dissolution order under CR 60(b)(11) because of South's depression and resulting neglect of Cutler's case. After a hearing, the trial court denied Cutler's motion to vacate because, unlike in other cases where default orders were vacated because of an attorney's complete failure to appear or otherwise participate, this case was heard on the merits at a trial. Additionally, South attended the trial and at least participated minimally in the proceedings.

Cutler appealed the denial of the motion to vacate the final dissolution order. Since Cutler appealed, a hearing officer for the WSBA entered findings of fact and conclusions of law, as well as a recommendation that South be suspended from practicing law for one year.[1] The hearing

[1] Cutler has filed a motion asking this court to accept additional evidence under RAP 9.11, including the WSBA disciplinary board's notice of South's suspension; the Washington Supreme Court's suspension order for South; the WSBA disciplinary board's order adopting the hearing

officer found that Cutler suffered injury as a result of South's conduct, but not serious injury because Cutler signed the response conceding the real property at issue was community property. Mot. for Additional Evid. on Rev. (Feb. 14, 2025), Ex. A at 9 (Findings of Fact (FF) 5, 6)[2]. The hearing officer found that South knowingly failed to involve Cutler in discussions about the motions regarding default and failed to obtain Cutler's consent on case strategy. FF 8. The hearing officer also found there was insufficient evidence of depression to support a mitigating factor. FF 19. Finally, the hearing officer found South delayed transmitting his case records to Cutler's new attorney. FF 10. The disciplinary board adopted the hearing officer's decision, and the Washington Supreme Court entered an order suspending South from the practice of law for one year.

ANALYSIS

Cutler argues that South's depression, and his resulting performance, was an extraordinary circumstance that deprived Cutler of representation, so the trial court erred by denying Cutler's motion to vacate the final dissolution order. While we recognize this case presents unfortunate circumstances, given the high bar for vacating a judgment under CR 60(b)(11) that arises from respect for the finality of judgments, we disagree.

We review a trial court's denial of a CR 60(b) motion to vacate for an abuse of discretion. *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003). CR 60(b)(11) is a catch-all provision

officer's decision; and the hearing officer's findings of fact, conclusions of law, and recommendation. Mot. for Additional Evid. on Rev. (Feb. 14, 2025). We conclude that the requirements of RAP 9.11 are met and we grant Cutler's motion to consider the documents listed above as additional evidence on review. We need not remand for the trial court to take the additional evidence.

[2] Subsequent cites to the findings of facts contained within exhibit A to this motion will be cited as FF.

that allows the trial court to vacate an order for any reason justifying relief that is not otherwise included in another provision of the rule. *Id.* But CR 60(b)(11) is confined to extraordinary circumstances relating to irregularities in the proceedings that are extraneous to the action. *Id.* at 48. A party must bring a CR 60(b) motion to vacate "within a reasonable time."

Generally, "an attorney's negligence or neglect does not constitute grounds for vacating a judgment under CR 60(b) because, under the law of agency, if an attorney is authorized to appear on behalf of a client, that attorney's acts are binding on the client." *Barr*, 119 Wn. App. at 46 (citing *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978)). However, Division One recognized a limited exception to this general rule in *Barr*.

In *Barr*, the trial court dismissed Barr's civil case with prejudice because her attorney failed to comply with an order compelling discovery. *Id.* at 44. Barr diligently prepared responses to discovery, and she reached out several times to her attorney but received no response. *Id.* at 45. Barr did not know that the defendant moved to compel or dismiss. *Id.* After her case was dismissed, Barr learned that her attorney suffered from severe clinical depression that caused him to neglect his practice. *Id.* Barr hired a new attorney and submitted a motion to vacate the dismissal, which the trial court granted. *Id.*

On appeal, Division One concluded that the trial court did not abuse its discretion when it vacated the dismissal. *Id.* at 48. It reasoned that there was no basis for attributing the attorney's actions to Barr because the agency relationship between attorney and client had "disintegrated to the point where as a practical matter there [was] no representation." *Id.* Additionally, Barr was a "diligent but unknowing" client. *Id.* She had no knowledge of the defendant's motions to compel or dismiss, nor did she know about her attorney's depression. *Id.* at 45. Barr also attempted to

contact her attorney several times over several months without a response. *Id.* When she learned of her attorney's neglect, Barr hired new counsel. *Id.* Finally, Division One noted that Barr's case was never litigated on its merits, which made dismissal premature in those circumstances. *Id.* at 47.

After *Barr*, Division Three held that a client is only excused from their attorney's actions if there has been "near-total abandonment" of the attorney client relationship. *In re Marriage of Olsen*, 183 Wn. App. 546, 557, 333 P.3d 561 (2014) (citing *Maples v. Thomas*, 565 U.S. 266, 283, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012)).

Though South's performance as Cutler's attorney violated the rules of professional conduct governing attorneys, it did not constitute near-total abandonment of Cutler's case. South failed to respond to the dissolution petition and several discovery requests for months. However, South called Cutler a day before the hearing on Wise's default judgment motion and motion in limine to inform Cutler that he had "screwed up" by failing to file a response. CP at 285. South then attended the trial readiness hearing on Cutler's behalf, asked Cutler to sign a response to Wise's dissolution petition, and filed that response. South appeared at the trial and attempted to limit the trial court's ruling, though he was unsuccessful. While South's failures violated the rules of professional conduct, this case is distinguishable from *Barr*, where an attorney entirely stopped responding to his client and the court. 119 Wn. App. at 44-45. South did not completely abandon Cutler. South continued to communicate with Cutler up to and after the trial. So the attorney-client agency relationship was not severed, and Cutler is not excused from South's actions as his representative. Additionally, unlike in *Barr*, the trial court heard this case on the merits when Wise presented testimony and evidence at trial, and the trial court entered findings of fact and conclusions of law,

as well as an order dividing property, applying the just and equitable standard. *See Olsen*, 183 Wn. App. at 554.

Cutler's briefing implies that an attorney's mental illness is always, or almost always, a basis for vacating a trial court order. However, even where a party alleges their attorney had a mental illness, the party still must show that the attorney provided effectively no representation or abandoned the case. *Id.* at 557.

Moreover, we question whether Cutler was a "diligent but unknowing client." *Barr*, 119 Wn. App. at 48. Cutler signed the response conceding that the contested property was community property, and the WSBA found that fact significant when it concluded that Cutler suffered injury, but not serious injury. The dissolution proceeding began in 2020 and the summons would have alerted Cutler to the need to file a response within 20 days. No response was filed for years, and trial did not occur until almost three years later. In January 2023, several weeks before the trial, South admitted to Cutler he "screwed up" by not filing a response, and he needed to "fix every[]thing," but Cutler did not seek new counsel at that time. CP at 285.

Cutler relies on the Ninth Circuit case, *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002), which states that a default judgment against a party may be set aside if the party's attorney was grossly negligent. In *Tani*, the Ninth Circuit held that the trial court abused its discretion by refusing to grant relief from default judgment where an attorney "virtually abandoned his client by failing to proceed with his client's defense despite court orders to do so." *Id.* at 1170. However, in *Tani*, the attorney continuously assured his client that the case was proceeding properly, thereby "deliberately deceiv[ing]" his client about his handling of the case. *Id.* at 1171. Here, South told Cutler that he had "screwed up" before the hearing on default judgment and

communicated with Cutler about other mistakes throughout the case. CP at 285. Unlike the client in *Tani*, Cutler knew about some of South's failures but continued to rely on South for representation.

Finally, Cutler did not seek reconsideration of or appeal the final orders even though entry of final orders was delayed for several weeks after Cutler became aware of the outcome. It took Cutler several weeks to retain another attorney and nearly eight months to seek to vacate the trial court's final orders, even though South admitted again to having made "a big mistake" about a week after trial. CP at 285. Although Cutler claims the delay was because he lacked awareness that South's performance was a result of mental illness, this does not excuse the delay where the more important factor is whether there was near total abandonment of representation, and Cutler was at least aware South's emotional state after his mother's death was affecting his performance.

Although the circumstances of this case are unfortunate, the trial court did not abuse its discretion by denying Cutler's motion to vacate the final dissolution order. We note that Cutler is free to pursue any available remedies against South.

ATTORNEY FEES

Wise requests attorney fees under RCW 26.09.140. To determine whether a party receives appellate attorney fees under this statute, we exercise our discretion and consider both the merit of the issues on appeal and the parties' financial resources, "balancing the financial need of the requesting party against the other party's ability to pay." *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P.3d 555 (2014). We have considered the parties' affidavits and we decline to award attorney fees.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

GLASGOW, J.

We concur:

MAXA, P.J.

CHE, J.

Filed
Washington State
Court of Appeals
Division Two
May 22, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of PATTI ELMER CUTLER, Respondent, and ALAN GERALD CUTLER, Appellant.	No. 59283-5-II ORDER DENYING MOTION FOR RECONSIDERATION

The unpublished opinion in this matter was filed on April 8, 2025. On April 28, 2025, appellant moved for reconsideration. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Maxa, Glasgow, Che.

FOR THE COURT

GLASGOW, J.

FILED
6/30/2025
Court of Appeals
Division II
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of PATTI ELMER CUTLER, Respondent, and ALAN GERALD CUTLER, Appellant.	No. 59283-5 MANDATE Cowlitz County Cause No. 20-3-00217-08

The State of Washington to: The Superior Court of the State of Washington in and for Cowlitz County

This is to certify that the Court of Appeals of the State of Washington, Division II, entered an opinion in the above entitled case on April 8, 2025. This ruling became the final decision terminating review of this court on June 23, 2025. An order denying a motion for reconsideration was entered on May 22, 2025. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court. Costs have been awarded in the following amount.

Judgment Creditor: Patti Cutler: $205.75 in costs
Judgment Debtor: Alan Cutler: $205.75 in costs

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma.

Dea Finigan
Deputy Clerk of the Court of Appeals,
State of Washington, Div. II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In the Matter of the Marriage of PATTI ELMER CUTLER, Respondent, and ALAN GERALD CUTLER, Appellant.	No. 59283-5-II MOTION TO RECALL THE MANDATE

1. IDENTITY OF MOVING PARTY

COMES NOW the Appellant, Alan Cutler, a common man, unschooled in law, and asks for relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Appellant seeks this Court recall the mandate issued by it on June 30, 2025, pursuant to RAP 12.9(b) to correct an inadvertent mistake.

3. FACTS RELEVANT TO MOTION

The following facts are presented, supported by affidavit.

On April 28, 2025, Appellant was informed by Appellant's former appellant attorney that a notice of intent to

withdraw had been filed with this Court at Appellant's request. On or before April 28, 2025, the Appellant created an online individual account at the Washington State Appellate Courts' Portal, providing Appellant's contact information.

On April 28, 2025, the Appellant, using his online account, electronically filed with this Court a motion for reconsideration.

On July 24, 2025, having not heard from this Court for nearly three months, Appellant contacted this Court by telephone to inquire as to the status of Appellant's motion for reconsideration. Appellant was informed that an order denying Appellant's motion was filed on May 22, 2025, and that a mandate was subsequently filed on June 30, 2025.

On July 24, 2025, in a follow-up telephone conversation with the case manager regarding Appellant having not received any notice from this Court, it was explained to Appellant that this Court had erred and failed to provide notice to Appellant of both the order denying the motion for reconsideration and the

subsequently filed mandate. Both documents were then promptly emailed to Appellant.

4. GROUNDS FOR RELIEF AND ARGUMENT

This Court erred in failing to provide timely notice to Appellant pursuant to RAP 17.6(b) of this Court's order denying Appellant's motion for reconsideration.

Because Appellant was not aware of this Court's order denying Appellant's motion and did not receive timely notice from this Court, Appellant had no opportunity pursuant to RAP 13.4(a) to file a petition for discretionary review by the Supreme Court within 30 days after the order was filed.

RAP 12.9(b) provides that the appellate court may recall a mandate issued by it to correct an inadvertent mistake.

The motion to recall the mandate should be granted here because of the inadvertent mistake made by this Court of failing to timely notify Appellant of its order denying Appellant's motion. Further, should this Court grant this motion, the date such order is filed should be recognized as the effective start of

the 30-day period during which Appellant may file a petition for discretionary review by the Supreme Court.

This motion is timely submitted, filed within one business day of Appellant having received notice by this Court of the filing of the mandate.

Respectfully submitted this 25th day of July, 2025.

Alan Cutler, Appellant, in propria persona
232 Dusty Drive
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In the Matter of the Marriage of PATTI ELMER CUTLER, Respondent, and ALAN GERALD CUTLER, Appellant.	No. 59283-5-II MOTION TO RECALL THE MANDATE SUPPORTING AFFIDAVIT OF FACTS

Comes now Alan Cutler, your Affiant, competent to testify and has personal knowledge of the following facts as true, correct, complete, and not misleading.

1. On April 28, 2025, Affiant was informed by Affiant's former appellant attorney that a notice of intent to withdraw had been filed with this Court.

2. On or before April 28, 2025, the Affiant created an online individual account at https://ac.courts.wa.gov/, providing Affiant's email address, mailing address, phone number, and an alternate email address. Affiant subsequently received electronic confirmation that the account had been activated.

3. On April 28, 2025, the Affiant, using his online account, electronically filed with this Court a motion for reconsideration.

4. On July 24, 2025, Affiant contacted this Court by telephone to inquire as to the status of Affiant's motion for reconsideration because Affiant had not received notice of any court action. Affiant was informed that an order denying Affiant's motion was filed on May 22, 2025. Affiant also was informed that a mandate was filed on June 30, 2025.

5. On July 24, 2025, in a follow-up telephone conversation with the case manager regarding Affiant having not received any notice from this Court, Affiant was informed this Court had erred and failed to provide notice to Affiant of both the order denying the motion for reconsideration and the mandate.

5. Affiant did not know and there is no evidence in fact that Affiant knew or should have known prior to July 24, 2025, of this Court's order denying the motion for reconsideration or the subsequently filed mandate.

I declare under penalty of perjury under the laws of the state of Washington that the facts I have provided herein are true.

Signed at Kelso, Washington on July 25, 2025.

Alan Cutler, Appellant in propria persona

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on July 25, 2025, I caused the foregoing document to be filed with the Court and served on counsel listed below, by way of the Washington State Appellate Courts' Portal.

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Valerie A. Villacin
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SIGNED at Kelso, Washington, this 25th day of July, 2025.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

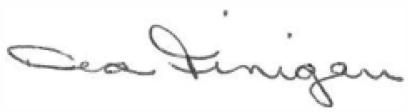
DIVISION II

In the Matter of the Marriage of: PATTI ELMER CUTLER, Respondent, v. ALAN GERALD CUTLER, Appellant.	No. 59283-5-II RULING RECALLING MANDATE Cowlitz County Superior Court No. 20-3-00217-08

THIS MATTER comes before the undersigned upon a motion by the Appellant, Alan Cutler, to recall the Mandate filed in the above-referenced matter on June 30, 2025. The Respondent, Patti Wise, filed an answer to the motion to recall the mandate asking this court to deny the motion. The Mandate was inadvertently issued without notice to the Appellant of the court's order on motion for reconsideration and should therefore be recalled. RAP 12.9 (b). Accordingly, it is

ORDERED that the Mandate in the above-referenced matter is recalled and the Cowlitz County Clerk is hereby directed to return said Mandate to the Clerk of this Court.

DATED this 5th day of August, 2025.



COURT CLERK

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 4, 2025, I caused the foregoing document to be filed with the Court and served on counsel listed below, by way of the Washington State Appellate Courts' Portal.

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SIGNED at Lacey, Washington, this 4th day of September, 2025.

/s/ Rhonda Davidson

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OLYMPIC APPEALS PLLC

September 04, 2025 - 3:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	59283-5
Appellate Court Case Title:	Patti Cutler, Respondent v. Alan Cutler, Appellant
Superior Court Case Number:	20-3-00217-2

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