SC98043

IN THE SUPREME COURT OF MISSOURI

JEANNE H. OLOFSON,

Appellant,

vs.

SCOTT W. OLOFSON, *in his capacity as* Personal Representative of the ESTATE OF TOM W. OLOFSON,

Respondent.

On Appeal from the Circuit Court of Jackson County
Honorable Susan E. Long, Associate Circuit Judge
Case No. 1416-FC09007

SUBSTITUTE BRIEF OF THE APPELLANT

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Preliminary Statement

After 55 years of marriage, Tom and Jeanne entered into a settlement agreement dissolving their marriage. Their largest asset was millions of shares of Epiq Systems, Inc. ("Epiq"), a publicly traded company of which Tom was Chairman and CEO. On Tom's representations that there had been "no compelling offers" for the sale of Epiq and he had "made a full disclosure concerning the nature and extent of" his "property, assets, liabilities, and financial condition," Jeanne agreed to a share price of $13.50 per share.

A few months after the dissolution, Jeanne discovered Tom had misrepresented the potential of selling Epiq and in fact, while negotiating the settlement with Jeanne in the dissolution, actually had been negotiating to sell Epiq for more than $13.50 per share. Ultimately, one of the same buyers Tom had been courting bought Epiq, took it private, and paid $16.50 per share, also entitling Tom to millions of dollars of change-in-control benefits.

Jeanne then moved under Rule 74.06(b)(2) to set aside the division of the marital estate for fraud. Thereafter, Tom died, and his estate was substituted. On the estate's motion, the trial court dismissed Jeanne's Rule 74.06(b)(2) motion with prejudice, holding Tom's death mooted or abated it.

This was error. A challenge to a property division in a dissolution decree, especially one for fraud, does not abate and is not made moot when a party dies after the dissolution was ordered. Tom's death here occurred long after the dissolution decree, and Jeanne's Rule 74.06(b)(2) proceeding only concerned her property rights. This Court should reverse the trial court's judgment and remand this case for further proceedings on Jeanne's motion.

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Jackson County granting a motion for judgment on the pleadings. The judgment dismissed the appellant's Rule 74.06(b)(2) action as moot or abated.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3, so the appellant timely appealed to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals.

After the Court of Appeals issued an opinion affirming the trial court's judgment, the appellant filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. The appellant then filed a timely application for transfer in this Court under Rule 83.04. The Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which authorizes this Court to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. Background and dissolution of marriage

Jeanne Olofson and Tom Olofson were married in 1960 when Jeanne[1] was 19 years old and Tom was 18 (D4 p. 2; D14 p. 4). They had two children during their marriage (D3 p. 1; D4 p.3). They were married for more than 55 years (D4 p.2; D14 p. 4).

Tom was the Chairman and CEO of Epiq Systems, Inc. ("Epiq"), a corporation in which he and Jeanne had purchased an interest in 1988, and which later during the marriage became a publicly traded company (D14 p. 5). From the time of its initial public offering through 2015, Epiq increased its annual revenue from $8 million to more than $500 million (D7 p. 31; D14 p. 6). During the marriage, the parties accumulated millions of shares of Epiq stock in Tom's name (D14 p. 5).

In 2014, Jeanne petitioned the Circuit Court of Jackson County for a dissolution of marriage (D14 p. 4). Their children were long emancipated, so the dissolution involved only financial issues (D3 p. 1; D4 pp. 2-3).

In February 2016, Jeanne and Tom executed a joint affidavit submitting a separation and property settlement agreement ("the Agreement") to the trial court, which they requested the court enter (D1 p. 17; D2; D3). The Agreement stated that "the parties represent that each has made a full disclosure concerning the nature and extent of the property,

[1] This brief uses some of the parties' first names for ease of reference only. No disrespect is intended.

assets, liabilities, and financial conditions" and "they have each disclosed to the other their respective properties and income" (D3 p. 2; D4 p. 4).

In March 2016, the trial court entered a judgment accepting the Agreement and dissolving Jeanne and Tom's marriage (D1 p. 17; D4).

In the Agreement, of the 3,236,055 shares of Epiq stock the parties owned directly, Tom received 2,159,416 shares and Jeanne received 1,076,639 shares (D3 pp. 14-15; D4 p. 16; D14 p. 6). Tom also received all 512,500 Epiq stock options and Jeanne received none (D3 p. 15). To value the Epiq stock, the Agreement used a share price of $13.50 per share (D14 p. 6).

B. Proceedings below

1. Jeanne's Rule 74.06(b)(2) motion

In February 2017, in a verified motion, Jeanne moved the trial court under Rule 74.06(b) to set aside the dissolution decree for fraud based on Tom's false representations and nondisclosures (D1 p. 19; D5 pp. 1, 39-44; App. A10,[2] A48-53). She alleged that in the summer of 2016, shortly after the decree was entered, it was made public – including for the first time to her – that Epiq was being purchased for $16.50 per share (D5 p. 4; App. A13).

Jeanne alleged this was fraud: that Tom deliberately misrepresented and failed to disclose facts regarding Epiq's strategic review process during the dissolution, that he intended Jeanne to rely on those misrepresentations in negotiating the property settlement in their dissolution, that she believed and relied on those misrepresentations in doing so, that she had a right to rely on those representations, that Tom knew or should have known those

[2] The copy of Jeanne's Rule 74.06(b) motion included in the appendix to this brief is without its exhibits, which are in the legal file at D6 through D13.

representations were false, and that she was financially damaged as a result of her reliance on Tom's misrepresentations (D5 p. 37; App. A46).

Jeanne alleged many examples of Tom's knowingly false representations during the dissolution proceedings that rose to the level of fraud (D5 pp. 30-31; App. A39-40).

First, at his deposition on December 14, 2015, Tom affirmatively represented there had been "no compelling offers" for the sale of Epiq (D5 pp. 10-11, 30; D13; App. A19-20). He refused to comment further when Jeanne's counsel asked him whether there had been any offers to buy Epiq at all (D5 pp. 10-11, 30; D13; App. A19-20). Tom also stated he planned to continue with Epiq, implying he had no plans to leave (D5 pp. 10-11, 30; D13; App. A19-20, A39). Jeanne attached and incorporated excerpts from the transcript of Tom's sworn deposition where he testified to these statements (D13).

Second, at the final settlement conference on January 7, 2016, Tom further represented that he had no new information regarding the sale of Epiq (D5 pp. 11, 30; App. A20, A39). Jeanne attached and incorporated her affidavit attesting to this (D5 pp. 39-44; App. A48-53).

Third, in the final Agreement the parties submitted to the court in February 2016, Tom represented he had "made a full disclosure concerning the nature and extent of" his "property, assets, liabilities and financial conditions" and warranted that he had disclosed to Jeanne all his properties and income (D5 pp. 11-12, 30-31; App. A20-21, A39-40). Jeanne attached and incorporated the judgment showing this (D6).

Jeanne alleged these statements were knowingly false, because Tom's representations that there were "no compelling offers" for the sale of Epiq were not true during the period when the parties negotiated the Agreement in January 2016 and before they submitted the Agreement to the trial court for approval in February 2016 (D5 pp. 6-7, 12-19, 31; App. A15-16, A21-28, A40). In fact, Epiq's Strategic Alternatives Committee had been looking at selling the company since 2014 (D5 pp. 13, 17; App. A22, A26). And at the same time as Tom negotiated a $13.50 per share settlement price with Jeanne in January 2016, on January 13, 2016 Epiq's ultimate buyers had made a compelling offer to purchase Epiq for $15.00 per share, compared to Epiq's stock's closing price that day of $11.85 (D5 pp. 13, 17; App. A22, A26). The Strategic Alternatives Committee rejected that offer on January 27, 2016 on the belief that it undervalued Epiq (D5 pp. 13, 17-18; App. A22, A26-27).

As Chairman and CEO of Epiq and an *ex officio* member of the Strategic Alternatives Committee, Tom was privy to all Epiq's internal information and so was aware of all this, including this decision that $15.00 per share undervalued Epiq and a sale of the company would close higher than that (D5 pp. 5-6; App. A14-15). Jeanne attached and incorporated Epiq's later public SEC filings, which confirmed these facts (D7 pp. 33-42).

Then, shortly after the parties finalized their Agreement, and unknown to Jeanne, a deal was reached for the sale of Epiq at $16.50 per share, $3.00 more than the share price the parties used in the Agreement (D5 pp. 12-14, 18-19; App. A21-23, A27-28). Epiq's buyers took the company private, liquidating all the shareholders' stock, including Jeanne's and Tom's, at

$16.50 per share, with the transaction closing September 30, 2016 (D5 pp. 4, 13; App. A13, A22). And with the sale at $16.50 per share instead of the $13.50 the parties used in the Agreement, Tom received a significantly greater portion of the marital estate worth millions of dollars, culminating in a materially inequitable division (D5 pp. 4, 13; App. A13, A22). Again, Epiq's later public SEC filings supported all these claims (D7 pp. 33-42; D8).

The sale also triggered Tom's receipt of $16 million in benefits including cash compensation of more than $8.7 million, equity compensation of more than $6.8 million, and other benefits of more than $800,000, from none of which Jeanne received any proceeds (D5 pp. 4-5; App. A13-14). These benefits were part of a compensation plan in place since 2014 in the event of a change of control of Epiq, giving Tom a further reason to hide information about the imminence of a sale of Epiq in the dissolution (D5 p. 5; App. A14). Epiq's later public SEC filings supported these facts, too (D7 pp. 53-57).

Jeanne alleged that Tom stonewalled her discovery throughout the dissolution proceedings to hide the imminence of a sale of Epiq (D5 pp. 7-12; App. A16-21). This included his refusal or failure to provide anything related to the Strategic Alternatives Committee's plans, including offers to purchase Epiq, except for insufficient already-public information (D5 pp. 7-12; App. A16-21). As Epiq's SEC filings later made public in August and September 2016 confirmed, Tom himself was pursuing potential buyers for Epiq, including facilitating formal due diligence, in which he provided non-public information to potential buyers subject to confidentiality agreements while at the same time refusing to provide this information to Jeanne per her

discovery request and under her own proposed confidentiality agreement (D5 pp. 12, 16-19; D7 pp. 33-42; D8; App. A21, A25-28).

A chart in Jeanne's motion shows the parallel timelines of proceedings in the dissolution case and in Epiq's strategic review process and sale (D5 p. 15; App. A24). It shows how during this time Tom, as Chairman and CEO of Epiq and *ex officio* member of its Strategic Alternatives Committee, had substantial knowledge to which Jeanne was not privy regarding potential buyers for Epiq, pending bids, and that a transaction for the sale of Epiq was imminent at a price above $13.50 per share (D5 p. 15; App. A24).

Citing the Court of Appeals' decisions in *Hewlett v. Hewlett*, 845 S.W.2d 717 (Mo. App. 1993), and *Alexander v. Sagehorn*, 600 S.W.2d 198 (Mo. App. 1980), Jeanne argued that Tom's misrepresentations were fraud entitling her to set aside the division of the marital estate (D5 pp. 27-37; App. A36-46):

- Tom made representations (D5 pp. 30-31; App. A39-40),
- which were false and material (D5 pp. 30-32; App. A39-41),
- he knew they were false (D5 p. 32; App. A14),
- he intended Jeanne to act on the false representations in dividing the parties' marital estate (D5 pp. 32-35; App. A41-44),
- she was not aware of the representations' falsity (D5 p. 35; App. A44),
- she relied on Tom's false representations (D5 pp. 35-36; App. A44-45),
- after more than 55 years of marriage she had a right to rely on them and did so because Tom's actions precluded her from obtaining non-public information regarding the imminence of a potential sale of Epiq from any source other than Tom (D5 pp. 36-37; App. A45-46), and

- she was injured (D5 p. 37; App. A46).

Jeanne requested the court "set aside the Judgment of Dissolution of Marriage or, in the alternative, set aside portions of the Judgment, so as to effectuate an equitable division of the marital estate to include the value of the Epiq stock at $16.50 per share and the value of Tom's Golden Parachute Benefits" (D5 p. 37; App. A46).

Tom responded to Jeanne's motion, denied her allegation of fraud, and made counterarguments to her legal arguments (D1 pp. 19-22; D14; D15). He requested the court deny her motion (D15 p. 38). Unlike Jeanne's motion, which she verified with a personal affidavit detailing her knowledge of all her allegations (D5 pp. 39-44; App. A48-53), Tom's response was not verified at all (D14; D15). Jeanne then replied to Tom's counterarguments (D17).

2. Tom's death and substitution of the Estate for Tom

On April 8, 2017, only two days after filing his opposition to Jeanne's Rule 74.06(b)(2) motion, Tom died (D19).

In June 2017, Scott Olofson, one of Tom and Jeanne's children and the personal representative of Tom's estate, filed a suggestion of Tom's death and sought to be substituted for Tom (D18 p. 1; D20 pp. 1-2). The court granted Scott's motion and he was substituted for Tom as the respondent in his capacity as the personal representative of Tom's estate (D22 p. 1). This brief refers to Scott in his capacity as personal representative as "the Estate."

The court then set the case for a five-day trial in March 2018 and discovery began, continuing through the summer and fall of 2017 with many discovery disputes between Jeanne, the Estate, and Epiq (D1 pp. 24-32).

3. The Estate's motion for judgment on the pleadings

In December 2017, the Estate moved for judgment on the pleadings "pursuant to Mo. R. Civ. P. 55.28(b)," making three arguments (D1 p. 32; D23 p. 1; D24 pp. 5-24).

First, the Estate argued that Tom's death "moot[ed Jeanne]'s [Rule 74.06(b)] motion" and so "the Court lack[ed] subject matter jurisdiction to proceed under the doctrine of abatement" (D23 p. 1; D24 pp. 10-14) (emphasis and capitalization removed). It argued this was because a dissolution of marriage proceeding abates automatically on either party's death, and as the most Jeanne could get out of her Rule 74.06(b)(2) motion would be to set aside the dissolution, Tom's death rendered her motion moot and deprived the court of "subject matter jurisdiction" (D23 p.1; D24 pp. 10-14).

Next, the Estate argued that Jeanne's Rule 74.06(b)(2) motion really sought to modify the dissolution decree, rather than set it aside (D24 pp. 14-15). It argued this was not allowed because the division of property in a dissolution was not modifiable and a Rule 74.06(b)(2) motion could not be used to modify a final property division (D24 pp. 14-15).

Finally, the Estate argued that Jeanne's Rule 74.06(b)(2) motion "to relitigate her divorce on the basis of fraud [was] barred by the doctrines of res judicata and collateral estoppel" (D23 p. 1; D24 pp. 15-24) (emphasis and capitalization removed). It argued this was because she had a full and fair opportunity to litigate all issues raised in her Rule 74.06(b)(2) motion in the dissolution, which resulted in a final, conclusive judgment (D24 pp. 15-17).

The Estate also argued that Jeanne's claims relating to or arising from the sale of Epiq were precluded by a class action settlement in *In re Epiq Sys., Inc. Stockholder Litig.*, Case No. 1616-CV18720 in the Circuit Court of Jackson County ("the Class Action") (D24 pp. 21-24). It argued this was because a "non-opt out class" certified in the Class Action, which claimed that defendants including Tom breached their fiduciary duties by approving the $16.50 sale share price, comprised everyone "who held or owned common stock of Epiq Systems, Inc." during "the period beginning on and including July 26, 2016 through and including September 30, 2016," which included Jeanne (D24 p. 22). It argued Jeanne did not file any objections to the settlement, which then was approved and on behalf of the class released Tom and his successors or heirs from any claims related to disclosures, the sale of Epiq, and any events leading to it (D24 pp. 22-23). It argued this was res judicata that precluded Jeanne's Rule 74.06(b)(2) motion (D24 pp. 23-24).

4. Jeanne's opposition to judgment on the pleadings

Jeanne timely opposed the Estate's motion for judgment on the pleadings (D1 pp. 33-35; D32).

Jeanne initially noted there was no "Rule 55.28(b)," nor did Rule 55.28 concern motions for judgment on the pleadings, and the Estate's motion also mis-cited a variety of other rules (D32 pp. 1-2, 7-8). Jeanne argued the Estate's arguments that she had failed to state a claim, or that her claims were barred by res judicata or collateral estoppel, now were time-barred under Rule 55.27(a), as the Estate did not include them in its response to her Rule 74.06(b)(2) motion and so could not make these arguments now, many

months later (D32 pp. 8-9). Jeanne also objected that a motion for judgment on the pleadings was limited to the pleadings themselves and the Estate's motion improperly was based on materials outside the pleadings, making it a motion for summary judgment that itself was defective for not following the guidelines of Rule 74.04 (D32 pp. 2-3, 9-11, 20-21, 28-29).

Jeanne then responded to each of the Estate's arguments (D32 pp. 3, 7-31).

First, Jeanne argued that Tom's death did not moot or abate her motion (D32 pp. 3, 11-16). She distinguished the authorities on which Tom relied to support his abatement argument, noting they only involved the death of a party to a dissolution during the dissolution proceeding itself and before entry of a decree (D32 pp. 12-14). She argued that where a party dies after entry of the decree, but issues concerning the property division still are being litigated, the law of Missouri is that the death does not affect that litigation (D32 pp. 13-15). Because Tom had died after entry of the decree and her Rule 74.06(b)(2) motion concerned only the property division, Tom's death did not operate to bar her Rule 74.06(b)(2) proceeding or otherwise deprive the court of "subject matter jurisdiction" (D32 pp. 15-16).

Second, Jeanne argued that her Rule 74.06(b)(2) motion did not seek to "modify" the judgment, but instead just sought to set aside the division of the marital estate for fraud, permitting the parties then to relitigate the property division, which the law of Missouri allows (D32 pp. 17-20). She argued that her Rule 74.06(b)(2) motion filed after the dissolution judgment was final is

an authorized independent action, and because of Tom's fraud it provided the trial court authority to set aside the property division (D32 pp. 17-20).

Finally, Jeanne argued that the doctrines of res judicata and collateral estoppel did not preclude her Rule 74.06(b)(2) motion (D32 pp. 21-31). She argued that res judicata did not apply because the prior action was for dissolution of marriage and her Rule 74.06(b)(2) motion was to set the property division aside due to Tom's fraud, meaning two of four identities required for res judicata – "the identity of the thing sued for" and "the identity of the cause of action" – were absent (D32 p. 23). She argued collateral estoppel equally did not apply because the issue being litigated in her Rule 74.06(b)(2) motion was Tom's fraud under the nine elements to prove that claim, which are not the same as the issues decided in the dissolution, namely the valuation and division of marital property (D32 p. 23). She argued that, taking all the facts in her Rule 74.06(b)(2) motion as true, which the court had to, Tom's fraud was not mere "discovery violations" but instead was a pervasive intentional fraud that she did not have a full and fair opportunity to litigate in the dissolution (D32 pp. 23-28).

Jeanne also argued that the Class Action settlement had no preclusive effect on her Rule 74.06(b)(2) motion (D32 pp. 29-31). She argued there was no proof she was a member of the class at issue (D32 p. 29). Later, in her sur-reply, she showed this more directly, explaining how she by definition was excluded from the class and also by definition was a "Released Defendant" who therefore was not part of the class (D34 pp. 7-8) She further argued that even if she somehow could be a member of the class, the release

of claims in the settlement only concerned claims "based on [the class member's] ownership of Company stock during the Class Period," which had nothing to do with her claim that Tom committed fraud in the dissolution, which was not based on her ownership of Epiq stock (D32 pp. 29-30).

Jeanne also argued the Class Action had no res judicata or collateral estoppel effect, as neither the four identities required for res judicata nor the identity of issues for collateral estoppel were present between the Class Action and her Rule 74.06(b)(2) motion (D32 pp. 30-31). Rather, the Class Action was a claim by shareholders against Epiq and others concerning the approval of the transaction for Epiq's sale and public disclosures in the proxy statements in connection with that sale, which occurred after the parties' dissolution (D32 pp. 30-31). Conversely, Jeanne's Rule 74.06(b)(2) motion concerned Tom's fraud in the dissolution itself (D32 pp. 30-31). She also argued that she would have had no opportunity in the Class Action to litigate her fraud claim against Tom regarding the dissolution (D32 pp. 30-31).

5. Reply and sur-reply

The Estate replied in support of its motion for judgment on the pleadings (D1 p. 36; D33). Besides replying to support its substantive arguments, the Estate also argued that going beyond the pleadings was proper because its motion really was a "motion for judgment as a matter of law" or "a motion to dismiss for lack of subject matter jurisdiction," for which the court was not limited to the face of the pleadings (D33 pp. 10, 12). It argued the court "can and should take judicial notice of all prior filings in the underlying divorce case, ancillary discovery filings by the parties in Kansas

courts and the pleadings on file in this Court in the Epiq shareholder litigation" (D33 pp. 12-13). The Estate also argued it properly had raised the issues of res judicata and collateral estoppel, because these "may be properly raised on a motion under Rule 55.27," and in any case Jeanne's Rule 74.06(b)(2) motion was a "motion" and so was not a "pleading" to which the pleading response rules applied (D33 pp. 11-12).

With leave of court, Jeanne then filed a sur-reply in opposition to judgment on the pleadings (D1 pp. 38-39; D34). Among other things, she argued that if her Rule 74.06(b)(2) motion did not qualify as a "pleading," the Estate could not seek "judgment on the pleadings" from it (D34 pp. 8-9). The Estate later filed a response to the sur-reply (D1 p. 39; D35).

6. Further proceedings and judgment

While the parties briefed the Estate's motion for judgment on the pleadings, the proceedings continued, including more discovery and more discovery disputes between Jeanne, the Estate, and Epiq (D1 pp. 32-40). In February 2018, the trial was continued from March to June (D1 pp. 36-37).

In April 2018, the trial court informed the parties that it intended to grant the Estate's motion for judgment on the pleadings and invited them to file proposed judgments (D38 p. 1). The Estate then forwarded a proposed order granting judgment on the pleadings, which would have denied Jeanne's procedural objections to its motion, held that Tom's death deprived the court of subject-matter jurisdiction, and held that res judicata and collateral estoppel barred Jeanne's Rule 74.06(b)(2) motion both from the dissolution and the Class Action settlement (D37 pp. 6-24).

On May 17, 2018, the trial court entered judgment on the pleadings for the Estate and dismissed Jeanne's Rule 74.06(b)(2) motion with prejudice (D39 p. 1; App. A1). It held only that Tom's death mooted or abated Jeanne's Rule 74.06(b)(2) proceedings (D39 pp. 1-9; App. A1-9). It did not address any of the Estate's other arguments (D39 pp. 1, 5-9; App. A1, A5-9).

The court held the Estate's motion was timely because "under the plain language of the Rule, dismissal for lack of subject matter jurisdiction is required '*[w]henever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter'" (D39 p. 4; App. A4) (quoting Rule 55.27(g)(3)) (emphasis added by the court). It also held it was proper to look outside the pleadings "in ruling on a motion to dismiss for lack of subject matter jurisdiction" (D39 p. 4; App. A4). It then held, "the defenses asserted by [the Estate] – namely, lack of a justiciable controversy, mootness, and abatement – all relate to the issue of subject matter jurisdiction. Thus, the Court may consider matters outside the pleadings without converting [the Estate]'s motion into one for summary judgment" (D39 p. 5; App. A5). When discussing what "subject matter jurisdiction" is, the court did not cite any decisions dated after 2005 (D39 pp. 2, 4-6; App. A2, A4-6).

The court held Tom's death mooted or abated Jeanne's Rule 74.06(b)(2) motion because "if the judgment were set aside, the procedural posture would be the same as if Tom Olofson died prior to entry of final judgment, at which point the lawsuit would abate and the Court would lose subject matter jurisdiction to take further action" (D39 p. 6; App. A6). It held the fact that Jeanne's motion concerned only property rights did not save her action,

because "even if the Court were to set aside the judgment, because of [Tom]'s death, there is no longer a marital estate capable of being reallocated under" § 452.330, R.S.Mo., and even "[t]he Epiq stock no longer exists, having been sold by the parties" (D39 pp. 6-7; App. A6-7).

The court held that "[a]s a matter of law, if there is a final judgment and decree of dissolution dividing marital property in effect at the time of a parties' death [*sic*], it is not subject to modification or collateral attack" and "[t]o hold otherwise and allow a surviving former spouse to set aside a final division of marital property for reallocation between parties, when one is deceased and the marital estate no longer exists, would call upon the Court to impermissibly adjudicate a moot controversy on hypothetical facts" (D39 p. 7; App. A7). It held "should [Jeanne] prevail on her motion, the only relief available to [her] would be for the Court to set aside that part of the judgment dividing marital property entirely and reallocate the marital estate" under § 452.330.1, which would be "impossible" because "one party has died and there is no marital estate to reallocate" (D39 p. 7; App. A7).

Jeanne timely appealed to the Missouri Court of Appeals (D40), which issued an opinion affirming the trial court's judgment. This Court then sustained Jeanne's application for transfer and transferred her appeal.

Point Relied On

The trial court erred in dismissing Jeanne's Rule 74.06(b)(2) motion as moot or abated due to Tom's death *because* the doctrine of abatement-by-death in dissolution of marriage actions does not apply where a dissolution of marriage has been ordered before the party died and the remaining issues concern only the parties' property rights, and Rule 74.06(b) relief lies to set aside the division of the marital estate in a dissolution where one spouse defrauded the other *in that* Tom died after the court dissolved the parties' marriage, and taking the allegations in Jeanne's Rule 74.06(b)(2) motion as true, Tom defrauded her in the dissolution, entitling her to set aside the division of the marital estate.

Anderson v. Dyer, 456 S.W.2d 808 (Mo. App. 1970)

Hewlett v. Hewlett, 845 S.W.2d 717 (Mo. App. 1993)

Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997)

Cregan v. Clark, 658 S.W.2d 924 (Mo. App. 1983) (W.D. en banc)

Rule 74.06

Argument

The trial court erred in dismissing Jeanne's Rule 74.06(b)(2) motion as moot or abated due to Tom's death *because* the doctrine of abatement-by-death in dissolution of marriage actions does not apply where a dissolution of marriage has been ordered before the party died and the remaining issues concern only the parties' property rights, and Rule 74.06(b) relief lies to set aside the division of the marital estate in a dissolution where one spouse defrauded the other *in that* Tom died after the court dissolved the parties' marriage, and taking the allegations in Jeanne's Rule 74.06(b)(2) motion as true, Tom defrauded her in the dissolution, entitling her to set aside the division of the marital estate.

Preservation Statement

Jeanne made the argument in this point in her opposition to the Estate's motion for judgment on the pleadings (D32 pp. 3, 11-16; D34 pp. 2-3). Therefore, it is preserved for appellate review. *Mayes v. St. Luke's Hosp. of Kan. City*, 430 S.W.3d 260, 266-68 (Mo. banc 2014).

* * *

Standard of Review

This Court reviews a judgment on the pleadings de novo. *Mo. Mun. League v. State*, 489 S.W.3d 765, 767-78 (Mo. banc 2016). It "review[s] the allegations of [the] petition to determine whether the facts pleaded therein are insufficient as a matter of law …." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). It takes the allegations as true, gives them the benefit of all reasonable inferences, and determines whether they

"are, nevertheless, insufficient as a matter of law." *Id.* "A trial court properly grants a motion for judgment on the pleadings if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law." *Id.*

* * *

The law of Missouri is that while a pending dissolution of marriage action abates on a party's death, this doctrine does not apply where the dissolution was ordered before the party's death and the remaining issues concern only property rights. Here, after the trial court dissolved the parties' marriage, Jeanne moved under Rule 74.06(b)(2) to set aside the decree's division of the marital estate, alleging Tom had defrauded her in the dissolution proceedings. But the trial court dismissed, holding Tom's death during the Rule 74.06(b) proceedings abated them. This was error. The law of Missouri is and must be that Rule 74.06(b): (1) does not limit a spouse defrauded as to a divorce's property division to seeking to be un-divorced, rather than to set aside that division, and (2) allows that defrauded spouse to obtain relief from that fraud even if the tortfeasor has died.

A. Summary

The trial court dismissed Jeanne's Rule 74.06(b)(2) motion that sought to set aside for fraud the division of the parties' marital estate (D39 p. 1; App. A1). It held that Tom's death during the Rule 74.06(b)(2) proceedings made the issues moot and abated the action (D39 pp. 1, 5-9; App. A1, A5-9).

The court reasoned this was because "if the judgment were set aside, the procedural posture would be the same as if Tom Olofson died prior to entry of final judgment, at which point the lawsuit would abate" (D39 p. 6;

App. A6). It held that the fact that Jeanne's motion concerned only property rights did not save her Rule 74.06(b)(2) action, because "even if the Court were to set aside the judgment, because of Mr. Olofson's death, there is no longer a marital estate capable of being reallocated" (D39 pp. 6-7; App. A6-7).

This was error. While a party's death during a pending dissolution of marriage action *before* any order has been entered dissolving the parties' marital status abates *those* proceedings, the law of Missouri is that this doctrine does not apply when the party dies *after* the trial court enters an order dissolving the marriage and the only remaining issues concern the division of the marital estate. *See, e.g.*, *Linzenni v. Hoffman*, 937 S.W.2d 723, 726 (Mo. banc 1997). When the party dies after the order dissolving the marriage, the death does not mean (as the trial court suggested here) that there no longer is a marital estate capable of being re-divided. Instead, the party's estate is substituted and is responsible for the redivision. *See, e.g., Id.*; *Cregan v. Clark*, 658 S.W.2d 924, 926 (Mo. App. 1983) (W.D. en banc).

Here, Tom died after the parties' marriage was dissolved, and the only issues in Jeanne's Rule 74.06(b)(2) motion concerned the division of the marital estate. Taking her allegations as true, Tom committed fraud in the dissolution action, entitling her to Rule 74.06(b) relief setting aside the division of the marital estate. *See, e.g., Hewlett v. Hewlett*, 845 S.W.2d 717, 719-22 (Mo. App. 1993); *Essig v. Essig*, 921 S.W.2d 664, 665-67 (Mo. App. 1996); *Alexander v. Sagehorn*, 600 S.W.2d 198, 201-02 (Mo. App. 1980).

Tom's death therefore did not abate Jeanne's Rule 74.06(b)(2) motion. *See, e.g., Anderson v. Dyer*, 456 S.W.2d 808, 814-15 (Mo. App. 1970).

B. The law of Missouri is that the doctrine of abatement-by-death in dissolution of marriage actions does not apply where the marriage has been ordered dissolved before the party died and the remaining issues concern only the parties' property rights.

"Generally, jurisdiction[3] abates in a dissolution of marriage action where one of the parties dies while the case is pending." *Linzenni*, 937

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[3] Below, the trial court and the Estate also used the term "jurisdiction" – specifically "subject-matter jurisdiction" – to describe what a party's death in a dissolution affects (D23 p. 1; D24 pp. 10-14; D39 pp. 2, 4-6; App. A2, A4-6).

The court held the Estate's motion for judgment on the pleadings was timely because "dismissal for lack of subject matter jurisdiction is required '[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter'" (D39 p. 4; App. A4) (quoting Rule 55.27(g)(3)) (emphasis removed). It also held it was proper to look outside the pleadings "in ruling on a motion to dismiss for lack of subject matter jurisdiction" (D39 p. 4; App. A4). It then held, "the defenses asserted by [the Estate] – namely, lack of a justiciable controversy, mootness, and abatement – all relate to the issue of subject matter jurisdiction" (D39 p. 5; App. A5).

Throughout this discussion the trial court did not cite any decisions dated after 2005 (D39 pp. 2, 4-6; App. A2, A4-6). This is notable because the conceptions of subject-matter jurisdiction it stated all predate this Court's clarification of it in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. banc 2009), and are not the present law of Missouri.

In *Webb*, this Court explained that subject-matter jurisdiction merely means "the court's authority to render a judgment in a particular category of case" and is a matter of state constitutional law. *Id.* at 253. Missouri's Constitution establishes the circuit courts' subject-matter jurisdiction by giving them "original jurisdiction over all cases and matters, civil and criminal." *Id.* (quoting Mo. Const. art. V, § 14). So, as the "present case is a civil case," "the circuit court ha[d] subject matter jurisdiction and, thus, ha[d] the authority to hear this dispute." *Id.* at 254.

Conversely, mootness and abatement "implicat[e] the justiciability of a controversy." *Mo. Mun. League*, 465 S.W.3d at 906. Post-*Webb*, justiciability

S.W.2d at 726. This is because "[u]pon the death of a spouse there is no res for the decree to operate upon and the issue becomes moot." *Cregan*, 658 S.W.2d at 927. As the Supreme Court of California put it a century ago, once one of the spouses involved in a divorce dies, the result of the action "is already accomplished by the death of one of the parties." *Gloyd v. Super. Ct. in & for L.A. Cty.*, 185 P. 995, 997 (Cal. 1919) (citation omitted).

But it is well-established that this "doctrine of abatement" does not apply "where a dissolution of marriage has been ordered prior to the death of a party, even though the order may be partial, interlocutory or not a final judgment resolving all issues in the case." *Linzenni*, 937 S.W.2d at 726 (citing *Fischer v. Seibel*, 733 S.W.2d 469, 472 (Mo. App. 1987)).

Instead, when a party dies after an order dissolving the marriage, any issues concerning property division remain litigable. "[W]hen property rights of the parties are involved, the parties are entitled to have that aspect of the case decided though one of the parties has died." *Cregan*, 658 S.W.2d at 927.

This is because:

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is not a question of subject-matter jurisdiction. *Schweich v. Nixon*, 408 S.W.3d 769, 774 n.5 (Mo. banc 2013).

Still, even post-*Webb* justiciability remains "a prerequisite to the court's authority to address substantive issues" in a case. *Id.* So, it, too, is a threshold question addressable in a motion for judgment on the pleadings or a motion to dismiss. *See, e.g.*, *Salvation Army v. Bank of Am.*, 435 S.W.3d 661, 665-66 (Mo. App. 2014). Therefore, Jeanne concedes that the Estate could raise the question of mootness or abatement – but not any of its other arguments below – in a motion for judgment on the pleadings.

> [w]hen the issue of marital status has been resolved by a decree dissolving a marriage, the issue of the distribution of property is not personal. On that basis, the death of a party after a decree of dissolution has become final does not cause an action pending on the issue of the distribution of property to abate.

In re Marriage of Carter, 794 S.W.2d 321, 322 (Mo. App. 1990).

This Court's decision in *Linzenni* cemented that the answer to whether the doctrine of abatement-on-death applies to an issue of property division rests on a bright-line test of whether the party's death occurred before the order dissolving the party's marriage or occurred after that order.

In *Linzenni*, for example, the parties filed for a dissolution of marriage and the trial court entered an order stating, "ORDERED DISSOLVED." 937 S.W.2d at 724. Only later did it enter a final judgment that divided the marital estate. *Id.* In the meantime, the husband died. *Id.* When the wife then sought to set aside the judgment as void under the doctrine of abatement-by-death, the trial court refused and this Court affirmed:

> The work sheet, signed by the judge and filed in the case, unequivocally states the marriage is "ORDERED DISSOLVED." This is unquestionably a valid order. Rule 74.03. … Because the marriage was ordered dissolved [before the husband's death], there was no abatement of the action as a result of [the husband]'s death.

Id. at 726 (internal citations omitted).

Similarly, in *Fischer*, on which the Court in *Linzenni* relied, the trial court entered a partial decree dissolving the parties' marriage but continued the case for later consideration of the marital property division. 733 S.W.2d at 470. The husband then died. *Id.* Thereafter, the personal representative of his estate was substituted for him and the court divided the property. *Id.*

The Court of Appeals held that the issue of property division did not abate at the husband's death. *Id.* at 471-73. "[W]hen property rights of the parties are involved, the parties are entitled to have that aspect of the case decided though one of the parties has died." *Id.* at 472 (quoting *Cregan*, 658 S.W.2d at 927). The Dissolution of Marriage Act commanded this result, as it would "further the goals" and purposes of those statutes, including "the court's duty to distribute the property" regardless of how it is titled, "determine the rights of the parties to all property brought into or acquired during the marriage," and "foster the parties' independence by placing each … in the most self-sufficient status possible." *Id.* at 473.

For these reasons, since this Court's decision in *Linzenni* in 1997 (in fact, since the Western District's en banc decision in *Cregan* in 1983), no Missouri court has held that when a spouse died after the marriage was declared dissolved, the death abated any ongoing proceedings at any stage that just concerned the division of marital property. To the contrary, whenever a party died after a marriage was ordered dissolved, Missouri courts uniformly have held the death had no effect on those proceedings. *See, e.g.*:

- *Simpson v. Strong*, 234 S.W.3d 567, 574 (Mo. App. 2007) (where court entered judgment of legal separation before wife's death, her death did not abate husband's appeal from that judgment);
- *In re Marriage of McIntosh*, 126 S.W.3d 407, 417-18 (Mo. App. 2004) (where court found marriage was dissolved before wife's death, her death did not abate proceedings over the property division, so property

division affirmed; but her death did abate proceedings over child custody and support, so custody and support orders reversed); and

- *Cregan*, 658 S.W.2d at 927-30 (where husband died pending appeal challenging decree's legal separation, property, and support provisions, his death did not abate wife's appeal as to the property division; reversed and remanded to trial court as to issues of distribution of husband's retirement benefits and disposition of the marital home, even though he was deceased and the ultimate resolution of those issues would operate on his estate's personal representative).

Further illustrating this bright-line test, post-*Linzenni* Missouri courts have *applied* the abatement-on-death doctrine *only* to pending dissolution actions where a party died *before* any order had been entered dissolving the marriage. *See, e.g.*, *McMillian v. McMillian*, 215 S.W.3d 313 (Mo. App. 2007) (where no finding marriage had been dissolved, husband's death abated pending dissolution proceeding); *Bilgere v. Bilgere*, 128 S.W.3d 617 (Mo. App. 2004) (same); *Clark v. Clevenger*, 978 S.W.2d 511 (Mo. App. 1998) (same); *Estate of Hayes v. Hayes*, 967 S.W.2d 305 (Mo. App. 1998) (same).

Per *Linzenni* and all these decisions, the trial court here was wrong that "because of Mr. Olofson's death, there is no longer a marital estate capable of being reallocated" (D39 pp. 6-7; App. A6-7). To the contrary, as these decisions show, all that occurs when a party dies post-dissolution is that, like the Estate here, the personal representative of the deceased former spouse's estate is substituted for that spouse and the estate is liable for any division or re-division of property. *See Simpson*, 234 S.W.3d at 574 (personal

representative substituted, judgment affirmed); *McIntosh*, 126 S.W.3d at 409 (personal representative substituted, property division affirmed); *Linzenni*, 937 S.W.2d at 725 (public administrator substituted, judgment affirmed); *Fischer*, 733 S.W.2d at 470 (personal representative substituted, property division affirmed); *Cregan*, 658 S.W.2d at 926 (personal representative substituted; property division reversed, remanded for re-division).

Nor does the fact that "[t]he Epiq stock no longer exists, having been sold by the parties" mean "there is no longer a marital estate capable of being reallocated" (D39 pp. 6-7; App. A6-7). If anything, the sale of the Epiq stock renders the marital estate easier to value and allocate because it now is all cash.

The trial court is perfectly capable of valuing the marital estate and ordering cash equalization payments to account for any missing or sold assets. *See, e.g.*, *Schutter v. Seibold*, 540 S.W.3d 494, 497 (Mo. App. 2018). In *Seibold*, for example, the husband had dissipated, squandered, and hidden marital assets, many of which apparently no longer even existed. *Id.* So, the trial court ordered him to pay the wife a cash equalization payment to account for the value of the missing assets, and the Court of Appeals affirmed. *Id.* In fact, here, Jeanne filed a claim against the Estate in the Circuit Court of Jackson County, Probate Division, which has been stayed pending this appeal. *See Olofson v. Olofson*, No. 17P8-PR04197.

C. As Tom and Jeanne's marriage was dissolved before Tom's death, his death did not abate Jeanne's Rule 74.06(b)(2) motion seeking to set aside the division of the marital estate for fraud.

Applying the bright-line *Linzenni* test here, Tom's death after the parties' marriage was dissolved did not abate Jeanne's Rule 74.06(b)(2) motion, which sought to set aside the property division in the decree due to Tom's fraud. The law of Missouri is and must be that despite Tom's death, Jeanne can seek that relief and, if successful, go on to relitigate that division with the Estate substituted for Tom. The trial court erred in holding otherwise.

1. Rule 74.06(b) provides the proper procedure to set aside the division of a marital estate due to a spouse's fraud.

At one point in its judgment, the trial court seemed to suggest that Jeanne could not seek to set aside the division of marital property for fraud under Rule 74.06(b)(2) at all. It stated, "As a matter of law, if there is a final judgment and decree of dissolution dividing marital property in effect at the time of a parties' death [*sic*], it is not subject to modification or collateral attack" (D39 p. 7; App. A7). Then, it suggested that this holding was limited to where one party was dead and the other survived: "[t]o hold otherwise and allow a surviving former spouse to set aside a final division of marital property for reallocation between parties, when one is deceased and the marital estate no longer exists, would call upon the Court to impermissibly adjudicate a moot controversy on hypothetical facts" (D39 p. 7; App. A7).

Either way, the trial court's reasoning was incorrect. Jeanne is not seeking a "modification." Rather, under Rule 74.06(b)(2), she sought to set

aside the division of her and Tom's marital estate because Tom committed fraud. The law of Missouri is that this was entirely proper.

Generally, in Missouri a party's "only means of seeking relief from [a] judgment" on the merits of an issue "is pursuant to Rule 74.06(b) …." *Willis v. Placke*, 903 S.W.2d 219, 220 (Mo. App. 1995). Rule 74.06(b)(2) provides in relevant part that, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: … fraud (whether heretofore denominated intrinsic or extrinsic) …." A motion under Rule 74.06(b) filed more than 30 days after a judgment is "in the nature of an independent proceeding," which proceeds as a new civil lawsuit and a judgment on which is independently appealable. *Kibbons v. Union Elec. Co.*, 823 S.W.2d 485, 489-90 (Mo. banc 1992).

It is well-established that Rule 74.06(b)(2) relief lies to set aside the property division in a dissolution of marriage where one party defrauded the other as to the contents of the marital estate. In *Hewlett,* 845 S.W.2d at 719-22, a decision on which Jeanne relied in her Rule 74.06(b)(2) motion (D5 pp. 21-27; App. A30-36), that is exactly what occurred, and the Court of Appeals affirmed a judgment granting Rule 74.06(b)(2) relief where the husband misrepresented the marital estate's value and content.

In *Hewlett*, the trial court entered a judgment dissolving the parties' 29-year marriage and dividing their property per their settlement agreement. *Id.* at 718. Eleven months later, the wife moved to set aside the judgment under Rule 74.06(b)(2), alleging the husband defrauded her into agreeing to the property settlement. *Id.*

The trial court ultimately set aside the decree, applying the nine elements of common-law fraud and finding that: (1) the husband deliberately undervalued and concealed assets and overstated debts, impacting the marital estate by more than $1 million; (2) he intended the wife to rely on his representations in negotiating the property settlement; (3) the wife believed and relied on his representations in negotiating the property settlement; (4) the wife had a right to rely on his representations; (5) the husband knew or should have known that these representations were false; and (6) the wife was financially damaged as a result of her reliance upon his representations. *Id.* The husband appealed, and the Court of Appeals affirmed. *Id.* at 723.

In its decision in *Hewlett*, the Court of Appeals confirmed that Rule 74.06(b)(2) allows a trial court to set aside a dissolution decree when, within a year from the entry of the dissolution decree, a party moves to set aside the judgment for fraud as to the property division. *Id.* at 719. Under the plain language of Rule 74.06(b)(2) she was "entitled to allege claims of intrinsic or extrinsic fraud" to set aside the property division. *Id.* Moreover, "a single finding of misrepresentation or concealment rising to the level of fraud is a sufficient basis upon which to set aside the judgment." *Id.*

The Court of Appeals in *Hewlett* held there was substantial evidence that the husband had undervalued and concealed assets and overstated liabilities, all of which were actionable fraud, and which fit the nine elements of fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or awareness that he or she lacks knowledge of its truth or falsity; (5) the speaker's intent that the other party

act on the statement in the manner contemplated; (6) that party's ignorance of the falsity; (7) her reliance on the statement; (8) her right to rely on it; and (9) injury. *Id.* at 719-22. Therefore, "the trial court did not err in setting aside the property settlement agreement based on Husband's misrepresentations." *Id.* at 722. *See also Essig*, 921 S.W.2d at 666-67 (affirming Rule 74.06(b)(2) judgment setting aside only the property division portion of a dissolution decree when the husband defrauded the wife by promising to divide the property evenly if she did not retain counsel but then foisting an agreement on her to receive only the property in her possession).

2. Decisions in pre-Rule 74.06(b) common-law actions to set aside a dissolution decree's property division for fraud continue to apply to actions under Rule 74.06(b).

No decision ever has held that the adoption of Rule 74.06(b) changed the standards for setting aside a judgment for fraud or lessened the available relief. Instead, the law always has been that Rule 74.06(b) merely incorporated the prior common law and did not change it.

In 1988, this Court adopted "Rule 74.06 … to simplify the procedure for setting aside judgments." *McKarnin v. McKarnin*, 795 S.W.2d 436, 439 (Mo. App. 1990). But Rule 74.06 did not change that prior law. To the contrary, it "preserved" and "incorporated" that longstanding prior law. *Id.*

In *Hewlett*, for example, the Court of Appeals relied heavily on its 1980 decision in *Alexander*, 600 S.W.2d at 201, even though the decision in *Alexander* predated the adoption of Rule 74.06(b) and instead was under the prior common law. *See* 845 S.W.2d at 721.

In *Alexander*, the marriage's principal asset was 1,840 acres of farmland. 600 S.W.2d at 200. After filing her dissolution petition, the wife discussed the value of the land with the husband, who said it "would average out to $175.00 an acre" and that the debt against the land was about $200,000. *Id.* Based on these representations, the wife calculated the net value of the land as being "a little over" $100,000 and agreed to take $50,000 as her interest in it. *Id.* The husband knew the land actually was worth $1 million or more. *Id.*

The now-former wife sought to set aside just the property division of the dissolution decree on grounds of fraud, and after a hearing the trial court agreed and did so. *Id.* The Court of Appeals then affirmed, applying the nine elements of fraud as in *Hewlett* and holding that substantial evidence supported the trial court's judgment. *Id.* at 200-02.

As the Court of Appeals' application of *Alexander* in *Hewlett* infers, the fact that *Alexander* predated Rule 74.06(b) is a distinction without a difference on its applicability today. Without exception, Missouri courts broadly and uniformly have applied the longstanding pre-Rule 74.06(b) common law of setting aside a dissolution decree for fraud to cases brought under Rule 74.06(b). The history of Rule 74.06(b) and its relationship to its common-law antecedents bears out that the law of Missouri requires this.

At common law, "a court ha[d] equity jurisdiction to entertain a motion to vacate at any time if the judgment was procured by fraud practiced on the court." *In re Marriage of Brown*, 703 S.W.2d 59, 60 (Mo. App. 1985). After 30 days, to attack a judgment a court could entertain:

> an arsenal holding six weapons: (1) a separate suit in equity; (2) a statutory petition for review; (3) a nunc pro tunc order; (4) a motion in the nature of a writ of error coram nobis; (5) a motion showing fraud practiced on the court; and (6) a motion showing irregularity on the face of the record.

Kranz v. Centropolis Crusher, Inc., 630 S.W.2d 136, 138-39 (Mo. App. 1982).

But the adoption of Rule 74.06(b) in 1988 did not change the application of this prior law. To the contrary, in *McKarnin* the Court of Appeals observed that Rule 74.06(b)'s action to set aside a judgment applied to "judgments or decrees of divorce or dissolution of marriage" after its adoption, just as the action at equity had before. 795 S.W.2d at 439.

In fact, as the Court of Appeals observed in *McKarnin*, if anything Rule 74.06(b) only served to make the procedure more open and freer, because the single change it made was to "eliminat[e]" the "distinction between extrinsic and intrinsic fraud." *Id.* at 440. So, even under Rule 74.06(b), "a separation agreement and a judgment distributing the marital property in accordance with that agreement could be set aside upon the basis of fraud in the procurement of that separation agreement," just as it had before. *In re Marriage of Turner*, 803 S.W.2d 655, 658-59 (Mo. App. 1991).

For these reasons, after the adoption of Rule 74.06(b), Missouri courts consistently and faithfully have applied pre-Rule 74.06(b) law from the prior action at equity without change or distinction, including *Alexander* many times, to actions brought under that rule. *See, e.g.*:

- *McKarnin*, 795 S.W.2d at 439 (applying to Rule 74.06 proceedings the standard for fraud to set aside a divorce judgment in *Jones v. Jones*, 245 S.W.2d 260, 261 (Mo. App. 1953));

- *Turner*, 803 S.W.2d at 658-59 (same re *Curtis v. Kays*, 670 S.W.2d 887, 891 (Mo. App. 1984), and *Alexander*, 600 S.W.2d at 198);
- *Hewlett*, 845 S.W.2d at 719-22 (same re *Alexander*, 600 S.W.2d at 201);
- *Mitchell v. Mitchell*, 888 S.W.2d 393 (Mo. App. 1994) (same);
- *Essig*, 921 S.W.2d at 666 (same re *Sofka v. Thal*, 662 S.W.2d 502, 507 (Mo. banc 1983), and *Vinson v. Vinson*, 725 S.W.2d 121, 124 (Mo. App. 1987); **setting aside only the division of marital property**);
- *Reimer v. Hayes*, 365 S.W.3d 280, 284 (Mo. App. 2012) (same re *Curtis*, 670 S.W.2d at 891).

The law of Missouri since Rule 74.06(b)'s adoption gives no sign that this Court ever intended its action to set aside a judgment for fraud to differ from its common-law antecedents. Instead, just as all these decisions did, it intended that the Rule just incorporate and apply the prior standards.

Therefore, *Hewlett* and *Essig* – and *Alexander*, too – all establish that when a spouse engages in fraud to procure a property division in a divorce, a motion to set aside that property division for fraud – previously under the common law, today under Rule 74.06(b)(2) – provides the proper procedure to set aside that division. This is not a "modification," but instead is a request to set aside the property division in the parties' dissolution decree, *after which* that division then can be litigated anew.

Therefore, as in *Hewlett*, *Essig*, and *Alexander*, Jeanne's Rule 74.06(b) motion is not a motion to modify. It is an authorized motion to set aside the division of the marital estate and is the proper procedure under which she had to proceed to do so and then be able to relitigate that division.

3. An order granting Jeanne's Rule 74.06(b)(2) motion properly could set aside the division of the marital estate without affecting the status of the dissolution of the parties' marriage.

Another reason the trial court gave for applying the abatement-on-death doctrine to Jeanne's Rule 74.06(b)(2) motion was that "if the judgment were set aside, the procedural posture would be the same as if Tom Olofson died prior to entry of final judgment, at which point the lawsuit would abate and the Court would lose subject matter jurisdiction[4] to take further action" (D39 p. 6; App. A6). This seemed to suggest the only relief Jeanne could obtain was an order un-divorcing the parties, making them married again, on which no dissolution judgment would have been entered, requiring dismissal.

This statement is not legally correct. Indeed, on the very next page the trial court acknowledged that should Jeanne "prevail on her motion, the only relief available to [Jeanne] would be for the Court to set aside *that part of the judgment dividing marital property entirely* and reallocate the marital estate taking into account all of the factors set forth in § 452.330.1," R.S.Mo. (D39 p. 7; App. A7) (emphasis added).

The trial court's second notion was correct. Nothing in Rule 74.06(b) limits Jeanne to an all-or-nothing request to suddenly be married to Tom again. In fact, the Estate openly conceded this at oral argument in the Court of Appeals. In the course of his argument, the Estate's counsel stated, "[O]f course the trial court had the authority to set aside just the property portion of the decree ...." Confirming this concession, the Honorable Gary Witt then stopped counsel and asked, "So, it's the respondent's position that the trial

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[4] *See* note 3, *supra* at pp. 30-31.

court *did* have the authority to set aside a portion of the decree, only the marital property portion of the decree?" (Emphasis Judge Witt's). The Estate's counsel responded, "Yes, judge." The exchange occurs at 15:37-16:09 in the Court of Appeals' recording of the oral argument.

Rule 74.06(b) provides that the trial court "may relieve a party … from a final judgment or order" "**upon such terms as are just** …." (Emphasis added). The Court of Appeals addressed this issue in *Essig* when it affirmed the trial court's judgment under Rule 74.06(b)(2) "setting aside the portions of the decree of dissolution relating to the division of marital property and maintenance" for fraud but *not* the portion of the judgment dissolving the status of the parties' marriage. 921 S.W.2d at 665-67. Likewise, in *Alexander*, the trial court set aside *only* the division of the marital estate, leaving the dissolution itself intact, which the Court of Appeals also affirmed. 600 S.W.2d at 199-200 (the trial court "set aside that part of the judgment approving and incorporating the property settlement agreement").

The judgments affirmed in *Alexander* and *Essig* are consistent with the distinction Missouri courts repeatedly have drawn between "the issue of marital status," that is, whether the marriage is broken, which is personal, and "the issue of the distribution of property" which is not personal. *Carter*, 794 S.W.2d at 322. These are two separate issues, which need not be intertwined, and the property division can be attacked without affecting the dissolution itself. *Fischer*, 733 S.W.2d at 471-73. Instead, the property division is severable from the rest of the decree, and even can be relitigated after one of the two parties is dead. *See, e.g.*, *Cregan*, 658 S.W.2d at 927-30

(husband died during wife's pending appeal as to property division; property division reversed due to errors and remanded for redivision, even though husband was dead and the redivision would operate against his estate).

So, consistent with both *Essig* and *Alexander*, the relief Jeanne sought was not to undo the status of the parties' marriage as being dissolved, but instead to do justice and "set aside portions of the Judgment," i.e., the property settlement, so as later then "to effectuate an equitable division of the marital estate to include the value of the Epiq stock at $16.50 per share and the value of Tom's Golden Parachute Benefits" (D5 p. 37; App. A46).

Several decisions from the Court of Appeals have suggested in dicta that a party cannot obtain relief under Rule 74.06(b) from "part of a judgment." *See Spicuzza v. Spicuzza*, 886 S.W.2d 660 (Mo. App. 1994); *Settles v. Settles*, 913 S.W.2d 101 (Mo. App. 1995); *In re Marriage of Ulmanis*, 23 S.W.3d 814, 818 (Mo. App. 2000); *Young v. Young*, 273 S.W.3d 86, 88 (Mo. App. 2008). All of these decisions' use of this statement rest on this sentence in *Spicuzza*: "Rule 74.06 makes no provision … for relief from part of a judgment …." 886 S.W.2d at 661.

But none of these decisions actually held that Rule 74.06(b) precludes a spouse defrauded in a dissolution from seeking to set aside just the division of property and instead limits her to being un-divorced. None held that a party cannot obtain relief from the division of property incorporated into a dissolution decree without also setting aside the status of the dissolution of the marriage itself. That construction would run contrary to the plain language of Rule 74.06(b) expressly giving the trial court broad authority to

determine what "terms are just." It also would conflict with *Essig* and *Alexander*, both of which held it was proper to set aside only the portion of the judgment relating to financial matters without setting aside the status of the dissolution of the parties' marriage.

Moreover, *Spicuzza* and these other decisions are inapposite. In none was a party actually asking to set aside a divorce property division for fraud. Instead, the parties in these decisions sought to *modify* the division, which the courts (rightly) held was not allowed.

For example, in *Spicuzza*, the wife filed a pleading described as "a motion to set aside, vacate, amend or modify the decree of dissolution, or, in the alternative, for relief pursuant to Rule 74.06." 886 S.W.2d at 660. The Court of Appeals held that though a trial court "may not *modify* a property distribution, Rule 74.06 allows the dissolution decree, as well as any division of property incorporated or included therein, to be set aside for one of the … listed reasons." *Id.* at 661 (emphasis in the original). In holding that the wife's motion "fail[ed] to meet the specific requirements" of Rule 74.06, the court pointed to both the wife's specific statement in her motion that she did "not seek to set aside or vacate the Decree of Dissolution, but, in the alternative, seeks to *amend or modify* the division of property provisions of said Decree," as well as the fact that the decree was unconscionable, which is not listed as a basis for relief in Rule 74.06. *Id.* (emphasis in the original).

So, the Court of Appeals' language that "we note Rule 74.06 makes no provision for the amendment or modification of a judgment, or for relief from part of a judgment" was dicta, which must be confined to the specific context

of that case: the distinction between an action to amend or modify a judgment and a Rule 74.06 action to set aside a judgment. The court in *Spicuzza* provided no discussion or analysis of whether the parties' property division can be set aside under Rule 74.06 without also setting aside the status of the dissolution of their marriage. And indeed, in *Young*, the Court of Appeals specifically contrasted the improper modification with seeking to set aside just a property division for fraud, which it held is proper under Rule 74.06(b):

> Wife failed to establish fraud. But even **had Wife established fraud, Rule 74.06 only allows the trial court to then set aside the division of property**. Here, the trial court went well beyond the bounds of Rule 74.06 by awarding Wife damages and relieving her of her obligations under the Consent Judgment. Rule 74.06 does not provide for this type of modification ….

273 S.W.3d at 89 (emphasis added).

Similarly, in *Settles*, the trial court improperly modified the dissolution decree while purporting to act under Rule 74.06, even though the parties had not invoked Rule 74.06. 913 S.W.2d at 103. The Court of Appeals cited *Spicuzza* for the proposition that while a trial court may not modify a property division contained in a final decree of dissolution, Rule 74.06 allows the trial court to set aside the decree, as well as any division of property incorporated in it, for the reasons the rule gives. *Id*. at 103. The court held that the trial court in *Settles* therefore erred in *sua sponte* relying on Rule 74.06 to improperly amend the decree. *Settles* quoted in dicta the same language from *Spicuzza* that "Rule 74.06 makes no provision for the amendment or modification of a judgment, or for relief from part of a judgment …." *Id.* And in *Ulmanis*, the spouse was asking to vacate the

whole judgment and "then immediately reinstate all of it except the maintenance and child support provisions," which Rule 74.06 also does not provide for. 23 S.W.3d at 818. Obviously, Jeanne is not asking for that, either. So, in all these cases, the statement is inapposite to this case.

Finally, the statement in *Spicuzza* on which all of this rests is simply wrong that "Rule 74.06 makes no provision … for relief from part of a judgment." To the extent this statement may not be dicta, this Court should overrule it. Notably, the Court of Appeals in *Spicuzza* cited no authority at all for this statement. A view of Rule 74.06(b) that it only allows a *whole* judgment to be set aside, not a severable portion of that judgment, runs afoul of the Rule's plain language allowing the trial court to fashion its relief "**upon such terms as are just**." (Emphasis added). As in *Essig*, decided under Rule 74.06(b), and *Alexander*, decided under the prior common law incorporated into Rule 74.06(b), this broad discretionary "justice" component does and must allow for setting aside the property division portion of a decree without un-divorcing the parties.

Decisions from other jurisdictions bear this out. "Rule 74.06 was patterned after Fed.R.Civ.P. 60," so we "look to the federal decisions" in construing it. *Platt v. Platt*, 815 S.W.2d 82, 83 (Mo. App. 1991). Fed. R. Civ. P. 60(b)(3) equally provides, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment … for … fraud (whether previously called intrinsic or extrinsic)." Before 2007, it had exactly the same language as Missouri's Rule 74.06(b)(2): "On motion and upon such terms as are just, the court may relieve a party or a party's legal

representative from a final judgment, order, or proceeding … for … fraud ….” *Id.* (eff. 1937 to Dec. 2007).

Because of this “justice” component, it is well-established that Federal Rule 60(b) allows a court to “relieve [a party] from … part of the judgment” if justice so requires. *District of Columbia v. Stackhouse*, 39 F.2d 62, 65 (D.C. Cir. 1956). *See, e.g.*:

- *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1272-73 (11th Cir. 2009) (affirming trial court’s grant of relief under Rule 60(b) from part of judgment due to satisfaction of that part);
- *Foley v. Litscher*, 56 F. App’x 731, 733 (7th Cir. 2003) (remanding case to trial court with instructions to set aside under Rule 60(b) the “with prejudice” designation in the prior judgment at issue);
- *Flowers v. S. Reg. Physician Servs., Inc.*, 286 F.3d 798, 802 (5th Cir. 2002) (affirming trial court’s decision under Rule 60(b) setting aside attorney fee award portion of judgment);
- *Stackhouse*, 39 F.2d at 65 (affirming trial court’s decision under Rule 60(b) setting aside part of judgment related to party’s residency);
- *In re Aztec Supply Corp.*, 399 B.R. 480, 495 (Bankr. N.D. Ill. 2009) (under Rule 60(b), setting aside portion of bankruptcy dismissal judgment that authorized bank to stop payment on cashier’s check);
- *In re Whelton*, 312 B.R. 508, 518-19 (D. Vt. 2004) (affirming bankruptcy court’s decision under Rule 60(b) setting aside part of confirmation judgment relating to student loan debts).

Similarly, other states view their version of Federal Rule 60(b) / Missouri Rule 74.06(b) as allowing a spouse defrauded in a dissolution of marriage to set aside just the property division, without requiring her to be un-divorced from the defrauding spouse. *See, e.g.*, *In re Marriage of Himes*, 965 P.2d 1087, 1091-1102 (Wash. 1998) (construing Wash. Civ. R. 60(b)); *Palko v. Palko*, 375 A.2d 625, 626 (N.J. 1977) (construing N.J. Rule 4:50). (More other states' decisions on point are discussed *infra* at pp. 54-58.)

Neither *Spicuzza* nor the decisions that cited its statement gave any indication why Rule 74.06(b) should be different, especially given the federal rule on which it was based and the prior common law it incorporated, both of which plainly allow setting aside a severable part of a judgment. And the Court of Appeals in *Essig*, echoing the prior common law, agreed that under Rule 74.06(b) it was "just terms" to relieve a spouse of a fraudulent property division, rather than requiring her to be remarried to her defrauder.

Simply put, none of *Spicuzza* or the other decisions quoting its "part of a judgment" statement concerned or substantively discussed the issue in this case: whether Rule 74.06(b) allows a court to set aside a division of a marital estate for fraud without disturbing the dissolution of the parties' marriage. Conversely, *Essig* and *Alexander are* on point, *do* directly address that issue, and are the law of Missouri as to it: under Rule 74.06(b), a court properly may set aside the division of the marital estate while keeping the status of the dissolution of the parties' marriage in place. That is all Jeanne requested here. The law of Missouri allows her to pursue that relief.

4. As in every other reported case in America where this occurred, including in Missouri, Tom's death does not abate Jeanne's Rule 74.06(b)(2) motion seeking to set aside the division of the marital estate due to Tom's fraud.

A dissolution judgment *was* entered before Tom's death, and the only issue now involves the division of the marital estate. So, the law of Missouri is that Jeanne's Rule 74.06(b)(2) motion survives Tom's death.

While no Missouri appellate court has dealt with the exact fact scenario in this case for a long time, all the decisions from this Court and the Court of Appeals addressing whether a post-judgment action to set aside a dissolution of marriage decree for one party's fraud during the dissolution proceedings survives that party's death have held it does. *See Anderson*, 456 S.W.2d at 814-16; *Hemphill v. Quigg*, 355 S.W.2d 57, 62-63 (Mo. 1962); *Richmond v. Richmond*, 225 S.W. 126, 127 (Mo. App. 1920). And while these common-law decisions predate Rule 74.06(b), the Rule incorporates all the prior common law standards. *Supra* at pp. 39-42.

In short, "A court of equity may vacate a divorce decree for extrinsic fraud in the procurement of the judgment notwithstanding the prevailing party has died." *Anderson*, 456 S.W.2d at 814 (citing *Hemphill*, 355 S.W.2d at 62-63). "The divorce judgment in such cases is voidable." *Hemphill*, 355 S.W.2d at 62-63 (citing *Richmond*, 225 S.W. at 127).

In *Anderson*, a husband obtained a default divorce against his wife and then died some eight years later. 456 S.W.2d at 810. Shortly after his death, the wife filed an action against his heirs to set aside the divorce judgment for fraud, alleging the husband had filed a false affidavit to obtain the default.

Id. The trial court granted the heirs' motion to dismiss, holding the wife's action violated the statute of limitations for fraud. *Id.*

While reversing the trial court's dismissal and holding the wife's action was within the applicable limitation period, *id.* at 811-14, the Court of Appeals also addressed whether her action survived the husband's death. *Id.* at 814-15. It held that the husband's death did not abate her action to set aside the divorce for fraud, as "[a] court of equity may vacate a divorce decree for extrinsic fraud in the procurement of the judgment notwithstanding the prevailing party has died." *Id.* at 814. If "setting aside the divorce affects or will determine property rights, the action may … be maintained after death." *Id.* Because the wife in *Anderson* "might be entitled to some financial benefits upon [the husband]'s death," the husband's death did not render her request to set aside the action for fraud moot. *Id.* (citing *Hemphill*, 355 S.W.2d at 62-63, and *Richmond*, 225 S.W. at 127).

In *Hemphill*, a husband obtained a divorce against his incapacitated ex-wife, who a guardian ad litem represented. 355 S.W.2d at 59. The husband remarried four years later and died nine years after that. *Id.* Two years later – 13 years after the divorce – the wife, through her full guardian, filed an action against the husband's heirs to set aside the divorce judgment for fraud, alleging the guardian ad litem had failed to discharge his duties to her and instead was complicit in obtaining the divorce on the husband's terms. *Id.* The trial court heard the merits of the wife's action to set aside the divorce and then denied her request for relief. *Id.* at 59-60.

Ultimately, this Court affirmed, holding on the merits that the wife's allegations against the guardian ad litem did not amount to a fraud sufficient to set aside the prior judgment. *Id.* at 61-62. But it was careful to note that the husband's death played no part in this analysis and the wife could maintain her action to set aside the dissolution for fraud even 13 years after his death. *Id.* at 62-63. "An equity court has the power to vacate a decree of divorce for extrinsic fraud in the procurement of the judgment … notwithstanding one of the parties has died …. The divorce judgment in such cases is voidable." *Id.* (citing *Richmond*, 225 S.W. at 127).

Finally, in *Richmond*, a husband obtained a divorce in Vernon County against his wife after service by publication on her. 225 S.W. at 127. Shortly after the divorce, he died. *Id.* After his death, the wife filed an action against his heirs to set aside the divorce judgment for fraud, alleging that the husband really had been a resident of Barton County and falsely had sworn she was a nonresident of Missouri, when in fact she resided in Vernon County. *Id.* The trial court refused to set aside the divorce judgment. *Id.*

The Court of Appeals affirmed on the merits but at the same time held the wife's action was proper even after the husband's death. *Id.* The husband's death "left it unnecessary to set aside the divorce, in so far as concerned a separation between them as husband and wife. But, if it affected her rights in any property left by him at his death, she could have it annulled for the fraud charged." *Id.* The problem was that regardless of the evidence of fraud, which the Court of Appeals held could go either way, there was no evidence that the husband had any property that setting aside the divorce

judgment would affect. *Id.* For this, the Court of Appeals relied on *Caddell v. Caddell*, 222 S.W. 873, 873-74 (Mo. App. 1920), *id.*, which like the modern *Simpson* and *Cregan* decisions, *supra* at pp. 33-35, held that a husband's death did not abate the wife's appeal of the property division in a divorce decree, and reversed the property division despite the husband's death.

All three decisions of *Anderson*, *Hemphill*, and *Richmond* rely on the same rationale as the modern *Cregan* and *Linzenni* line of cases. They apply the bright-line test of whether the party's death occurred before or after entry of the dissolution order to actions to set aside a dissolution decree for fraud. Their point, too, is that "when property rights of the parties are involved, the parties are entitled to have that aspect of the case decided though one of the parties has died." *Cregan*, 658 S.W.2d at 927.

As in *Anderson*, *Hemphill*, and *Richmond*, this rule applies in the context of Jeanne's action under Rule 74.06(b)(2) to set aside the division of the marital estate for fraud just as it did in *Simpson*, *Cregan*, and *Caddell*'s context of a post-judgment, post-death appeal from a dissolution decree. Either way, when "the issue of marital status" – whether the marriage is broken – "has been resolved by a decree dissolving the marriage," "the issue of the distribution of property is not personal." *Carter*, 794 S.W.2d at 322.

This makes special sense in the case of fraud. Under § 537.010, R.S.Mo., an ordinary action for fraud, which is a wrong done to a property interest, always survives the death of the tortfeasor. *Breeden v. Hueser*, 273 S.W.3d 1, 11-13 (Mo. App. 2008). Other states have held that this tort survival statute applies to fraud in divorce cases just as it does in any other.

See Howsden v. Rolenc, 360 N.W.2d 680, 682 (Neb. 1985) (applying Neb. Rev. Stat. § 25-1401, Nebraska's version of § 537.010, to hold husband's death did not abate wife's action to set aside divorce property settlement for fraud).

While *Anderson*, *Hemphill*, and *Richmond* appear to be the only Missouri decisions touching on the survivability of a post-judgment action to set aside a divorce decree for fraud after a party's death, they join every decision Jeanne's counsel can find on this question anywhere in the United States for nearly 90 years. It is a uniformly accepted American legal principle that a post-judgment action to set aside a dissolution of marriage property division for one party's fraud survives either party's death. *See, e.g.*:

- *Himes*, 965 P.2d at 1102 (where husband obtained dissolution by filing false affidavit, his death did not abate wife's action to set aside dissolution for fraud under Wash. Civ. R. 60(b); dismissal reversed);
- *Howsden*, 360 N.W.2d at 682 (where husband defrauded wife into agreeing to divorce, his death did not abate wife's action to set aside decree for fraud; anti-abatement statute for fraud actions applied);
- *Palko*, 375 A.2d at 626 (where husband, now deceased, willfully withheld material information as to the value of his holdings during negotiation of property settlement agreement, his death did not abate wife's action under N.J. Rule 4:50 to set aside the portion of the judgment incorporating the property settlement agreement for fraud, and his estate through his executor could be substituted for him);
- *Allen v. Allen*, 67 N.W.2d 805, 808 (Mich. 1954) (where wife defrauded husband into entering into property settlement, his death was "not a

bar to reopening the case or setting aside the decree on the ground of fraud on the court, in so far [*sic*] as it involved property rights");

- *Weber v. Weber*, 51 N.W.2d 18, 23-24 (Wis. 1952) (where husband, now deceased, withheld material information as to his property during divorce, despite his death wife could seek to set aside the divorce judgment for fraud, and it was her choice whether to set aside just the property division or the whole judgment and be declared his widow);
- *Vaughan v. Vaughan*, 62 So.2d 466, 472 (Ala. 1952) (where husband defrauded wife by making her think he had dismissed divorce as he promised in exchange for her continuing to live with him, his death did not abate her action to set aside the divorce decree for fraud; "the court will entertain the suit to annul a decree of divorce for fraud, whether or not it is pending at the time of the death of such person");
- *Dye v. Dye*, 93 N.Y.S.2d 95, 101 (1949) (where husband conspired with witness to give perjured testimony to obtain judgment annulling marriage, his death did not abate the wife's motion to set aside the annulment; "[t]he jurisdiction of a court of equity to set aside a judgment at law obtained by fraud, or on other grounds of equitable cognizance, has been often asserted, and is unquestioned");
- *Zeig v. Zeig*, 198 P.2d 724, 731 (Nev. 1948) (where wife entered into separation agreement based on husband's fraud as to financial worth, his death did not abate wife's action to set aside divorce judgment);
- *Gillen v. Gillen*, 159 P.2d 511, 514-15 (Mont. 1945) (where husband obtained divorce decree by filing fraudulent affidavit of service,

husband's death did not abate wife's action to set aside divorce decree for fraud; "[d]eath of one of the parties to a divorce action, after decree therein, does not deprive the trial court of its power to purge its records of a void or voidable decree procured by fraud practiced upon it");

- *Thorn v. Thorn*, 27 N.Y.S.2d 593, 594-95 (App. Div. 1941) ("fraud consisting of the concealment of the husband's assets and thus inducing the plaintiff to enter into the agreement by deceiving her as to the true amount of the husband's financial worth" was actionable to set aside divorce decree and "the cause of action did not abate at" his death);
- *Kight v. Boren*, 27 Ohio Law Abs. 89, 95 (App. 1938) (where husband defrauded wife into agreeing not to seek alimony by misrepresenting his financial worth in divorce, this was enough to support wife's action to set aside divorce decree for fraud, and husband's death in the interim did not abate her action);
- *Fowler v. Fowler*, 130 S.E. 315, 319 (N.C. 1925) (where husband filed false affidavit to obtain divorce decree without wife's knowledge, wife properly could seek to set it aside for fraud, and husband's death did not abate her action to do so; "the court may vacate a decree, even after complainants' death, where it was obtained by fraud");
- *McGuinness v. Superior Ct. in & for City & Cty. of S.F.*, 237 P. 42, 48 (Cal. 1925) (same; "a decree of divorce which has been obtained by either party to the marriage by fraud may be set aside by the court in which the decree was rendered upon application of the party aggrieved;

and the fact that the party who procured the divorce is dead does not necessarily defeat a proceeding to vacate the decree"); and

- *Dennis v. Harris*, 153 N.W. 343, 350 (Iowa 1915) (where husband fraudulently misrepresented his debts in relation to his assets, and in so doing induced wife to accept less in alimony than that to which she otherwise would have been entitled, wife had valid claim to set aside divorce decree for fraud and husband's death did not abate it; "upon proof that a decree of divorce has been obtained by fraud or duress, it may be set aside even after the death of the perpetrator of such fraud and the relief awarded sufficient to compensate the financial loss consequent upon the wrong perpetrated").

And besides this century of uniform precedent, keeping an action to set aside a divorce property settlement for fraud alive even though the defrauding spouse has died just makes sense. Nothing stands in the way of a new property division once the existing one has been set aside, as the deceased's estate stands in his shoes, ready to be responsible it. And otherwise, it would mean that only an accident of timing would prevent relief from fraud by a dead tortfeasor, compared to when he is alive. It also would mean that unlike any other fraud victim, a spouse defrauded in a dissolution has no recourse when the tortfeasor dies.

The uniform rationale and holdings in all these decisions apply in this case, too. The law of Missouri – and of the United States in general – is that Jeanne's post-judgment action to set aside the division of her and Tom's marital property in the dissolution judgment survives Tom's death.

5. Taking the allegations in Jeanne's Rule 74.06(b)(2) motion as true, Tom defrauded her in the dissolution, entitling her to set aside the division of the marital estate.

Taking the allegations in Jeanne's Rule 74.06(b)(2) motion as true and granting her the benefit of all reasonable inferences from them, as the Court must do at this stage of the proceedings, *Nixon*, 34 S.W.3d at 134, *Hewlett*, *Essig*, and *Alexander* control the outcome here in Jeanne's favor. She stated a proper claim that Tom defrauded her in the dissolution, entitling her under Rule 74.06(b)(2) to have the division of the marital estate set aside.

During the dissolution proceeding, Tom made many knowingly false representations on which Jeanne relied and was damaged (D5 pp. 30-31; App. A39-40). Jeanne's affidavit confirms this (D5 pp. 39-44; App. A48-53).

First, at his deposition on December 14, 2015, Tom affirmatively represented that there had been "no compelling offers" to purchase Epiq (D5 pp. 10-11, 30; App. A19-20). He refused to comment further when Jeanne's counsel asked him whether there had been any offers to buy of Epiq at all (D5 pp. 10-11, 30; App. A19-20, A39). He also stated he planned to continue with Epiq, implying he had no plans to leave (D5 pp. 10-11, 30; App. A19-20, A39). The relevant portions of Tom's deposition transcript confirm all this (D13).

Second, at the final settlement conference on January 7, 2016, Tom further represented that he had no new information regarding the sale of Epiq (D5 pp. 11, 30; App. A20, A39). Jeanne's affidavit confirms this (D5 pp. 39-44; App. A48-53).

Finally, in the ultimate Agreement the parties submitted to the trial court in February 2016, Tom specifically represented he had "made a full

disclosure concerning the nature and extent of" his "property, assets, liabilities and financial conditions" and that he had disclosed to Jeanne all his properties and income (D5 pp. 11-12, 30-31; App. A20-21, A30-40). The dissolution judgment confirms Tom's statement (D6).

All these statements were knowingly false, because Tom's representations that there were "no compelling offers" for the sale of Epiq was not true during the period when the parties were negotiating the Agreement in January 2016 and before they submitted it to the trial court for approval in February 2016 (D5 pp. 6-7, 12-19, 31; App. A15-16, A21-28, A40). In fact, on January 13, 2016 Epiq's ultimate buyers had made a compelling offer to purchase Epiq for $15.00 per share, compared to Epiq's stock's closing price that day of $11.85 (D5 pp. 13, 17; App. A22, A26). The Strategic Alternatives Committee rejected this offer on January 27, 2016 on the belief that it undervalued Epiq (D5 pp. 13, 17-18; App. A22, A26-27).

As an *ex officio* member of the Strategic Alternatives Committee as well as Epiq's Chairman and CEO, Tom was not only aware of but also integrally involved in matters concerning offers for the sale of Epiq, the value of those offers, and the imminence of a potential sale, including this decision that a sale of Epiq likely would close higher than $15.00 per share (D5 pp. 5-6; App. A14-15). Epiq's later public SEC filings in August and September 2016 confirm these details and corroborate this timeline of events (D7 pp. 33-42).

Then, shortly after the parties finalized their Agreement, and unknown to Jeanne, a deal was reached for the sale of Epiq at a price per share of $16.50, $3.00 more than the share price the parties used in the Agreement

(D5 pp. 12-14, 18-19; App. A21-23, A27-28). Epiq's buyers took the company private, liquidating all the shareholders' stock, including Jeanne's and Tom's, at $16.50 per share (D5 pp. 4, 13; App. A13, A22). With the sale at $16.50 per share instead of the $13.50 the parties used in the Agreement, Tom received millions of dollars more of the marital estate, culminating in a materially inequitable division (D5 pp. 4, 13; App. A13, A22). Again, Epiq's later public SEC filings supported these claims (D7 pp. 33-42; D8).

Besides his stock windfall, Tom also received some $16 million in cash and other benefits that the sale triggered, including cash compensation of more than $8.7 million, equity compensation of more than $6.8 million, and other benefits of more than $800,000, from none of which Jeanne received any proceeds (D5 pp. 4-5; App. A13-14). These benefits were part of a plan for Tom's compensation in place since 2014 in the event of a change of control of Epiq, giving Tom a further reason in the dissolution to hide information about the imminence of Epiq's sale (D5 p. 5; App. A14). Epiq's later public SEC filings once again support all these claims (D7 pp. 55-57).

To prevent Jeanne from receiving internal Epiq information regarding the imminent sale of Epiq and the price of offers made in connection with it, Tom stonewalled Jeanne's discovery throughout the dissolution proceedings (D5 pp. 7-12; App. A16-21). He refused or failed to provide any non-public information related to Epiq's strategic review process, including offers to purchase Epiq (D5 pp. 7-12; App. A16-21).

During this same time, as Epiq's SEC filings later made public in August and September 2016 confirmed, Tom himself was pursuing potential

buyers for Epiq, including facilitating formal due diligence, thereby providing non-public information to potential buyers under confidentiality agreements while at the same time refusing to provide this information to Jeanne per her discovery request and under her own proposed confidentiality agreements (D5 pp. 12, 16-19; D7 pp. 33-42; D8; App. A21, A25-28). Jeanne did not learn of any of this until August 2016, after the dissolution judgment had been entered (D5 pp. 4-19; App. A13-28). A chart in Jeanne's Rule 74.06(b)(2) motion shows the parallel timeline of proceedings in the dissolution case and in Epiq's strategic review process and sale, illustrating Tom's willful false representations (D5 p. 15; App. A24).

The law of Missouri is that, taking these facts as true and according them the benefit of all reasonable inferences, and like the misrepresentations in *Hewlett* and *Alexander*, which Jeanne cited in her Rule 74.06(b)(2) motion, and as in *Essig*, Tom's misrepresentations were intrinsic fraud, warranting relief under Rule 74.06(b)(2) by setting aside the division of the marital estate (D5 pp. 27-37; App. A36-46).

As Jeanne explained at length in her Rule 74.06(b)(2) motion, these facts satisfy the nine elements of fraud recounted *supra* at pp. 38-39:

- Tom made representations (D5 pp. 30-31; App. A39-40),
- which were false and material (D5 pp. 30-32; App. A39-41),
- Tom knew they were false (D5 p. 32; App. A41),
- Tom intended Jeanne to act on the false representations in dividing the parties' marital estate (D5 pp. 32-35; App. A41-44),

- Jeanne was not aware of the falsity of Tom's representations (D5 p. 35; App. A44),
- Jeanne relied on Tom's false representations (D5 pp. 35-36; App. A44-45),
- after more than 55 years of marriage Jeanne had a right to rely on Tom's false representations, especially as his actions precluded her from obtaining non-public information regarding Epiq including offers to purchase it and the imminence of a potential sale, from any source other than him (D5 pp. 36-37; App. A45-46), and
- Jeanne was injured (D5 p. 37; App. A46).

Taking Jeanne's allegations in her Rule 74.06(b)(2) motion as true and according them the benefit of all reasonable inferences in her favor, just as in *Hewlett*, *Essig*, and *Alexander*, Tom defrauded her in the dissolution proceedings, entitling her under Rule 74.06(b) to have the division of the marital estate set aside.

The trial court erred in dismissing Jeanne's Rule 74.06(b) motion. The well-pleaded facts in it, taken as true and accorded the benefit of all reasonable inferences in her favor, establish that she would prevail under her theory that Tom committed fraud in the dissolution of marriage proceeding, and the property division therefore must be set aside. The trial court was wrong in holding that Tom's death alone can prevent this.

This Court should reverse the trial court's judgment and remand this case for further proceedings on Jeanne's Rule 74.06(b) motion.

Conclusion

The Court should reverse the trial court's judgment and remand this case for further proceedings on Jeanne's Rule 74.06(b) motion.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 16,662 words.

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Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on December 2, 2019, I filed a true and accurate Adobe PDF copy of this substitute brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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