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 REPLY BRIEF OF THE APPELLANT

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Reply Argument

A. Summary

The trial court granted the Estate's motion for judgment on the pleadings, dismissing Jeanne's Rule 74.06(b)(2) motion that sought to set aside the division of the parties' marital estate because Tom committed fraud during the dissolution proceedings. The trial court held that Tom's death in the meantime rendered the Rule 74.06(b)(2) proceedings moot and abated.

In her opening brief, Jeanne explained that this was error.

Jeanne explained that the doctrine of abatement-by-death in divorce cases, in which one party's death automatically makes the proceedings moot, only applies where a decree has not yet been entered, and does not apply to litigation over the division of marital property after the decree (Substitute Brief of the Appellant ["Aplt.Br."] 30-33). She cited *Linzenni v. Hoffman*, 937 S.W.2d 723 (Mo. banc 1997), which set a bright-line test of whether the party's death occurred before or after the order dissolving the marriage (Aplt.Br. 31-33). She showed that since then, no Missouri court ever has held that when a party died after a dissolution decree was entered, the death mooted proceedings about the division of marital property (Aplt.Br. 33-35).

Applying this test to this case, Jeanne explained that as Tom died after the dissolution, his death did not abate her Rule 74.06(b)(2) proceedings seeking to set aside the property division for his fraud (Aplt.Br. 36-63).

First, Jeanne showed that Rule 74.06(b)(2) relief lies to set aside the division of a marital estate due to a spouse's fraud (Aplt.Br. 36-39). She cited *Hewlett v. Hewlett*, 845 S.W.2d 717 (Mo. App. 1993), *Essig v. Essig*, 921

S.W.2d 664 (Mo. App. 1996), and *Alexander v. Sagehorn*, 600 S.W.2d 198 (Mo. App. 1980), all of which granted exactly that relief on fraud allegations relating to the division of the marital estate (Aplt.Br. 36-39). She showed that decisions in pre-Rule 74.06(b) common-law actions to set aside a dissolution decree's property division for fraud, including *Alexander*, continue to apply to actions under Rule 74.06(b) (Aplt.Br. 39-42). She also showed that the Rule's plain language allowing the trial court to fashion relief "upon such terms as are just" allows it to set aside just the division of the marital estate, rather than the whole decree (Aplt.Br. 43-50). She pointed again to *Essig* and *Alexander*, which upheld doing exactly that, as well as to federal and other states' decisions applying identical rules this way (Aplt.Br. 43-50).

Second, Jeanne tied this together with the *Linzenni* test and explained that because a dissolution judgment *was* entered before Tom's death, and the only issue now involves the division of the marital estate, the law of Missouri is that her Rule 74.06(b)(2) motion survives (Aplt.Br. 51-58). She cited *Anderson v. Dyer*, 456 S.W.2d 808 (Mo. App. 1970), *Hemphill v. Quigg*, 355 S.W.2d 57 (Mo. 1962), and *Richmond v. Richmond*, 225 S.W. 126 (Mo. App. 1920), all of which held that an independent post-judgment action to set aside a dissolution of marriage decree for one party's fraud survives that party's death, and for largely the same reasons as the *Linzenni* line of cases (Aplt.Br. 51-55). She also cited every decision on this question anywhere in America for nearly 90 years, all of which concurred with Missouri that a post-judgment action to set aside a division of marital property for one party's fraud survives either party's death (Aplt.Br. 55-58).

Finally, Jeanne showed that taking the allegations in her 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 (Aplt.Br. 59-63). He knowingly made numerous false representations relating to the sale of Epiq, on which she relied and was damaged, meeting all elements of fraud (Aplt.Br. 59-63).

The Estate's brief is unresponsive either to what the trial court held in its judgment or Jeanne's arguments in her brief. Instead, it seems to respond to a different case that Jeanne never made below and does not make now.

First, the Estate ignores all of Jeanne's on-point authorities. Contrary to its briefing below both in the trial court and in the Court of Appeals, it apparently now *concedes* that the trial court *could* set aside only the dissolution judgment's division of marital property (Substitute Brief of the Respondent ["Resp.Br."] 34), the issue the Court of Appeals held against Jeanne on which she sought transfer. It also offers no argument that taking Jeanne's facts as true, Tom *did not* defraud her in the dissolution.

Instead, the Estate casts Jeanne as having requested monetary damages below, which it says dooms her appeal because that was unavailable relief under Rule 74.06(b) (Resp.Br. 23, 26, 32). It then argues with no authority in support – and conspicuously ignoring every one of the on-point authorities on pages 51-58 of Jeanne's brief contrary to it – that Tom's death *did* moot Jeanne's Rule 74.06(b) action because the trial court could not feasibly revalue or re-divide the marital estate with one party deceased (Resp.Br. 22-23, 29-30, 33-34).

Finally, the Estate tries to shoehorn in two arguments it made at different times below that the trial court did not accept. It makes a *res judicata* argument that was untimely in its motion for judgment on the pleadings and fails to view the facts in the light most favorable to Jeanne (Resp.Br. 35-41). It also makes a timeliness argument that it omitted from its motion for judgment on the pleadings and this Court cannot decide for the first time on appeal, and which also fails to view the facts as required (Resp.Br. 41-46).

The Estate's arguments are without merit. Jeanne never requested an award of monetary damages below. At all times, both in her Rule 74.06(b)(2) motion and her opposition to the Estate's motion for judgment on the pleadings, she requested only that the court set aside the division of the marital estate. That Tom died during those proceedings does not prevent the trial court from setting aside the division of the marital estate and then re-valuing and re-dividing it to remedy his fraud. Missouri case law is replete with examples of the division of marital estates when one party is dead, sometimes years after the death. There is no reason this case is different.

The Estate now concedes that the trial court had the power to do what Jeanne requested below and set aside the division of the marital estate. It also tacitly concedes that Jeanne stated a proper claim for Rule 74.06(b) relief due to Tom's fraud. Therefore, and as in every other reported American case where this has ever occurred, in Missouri and elsewhere, as a matter of law Tom's death did not moot or abate the proceedings below. The Estate's contradictory arguments otherwise are without merit.

B. Review is *de novo*, with all Jeanne's allegations taken as true and accorded all reasonable inferences in her favor.

The trial court's judgment granted the Estate's motion for judgment on the pleadings (D39 pp. 1, 5-9). In her opening brief, Jeanne explained that a grant of judgment on the pleadings is reviewed *de novo*, with the nonmovant's allegations taken as true and accorded all reasonable inferences (Aplt.Br. 27-28) (citations omitted). It can be affirmed only "if, from the face of the pleadings" so viewed, "the moving party is entitled to a judgment as a matter of law" (Aplt.Br. 28) (citation omitted).

In a footnote, the Estate agrees *de novo* is the standard for a grant of judgment on the pleadings (Resp.Br. 22 n.6), but it argues review here should be for abuse of discretion (Resp.Br. 21-22). It says this is because the trial court denied Jeanne's Rule 74.06(b)(2) motion, and "[a]n order denying a motion under Rule 74.06(b)(2) is reviewed only for abuse of discretion" (Resp.Br. 21). It says the trial court really "denied [Jeanne]'s" Rule 74.06(b)(2) motion "and dismissed it with prejudice, while at the same time granting judgment on the pleadings" (Resp.Br. 21 n.5).

The Estate's argument is without merit. The only decisions it cites for its abuse-of-discretion standard were *on the merits* of a Rule 74.06(b)(2) motion, not granting judgment on the pleadings, a motion to dismiss, or summary judgment. *See McCullough v. Commerce Bank*, 349 S.W.3d 389, 392 (Mo. App. 2011) (denial on merits of post-judgment motion for new trial filed as Rule 74.06(b)(2) motion); *Clark v. Clark*, 926 S.W.2d 123, 126 (Mo. App. 1996) (grant on merits of Rule 74.06(b)(2) motion to set aside default judgment).

Here, the trial court did not decide the merits of Jeanne's Rule 74.06(b)(2) motion. Instead, it only granted the Estate's motion for judgment on the pleadings, accepting *solely* the Estate's mootness/abatement argument. The court entered one judgment, titled "Judgment on the Pleadings," stating the Estate's motion for judgment on the pleadings "is GRANTED" (D39 p. 1).

That this culminated in denying and dismissing Jeanne's Rule 74.06(b)(2) motion makes no difference. The Estate's motion for judgment on the pleadings argued the motion "should be dismissed" because Tom's death mooted or abated it (D24 pp. 6-10). The relief it sought was to "grant Respondent's Motion for Judgment on the Pleadings and deny Petitioner's motion for relief under Rule 76.04(b) [*sic*]" (D23).

So, in granting the Estate's motion for judgment on the pleadings, the court entered "judgment on the pleadings" and did what the Estate requested: "Petitioner's Motion to Set Aside the final judgment … is DENIED and this action is DISMISSED with prejudice" (D39 pp. 1, 9). There was no decision on the merits of Jeanne's fraud claim, just a grant of judgment on the pleadings (D39 pp. 5-9). So, review is *de novo*, with Jeanne's allegations taken as true and accorded all reasonable inferences (Resp.Br. 22 n.6).

Moreover, even if abuse-of-discretion review somehow applied, Jeanne's point still would be reviewed *de novo* because the issue before the Court is purely legal. "A court abuses its discretion if" its decision "is based on an erroneous application of the law …." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 599 (Mo. banc 2012). The issue here is whether Tom's death

mooted Jeanne's Rule 74.06(b)(2) motion, as the court held it did. "Mootness is a legal issue reviewed de novo." *State ex rel. Mo. Coalition for the Env. v. Joint Comm. on Admin. Rules*, 519 S.W.3d 805, 810 (Mo. banc 2017).

Not citing the record, the Estate also briefly suggests Jeanne's notice of appeal was defective because it "references only the trial court's denial of her Rule 74.06(b)(2) motion as the order appealed from" (Resp.Br. 21 n.5). It suggests this is like *Anderson v. Anderson* (Resp.Br. 21 n.5), where a notice of appeal that only pointed to and attached a final judgment did not allow a challenge to a separate partial judgment entered months earlier. 869 S.W.2d 289, 292 (Mo. App. 1994).

This is untrue. Here, the trial court only entered one judgment (D39 pp. 5-9). Jeanne's notice of appeal identified that judgment by date and attached it (D40 pp. 1, 3).

C. Jeanne's point is preserved for appeal.

The Estate also argues that Jeanne's point is not preserved for appeal (Resp.Br. 25-26, 30-34). This is equally without merit.

First, the Estate suggests the trial court held Jeanne's Rule 74.06(b)(2) motion "moot not because of abatement, but because it was not possible to grant effectual relief" (Resp.Br. 25).

This confuses the issue. The trial court granted the Estate's motion for judgment on the pleadings because it held that Tom's death rendered the Rule 74.06(b) proceedings moot or abated. It stated, "[t]he Court agrees with [the Estate] and finds that Petitioner's Rule 74.06(b) Motion fails regardless of whether analyzed under the theory of mootness or abatement" (D39 p. 7), noting that "[t]he doctrine of abatement in dissolution proceedings is based

on the principle of mootness" (D39 p. 5). It then stated that it could not set aside the division of the marital estate and then later reallocate it *solely* because of Tom's death: "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 pp. 6-7).

In her opening brief, Jeanne explained that this was error, and all for reasons she argued below in opposition to the Estate's motion for judgment on the pleadings:

- The law of Missouri is that when a party dies after entry of the decree, issues concerning the property division still can be litigated, and the death does not affect that litigation (Aplt.Br. 30-35). She argued this below, too (D32 pp. 13-15).
- The trial court did not have to set aside the entire dissolution, but properly could set aside just the division of the marital estate (Aplt.Br. 43-50). She argued this below, too (D32 pp. 17-20).
- Tom's death did not abate her Rule 74.06(b)(2) motion or make it moot, because Tom died *after* the dissolution judgment, not before (Aplt.Br. 29, 36, 58). She argued this below, too (D32 pp. 3, 11-16).

The trial court held in plain language that Tom's death automatically mooted or abated Jeanne's Rule 74.06(b)(2) motion. Jeanne's arguments why that was error are exactly those that she made below.

Next, the Estate suggests the relief Jeanne now requests – "to set [aside] the divisible portion of the judgment allocating the marital estate"

(Resp.Br. 23, 33) – is not what she requested below. It says this is because below, she "never expressly asked the trial court to set the divisible portion of the judgment allocating the marital estate" (Resp.Br. 23) and instead made a "claim for money damages" (Resp.Br. 26). It then repeats this throughout its brief, couching its response to the merits of Jeanne's argument entirely in terms of this notion about money damages (Resp.Br. 17-18, 23, 26, 29-30, 32).

This is simply untrue. In her Rule 74.06(b)(2) motion itself, 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) (emphasis added).

The Estate ignores the prayer for relief in Jeanne's Rule 74.06(b)(2) motion and instead gloms onto a statement in her opposition to its motion for judgment on the pleadings, which it takes wildly out of context. The Estate had argued Jeanne was trying to modify the property division in the dissolution, which the law of Missouri does not allow (D24 pp. 14-15). Jeanne argued this was not so, and instead she sought to set aside the property division for fraud and then relitigate it, which the law allows (D32 pp. 17-20).

In arguing this, Jeanne *analogized* her Rule 74.06(b)(2) motion to an independent action for money damages for fraud, which survives a party's death (*see also* Aplt.Br. 54-55)), and explained that if the property division was (first) set aside and (then) ultimately relitigated, the basic effect would be to make for a monetary award:

> ***the practical effect*** **of granting the relief sought in Petitioner's motion is to award damages to Petitioner** that flow from these two assets of the marital estate. This is not a request to modify or amend a judgment. **Petitioner seeks to set aside the Judgment and offers, in the alternative, a practical resolution to the relief sought.** … In reality, the damages as a result of Tom's fraud will be calculated and funds ordered paid to Petitioner ….

(D32 p. 18) (emphasis added).

Jeanne clearly meant that her Rule 74.06(b)(2) motion was not a "modification," but instead its net practical effect, if successful, would be to give her a monetary award. "**Ultimately** this action concerns an issue of a monetary sum to be awarded to Petitioner" (D32 p. 15) (emphasis added).

Amplifying this, Jeanne pointed out that a Rule 74.06(b)(2) motion is an independent action, not a continuation of the original case (D32 p. 16). This is correct. "[A] Rule 74.06(b) motion must be treated as an independent action if the motion is filed after the underlying judgment becomes final …." *Citimortgage, Inc. v. Waggoner*, 440 S.W.3d 589, 590-91 (Mo. App. 2014).

Jeanne's statement regarding "monetary damages" was just an analogy. She plainly never requested the trial court *enter an award of money damages* on her Rule 74.06(b)(2) motion. To the contrary, the relief she sought below was exactly what she continues to request now: setting aside the property division, which then will be relitigated in full, accounting for the fraud Tom committed. *See* below at pp. 18-20.

"In almost every context, we construe a plaintiff's petition liberally, in favor of the plaintiff, regardless of the form of the petition." *Stewart v. Sturms*, 784 S.W.2d 257, 260 (Mo. banc 1989). Especially liberally construed,

Jeanne's Rule 74.06(b)(2) motion plainly requested that the division of the marital estate be set aside so that the court then could proceed to revalue and re-divide the marital estate and in doing so remedy Tom's fraud. She invoked case law doing exactly that, including *Alexander* and *Hewlett* that she discussed in her opening brief (D5 pp. 21-27). And as the Estate concedes, this is exactly the relief Jeanne argues for now: "to set [aside] the divisible portion of the judgment allocating the marital estate" (Resp.Br. 23).

Jeanne's opposition to the Estate's motion for judgment on the pleadings consistently and repeatedly continued to seek the court to set aside the property division for fraud, enabling re-litigation of the property division (D32 p. 3; 6, 12-13, 15-16, 20). She specifically stated she "seeks to set aside the Judgment which allocated marital property so as to effectuate an equitable distribution of same" and "does not seek to change the status of the divorce of the parties, nor is such a change in status required" (D32 p. 15). She pointed to *Essig* as authority for this, where under Rule 74.06(b) the trial court "properly set aside the property division portion of the divorce decree on the grounds that the property settlement underlying the decree had been procured by fraud" (D32 p. 20).

The Estate's suggestion that Jeanne's brief analogy transformed her entire Rule 74.06(b)(2) action into an illegitimate case for money damages is without merit. Jeanne continues to seek exactly relief that she did below, and on exactly the same arguments.

D. 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.

When the Estate finally gets to the merits of Jeanne's point, its only response is to ignore and misstate both the authorities Jeanne cited and the facts. Its confusing counterargument is without merit.

First, Jeanne explained in her opening brief that, taking the allegations in her Rule 74.06(b)(2) motion as true, she stated a sufficient claim that Tom defrauded her in the dissolution (Aplt.Br. 59-63). The Estate does not offer any response to this at all, tacitly conceding it.

But in discussing Jeanne's fraud claim and what happened in the dissolution and afterward, both in its statement of facts and its argument the Estate fails to take several of Jeanne's important allegations as true and instead improperly argues its own factual conclusions.

Many of the Estate's record citations are to Tom's answer, rather than Jeanne's allegations (Resp.Br. 7-8, 11, 12, 24, 38, 39, 44). (In her opening brief, Jeanne only cited Tom's responses when they admitted her allegations.) For example, the Estate describes Tom stating in his deposition that there had been no "binding" offers to purchase Epiq (Resp.Br. 11 n.3, 39). But the false statement Tom made at his deposition was there had been "no compelling offers" (D5 pp. 10-11), which has a distinctly different meaning in the context of this case compared to the Estate's description of "binding" offers. Whatever Tom alleged in opposition to Jeanne's Rule 74.06(b)(2) motion is irrelevant in reviewing the propriety of the trial court granting the Estate judgment on the pleadings (Aplt.Br. 27-28).

The Estate also proffers what it alleges was "specifically" the division of the marital estate, including the Epiq shares allocated, Jeanne receiving a condominium, Tom assuming debt, and other items (Resp.Br. 7-8, 24). This seems tuned to suggest, "Jeanne got a good deal, so what's she complaining about?" But this is an incomplete record of the property settlement, which was complex and contained in a lengthy agreement (D3).

Moreover, regardless, the Epiq stock was the parties' largest asset, and Tom's fraud amounts to a difference of millions of dollars of windfall in his favor based on its division at a three-dollar-per-share lower value for purposes of dividing the marital estate than the $16.50 per share for which Epiq sold (D5 pp. 4, 13). The other benefits he received from the sale amounted to a further $16-million-plus (D5 pp. 4-5). So, regardless of the rest of the estate division, Tom defrauded Jeanne out of millions of dollars of marital property that she should have received under their agreement (D5 pp. 27-37).

Beyond that, the Estate's only response is to misstate authorities that Jeanne cited and ignore important others.

Contrary to its briefing below and in the Court of Appeals, the Estate now apparently concedes that the trial court *could* set aside just the division of the marital estate (Resp.Br. 34). It suggests that even the trial court held this (Resp.Br. 33-34). But as Jeanne explained in her opening brief, at best the trial court was confused on this, at one point stating "if the judgment were set aside, the procedural posture would be the same as if Tom Olofson died prior to entry of final judgment" (Aplt.Br. 43) (quoting D39 p. 6).

The Estate also says that all the decisions Jeanne cited concerning non-abatement with deceased parties "involved the death of a party where the dissolution action was still ongoing before the trial court or on appeal" (Resp.Br. 19, 28). It suggests Jeanne has no authority supporting her argument that a party's death does not abate an independent post-judgment action to set that judgment aside for that party's fraud (Resp.Br. 19, 28-29).

The Estate must not have read pages 51-58 of Jeanne's opening brief. There, she discussed three Missouri decisions – *Anderson*, *Hemphill*, and *Richmond*, all of which expressly held that an independent 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 (Aplt.Br. 48-51). She also cited every similarly postured decision anywhere in America for nearly 90 years, all of which concurred (Aplt.Br. 52-55).

The Estate gives no response to any of this. It does not mention any of these authorities. It offers no contrary authority involving this procedural situation. Instead, it just pretends none of this on-point law exists.

Finally, throughout its brief, while ignoring all this authority, the Estate nonetheless argues Tom's death *did* moot Jeanne's Rule 74.06(b) action because the trial court could not feasibly revalue or re-divide the marital estate with one party deceased (Resp.Br. 22-23, 29-30, 33-34).

That is untrue. Missouri courts many times have revalued and re-divided marital estates in this posture, sometimes years after the dissolution of marriage. *See*:

- *Linzenni*, 937 S.W.2d at 724 (judgment valuing and dividing estate was finalized after spouse died and personal representative substituted);
- *Simpson v. Strong*, 234 S.W.3d 567, 574 (Mo. App. 2007) (after wife died and personal representative substituted, personal representative would receive her equalization payment);
- *In re Marriage of McIntosh*, 126 S.W.3d 407, 417-18 (Mo. App. 2004) (estate was valued and divided a year after wife's death and personal representative's substitution);
- *Fischer v. Seibel*, 733 S.W.2d 469, 472 (Mo. App. 1987) (same);
- *Cregan v. Clark*, 658 S.W.2d 924, 926 (Mo. App. 1983) (W.D. en banc) (more than 16 months after husband's death and personal representative's substitution, reversing trial court's judgment and remanding for re-division of estate); and
- *Anderson*, 456 S.W.2d at 814 (allowing action to set aside judgment twelve years after divorce and 18 months after husband's death).

This makes sense. If the division of the marital estate is set aside and then relitigated, the trial court is perfectly capable of hearing evidence of the value of the marital estate at the time of the dissolution. As in any other dissolution, it then can divide the marital assets equitably "in such proportions as the court deems just after considering all relevant factors …." § 452.330.1, R.S.Mo. And if anything, the division of the Epiq stock is easier because its value was reduced to cash. Moreover, if after that money is owed to equalize the division, as in any other case Tom's estate can be ordered to make Jeanne an equalization payment or vice-versa. *See, e.g.*, *Simpson*, 234

S.W.3d at 574 (involving equalization payment to be paid after party's death); *McIntosh*, 126 S.W.3d at 417-18 (same).

Viewing the facts in the light most favorable to Jeanne, as in all these cases there is nothing stopping the trial court from doing the same here if Jeanne prevails and the marital estate is revalued and re-divided. Instead, as in every decision in Missouri and elsewhere in America in this posture for nearly 90 years, the law of Missouri is that Jeanne's post-judgment action to set aside the division of the parties' marital property due to Tom's fraud survives Tom's death. The trial court erred in holding otherwise.

E. The Estate's invocation of *res judicata* is not properly before the Court and is without merit.

The Estate also makes two arguments seeking to avoid deciding the merits of Jeanne's appeal. First, it argues *res judicata* precludes Jeanne's Rule 74.06(b)(2) motion (Resp.Br. 35-42). This resurrects a defense it did not raise in its answer, and instead argued for the first time in its motion for judgment on the pleadings (D23 p. 1; D24 pp. 15-17), and which the trial court did not decide in its judgment (D39). It says *res judicata* bars Jeanne's motion because she "had the full opportunity to litigate all of the issues raised in" it in the parties' prior dissolution action (Resp.Br. 41).

This is without merit. First, the Estate's terminology is confused. Sometimes it refers to the doctrine it is invoking as "*res judicata*" (Resp.Br. 35-37, 40-41). At other times, including in all its headings, it calls the doctrine it is invoking "collateral estoppel" (Resp.Br. 35-37, 40-41).

Res judicata and collateral estoppel are two different legal theories. "[R]es judicata (claim preclusion) preclude[s] the same parties from

relitigating the same cause of action whereas collateral estoppel (issue preclusion) preclude[s] the same parties from relitigating issues which had been previously adjudicated." *Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. banc 1979).

Second, the Estate did not properly raise either affirmative defense below, precluding it from invoking them now. Rule 55.08 lists both "res judicata" and "estoppel" as "affirmative defenses and avoidances" that must be included in a defendant's answer. *See Gamble v. Browning*, 277 S.W.3d 723, 727 (Mo. App. 2008) (on plaintiff's appeal, defendant barred from raising defense of *res judicata* where not pleaded in answer). Under Rule 55.27(a), these defenses also may be raised for the first time in a motion. *King Gen. Contractors Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 498-99 (Mo. banc 1991). But that motion would have to be filed "[w]ithin the time allowed for responding to the opposing party's pleading[.]" Rule 55.27(a). Tom filed his answer in April 2017 (D14; D15). The Estate filed its motion for judgment on the pleadings in December 2017 (D23), nearly eight months out of time to raise new affirmative defenses. Rule 55.27(a). So, as these defenses were not properly before the trial court, they cannot be considered for the first time in response to Jeanne's appeal. *Gamble*, 277 S.W.3d at 727.

Moreover, even when collateral estoppel or *res judicata* is properly and timely raised in a motion to dismiss, for the trial court to be able to consider it the motion must be converted into one for summary judgment. *Stegner v. Milligan*, 523 S.W.3d 538, 541-44 (Mo. App. 2017). This means the Estate

would have to follow the summary judgment procedure in doing so or otherwise granting its motion would be reversible error. *Id.* (reversing dismissal for this reason). Here, as Jeanne pointed out below (D23), its motion for judgment on the pleadings did not follow the summary judgment rule. So, even if its motion were timely to raise these defenses, they were not properly before the trial court for this reason, too.

Finally, the Estate's *res judicata* argument and its substantially similar collateral estoppel argument are without merit.

To bar subsequent litigation, *res judicata* requires "four identities" in both cases: (1) the thing sued for; (2) the cause of action; (3) the persons and parties to the action; and (4) the quality of the person for or against whom the claim is made. *King*, 821 S.W.2d at 501. The Estate notably does not mention this test (Resp.Br. 35-42).

Here, both the thing sued for and the cause of action in Jeanne's Rule 74.06(b)(2) motion are different from those in the dissolution. Jeanne's Rule 74.06(b)(2) motion seeks to *set aside* the property division portion of the dissolution judgment due to fraud, just as Missouri courts and other states' courts have held proper many times (*see* cases cited in Aplt.Br. 36-39 and 51-58, none of which the Estate addresses). The cause of action is Tom's fraud, which has nine elements (Aplt.Br. 38), and the thing sued for is to set aside the property division in the parties' divorce. Conversely, the cause of action in the dissolution was to dissolve the parties' marriage, with none of the nine elements of fraud at issue, and the thing sued for was for a valuation and

division of the marital estate. Therefore, *res judicata* does not bar Jeanne's Rule 74.06(b)(2) motion.

By definition, Tom's fraud and its elements alleged in Jeanne's Rule 74.06(b) motion were not matters litigated in the original dissolution case, nor could they have been. Jeanne did not become aware of the facts showing Tom's fraud until Epiq's relevant SEC filings became public in August and September 2016, many months after the dissolution decree.

Taking the facts in Jeanne's Rule 74.06(b)(2) motion as true, the Estate's *res judicata* argument fails even more glaringly. Her motion describes in detail the efforts she took through discovery in the original dissolution to obtain any non-public information concerning Epiq and the status of its strategic review process, showing that she reasonably relied on Tom's affirmative representation that there had been no compelling offers for its sale (D5 pp. 7-12). Considering Tom held all the information relevant to the value and division of the largest assets of the marital estate and he and Epiq had both stonewalled Jeanne and precluded her from access to all non-public information, it is reasonable for Jeanne to have relied on Tom's representations in entering into the separation agreement. Tom induced her reliance based on his fraudulent misrepresentations, which caused her injury.

Jeanne's reliance and right to rely on Tom's misrepresentations are two elements of her fraud claim (D5 pp. 7-12). But they were not at issue in the dissolution, because she did not yet know they were misrepresentations. Simply because the same or similar discovery may have been relevant to

matters in the original dissolution, it does not follow that Jeanne is relitigating an issue or claim from the dissolution.

All the decisions the Estate cites in support of its *res judicata* argument in which an action was barred bear this out. In each, a party improperly sought to use a new cause of action to relitigate an issue it knew about and had litigated unsuccessfully in a prior case.

First, the Estate cites two conversion actions, *Dahn v. Dahn*, 346 S.W.3d 325 (Mo. App. 2011), and *Yates v. Yates*, 680 S.W.2d 361 (Mo. App. 1984) (Resp.Br. 40-41). In both, one spouse in a dissolution of marriage argued the other had misappropriated assets but lost that argument, and then turned around afterward and filed a conversion action against the other spouse to seek to relitigate that claim.

Next, the Estate cites two Rule 74.06(b) cases, *Cain v. Porter*, 309 S.W.3d 387 (Mo. App. 2010), and *Allison v. Allison*, 253 S.W.3d 91 (Mo. App. 1995) (Resp.Br. 36). In both, parties tried to use a Rule 74.06(b) action to set aside a judgment for lack of "subject matter jurisdiction," when that issue had been fully litigated and disposed of in the original cases.

Finally, the Estate cites a pre-Rule 74.06 case, *Miller v. Hubert*, 804 S.W.2d 819, 820 (Mo. App. 1991) (Resp.Br. 41), in which a father sought to set aside a paternity judgment on the basis that the mother had lied in stating he was the father. At the time, only *extrinsic* fraud was enough to set aside a judgment, and the mother's alleged fraud was *intrinsic*, not extrinsic. *Id.* (Today, Rule 74.06(b) allows relief for fraud "whether heretofore

denominated intrinsic or extrinsic" (Aplt.Br. 41).) The issue of paternity had been fully litigated in the earlier dissolution, barring its re-litigation. *Id.*

At the same time, the Estate does not address any decisions analogous to this case that Jeanne discussed below or in her brief, and which substantiate her right to reasonably rely on Tom's representations in the dissolution in lieu of pursuing further discovery. The Estate's *res judicata* argument essentially is that Jeanne should have pursued discovery during the dissolution and her having not done so bars her motion to set aside that judgment for fraud. But the law of Missouri is the opposite: for purposes of establishing the elements of a fraud claim, a party has a right to reasonably rely on the representations of the other party in lieu of pursuing discovery.

In *Hewlett*, for example, the husband was aware of his wife's lack of knowledge as to the property's value, and therefore knew that she could reasonably rely on his representations of its value. 845 S.W.2d at 719-21. Like the husband in *Hewlett*, Tom had special knowledge of the value of his interest in Epiq and knew that Jeanne would rely on his representations regarding the potential for a sale of Epiq and its value. The information was critical to determining the value of the marital estate, and Jeanne had no other means to obtain it due to Tom's efforts to stonewall Jeanne and deprive her of information throughout the discovery process.

Further, while in an ordinary fraud case the general rule is that "a party who undertakes an independent investigation does not have the right to rely on the misrepresentations of another," three exceptions to this rule apply here:

> (1) the investigating party makes only a partial investigation and relies on both the results of the inspection and the misrepresentation; (2) the [investigating party] lacks equal footing for learning the truth, and the facts are not easily ascertainable but are peculiarly within the knowledge of the [defrauder]; and (3) the [defrauder] makes a specific and distinct misrepresentation.

Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 132-33 (Mo. banc 2010).

Tom's actions precluded Jeanne from investigating the status of Epiq's strategic review process or internal calculations of value. Tom was aware of her lack of knowledge and prevented her from obtaining it. Jeanne therefore lacked equal footing for learning the truth, compared to Tom's vast knowledge regarding Epiq's strategic review process and value. Jeanne was devoid of internal information regarding the potential sale of Epiq except for Tom's misrepresentations.

Therefore, taking the allegations in Jeanne's Rule 74.06(b)(2) motion as true, she reasonably relied on Tom's representations when entering into the final marital settlement agreement in lieu of pursuing further discovery. Whether Tom committed fraud in the dissolution action in making his false representations was not at issue in the dissolution, nor could it have been, as Jeanne was not then aware that Tom's representations were false. Whether the property division should be set aside for this then-unknown fraud, just as in *Hewlett*, *Essig*, *Alexander*, and the other decisions on which Jeanne relies, was not at issue in the dissolution, either.

Neither *res judicata* nor collateral estoppel bars Jeanne's motion to set aside the judgment due to Tom's fraud.

F. Jeanne's Rule 74.06(b)(2) motion timely and reasonably was filed within five months of her fraud claim becoming ripe.

Finally, resurrecting an argument Tom briefly made in his answer to Jeanne's Rule 74.06(b)(2) motion (D14 p. 33; D15 pp. 17-18) but the Estate omitted from its motion for judgment on the pleadings (D24), the Estate also now argues Jeanne's Rule 74.06(b)(2) motion was untimely (Resp.Br. 41-46). It says this is because she "waited 364 days after entry of judgment before filing" it "even though the allegedly fraudulent statements and non-disclosures" were as early as December 2015, so despite being filed within one year of the dissolution judgment the Rule 74.06(b)(2) motion was not filed "within a reasonable time" under Rule 74.06(c) (Resp.Br. 44).

The Estate's argument is without merit. First, Jeanne's Rule 74.06(b)(2) motion was not filed "364 days after entry of" the dissolution judgment. While the trial court apparently signed the judgment February 24, 2016, it was not file-stamped by the clerk and entered on the docket until March 1, 2016 (D1 p. 17; D4 pp. 1, 21-22). Therefore, it was entered March 1, 2016. Rule 43.02(b); *Shumate v. State*, 515 S.W.3d 824, 828 (Mo. App. 2017). Jeanne filed her Rule 74.06(b)(2) motion *359* days later on February 23, 2017.

Second, because the Estate did not argue this merits issue regarding the timeliness of Jeanne's Rule 74.06(b)(2) motion in its motion for judgment on the pleadings and the trial court did not rule on it, it would be improper for this Court to guess how the trial court would have exercised its discretion on this argument. Indeed, the Estate's failure to raise this argument in its motion means it cannot be considered at all. "This Court will consider only the grounds raised in the motion to dismiss …." *City of Lake St. Louis v. City*

of O'Fallon, 324 S.W.3d 756, 759 (Mo. banc 2010). Notably, the trial court observed that the Estate had argued Jeanne's motion was untimely (D39 p. 3) but did not rule that this was so. (The Estate's proposed judgment included a section dismissing Jeanne's Rule 74.06(b)(2) motion for this reason, too (D37 pp. 27-29). The trial court did not accept that part of the proposal in entering its judgment (D39).)

But the only "reasonable time" decisions the Estate cites – and that counsel for Jeanne can find – are ones in which the trial court *determined* whether the motion had been filed within a reasonable time.

Indeed, the only *Rule 74.06(c)* "reasonable time" decision the Estate cites at all was one in which the trial court held on the merits that it was untimely and the Court of Appeals affirmed. *See First Bank of the Lake v. White*, 302 S.W.3d 161, 165 (Mo. App. 2009). The other three decisions it cites all involved "reasonable time" to set aside a default judgment under Rule 74.05, one of which held it unreasonable, *see Engine Masters, Inc. v. Kirn's Inc.*, 872 S.W.2d 644, 645 (Mo. App. 1994), and two of which *reversed* the denial of a motion to set aside a default judgment and held it *had* been filed within a reasonable time. *See Capital One Bank (USA) NA v. Largent*, 314 S.W.3d 364, 367 (Mo. App. 2010); *Bell v. Bell*, 849 S.W.2d 194, 198 (Mo. App. 1993).

Here, because the trial court did not rule on the timeliness of Jeanne's Rule 74.06(b)(2) motion, and whether to do so would have been a decision on the merits of Jeanne's motion that the trial court expressly did not reach, this Court cannot speculate on how the trial court would have determined that.

Third, to the extent this Court can review this issue at all, it would have to take all the allegations in Jeanne's Rule 74.06(b)(2) motion as true and accord them all reasonable inferences. The Estate does not do this. Especially viewed that way, Jeanne's motion certainly was filed within a reasonable time.

Rule 74.06(c) provides that a motion to set aside a judgment under Rule 74.06(b)(2) for fraud must be made "within a reasonable time" and "not more than one year after the judgment or order was entered." In determining what is a "reasonable time," courts have looked to the circumstances underlying the timing of the filing. *See, e.g.*, *First Bank*, 302 S.W.2d at 168. Relevant factors include the existence of circumstances beyond the party's control, novel questions of law requiring extensive preparation, and difficulty obtaining counsel. *Engine Masters*, 872 S.W.2d at 646.

Here, while the dissolution judgment was entered March 1, 2016, Jeanne's fraud claim did not become ripe until the sale of Epiq closed on September 30, 2016. Her detailed, legally complex Rule 74.06(b)(2) motion filed less than five months later was filed within a reasonable time, especially considering she obtained new counsel to prepare and file it.

The disclosure regarding the sale of Epiq was not made public until late August 2016 (D7). This public SEC filing was when Jeanne first became aware of this information (D5 pp. 4, 43). More details about the proposed sale were not released until September 20, 2016 (D8). And the sale did not close until September 30, 2016 (D5 p. 13).

Jeanne filed her Rule 74.06(b)(2) motion 146 days – less than five months – later. Her motion was 44 pages long, with nearly 100 paragraphs, a six-page affidavit, and hundreds of pages of exhibits (D5-D13). According her the benefit of all reasonable inferences, the issues were complex, required significant time to research and brief, and her motion filed less than five months after her fraud claim was ripe was perfectly reasonable, especially given pending deadline to file before one year after the judgment.

The only two decisions the Estate cites in which a motion to set aside a judgment was held not filed within a reasonable time, *First Bank of the Lake*, and *Engine Masters*, are inapposite. Both involved simple issues with unexplainable, lengthy delays.

In *First Bank*, debtors knew of a default judgment 80 days after its entry but intentionally sat for 234 days before filing a motion to set it aside under Rule 74.06(b). 302 S.W.3d at 166-68. The Court of Appeals affirmed the trial court's finding that this was unreasonable. *Id.* at 167.

Similarly, in *Engine Masters*, the defendant was informed about the default judgment one week after it was entered but without any justification waited to file a motion to set it aside until 316 days after its entry. 872 S.W.2d at 645-46. Again, the Court of Appeals affirmed the trial court's discretionary determination that the delay was unreasonable. *Id.* at 646.

This case is nothing like *First Bank* or *Engine Masters*. Here, Jeanne diligently pursued her complex claim as soon as she became aware of it and it became ripe. And the trial court did not find it untimely.

Conclusion

The Court should reverse the trial court's judgment and remand this case for further proceedings on Jeanne's Rule 74.06(b)(2) motion.

Respectfully submitted,

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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 7,745 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that I signed the original of this substitute reply brief, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on January 31, 2020, I filed a true and accurate Adobe PDF copy of this substitute reply brief via the Court's electronic filing system, which notified the following of that filing:

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