No. **DA 22-0218**

IN THE

Supreme Court of the State of Montana

Elaine Herman Girdler,

Appellant,

v.

Jeffrey Alan Girdler

Appellee,

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, HON. MIKE MENAHAN, PRESIDING
CASE NO. DR-25-2021-0000308-IM

APPELLANT'S REPLY BRIEF

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DISPUTED FACTS

As a threshold matter, Appellee Jeffrey Alan Girdler (hereinafter "Girdler"), mischaracterizes the Maryland divorce proceedings. The Maryland Complaint is for Limited Divorce. Maryland Complaint for Limited Divorce at App. 15, Exhibit A. As opposed to Absolute Divorce, Limited Divorces in Maryland do not distribute or allocate property. In fact, in this case, there is no property in dispute. The parties had a prenuptial agreement, and per that agreement each party retained all premarital property and future acquired property as their separate property, and each party waived their rights to inherit from the other. Prenuptial Agreement at App. 3. Therefore, it was completely misplaced for Girdler to allege that Appellant Elaine Herman Girdler (hereinafter "Herman") took his personal property, i.e. the mother's China. But since Girdler stated facts outside the pleadings, Herman responds in kind that his statement is not true.

SUMMARY OF THE ARGUMENT

Girdler continually relies on the fact that he was the first to file, but the issues and analysis before this Court require deeper examination than that. The district court abused its discretion when it set aside the Decree of Invalidity of Marriage. This Court should examine the district court's decision and whether it followed proper procedure in doing so.

ARGUMENT

I. HERMAN PRESERVED HER ARGUMENTS FOR APPEAL.

Girdler argues that Herman is raising issues for the first time on appeal, but fails to acknowledge that in this matter the issue before the district court was whether it would set aside the default judgment in response to a Rule 60(b)(4) motion arguing the judgment was void for lack of jurisdiction. M. R. Civ. P. 60(b). Instead, the Court ruled that "in the interest of sound judicial administration" that it would set the case aside relying on the "first-to-file rule." Given that sequence of events, responding to the district court's abuse of discretion in its ruling is appropriately addressed for the first time on appeal. Whether the District Court abused its discretion when it granted Girdler's Motion to Set Aside Judgment and vacated the Decree of Invalidity of Marriage thereby dismissing Herman's Petition on that basis is properly at issue now.

A. Herman's argument that the district court abused its discretion in setting the judgment aside under Rule 60(b)(6) is equally applicable to an argument that it was set aside under section (1).

If as Girdler argues, the district court set aside the judgment under Rule 60(b)(1) of the Montana Rules of Civil Procedure, then the court would have stated so. Unlike section (6) which is the catch-all provision, section (1) allows a judgment to be set aside for "mistake, inadvertence, surprise, or excusable neglect." The district court would have stated which of those four prongs was

exercised. The first-to-file rule and judicial efficiency do not fall under those prongs.

Moreover, the district court could not set aside the judgment under section (1) because Girdler argued that the judgment was void under section (4). *Green v. Gerber*, 2013 MT 35, ¶ 35, 369 Mont. 20, 30, 303 P.3d 729, 736. (Movant "brought its motion to set aside the default judgment under Rule 60(b)(6), and the District Court granted the motion based upon such argument, we analyze the case under that provision of Rule 60(b) and do not analyze whether the motion should have been brought under Rule 60(b)(1)-(5).") Such action would have been a manifest abuse of discretion, as Herman argues in her opening brief.

Girdler also misstates the test for setting aside a judgment. The standard for "good cause" is inapplicable here and the *Essex* case explains the distinction. *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 23, 338 Mont. 423, 431, 166 P.3d 451, 457. Nevertheless, Jeffrey in no way acted with diligence. He chose not to answer in Montana, providing him an advantage in Maryland. He never argues that he did not have adequate notice; because he was informed of the pending lawsuit in Montana but decided not to participate. Moreover, he was neglectful. He missed the trial level options for reconsideration and to dismiss, instead asking the Court to after letting the case go as far as a judgment to set it aside. He is as much responsible for two courts actively litigating this matter as

Herman, and as discussed infra, he is more responsible for the parties incurring unnecessary fees. Girdler's argument that allowing the judgment to stand would cause harm to him is also untrue. There is no property in dispute in the Maryland proceedings. All property was controlled by a prenuptial agreement and Girdler did not plead in his Maryland Complaint requesting a distribution of property.

Girdler cites *Bartell v. Zabawa*, 2009 MT 204, ¶ 22, 351 Mont. 211, 218, 214 P.3d 735, 740, suggesting that "subsection (1) or subsection (6) may apply". Girdler ignores the OR. It was not until *Essex* that the Court imposed an affirmative duty upon the moving party to demonstrate that "none of the other five reasons in Rule 60(b) apply." *Essex,* ¶ 23. This requirement forces a party to address portions of subsection (1) through (5) that may not be connected remotely to their motion. That was not done at the trial level and there is no way to make up for that oversight now.

Herman cannot be expected to make arguments for Girdler. When she filed her pleading *pro se*, she filled out the form and the questions asked. No one can explain why Girdler's alleged Motion to Dismiss was not received and docketed. The Court ruled without this information and Girdler did not immediately move have the court reconsider the judgment. He waited over a month and asked the court to set it aside. Again, "[i]t is not the intent of Rule 60(b)(6) to be a substitute for appeal." *Lussy v. Dye,* 215 Mont. 91, 93, 695 P.2d 465, 466 (1985).

Finally, Herman responds to Girdler that the integrity of legal procedure relies on the correct decisions being made for the *correct* reasons.

B. The Court abused its discretion when it set aside the Montana Decree of Invalidity of Marriage "in the interest of sound judicial administration" under the "first to file rule".

The district court did not properly decline jurisdiction. Logically, the Montana court should decide whether the marriage is annulled before a court were to decide how to dissolve it. Whether a marriage existed to begin with is the preliminary question. Moreover, there is no risk of inconsistent decisions here. Either the marriage is annulled, or it will be dissolved. That risk factor has no relevance in this situation.

Girdler urges the court to consider which form is most convenient for everyone including witnesses. The parties married in Montana. They executed the prenuptial agreement in Montana. The parties resided in Maryland together only briefly, approximately three months. And, again, there is a prenuptial agreement controlling the property, and likely very little utility for witnesses. Witnesses to the marriage and the conduct of the parties leading up to the marriage appear to be the most relevant. Therefore, Herman argues Montana is the correct forum for this dispute. This reasoning is further proof that Herman's actions were in no way an act of forum shopping. There is no evidence that the Montana court would rule

differently than the Maryland court. But as a matter of procedure, Montana has jurisdiction to decide whether the marriage should be annulled.

1. Herman is not litigating the Maryland Appeal in Montana; rather it is necessary for the court to consider the course of the proceedings in Maryland to set aside a judgment and put it in the purview of another Court.

Two courts can have concurrent jurisdiction. When two courts do have concurrent jurisdiction, the court deciding whether to proceed with an action should employ a conflict of laws analysis. To this extent it is necessary to consider the progress in the Maryland action. Herman argues that Girdler was forum shopping and that Montana is the appropriate place to first decide whether this marriage is properly annulled before it is dissolved. For the third time, there is no property at issue. The Maryland pleadings and the prenuptial agreement support this. This simply comes down to the question of whether a valid marriage occurred in Montana.

2. Herman argues that she was deprived of her judgment without the district court following proper procedure to do so.

Herman acknowledges that Girdler argues he was the first to file. Her issue, however, is that neither Girdler nor the district court employed the necessary analysis to set aside the judgment under the first to file rule. Herman further argues that the proper means of challenging the judgment was to file an appeal. The

motion to set aside was a means of evading appeal which would have been more timely but arguably would have provided more significant review than the district court did in this case when deciding the motion to set aside.

3. Girdler's actions to vacate the annulment were unnecessary and Herman does conclude that action was to harass.

The motivation behind Girdler's Maryland filing is of little significance. What is significant, however, is that Girdler vacated a Maryland grant of annulment to pursue an action for divorce in Maryland. For the fourth time, there is no property in dispute. The Maryland action only seeks a decree of divorce and attorney fees. Therefore, Herman sees little reason why Girdler would be so desperate to pursue this other than to harm her and increase her costs.

4. The district court failed to analyze exceptions to the first to file rule.

As stated previously, the district court failed to properly analyze the "first to file rule." There is an exception to the "first to file" rule where a party is forum-shopping or acting in bad faith. *Alltrade, Inc. v. Uniweld Prod. Inc.,* 946 F.2d 622, 627-28 (9th Cir.1991) (The circumstances under which an exception to the first-to-file rule typically will be made include bad faith, *see Crosley Corp. v. Westinghouse Elec. & Mfg. Co.,* 130 F.2d 474, 476 (3d Cir.), *cert. denied,* 317 U.S. 681, 63 S.Ct. 202, 87 L.Ed. 546 (1942); anticipatory suit, and forum shopping, *see Mission Ins. Co. v. Puritan Fashions Corp.,* 706 F.2d 599, 602 n. 3

(5th Cir.1983) ("Anticipatory suits are disfavored because they are aspects of forum-shopping"). At a minimum, Girdler knew that proceeding with divorce in Maryland would inconvenience Herman. Even more overtly, however, Girdler's failure to participate in the Montana litigation can be viewed as forum shopping. He delayed the proceedings in Montana despite having notice to get an advantage in Maryland. This strategic decision substantially increased Herman's legal fees.

Again, seeing that there is no property at issue in the Maryland proceeding, in this matter, annulment and divorce are nearly identical. Logically, however, it must first be determined whether a marriage was valid, before it can be dissolved.

Herman cannot respond to Girdler's intentions pre-dating the filing of his complaint. There is no representation of any notice in the record. Herman's Response to Ex Parte Motion to Set Aside Judgment, containing an affidavit, gives substance to the fact that the parties agreed she would file for annulment. App. 18.

II. HERMAN IS ENTITLED TO FEES FOR THE NECESSITY OF BRINGING THIS APPEAL.

Girdler asserts that he should be awarded attorneys' fees for defending this appeal. But this appeal was necessary. Herman received a judgment; albeit due to Girdler's lack of participation in the suit. The Court granting Girdler's Motion to Set Aside the Annulment could only be resolved by appeal and this Court considering whether the actions of the district court abused their authority.

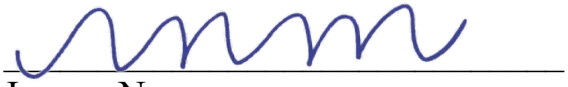
Moreover, Herman argues, for the last time, that there is no property in dispute in the Maryland case. *See* Prenuptial Agreement at App. 3; Maryland Complaint for Limited Divorce at App. 15, Exhibit A. There was no reasonable basis for Girdler to set aside the annulment. In asking the court to set it aside, he is only accomplishing a decree of divorce as opposed to a decree of invalidity of marriage. Nothing else. The expense to both parties is cause by the value of the distinction he puts between the two decrees. Herman argues the value is that it is punitive to her and her religion to have this end in divorce as opposed to an appropriate annulment. Girdler should not be awarded fees for the litigation he caused. If fees are awarded, they should be awarded to Herman.

CONCLUSION

For the foregoing reasons, Herman respectfully requests that the Court reverse the district court's grant of Appellee's motion to set aside judgment, vacate the district court's Order and reinstate the Decree of Invalidity of Marriage, or in the alternative, reverse the district court's dismissal of Appellant's petition for declaration of invalidity of marriage and return the case to the district court for trial on the merits.

Dated: October 17, 2022

Respectfully submitted,



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I certify that, pursuant to M. R. App. P. 11(4), this reply brief is proportionately spaced, has a typeface of 14 points or more, is in Times New Roman font, and contains 2,862 words, as determined by the undersigned's word processing program.

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