IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

KATHERINE RIEMAN, Appellee, vs JOSEPH RIEMAN, Appellant.	2CA-CV 2011-0042 Pima County Superior Court Cause No.D2010-2044 APPELLANT'S OPENING BRIEF

Dated this 12TH day of August, 2011

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ABBREVIATIONS USED IN THIS BRIEF: **ROA** = Record on Appeal

STATEMENT OF THE CASE/STATEMENT OF FACTS

¶1 This is an appeal of the trial court's denial of a motion to set aside a default judgment in a dissolution case. Appellee filed her Petition for Dissolution on May 26, 2010 and it was served on June 6, 2010. **ROA #'s 2 & 5.** An application for default was filed on July 2, 2010 and granted *ex parte* after Appellee testified under oath on September 24, 2010. **ROA #'s 7 & 12.** Counsel appeared for Appellant and filed a verified motion to set aside the decree of dissolution on October 15, 2011 and Appellee responded on October 29, 2010. **ROA #'s 17 & 20.** The motion was heard on December 13, 2010 and denied by under advisement ruling on January 10, 2011. **ROA #'s 23 & 24.** A timely notice of appeal was filed on February 11, 2011. **ROA #25.** Jurisdiction is vested in this Court pursuant to Article 6, section 9 of the Arizona Constitution, A.R.S. 12-120.21(A)(1), A.R.S. 12-2101(B), (C), (D) & (F) and Rule 1 of the Rules of Civil Appellate Procedure.

¶2 In his verified motion to set aside the decree of dissolution, Appellant asserted Appellee made several misrepresentations to the Court in procuring the decree. First, he asserted he agreed not to contest the divorce so long as Appellee agreed to a fair division of their property and

debts and agreed not to seek spousal maintenance. He asserted she accepted these terms, but in the *ex parte* decree of dissolution went back on her word, seeking and obtaining spousal maintenance and a division of assets and liabilities that was grossly inequitable. To justify the award of spousal maintenance, she falsely asserted she assisted Appellant in his educational opportunities and helped pay off his student loans. She also falsely asserted that awarding the marital home to Appellant and awarding a five acre parcel of land to her was equitable, whereas, Appellant's motion to vacate asserted the home is worth approximately $200.000.00 but had an outstanding loan of $130,000.00 against it, while the parcel, also worth approximately $200,000.00, is owned free and clear. Further, he asserted the award to him of Duval Triple Play, LLC was illusory since it was a business the parties operated together and had a current debt of approximately $100,000.00, the majority of which was community debt. He concluded, "This leaves Respondent with a net debt of $30,000.00 and Petitioner with a net equity of $200,000.00. The division of property and debt is far from equitable." Appellant requested that the motion be determined at an evidentiary hearing. **ROA #17.**

¶3 Appellee filed a verified response to the motion. In it, she specifically argued that the Rules of Family Law Procedure do not support a request

that any motion be decided at an evidentiary hearing. She specifically requested that the motion be determined by oral argument only. **ROA #20, p.2.** Ironically, she then argued, Respondent "does not have evidence to support his claim." **ROA #20, p.4, l. 19-20.** Next, the response attempts to contradict Appellant's assertion that Appellee had agreed not to seek spousal maintenance by citing to the petition where she clearly seeks spousal maintenance. **ROA #20 pp.3-4.** The problem with this citation is it ignored the fact that discussions occurred between the parties ***after*** Appellee filed her petition for dissolution. Further, the response asserted Appellant's verified contention that the division of property was inequitable is not cognizable under ARFLP, Rule 85(c) because:

> it is neither mistake, inadvertence, surprise or excusable neglect, nor is it newly discovered evidence nor is it fraud, misrepresentation or misconduct of an adverse party. It is merely a disagreement with the division and an attempt to litigate after default that which could have been dealt with before but for the fact that Respondent chose not to. **ROA #20. p. 5, l. 21-25.**

However, it was clear from Appellant's motion that he was specifically asserting misconduct of a party by fraud or misrepresentation, a ground clearly cognizable under Rule 85(C)(1)(c).

¶4 Throughout the response, Appellee made a number of factual assertions meant to contradict Appellant's factual assertions. Yet, her

"she-saids" clearly do not conclusively resolve his "he-saids." Appellee concludes her motion stating, "there is nothing contained in the Motion to Vacate the Decree which rises to 'extraordinary circumstances of hardship or injustice' justifying the use of Rule 85(C)." **ROA #20. p. 7, l. 23-25.** Apparently, Appellee did not grasp the facial injustice implicit in his assertion that a division of property resulting in net debts of $30,000 to him and net assets of $200,000 to her was inequitable.

¶5 The lower court heard the motion without taking evidence and took the matter under advisement. **ROA #23.** The Court (incorrectly, Appellant asserts) characterized Appellant's motion as one arising only under ARFLP, Rule 85(C)(1)(f). **ROA #24.** In denying the motion, the Court ruled, "The facts alleged by the Petitioner (*sic*) do not rise to the level of demonstrating an extreme case of hardship or injustice." **ROA #24.** The under advisement ruling fails to address Appellant's central contention that a division of property resulting in $30,000.00 in liability for Appellant and $200,000.00 in assets for Appellee was grossly inequitable.

QUESTIONS PRESENTED

¶6 Given the clear questions raised regarding the equitable division of property/debts and the propriety of the award of spousal maintenance being procured via misrepresentations or fraud by Appellee, did the Court

abuse its discretion in failing to set aside the default decree pursuant to ARFLP, Rule 85(C)(1)(c)?

¶7 Since a division of property and debts is not modifiable, given Appellant's verified assertion that the decree left him with debts of $30,000.00 whereas it left Appellee with assets of $200,000.00, did the Court err in failing to grant relief under ARFLP, Rule 85(C)(f)?

LAW AND ARGUMENT

¶8 Generally, denial of a motion to vacate a judgment is reviewed for an abuse of discretion. Rosen v. Board of Medical examiners of State of Ariz., 185 Ariz. 139, 912 P.2d 1368 (App.1995). However, when a refusal to set aside a judgment is harsh, rather than fair and equitable, an appellate court can "look over the shoulder" of a trial court and appropriately substitute its judgment for that of the trial court. Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App.1993). An appellate court should be more loath to reverse an order vacating a default judgment than an order denying such a motion. Marsh v. Riskas, 73 Ariz. 7, 236 P.2d 294 (1951). In reviewing orders related to motions to vacate default judgments, the following principles, among others, guide the Court of Appeals: (1) default judgments are not favored by the courts; (2) it is a desirable legal objective that cases be decided on their merits; (3) doubt should be resolved in favor of setting

aide default judgments. Sloan v. Florida-VanderbiltDevelopment Corp., 22 Ariz.App. 572529 P.2d 726 (App.1974). Arizona has a strong public policy favoring resolution of lawsuits on their merits. Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984).

¶9 In a dissolution proceeding, A.R.S. 25-318(A) requires a court to divide the parties property "equitably." A.R.S. 25-318(B) permits the Court to consider debts relating to the property. Appellant's motion to vacate the dissolution decree asserted that there was a $130,000.00 debt on the real estate awarded to him in the *ex parte* decree whereas the real estate awarded Appellee was debt-free. The trial court failed to consider this in the dissolution decree or in denying Appellant's motion to set it aside. **ROA #'s 13 & 24.** This was inequitable and constitutes an abuse of discretion. Appellant also asserted, via the Court's division of property, he received a business in debt to the tune of $100,000.00. Thus, the total disparity between what he received and what Appellee received was $230,000.00 according to Appellant's verified motion. Clearly, it was the height of inequity for the trial court not to set aside the dissolution decree so the property issues could be determined on their merits. For a middle class couple such as the Riemans, the inequity of a $230,000.00 disparity in the division of property is self-evident.

¶10 In paragraph #1 of its ruling **(ROA #24)** the Court failed to recognize that Appellant asserted grounds for relief under Rule 85(C)(1)(c). In Moreno v. Jones, 313 Ariz. 94, 139 P.3d 612 (2006), a case involving the certification of voters signatures on nominating petitions, the Court granted a Rule 60(c)(3) motion based on Moreno's assertion that he could prove Jones made misrepresentations to the Court at trial. The Court granted an evidentiary hearing on the motion and thereafter vacated the earlier judgment. Id., ¶11. In our case the Court should have, but did not, conduct an evidentiary hearing. The trial court's failure to do so obviously impeded Appellant's ability to prove his verified allegations.

¶11 Our judicial system has no integrity if decrees are procured by misrepresentation or fraud. When such allegations are made, a trial Court should be quite circumspect about those allegations. Yet the lower court here was dismissive of Appellant's allegations and failed to permit Appellant an opportunity to prove his allegations at an evidentiary hearing. In Breitbart-Napp v. Napp, 216 Ariz 74, 163 P.3d 1024 (App.2007) and Norwest Bank (Minnestoa) N.A. v. Symington, 197 Ariz. 181, 3 P.3d 1101 (App.2000) the trial court granted Rule 60(c)(3) motions relating to misconduct on the part of a party related to disclosure violations discovered after judgment. In neither case did the Court grant the motion after an

evidentiary hearing. Rather, it did so upon oral argument because "a sufficient preliminary showing" had been made by the moving party. Napp, ¶23. Such "a sufficient preliminary showing" was also made here yet the lower court denied the motion.

¶12 Both Napp and Symington also affirm, "Rule 60(c)(3) does not require a showing that the outcome of the case would have been different but for the non-disclosure." Napp, ¶18. Here, we are not dealing with a disclosure violation because the disclosure duties do not arise until a responsive pleading is filed, which did not occur in our case. Yet, the principal of not needing to show that "the outcome would have been different" is equally, if not more compelling, where, as here, a party asserts active misrepresentation by his opponent as opposed to mere suppression of disclosure.

¶13 Again it is self-evident that an alleged disparity of $230,000 in a division of property is inequitable. Why the lower Court favored Appellee's "she-saids" over Appellant's "he-saids" is not revealed in the lower court's ruling. However, if the Court had granted the motion, both parties would have had an opportunity to obtain appraisals of the respective properties so the Court could make an actual equitable division of the parties' real estate rather than simply rely on one party's *ex parte* testimony. Similarly, if the

motion were granted, Appellant would have been able to obtain evidence proving that Appellee did not contribute to his educational opportunities and that the vast majority of his student loans were repaid prior to the parties' marriage.

¶14 It should have come as no surprise to the trial Court that misrepresentations may have occurred in this dissolution proceeding since such proceedings are often fraught with exaggerated claims or omissions from parties who are often quite emotional due to the demise of their marriage. Here, Appellant asserted Appellee breached an informal understanding the parties had regarding spousal maintenance and the division of assets and liabilities. Though it is true Appellant was served a copy of the petition for dissolution, revealing what Appellee sought ***preliminarily***, this Court should note the record contains no proof that Appellee served Appellant the dissolution decree that she proposed to be signed by the lower court at the default hearing. **ROA #'s 2 & 7.** Thus, he had no way of knowing that the terms of his informal agreement reached with Appellee after she filed her petition would be breached.

¶15 Dissolution proceedings are largely proceedings in equity. Yet, based on the record in this case, there is grave doubt whether equity was done between the parties. Doubt should be resolved in favor of setting

aide default judgments. Sloan v. Florida-VanderbiltDevelopment Corp., 22 Ariz.App. 572529 P.2d 726 (App.1974).

¶16 As to question #2 in this appeal, the property division aspects of a dissolution decree are generally not modifiable. *See* A.R.S. 25-327(A). And, though such aspects are appealable, obviously, with no record established by the defaulting party in a dissolution decree entered after default, the defaulting party cannot mount an efficacious appeal. That is why Rule 85(C)(c) is so important. Even if Appellant's motion to vacate the decree was not read by the lower court as a plea for relief under Rule 85(C)(1)(c), it should have been sufficient to trigger relief under Rule 85(C)(1)(f). Even if the motion was not read as an assertion of misrepresentation, fraud or other misconduct on the part of the adverse party, the allegation of a disparity of $230,000.00 in the division of property meted out by the decree should have been sufficient for the lower court to find "any other reason justifying relief from the operation of the judgment" and "extraordinary circumstances of…injustice." Panzino v. City of Phoenix, 199 Ariz. 442, 999 P.2d 198 (2000). *See* also, Brit v. Brit, 208 Ariz. 546, 96 P.3d 544 (App.2004). In fact, if Appellee's misrepresentations were insufficient, standing alone, to warrant relief under Rule 85(C)(1)(f),

they could still be considered under Rule 85(C)(1)(f). Bickerstaff v. Denny's Restaurant, Inc. 141 Ariz. 629, 688 P.2d 637 (1984).

CONCLUSION

¶16 Based upon the above citations to the record and the above argument, Appellant requests this Court reverse the trial Court's denial of his motion for relief from the judgment.

RESPECTFULLY submitted this 12th day of August, 2011

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CERTIFICATE OF COMPLIANCE

By his signature, above, Mr. Rieman's counsel hereby certifies that this brief was prepared in proportionately spaced 14-point, "Arial" typeface, is double-spaced, and consists of 2,193 words.