

IN THE
Supreme Court of Missouri

JEANNE H. OLOFSON,

Appellant,

v.

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

Respondent.

RESPONDENT'S SUBSTITUTE BRIEF

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

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PRELIMINARY STATEMENT

Appellant moved to set aside the final judgment of dissolution in her divorce action on grounds of alleged fraud by her former husband, who she claimed failed to disclose “insider information” regarding the value of the parties’ shares of publicly traded stock, causing her to agree to an inequitable division of the remainder of their marital estate. Upon the former husband’s death, the trial court denied Appellant’s motion as moot. The court found that even if Appellant could prove fraud and assuming it set aside the portion of the judgment dividing marital property, reallocation of the assets and debts of a non-existing marital estate was not possible. Appellant conceded as much, but argued that the court could still award relief in the form of monetary damages. The trial court correctly rejected this argument because damages are not a remedy available under Rule 74.06 and concluded that it was otherwise unable to award effectual relief, rendering the motion moot. Appellant claims no error on either point. She instead offers an unpreserved, abstract argument as to whether Rule 74.06(b) authorizes courts to set aside the portion of a judgment dividing marital property without disturbing the decree and “un-divorcing” the parties – an issue never presented to or decided by the trial court, but which was passingly addressed in dicta by the Court of Appeals in affirming the decision below. Appellant applied for transfer on essentially this issue, arguing that the Court of Appeals created a conflict between Rule 74.06 and the common law and was wrongly decided, but never attempts to show how the *trial court* erred in its ruling. Only the latter question matters and her utter failure to address it is fatal to this appeal.

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STATEMENT OF FACTS

The Underlying Divorce Proceeding and Settlement

On September 19, 2014, Petitioner/Appellant Jeanne Olofson filed her Petition for Dissolution of Marriage in the Jackson County Circuit Court against her now deceased husband, Tom Olofson. (D5 p. 2.) At the time, Tom Olofson was the Chairman and Chief Executive Officer of Epiq, Systems, Inc. (“Epiq”), a publicly traded company based in Kansas City, Kansas. (D5 p. 2; D14 p. 5.) Tom Olofson was a member of the company’s nine-person Board of Directors, seven of whom were independent, outside directors. (D14 p. 6; D17 p. 22.) The parties’ accumulated shares of Epiq stock represented the largest, but far from only, marital asset.

Following several months of discovery, the parties and their counsel held a settlement conference on January 7, 2016, at which time they agreed to the financial terms of a Separation Agreement. (D5 p. 3; D17 p. 34.) Those terms included the division of a substantial marital estate with significant assets and liabilities beyond simply Epiq stock. (D6 pp. 9-15.) Specifically:

- (a) Petitioner received a condominium in Chicago worth \$5,500,000 (a 75 percent share of the parties’ \$7,300,000 million in real estate assets), in addition to substantial personal property contained therein;
- (b) Tom Olofson agreed to assume *all* \$16,106,806 of marital debt;

- (c) Jeanne Olofson received 1,076,639 shares of the parties' Epiq stock at a stipulated value of \$13.50 per share, totaling nearly \$15 million dollars, while Tom received 2,159,416 shares; and
- (d) The parties agreed to an allocation of “over 20 other substantial items of marital property divided between them.

(D14 pp. 4-6; D17 pp. 22-24; D32 p. 6.) On the same day that the parties agreed to value Appellant’s stock at \$13.50 per share, the market closed with Epiq selling at a price per share of \$11.60. (D14 p. 2; D17 pp. 22-24, 32.)

On February 24, 2016, the trial court entered its Final Judgment and Decree of Dissolution of Marriage incorporating the terms of the parties’ settlement. (D6.)

The EPIC/DTI Merger

On June 26, 2016, Epiq received an offer from OMERS/DTI (“DTI”) to buy the company at \$16.50 per share. (D7 p. 55; D14 p. 26.) The offer was subject to multiple conditions, including the results of Epiq’s quarterly financial performance pending a July 21, 2016 report and approval by Epiq’s Board of Directors. (D14 p. 25.) On July 26, 2016, Epiq and DTI entered into Agreement and Plan of Merger (“Merger Agreement”) (D7 p. 8.) The Merger Agreement was also subject to significant contingencies, including regulatory review, resolution of three pending shareholder class actions challenging the transaction, and shareholder approval of the proposed merger at a specially scheduled meeting on September 27, 2016. (D7 p. 23; D17 p. 37.)

On or about August 24, 2016, Appellant received her Schedule 14A Proxy Statement and notice of the upcoming shareholder meeting attached as Exhibit B thereto (D7).¹ This and related public filings with the Securities and Exchange Commission (“SEC”) detailed Epiq’s strategic review process, the background of events leading to the merger, and the terms and conditions of the Merger Agreement. (D5 pp. 13, 16-19; D7 pp. 33-42.) These conditions were ultimately satisfied and the sale closed on September 30, 2016, almost nine (9) months after the parties’ settlement, and the parties each received \$16.50 per share for their Epic stock provided in the Merger Agreement. (D5 p. 13.)

Petitioner’s Motion to Set Aside Judgment

Just one day short of the one-year deadline prescribed by Mo. R. Civ. P. 74.06(c), on February 23, 2017, Appellant filed a “Motion to Set Aside the Judgment and Decree of Dissolution” on grounds of alleged fraud pursuant to Mo. R. Civ. P. 74.06(b)(2). (D5.)

¹ The following eight exhibits were attached to and incorporated by reference in Petitioner’s Rule 74.06(b)(2) Motion:

- The parties’ February 5, 2016 Judgment and Separation Agreement (D6);
- August 24, 2016 Epiq Proxy Statement (Schedule 14A) on shareholder vote to approve the Merger Agreement (D7);
- Epiq September 20, 2016 Supplemental Proxy Statement (Schedule 8-K) (D8);
- Petitioner’s standard dissolution interrogatories from the underlying divorce action (D9);
- Petitioner’s Second Request for Production of Documents dated January 30, 2015 from the underlying divorce action (D10);
- A proposed protective order from the underlying proceeding (D11);
- Petitioner’s October 26, 2015 third-party subpoena *duces tecum* to Epiq (D12); and
- Petitioner’s December 1, 2015 Motion to Compel Discovery directed to Epiq (D13).

The motion alleged that Tom Olofson made false statements and failed to disclose information about a prospective sale of Epiq stock during discovery in the underlying divorce action and claimed she would not have agreed to accept \$13.50 per share if she had known the facts about the Epiq's sale to DTI contained in Epiq's SEC filings. (D5, pp. 5-7; D17 p. 5.)

In its title, prayer for relief, and at various points in between, Appellant's motion asked the trial court to set aside the "Judgment and Decree of Dissolution" without qualification. (D5 pp. 1, 6, 37.) More specifically, the motion did *not* purport to request that only that portion of the judgment dividing the marital estate be set aside. (D5 pp. 1, 6, 37.)² To the contrary, as her proposed alternative to setting aside the dissolution decree, Appellant asked the trial court to "set aside *portions* [sic] of the Judgment, *so as to effectuate an equitable division of the marital estate including the value of the Epiq stock at \$16.50 per share and the value of Tom's Golden Parachute Benefits.*" (D5 pp. 1, 6-7, 37, emphasis added.) The motion failed to specify the authority and procedure for how the trial court might "effectuate" such a remedy, particularly in the context of proceedings on a Rule

² Appellant's Substitute Brief also states that she "moved the trial court under Rule 74.06(b) to set aside the *dissolution judgment* for fraud" (App. Br. p. 12, emphasis added.) (Elsewhere, she inconsistently and incorrectly describes her motion as seeking to set aside the "division of marital property," but in each instance, her citation to the record below shows otherwise. For example, although she argues that "Tom's misrepresentations were fraud entitling her go set aside the division of the marital estate" (App. Br. p. 16), the portion of the record she cites merely references ten pages of factual allegations ending with a prayer for relief asking for "the Judgment of Dissolution of Marriage" be set aside without qualification.) (D5 pp. 27-37.)

74.06(b) motion. And the record is clear that Appellant was seeking this monetary remedy *in the proceedings on her motion itself*. For example, throughout the briefing to the trial court, she argued:

- A motion to set aside a Judgment pursuant to Rule 74.06(b), as sought by Petitioner, is legally and factually distinguishable from a pre-decree divorce case. It is not an action to modify a Judgment. It is an action to set it aside on the basis of fraud, thus creating an independent legal action for monetary damages, which action does not abate upon the death of the Respondent What was at issue in the pre-decree divorce case was the valuation and division of the parties' marital property. (D32 p. 3.)
- Petitioner filed her Motion to Set Aside the Judgment on February 23, 2017 seeking damages as a result of Tom's fraud that caused financial damage to Petitioner. (D32 p. 4.)
- Since the damages caused by Tom's fraud only relate to the Epiq stock and Golden Parachute Benefits (a/k/a Separation Consideration Following a Change in Control), 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. (D32 p. 18.)

Tom Olofson filed a Memorandum in Opposition to the Appellant's Motion on April 7, 2017. (D14.) He argued that the undisputed facts and sequence of events foreclosed Appellant from showing fraud³ and, even assuming she met her burden and the

³ In addition, Mr. Olofson denied making any false statements and failing to disclose responsive information during discovery in the divorce action. (D14 pp. 3-4, 5-7, 14.) He also argued that the undisputed facts showed that Appellant's fraud allegations failed on their face; namely, that: (a) Epiq did not receive any binding offers to sell the company prior to DTI offer's on June 26, 2016; (b) the June 26, 2016 offer was subject to multiple contingencies that he could neither predict nor control; (c) Epiq and DTI did not actually enter into the Merger Agreement until July 26, 2016; (d) the Merger Agreement was itself subject to myriad contingencies, including regulatory and shareholder approval; and (e) the

judgment were set aside, the sole remedy would be to retry the underlying divorce case, requiring the trial court to reallocate the marital estate, including reapportioning the division of all real and personal property as well as debt pursuant to RSMo § 452.330.1. He argued further that the trial court lacked authority to grant the “alternative relief” of setting aside unspecified “portions” of the judgment dividing property. (D14 pp. 9, 16.) Finally, because Appellant was aware of all facts alleged in her motion by August 24, 2016 at the very latest, yet waited a total of 364 days to file it, Tom Olofson urged the trial court to deny the motion as not having been filed within a “reasonable time” under Rule 74.06(c). *See First Bank of the Lake v. White*, 302 S.W.3d 161 (Mo. App. S.D. 2009) (holding 234-day delay in seeking to set aside judgment unreasonable). (D 14 pp. 34-35; 60-63.)

On April 8, 2017, Tom Olofson died and a motion to substitute his estate, by and through his son Scott Olofson as personal representative, was granted on June 9, 2017. (D19.)

Respondent’s Motion for Judgment on the Pleadings

On December 12, 2017, Respondent moved for judgment on the pleadings, arguing, among other grounds, that Tom Olofson’s death rendered Appellant’s Rule 74.06(b)(2) motion moot because the trial court could not grant meaningful relief having a practical effect on any existing controversy. *See State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (holding that a party fails to present a justiciable case where there is no

sale did not close until September 30, 2016, nine months after the parties’ agreement to settle. (D14 pp. 15-16, 34-40.)

form of meaningful relief that would “have any practical effect upon any then-existing controversy.”) (D24 pp. 6-10.)

In the first instance, since Appellant’s motion purported to ask the trial court to set aside the *dissolution decree* (D5 pp. 1, 6, 37), Respondent argued that Tom Olofson’s death made such relief ineffectual because the proceeding would only revert to the same posture as a pre-decree divorce action, i.e., it would automatically abate, Appellant’s legal status would be changed to widow with a right to elect against the estate, but which, if exercised, would be to her significant economic detriment when compared to the parties’ settlement. (D24 pp. 7-9.) *See Bishop v. Eckhard*, 607 S.W.2d 716, 717-18 (Mo. App. E.D. 1980). (D24 pp. 7-9.) Respondent argued the trial court lacked the authority to grant the “alternative relief” of setting aside unspecified “portions” of the judgment to effectuate an award of money damages, but could only set aside the property portion of the judgment entirely for reallocation between the parties as proscribed by RSMo § 452.330.1, a remedy no longer possible once Tom Olofson died. This constraint aside, to the extent Appellant called upon the trial court to simply revalue the price per share Appellant received for her Epiq stock or award her a share of Tom Olofson’s post-employment benefits, Respondent maintained that such relief would be tantamount to modifying a final judgment dividing marital property, not setting one aside, a remedy not permitted under Rule 74.06(b)(2). *See Spicuzza v. Spicuzza*, 886 S.W.2d 660, 661 (Mo. App. E.D. 1994) (noting that while Rule 74.06 allows “any division of property incorporated or included therein, to be set aside . . . [the rule] makes no provision for the amendment or modification of a judgment, or

for relief from part of a judgment, as was requested.”) (D24 pp. 10-11.) In either event, Respondent asserted that there was no meaningful relief the trial court could grant under Rule 74.06(b)(2) and, therefore, the proceeding below was moot. (D24 p.6-9)

On January 18, 2017, Appellant filed her Memorandum in Opposition to Respondent’s Motion for Judgment on the Pleadings. (D32.) Throughout her Memorandum, Appellant continued to ask the trial court to set aside the “Judgment *and* Decree of Dissolution” without limiting her request to the portion of the judgment dividing the marital estate – only unspecified “portions” relating to the value of her Epiq stock and claim to Tom Olofson’s post-employment benefits. (D32 pp. 6, 15, 17-18.) Appellant did not dispute that RSMo § 452.330.1 required the trial court set aside the entire division of property for reallocation applying the statutory factors, or that Rule 74.06(b)(2) cannot be used to modify such a judgment. Rather, she maintained repeatedly that her motion was not moot because it was an “independent action for damages” that “survived Tom Olofson’s death.” (D32 pp. 4, 11-13, 16, 18-19.) Specifically, Appellant argued:

A motion to set aside a Judgment pursuant to Rule 74.06(b), as sought by Petitioner, is legally and factually distinguishable from a pre-decree divorce case. It is not an action to modify a Judgment. It is an action to set it aside on the basis of fraud, *thus creating an independent legal action for monetary damages*, which action does not abate upon the death of the Respondent What was at issue in the pre-decree divorce case was the valuation and division of the parties’ marital property.

(D32 p. 3.)

In reply, Respondent maintained that Appellant could not avoid mootness by characterizing her motion as an “independent action for fraud” because damages are not a remedy available under Rule 74.06(b)(2). (D33 pp. 2-3.) All the trial court was authorized to do under the rule is set aside the judgment in the original proceeding and retry the full division of property as it would in any dissolution action. (D33 pp. 2, 4-5, 9; D35 pp. 2-3.) Thus, Respondent argued that it necessarily followed that Appellant’s motion did not present any justiciable controversy because she sought a remedy the trial court simply could not award. (D35 pp. 3-5.)

The Trial Court’s Ruling

On May 17, 2018, the trial court issued its order granting judgment on the pleadings and denying Petitioner’s Rule 74.06(b)(2) motion. (D39.) Based on undisputed facts,⁴ the trial court found that it lacked the authority to set aside “portions” of a final judgment to carve out and reallocate isolated assets in disregard of RSMo § 452.330.1. (D39 pp. 2, 7; App. A2, A7.) Notably, however, the trial court *did* presume it had authority to set aside that divisible portion of the judgment allocating the marital estate:

Rather, should she prevail on her motion, the only relief available to Petitioner 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. The Court cannot base reallocation on non-statutory criteria, nor can it revalue only certain marital assets to the exclusion of other statutory factors such as the division of marital debt. Additionally, where, as here, one

⁴ Appellant does not challenge the accuracy of the trial court’s recitation of the undisputed facts, nor claim that there were material issues of fact precluding it from denying her Rule 74.06(b) motion.

party has died and there is no marital estate to reallocate, such relief is impossible.

Id. (emphasis added) (citations omitted).

The trial court further reasoned that Appellant's proposed "alternative relief" to set aside "portions" of the prior judgment dividing marital property to reallocate shares of a single asset in disregard of RSMo § 452.330 was "tantamount to modifying the judgment, which is not permitted under Rule 74.06(b)." (D39 p. 8; App. A8.) Finally, the court rejected Appellant's argument that her Rule 74.06(b)(2) motion could be treated as an independent action for money damages based on the alleged fraud, holding that money damages are unavailable under Rule 74.06(b) as a matter of law. (D39 p. 8; App. A8.)

All the Court is authorized to do under the rule is set aside the judgment in the original proceeding and retry the full division of property as it would in any dissolution action. It cannot grant the motion, set aside the prior judgment and treat the case like a garden-variety civil action for fraud because such relief is not available under Rule 74.06(b).

(D39 p. 8; App. A8.)

For these reasons, the trial court concluded it could not grant meaningful relief because Appellant's Rule 74.06(b)(2) motion failed to present a justiciable controversy. (D39 p. 9; App. A9.) This appeal follows.

SUMMARY OF ARGUMENT

Applying well-established principles of justiciability and mootness, the trial court correctly found that Tom Olofson's death rendered Appellant's Rule 74.06(b) motion moot because there was no longer any form of effectual relief that could be granted. The trial

court reasoned that even if Appellant prevailed in showing fraud, “the only relief available . . . 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.” (A7.) The trial court correctly determined that the passage of time combined with Mr. Olofson’s death made such relief impossible. *Id.* All but conceding this issue, in the trial court. Appellant maintained that her motion was not moot because it could still award relief in the form of money damages. The trial court flatly rejected this argument, finding that damages are not a form of relief available under Rule 74.06.

Appellant does not claim the trial court erred on either point, nor does her principal brief even address these issues. She instead attempts to advance an unpreserved, abstract argument neither presented to nor decided by the trial court; that is, whether Rule 74.06(b) authorizes the setting aside of only the “property portion” of a divorce judgment without also disturbing the decree and “un-divorcing” the parties. It is clear from the trial court’s ruling that it presumed that it did have such authority, but concluded that even assuming the division of property were set aside, it could not grant effectual relief. The Court of Appeals affirmed on this basis, but went on to opine that under Rule 74.06, the trial court could only have set aside the divorce judgment entirely and not simply the portion dividing marital property. Appellant sought transfer on essentially this issue – one that was never decided by the trial court. Appellant’s Substitute Brief is devoted almost entirely to the this hypothetical question and a newly minted argument that the Court of Appeals’ dicta created a conflict between Rule 74.06 and the common law, which Appellant claimed

allowed setting aside only the “property portion” in equitable actions for fraud. But she makes no attempt to show the *trial court* erred in finding it could not award her meaningful relief by, for example, stating precisely what type of effectual relief she maintains the trial court could have awarded but did not.

In other words, Appellant failed to preserve the error set forth in her Point Relied On because she attempts to advance arguments on appeal that were never presented to the trial court in support of her Rule 74.06(b)(2) motion or in opposition to Respondent’s motion for judgment on the pleadings. On appeal, she asks this Court to reverse the trial court’s denial of her motion and remand for a determination whether to set aside the final judgment dividing the marital estate and, if so, presumably reallocate all marital assets and debts in accordance with RSMo § 452.330.1. (App. Br. pp. 42-43) (“Taking Jeanne’s allegations as true, Tom defrauded her in the dissolution action, entitling her to Rule 74.06(b) relief from the division of the marital estate, rather than the dissolution itself.”) But this was *not* the relief she sought below and, in any event, the trial court correctly held that even should it set aside the division of marital property and reopen the dissolution action, there was still no meaningful relief available to Appellant. (D39 at 7; A7.) In fact, she implicitly conceded this remedy was impossible by her request that the trial court set aside unidentified “portions” of the judgment and award her money damages under the theory that her motion was an “independent action for fraud.” (D32 pp. 3, 11-12, 13, 16, 18-19.) The trial court correctly rejected this argument, finding that damages are not available under Rule 74.06(b)(2). (D39 p. 8; A8.)

Even assuming that Appellant had preserved her Point Relied On, she fails to demonstrate that the trial court erred on the theory that a dissolution action does not abate when a party dies post-decree while issues concerning the division of marital property supposedly remain unresolved. For one thing, the proceeding below was not a dissolution action, and issues concerning the division of the parties' marital estate had been resolved in a final, unappealed judgment in effect for almost a full year. The numerous cases in Appellant's brief discussing whether and when a divorce action abates upon the death of a party where there remain unresolved issues concerning property division (which is to say, prior to the date the dissolution decree became unappealable) thus have no application here. Each decision on which Appellant relies involved the death of a party where the dissolution action was still ongoing before the trial court or on appeal, not in the context of a post-judgment motion under Rule 74.06(b)(2). Appellant has not cited and Respondent has not located any Missouri case supporting the proposition that Rule 74.06(b) authorizes a trial court to reconsider issues relating to the division of marital property after those issues were resolved in a final judgment and after a party to the divorce proceeding has died. Moreover, Appellant's reliance on these cases to argue that her motion was not moot because it involves her "property rights" cannot be reconciled with her position below that her motion constituted "an independent action for damages" and not a "continuation" of the underlying divorce action.

Additionally, although the trial court did not reach the issue, Appellant's Rule 74.06(b) Motion was also barred by the doctrines of *res judicata* and claim preclusion.

All of the purported misstatements and non-disclosures of “internal” information on which her fraud claim is based are alleged to have occurred during pretrial discovery. Her alleged right to this information was the subject of two fully briefed discovery motions left pending when the parties agreed to settle on January 7, 2015. Because she had the full and fair opportunity to litigate this issue but decided to settle the case without first obtaining a ruling, *res judicata* bars her from using Rule 76.04 to obtain a second bite at the proverbial apple.

Finally, even if Appellant had preserved her claim of error and the trial court erred in dismissing her motion as moot, the judgment below should be affirmed because the record reveals that her Rule 74.06(b)(2) motion was not filed within a reasonable time. *See* Rule 74.06(c). Appellant concedes that all facts alleged in her Rule 74.06(b)(2) motion were known to her on or before August 24, 2016, six months after the judgment. But she waited another six months to file her motion, fully 364 days after entry of final judgment. There is nothing in the record explaining the reason for this delay, nor a good cause for disregarding the importance of protecting the finality of judgments. Although the trial court did not reach the timeliness issue, this Court will affirm its ruling for any reason supported by the record. The record below as well as Appellant's own admissions can leave little doubt that her motion was not filed within a reasonable time and this Court should affirm the trial court's order dismissing her Rule 74.06(b)(2) motion on this basis as well.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT’S MOTION AS MOOT BECAUSE IT CORRECTLY FOUND THAT THERE WAS NO LONGER A CONTROVERSY FOR WHICH MEANINGFUL RELIEF COULD BE GRANTED IN THAT THE COURT COULD NOT REALLOCATE THE ENTIRE MARITAL ESTATE OR AWARD DAMAGES UNDER RULE 74.06(b)(2).

Central Trust Bank v Graves, 495 S.W.3d 797, 801 (Mo. App. W.D. 2016)

McCullough v Commerce Bank, 349 S.W.3d 389, 395 (Mo. App. W.D. 2011)

Blanks v. Fluor Corp., 450 S.W.3d 308, 383 (Mo. App. E.D. 2014)

Anderson v. Anderson, 869 S.W.2d 289, 292 (Mo. App. S.D.1994)

I. THE TRIAL COURT CORRECTLY DENIED APPELLANT’S RULE 74.06(b) MOTION AS MOOT BECAUSE SETTING ASIDE THE FINAL JUDGMENT OR DIVISION OF THE MARITAL ESTATE WOULD HAVE NO PRACTICAL EFFECT ON AN EXISTING CONTROVERSY.

A. STANDARD OF REVIEW.

An order denying a motion under Rule 74.06(b)(2) is reviewed only for an abuse of discretion.⁵ See *McCullough v Commerce Bank*, 349 S.W.3d 389, 392 (Mo. App. W.D. 2011) (“The trial court is vested with broad discretion when acting on a motion to vacate a

⁵ The trial court denied Appellant’s Motion to Set Aside Judgment and dismissed it with prejudice, while at the same time granting judgment on the pleadings. (D39 pp. 1-9; App. p. A1, A9.) Appellant’s Notice of Appeal references only the trial court’s denial of her Rule 74.06(b)(2) motion as the order appealed from. *Anderson v. Anderson*, 869 S.W.2d 289, 292 (Mo. App. S.D. 1994) (holding that the appellant failed to adequately identify judgment appealed from where notice of appeal made no reference to earlier order entering partial judgment). Appellant’s Jurisdictional Statement in her brief also states that “[t]his is an appeal from a judgment of the Circuit Court of Jackson County dismissing a Rule 74.06(b)(2) action seeking to set aside a division of a marital estate for fraud.” (App. Br. p. 8.) Under the circumstances, Respondent respectfully suggests that the abuse of discretion is the proper standard of review.

judgment pursuant to Rule 74.06 and this Court will not interfere with that action unless the record convincingly demonstrates an abuse of discretion.”) (citing *Clark v. Clark*, 926 S.W.2d 123, 126 (Mo. App. W.D. 1996)). “A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 97-98 (Mo. banc 2010).⁶

B. THE TRIAL COURT CORRECTLY HELD THAT APPELLANT’S MOTION WAS MOOT BECAUSE IT COULD NOT AWARD EFFECTUAL RELIEF FOLLOWING TOM OLOFSON’S DEATH.

It is axiomatic that “Missouri courts do not determine moot causes of action.” *River Fleets, Inc., v. Creech*, 36 S.W.3d 809, 813 (Mo. App. W.D. 2001) (citations omitted). “When an event occurs that makes a court’s decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed.” *Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App. 1999). To avoid mootness, there must be a “presently existing controversy” between the parties and one

⁶ If construed as an appeal from the trial court’s grant of Respondent’s motion for judgment on the pleadings, this Court will employ a *de novo* standard of review to determine “whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.” *Claudia Lee & Associates v. Kansas City, Missouri Board of Zoning Adjustment*, 489 S.W.3d 802, 809 (Mo. App. W.D. 2016) (quoting *Emerson Electric Co. v. Marsh & McLennan Companies*, 362 S.W.3d 7, 12 (Mo. banc 2012)) (internal quotations omitted). The trial court’s grant of judgment on the pleadings will be affirmed if review of the totality of the facts pleaded by the petitioner and the benefit of all reasonable inferences drawn therefrom reveals that petitioner could not prevail under any legal theory. *Id.* Under either standard of review, the judgment below should be affirmed.

that is capable of redressing “specific relief,” not an advisory or hypothetical situation. *River Fleets*, 36 S.W.3d at 813; *see also State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (holding that a party fails to present a justiciable case where there is no form of meaningful relief that would “have any practical effect upon any then-existing controversy”). (Internal citations and quotations omitted.) Appellant’s Rule 74.06(b)(2) motion presented no such controversy.

Specifically, Appellant requested two forms of relief in her Rule 74.06(b) motion. First, she asked the Court to set aside the underlying decree of dissolution entirely, not simply that portion of the judgment dividing the parties’ marital estate. (D32 pp. 6, 15, 17-18.) Second, in the alternative, she proposed that the Court could award her monetary damages because she claimed that her Rule 74.06(b) motion was not a “continuation of the divorce case,” but an “independent legal action for monetary damages” that was “factually and legally distinguishable from a pre-decree divorce case” and which survived Tom Olofson’s death, making abatement inapplicable. (D32 pp. 3, 11-12, 13, 16, 18-19.) As discussed below, the trial court correctly concluded that neither form of relief would be effectual under the facts presented.

1. THE TRIAL COURT CORRECTLY HELD THAT IT EVEN IF APPELLANT COULD SHOW FRAUD, IT STILL COULD NOT SET ASIDE THE DIVISION OF MARITAL PROPERTY FOR REALLOCATION.

Her arguments on appeal notwithstanding, and although Appellant never expressly asked the trial court to set the divisible portion of the judgment allocating the marital estate, the trial court presumed that it had authority to do so, reasoning that “should she prevail on

her motion, the only relief available to Petitioner 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.”(D39 p. 7-8; A7.)

Here, the original allocation of the marital estate involved valuation and division assets and debt well beyond simply the parties’ Epiq stock. For example, Appellant received a condominium in Chicago worth \$5,500,000 (a 75 percent share of the parties’ \$7,300,000 million in real estate assets) in addition to substantial personal property contained therein. Further, Tom Olofson agreed to assume *all* \$16,106,806 of marital debt, while Jeanne assumed none. The also parties agreed to an allocation of “over 20 other substantial items of marital property divided between [them].” (D14 pp. 4-6; D17 pp. 22-24; D32 p. 6.)

Missouri law is clear that where a judgment dividing marital property is set aside, courts are required to conduct a full reallocation of the marital estate. *See e.g., Freeman v. Freeman*, 586 S.W.2d 386, 387 (W.D. Mo. 1979) (reversing trial court’s division of property where trial court failed to take into account value of the husband’s separate property as required under in RSMo § 452.330); *Selby v. Selby*, 149 S.W.3d 472, 483 (Mo. App. W.D. 2004) (holding that trial court erred in finding farm to be husband’s separate property and remanding case for “a new division of marital property with that interest included”); *In re Marriage of Strobel*, 2019 WL 5157015 *2 (Mo. App. S.D. Oct. 15, 2019) (noting that husband could not “pick out two particular slices of the property division cake without identifying how those slices fit into the context of the trial court’s overall division of

property and debt.”). The problem here, the trial court observed, was that given Tom Olofson’s death and the passage of time, it was no longer possible to reallocate the entire division of property, including the assets and debts noted above. (D39 p. 7-8; A7.)

Stated differently, the trial court found that setting aside and trying to reallocate piecemeal portions of the larger marital estate would be tantamount to modifying the judgment rather than setting it aside. (D39 p. 7; App. A7.) Such relief was also not possible because Missouri courts have long held that Rule 74.06(b) cannot be used to alter or modify a final, unappealed judgment dividing marital property. *In re Marriage of Rolfes*, 187 S.W.3d 355, 357-58 (Mo. App. S.D. 2006). *See also Settles v. Settles*, 913 S.W.2d 101, 102-03 (Mo. App. S.D. 1995) (reversing trial court’s grant of husband’s Rule 74.06(b) motion seeking return of certain personal property and damages for destruction of other items and holding that motion improperly sought to modify, not set aside, final judgment). “A division of marital property . . . is not subject to modification after the decree becomes final.” *Id.* at 103; *Spicuzza v. Spicuzza*, 886 S.W.2d 660, 661 (Mo. App. E.D. 1994) (similar).

Thus, the trial court correctly held that, even if Appellant could prevail in showing fraud and the judgment dividing the estate were set aside, the reopened dissolution action would still be moot not because of abatement, but because it was not possible to grant effectual relief consistent with the mandate RSMo § 452.330.1. *See Kratzer v. Kratzer*, 520 S.W.3d 809 (Mo. App. E.D. 2017) (noting that “[t]rial courts must divide marital property equitably after considering the factors laid out in § 452.330.1.”).

Appellant fails to show the trial court erred in this determination, nor does she provide any examples of cases where isolated assets of a marital estate divided and incorporated into a final judgment were “set aside” piecemeal without the court conducting a full reallocation of the remainder of the estate. The closest she comes is to argue that the trial court erred in holding it could not reallocate a marital estate which no longer existed because “[i]f any-thing, the sale of the Epiq stock renders the marital estate easier to value and allocate because it is all cash.” (App. Br. p. 33.) This argument is unavailing for myriad reasons. First, it wrongly implies that Epiq stock was the parties’ only marital asset and that it somehow equates to the “marital estate.” Second, it mischaracterizes Appellant’s purported claim for money damages in the trial court as the functional equivalent of a court-ordered equalization payment in a divorce action. *Id.* (citing *Schutter v. Seibold*, 540 S.W.3d 494, 497 (Mo. App. 2018)). The proceeding below was not a divorce action and monetary relief was not available either in the form of damages or an “equalization payment.” Third, while a dissolution court does have authority to order equalization payments to achieve a more equitable division of property in a divorce proceeding, it can only do so as to the entire marital estate, all assets and debts, and apply the statutory factors. *Miller v. Miller*, 184 S.W.3d 174, 184 (Mo. App. 2006) (noting that a trial court has “no discretion or leeway to leave out of its analysis any marital property or marital debt when deciding what is a fair and equitable distribution thereof.”). Here, the trial court could not order the Estate to make an “equalization” payment to make the previously agreed upon settlement “more equitable” by awarding Appellant cash payment for her stock without at

the same time allocating the entire marital estate. *Id.* As the trial court properly found, such a remedy would have been impossible.

2. THE ABATEMENT ON DEATH DOCTRINE HAS NO APPLICATION TO THE DECISION BELOW.

Rather than attempt to show the court erred in finding it could not award effectual relief, Appellant relies on the inapposite argument that Mr. Olofson's death did not trigger the doctrine of abatement-on-death applied in divorce actions. (D39 pp. 6-7; App. A6-7; App. Br. 32-33.) Specifically, she maintains that the trial court erred because "the doctrine of abatement is inapplicable 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*." (App. Br. p. 21) (citing *Linzenni v. Hoffman*, 937 S.W.2d 723 (Mo. banc 1997) (emphasis supplied)). She cites *Linzenni* for the proposition that "where a party dies after the entry of a dissolution decree, any issues concerning property division remain litigable," appearing to imply they remain so indefinitely. (App. Br. p. 31.)

But the proceeding on the motion below was *not* a divorce action; the doctrine of abatement-upon-death did not apply to proceedings on her Rule 74.06 motion, and the trial court did not find that it did. To the contrary, the trial court held that Appellant's motion was moot because it could issue no meaningful relief and her motion presented no justiciable controversy, not simply because Tom Olofson had died. (D39 p. 9; A9.) *See River Fleets*, 36 S.W.3d at 813.

Linzenni and the other abatement cases cited by Appellant are therefore inapt and merely stand for the unremarkable proposition that party to a divorce action is entitled to

have all unresolved issues concerning division of marital property finally decided *in the same dissolution proceedings*. See *In re Marriage of Carter*, 794 S.W.2d 321, 322 (Mo. App. 1990) (noting that “[w]hen the issue of marital status has been resolved by a decree dissolving a marriage . . . , 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*.”). (Emphasis added.) Thus, these cases are also distinguishable because they involved dissolution actions that were “ongoing” – that is, proceedings still pending before the trial court or on appeal when one party dies before entry of a dissolution decree, thus abating the proceeding; or after entry of the decree, in which case the deceased party's estate is substituted for the decedent and the surviving party is entitled to a determination concerning unresolved issues on the division of marital property. See, e.g., *Linzenni*, 937 S.W.2d at 726 (holding that trial court’s “worksheet” filed prior to husband’s death during divorce action was a valid order dissolving marriage to which doctrine of abatement was not applicable); *Cregan v. Clark*, 658 S.W.2d 924 (Mo. App. W.D. 1983) (action did not abate where husband died on direct appeal pending); *Fischer v. Seibel*, 733 S.W.2d 469 (Mo. App. W.D. 1987) (death of husband where new trial motion was pending did not abate action where there remained undecided issues of maintenance and property division.). None of these cases involved proceedings on a Rule 74.06 motion.

The cases decided under Rule 74.06 on which Appellant relies are equally inapposite; all simply state the obvious principle that Rule 74.06(b)(2) authorizes courts to set aside divorce judgments upon a showing of fraud. See, e.g., *Hewlett v. Hewlett*, 845

S.W.2d 717, 719-22 (Mo. App. 199); *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). None concerned the question presented here of whether a Rule 74.06 motion was rendered moot by the death of the non-movant. Moreover, in each decision where a judgment was set aside on grounds of fraud or otherwise, unlike the present case, the court was able to reallocate the entire marital estate between the parties as mandated by RSMo § 452.330.1.

3. THE TRIAL COURT COULD NOT AWARD EFFECTUAL RELIEF IN THE FORM OF MONEY DAMAGES WHICH ARE UNAVAILABLE UNDER RULE 74.06(b).

Although unapparent from her appellate briefing, it is not an understatement to say that her primary, if not only, argument below was that her Rule 74.06(b) motion was not rendered moot by her former husband's death because the proceeding was really "an independent action for fraud" and the trial court could award her meaningful relief in the form of money damages. (D32 pp. 17-20.) The trial court correctly held that such relief is simply not available under Rule 74.06(b)(2) and that, even upon a showing of fraud, all it was authorized to do was set aside the judgment. (D39 p. 8-9; App. A8-9.)

Despite frequent references to her Rule 74.06(b) motion as asserting a fraud claim for money damages, Appellant offered the trial court no supporting authority that such relief is even available on a motion to set aside a judgment. While courts in a variety of contexts have described motions under Rule 74.06(b) as "independent actions in equity," Respondent is aware of no Missouri cases holding that a party may use Rule 74.06(b) to assert a new claim for money damages based on fraud or other legal theory. Interpreting

the analogous federal rule, Fed. R. Civ. P. 60(b), the United States Supreme Court held long ago that the only remedy it provides is equitable and is limited to setting aside the judgment in question. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944); *see also Coultas v. Payne*, 2016 WL 740421 *4 (D. Ore. Feb. 24, 2016) (“Due to those equitable origins, no court has found that fraud on the court is an independent legal cause of action for which a plaintiff may recover damages.”); *Pellegrini v Fresno County*, 2017 WL 1348864 *22 (E.D. Ca. April 4, 2017) (same); *Florida Evergreen Foliage v El Du Pont De Nemours Co.*, 135 F. Supp. 2d 1271, 1288 (S.D. Fla. 2001) (holding that Fed. R. Civ. P. 60(b) does not authorize independent action for fraud); *Whitty v First Nationwide Mortg. Corp.*, 2007 WL 628033 *10 (S.D. Ca. Feb. 26, 2017) (“Plaintiffs are not requesting that a judgment be set aside, but are requesting damages, which are not available under rule 60(b).”).

Missouri courts have recognized that the federal rule is essentially identical to Rule 74.06(b). *See Anderson v Central Missouri State University*, 789 S.W.2d 41, 43 (Mo. App. W.D. 1990) (noting that Rule 74.06(b) is the functional equivalent Rule 60(b) and that federal cases construing the latter are persuasive authority in Missouri courts). As the trial court noted, Appellant cited no contrary authority from Missouri or other jurisdictions, nor did she offer any reason why Rule 74.06(b)(2) should be construed differently than the counterpart federal rule. (D39 p. 9; App. A9.) Thus, even had she preserved her damages theory, she has not attempted to show the trial court erred and the ruling below should therefore be affirmed.

II. APPELLANT'S SUBSTITUTE BRIEF IMPROPERLY ATTEMPTS TO ADVANCE NEW ARGUMENTS AND LEGAL THEORIES ON APPEAL.

“[A]n appellant must properly preserve their allegations of error in order to secure review on appeal.” *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 383 (Mo. App. E.D. 2014). “A point is preserved for appeal only if it is based on the same theory presented at trial.” *Id.* at 384. It is therefore axiomatic that “a party cannot rely on one theory to set aside a judgment before the trial court then, when unsuccessful, rely upon a different theory on appeal.” *McCullough v Commerce Bank*, 349 S.W.3d 389, 395 (Mo. App. W.D. 2011) (citing *Anderson v. Anderson*, 869 S.W.2d 289, 292 (Mo. App. S.D.1994)); *see also Whale Art Co., Inc. v. Docter*, 743 S.W.2d 511, 515 (Mo. App. E.D. 1988) (“An appellant is bound by the theory submitted to the trial court, and is not permitted on appeal to seek new or different relief or to change that theory.”); *Blanks*, 450 S.W.3d at 383 (“A party may not advance a new [theory] on appeal . . . [n]or may the party *alter or broaden* the scope of the [theory] voiced at trial.” (*Id.*, emphasis supplied); *Central Trust Bank v Graves*, 495 S.W.3d 797, 801 (Mo. App. W.D. 2016) (issue is not preserved for review if the appellant’s theory “has morphed from that presented below.”).

Appellant’s theory and the relief sought have morphed beyond recognition from what she argued below. Her Rule 74.06(b)(2) motion asked the trial court “to set aside the Judgment incorporating the Separation Agreement or, *in the alternative*, set aside unspecified *portions* of the Judgment, so as to effectuate an equitable division of the marital estate including the value of the Epiq stock at \$16.50 per share and the value of Tom's Golden

Parachute Benefits.” (D5 pp. 6-7, emphasis added.) Specifically, Appellant argued that her Rule 74.06(b)(2) motion was not a “continuation of the divorce case,” but an “independent legal action *for monetary damages*” that was “factually and legally distinguishable from a pre-decree divorce case” and which survived Tom Olofson’s death, making abatement inapplicable. (D32 pp. 3, 11-12, 13, 16, 18-19.) (Emphasis added). And, although Appellant at points couched her motion as somehow implicating her “property rights” (D32 pp. 15, 18), the record below could not be more clear that the actual remedy sought below was money damages.⁷

In the Court of Appeals, Appellant ignored the critical fact that she sought a different remedy below and makes no attempt to show the trial court erred in holding that damages are not a form of relief available under Rule 74.06(b). Her Point Relied On asserts that the trial court erred in dismissing her motion as moot 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.” (App. Br. p. 24.) But the proceeding below was *not* a dissolution action and, once Tom Olofson died, Appellant took the position that her Rule 74.06 motion was not moot because she was entitled to money damages – an argument that appears nowhere

⁷ While Appellant’s Preservation Statement asserts that “Jeanne made the argument in this [Point Relied On] in her opposition to the Estate’s motion for judgment on the pleadings” (App. Br. p. 27), the portions of the record cited all reference the argument below attempting to advance the same damages theory which the trial court rejected – none argue that the trial court erred in failing to set aside the severable portion of the judgment dividing marital property. (D32 pp. 3, 11-16; D34 pp. 2-3.)

in her appellate briefing. As a result, she has failed to preserve the error claimed in her Point Relied On and this Court should dismiss her appeal for this reason alone. *See, e.g., S. v. S.*, 595 S.W.2d 357, 363 (Mo. App.1980) (held that the wife who argued at trial that her husband was the father of the child could not ask the court on appeal to review the case on a different theory than the one she proceeded on in the trial court when she attempted on appeal to argue non-paternity); *Roche v. Roche*, 289 S.W.3d 747, 754 (Mo. App. 2008) (“We will not now allow Husband to use this Court as a pawn and change his theory on appeal because he is dissatisfied with the trial court’s Judgment.”); *Anderson v. Anderson*, 869 S.W.2d 289, 292 (Mo. App. S.D.1994) (“A party cannot try his case on one theory in the trial court and, if unsuccessful, rely upon a different theory on appeal.”).

On transfer to this Court, Appellant shifted her argument even more. Her Substitute Brief now attempts to advance an unpreserved, abstract argument neither presented to nor decided by the trial court; that is, whether Rule 74.06(b) authorizes the setting aside of only the “property portion” of a divorce judgment without also disturbing the decree and “un-divorcing” the parties. This argument appears directed at the Court of Appeals’ observation that “if Rule 74.06(b) is applied then the entire dissolution judgment must be set aside” (Op. at 11), which Appellant erroneously tries to attribute to the trial court. (Br. p. 28). Appellant sought transfer based on essentially this issue – one that was never decided by the trial court, claiming the Court of Appeals’ construction of Rule 74.06 was in conflict

with the common law, which allowed courts to set aside only the “property portion” in equitable actions for fraud.⁸

At best, this is no more than an unpreserved argument on a hypothetical question unrelated to whether the trial court erred. As clearly stated in its decision, the trial court presumed it did have authority to set aside the division of marital property only leaving the decree itself undisturbed. (D39 pp. 2, 7; App. A2, A7.) Specifically, the court found that even assuming Appellant could prove fraud, “the only relief available to Petitioner 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,” relief it found would be both impossible and ineffectual for all of the reasons discussed above. *Id.* The Court of Appeals affirmed on this basis, Appellant failed to show the trial court erred in so holding, and it is immaterial to this appeal whether the cited passage from the appellate opinion was a correct statement of the law. *See Williams v. Hubbard*, 455 S.W.3d 426, 432 (Mo. banc 2015) (noting that Rule 83.08(a) “emphasizes that the question is not whether the court of appeals was correct but whether the trial court’s judgment should be affirmed, reversed, or vacated and remanded.”)

⁸ See Appellant’s Motion for Rehearing or Transfer, p. 11) (“For the first time in any decision concerning Rule 74.06(b) since the Rule’s adoption in 1988, the Court [of Appeals] holds that the Supreme Court’s adoption of that Rule changed the common law standards for setting aside a judgment for fraud – such that Jeanne no longer can request what she would have been able to before Rule 74.06(b)”).

III. APPELLANT'S MOTION IS PRECLUDED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AS A MATTER OF LAW.

The doctrine of *res judicata* refers to the effect of a prior judgment on a subsequent judicial proceeding. *Griffith v. Hammer*, 595 S.W.2d 292, 294 (Mo. App. E.D. 1979). Collateral estoppel is one aspect of *res judicata*, and precludes the same parties from relitigating issues previously adjudicated. *People's Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 7 (Mo. App. W.D. 1980). "[C]laim preclusion [] precludes a litigant from bringing, in a subsequent lawsuit, claims that should have been brought in the first suit." *Dahn v. Dahn*, 346 S.W.3d 325, 331 (Mo. App. W.D. 2011)), quoting *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 715 (Mo. banc 2008). If a subsequent claim arises out of the same act, contract, or transaction, the claim is barred by the original judgment. *Id.* The doctrine of *res judicata* applies to all final judgments, including dissolution decrees. *Dahn*, 346 S.W.3d at 325. It is incumbent upon the parties to exercise reasonable diligence and bring all issues before the court that belong to the subject matter of their litigation. *Id.* Resolution of issues of child custody and support, spousal maintenance and the division of marital property are core functions of a dissolution court. *Id.* at 336; *see also Reimer v Hayes*, 365 S.W.3d 280, 283-84 (Mo. App. W.D. 2012). Accordingly, a party to a dissolution action who has been provided a full and fair opportunity to litigate these issues is bound by the final decree resolving them as with any final judgment.

A. CLAIM PRECLUSION IS STRICTLY APPLIED TO MOTIONS UNDER RULE 74.06(b).

Because a motion to set aside judgment seeks to reopen a previously adjudicated proceeding rather than commence a new action, to protect the interest in finality of judgments, Missouri Courts routinely apply *res judicata* principles stringently when deciding motions pursuant to Rule 74.06(b). *See Spino v. Bhakta*, 174 S.W.3d 702, 706 (Mo. App. 2005) (noting that a motion to set aside judgment filed in the same proceeding is an “independent action” only insofar as “the trial court’s order granting or denying the motion to set aside the default judgment is itself a separately appealable final judgment assuming that all other prerequisites of appellate jurisdiction and finality are met.”) Thus, preclusion principles apply to bar a party from raising arguments in a Rule 74.06(b) motion where that party has previously raised the identical arguments prior to the entry of final judgment in the underlying action. *Id.* at 707–08.; *see also Cain v. Porter*, 309 S.W.3d 387, 390 (Mo. App. W.D. 2010) (similar); *Allison v. Allison*, 253 S.W.3d 91, 95 (Mo. App. S.D. 1995) holding that (Rule 76.04(b) motion filed 11 months after judgment “cannot be used to evade effects of *res judicata* and collateral estoppel.”). Stated differently, equity imposes additional constraints on Rule 74.06(b) beyond traditional principles of *res judicata* that are designed to prevent parties from avoiding claim and issue preclusion when attempting to set aside a final judgment, including the requirement that the alleged fraud denied the moving party a full and fair opportunity to litigate an issue in the underlying proceeding. As the Western District Court of Appeals has explained:

Equity, as it relates to a claim of fraud, will not permit a new trial unless it involves fraud that prevents a party from having a trial or from the full presentation of its case. That long-standing and common sense rule of law remains today. Irrespective of whether the fraud is identified as intrinsic or extrinsic, there can be no basis for setting aside a judgment unless one party prevented the other party, through fraud, “from fully exhibiting and trying his case”. . . . Even if the defendant’s testimony was perjured under the facts of this case, it did not prevent the plaintiffs from completing a full presentation of the defendant’s net worth. The present contest before the trial court is no more than an attempt to re-examine a matter that was before the court in the underlying action. Plaintiffs decided to present no evidence on that issue and, even though an adverse result occurred, they must be bound by that decision.

State ex rel Missouri-Nebraska Exp. Inc. v Jackson, 876 S.W.2d 730, 734 (Mo. App. W.D. 1994) (quotations and citations omitted).

As these cases demonstrate, in the context of Rule 74.06(b)(2), the application of *res judicata* and collateral estoppel principles to such proceedings is straightforward because they invariably involve the same parties, disputes, and legal issues, thus requiring the movant to further demonstrate that the alleged fraud prevented a full and fair opportunity to litigate their claims. *Id.* Appellant’s attempt to recast her Rule 74.06 motion as an independent action for damages based upon alleged fraud does not change this analysis, particularly given that the rule does not permit her to assert such a claim for the reasons noted above.

B. APPELLANT COULD HAVE LITIGATED THE FRAUD CLAIM ALLEGED IN HER RULE 74.06(b) MOTION BUT DELIBERATELY ABANDONED IT.

Around the time that Appellant filed the underlying divorce action, Epiq had formed an internal Strategic Alternatives Review Committee (“SARC”) comprising select members of its Board of Directors and company executives, of which Tom Olofson was an “ex-officio” (i.e., non-voting) member. (D14 pp. 6, 13; D17 pp. 30-33.) The purpose of the SARC was “to explore a full range of strategic and financial alternatives, including among other things, acquisitions, divestitures, or a going private-recapitalization transactions, in order to determine a course of action that is in the best interest of all shareholders.” (D5 pp. 5, 25-26.)

Aware that Epiq was actively pursuing the possible sale of the company, Appellant's then-counsel, Bradley Manson (“Manson”), sought discovery from Tom Olofson and Epiq concerning the company's strategic review process, minutes of board meetings, the activities of the SARC, offers to purchase Epiq, and the effect of the possible sale of Epiq on its stock price as well as potential impact on Tom Olofson's continued employment and post-separation compensation. (D5 pp. 7-10, D9; D10; D12 pp. 2-4.) Epiq and Mr. Olofson objected to this discovery as seeking confidential, non-public information regarding the plans or condition of a publicly traded company that could provide a financial advantage

when used to buy or sell shares of that or another company's securities (i.e., "insider information"), the disclosure of which risked violating federal securities laws. (D5 pp. 6-7; D12 pp.2-4; D14 p. 18.)⁹

On December 1, 2015, Manson filed a motion to compel third-party discovery¹⁰ directed to Epiq, arguing that "[t]he information sought, by testimony and the documents requested, is crucial to determining the value and division of the parties' net worth." (D12, p. 6.) On December 14, 2015, Manson deposed Tom Olofson in the underlying divorce proceeding and had the opportunity to question him extensively about the activities of the SARC, offers to purchase Epiq, the potential sale of the company, Mr. Olofson's opinion regarding the value of Epiq stock and related matters. (D13.) Mr. Olofson testified that Epiq had not yet received any binding offers but that the strategic review process was ongoing. (D5 pp. 10-11; D14 pp. 14-17; D17 pp. 48-50.)

Manson never sought a hearing on his motion to compel from the Kansas court, nor did he raise this issue in pleadings or motions before the trial court below. (D14 pp. 14-17, 19; D17 pp. 33-34.) Instead, knowing she lacked the information at issue in the motion to

⁹ As a publicly-held company, Epiq and Tom Olofson argued that they were subject to stringent rules, regulations, and laws, including not to disclose to anyone outside of the company any non-public information that could in turn be used in connection with the purchase or sale of company stock. (D17 p. 37.) *See* 15 U.S.C. § 77j, *et seq.*; 17 C.F.R. §§ 240.10b5-1, 240.10b5-2.

¹⁰ The Motion to Compel was filed in the Johnson County, Kansas District Court, which issued Appellant's third-party subpoena to Epiq. (D5 p. 10.)

compel and fully aware that Epiq could still be sold at a higher price per share in the future, Appellant nonetheless agreed to the parties' property settlement on January 7, 2016.

C. BECAUSE APPELLANT HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HER FRAUD ALLEGATIONS IN HER DIVORCE ACTION, COLLATERAL ESTOPPEL PRECLUDED HER FROM USING RULE 74.06(b) TO ATTACK THE FINAL, UNAPPEALED JUDGMENT.

Where, as here, a party has the full and fair opportunity to litigate issues but fails either to assert claims that could have been brought in the proceeding, or develop facts in support of those claims, the entry of final judgment precludes that party from re-litigating the same claims or issues in a subsequent proceeding. *See Dahn*, 346 S.W.3d at 325. In *Dahn*, for example, the husband and wife agreed to a division of property that gave the husband sole ownership of bank accounts into which shareholder distributions from their closely-held corporation were deposited. *Id.* at 328. The parties reached their agreement, incorporated into a final decree, even after the wife was made aware through discovery that the husband had endorsed certain checks made payable solely to wife. *Id.* at 327. Following dissolution of parties' marriage, the wife sued her former husband for conversion and breach of fiduciary duty, alleging that the husband had misappropriated the checks and seeking compensation of the value of the allegedly misappropriated marital property. *Id.* at 332-33. The Court found that the wife's claims were based on the same "aggregate of operative facts," that she had the full and fair opportunity for discovery and to litigate the same issue in her divorce proceeding and, accordingly, her action was barred by *res judicata*. *Id.* at 334. *See also Yates v. Yates*, 680 S.W.2d 361, 363-64 (Mo. App.

E.D.1984) (ex-husband's later conversion claim held barred by *res judicata* based on an earlier dissolution judgment in which parties had the opportunity to litigate the disputed value of farm equipment); *Miller v. Hubbert*, 804 S.W.2d 819, 820 (Mo. App. E.D. 1991) (noting that party cannot avoid *res judicata* by simply claiming they were denied a full opportunity to litigate an issue because of insufficient or even false information produced during discovery in a prior proceeding).

Here, the record is plain that Appellant had the full opportunity to litigate all of the issues raised in her motion, including the opportunity to obtain the same information she now claims was withheld from her, yet without which she knowingly agreed to the terms of the parties' Separation Agreement and incorporated in a final, unappealed judgment. Collateral estoppel precluded her from using Rule 74.06 to re-litigate the same dispute, affording yet another basis for affirming the decision below.

IV. THIS COURT CAN AND SHOULD AFFIRM DENIAL OF APPELLANT'S RULE 74.06(b) MOTION BECAUSE THE RECORD DEMONSTRATES IT WAS NOT FILED WITHIN A REASONABLE TIME.

A. STANDARD OF REVIEW.

Even where the trial court's rationale is in error, because this Court is "primarily concerned with the correctness of the trial court's result," the judgment below will be affirmed "if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient." *Jaco v. Jaco*, 516 S.W.3d 429, 432 (Mo. App. 2017) (quoting *Blue Ridge Bank & Tr. Co. v. Trosen*, 221 S.W.3d 451, 457 (Mo. App. 2007); see also *State ex rel. Div. of Child Support Enforcement v. Hill*, 53 S.W.3d 137, 143

(Mo. App. 2001) (“[I]n reviewing a judgment of dismissal, this court must affirm the dismissal ‘if it can be sustained on any ground which is supported by the motion to dismiss, regardless of whether the circuit court relied on that ground.’”)

The decision to deny a Motion to Set Aside is within the discretion of the trial court and “appellate courts will not interfere with the trial court’s judgment unless the record convincingly indicates an abuse of discretion.” *Sears v. Dent Wizard Intern. Corp.* 13 S.W. 3d 661, 664 (Mo. App. E.D. 2000). Under that standard, if reasonable persons can differ as to the propriety of the trial court’s action, then it cannot be said that the trial court abused its discretion. *Coble v. NCI Building Systems, Inc.*, 378 S.W. 3d 443, 451 (Mo. App. W.D. 2012). A trial court abuses discretion only when the ruling is clearly against the logic of the circumstances before the court and the ruling is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberation. *Saturn of Tiffany Springs v. McDaris*, 331 S.W. 3d 704, 709 (Mo. App. W.D. 2011). While the law does favor resolution of cases on their merits, courts should carefully analyze the facts of each case “because the law defends with equal vigor the integrity of the legal process and procedural rules and, thus, does not sanction the disregard thereof.” *First Bank of the Lake v. White*, 302 S.W.3d 161, 165 (Mo. App. S.D. 2009) (quotations omitted).

B. BECAUSE APPELLANT WAS AWARE OF ALL FACTS ALLEGED IN HER RULE 74.06(b) MOTION SIX MONTHS PRIOR TO FILING AND 364 DAYS AFTER ENTRY OF JUDGMENT, SHE FAILED TO FILE IT WITHIN A REASONABLE TIME.

Rule 74.06(c) required Appellant to file her the motion to set aside “within a reasonable time, not to exceed one year” after the entry of judgment. *Capital One Bank (USA)*

NA v. Largent, 314 S.W.3d 364, 367 (Mo. App. 2010); *Engine Masters, Inc. v. Kirn's, Inc.*, 872 S.W.2d 644, 645 (Mo. App. E.D. 1994). The “one year” requirement is not a safe harbor for any Rule 74.06(b) motion, but rather an outer boundary for certain of them. *Id.* at 646-47. A motion filed sooner, rather than later, is more apt to be considered timely. *Bell v. Bell*, 849 S.W.2d 194, 198 (Mo. App. W.D. 1993). And the more that outside forces beyond the movant’s control interfere with its actions, the more time the movant has to file a “timely” motion. *See Engine Masters*, 872 S.W.2d at 646. Likewise, particular circumstances of the case, such as confusing docket entries, difficulties in hiring legal counsel, absence of actual notice, or the presence of novel questions of law may factor into the timeliness of a motion being filed. *Id.*

In *Engine Masters*, the defendant was informed about the default judgment one week after it was entered but waited to file a motion to set it aside until 316 days after the judgment was entered. *Id.* at 645-46. The court found no circumstances that were beyond the defendant’s control, no novel questions of law that necessitated extensive or lengthy preparations for appeal, “no obfuscation of the court docket,” no indication from the record that demonstrated defendant had trouble obtaining an attorney, and “defendant was promptly notified of the default judgment.” *Id.* at 646. Ultimately, the court found that defendant’s 316-day delay in filing a motion to set aside the default judgment was unreasonable under the circumstances. *Id.* The court concluded that “to set aside the default judgment after such a delay, without explanation, would imply any motion made within

the one-year limit would be *de facto* reasonable” and “would, in essence, read the ‘reasonable time’ limit out of Rule 74.05[(d)].” *Id.* at 646-47.

Similarly, in *First Bank of the Lake*, 302 S.W.3d 161, the court analyzed the reasonableness of the timing of a defendant who filed a motion to set a default judgment aside on the 332nd day after the entry of the judgment. *Id.* at 168. Affirming the lower court’s denial of the motion to set aside, this court noted that the last communication between the parties’ counsel occurred approximately 98 days after the entry of the default judgment, but the defaulting party waited another 234 days to file a Rule 74.05 motion to set aside. *Id.* at 167. Under the facts presented, the court found that:

During the 234-day period between [the last] letter . . . and May 22, 2008, the date Defendants filed their motion to set aside the judgment, Defendants were content to take no action to either prompt a further response . . . or set aside the default judgment. While it might arguably be reasonable for Defendants to wait a couple of weeks or as long as a month for a further response[,] . . . waiting 234 days for such a response strains the bounds of reason and credulity. At a minimum, reasonable minds could differ as to the propriety of such a wait, and, as such, the motion court could not have abused its discretion in determining that it was an unreasonable delay.

Id. at 167-68.

Here, Appellant waited 364 days after entry of judgment before filing her Rule 74.06(b) motion, even though the allegedly fraudulent statements and non-disclosures by Tom Olofson occurred even earlier during discovery in the underlying divorce action and concerned information she sought in a motion to compel filed on December 1, 2015 that she failed to prosecute. (D12 p. 6; D14 pp. 14-17.) Appellant’s brief even acknowledges that “[s]he alleged that in the summer of 2016, shortly after the dissolution judgment

was entered, it was made public – and for the first time to her – that Epiq was being purchased for \$16.50 per share.” (App. Br. p. 10.) Appellant also admits in her Rule 74.06 motion itself that all of the facts she alleged were known to her by August 24, 2016 at the very latest, but she still delayed six more months before filing it. (D5 pp. 13, 16-19; D7 pp. 32-42.)

The record below reveals no reasonable justification for Appellant’s delay. The scant two pages of argument offered below on this point consists of a naked contention that her motion was timely because her claim was not “ripe” until the Epiq transaction closed on September 30, 2016. (D17 pp. 2-3.) She offered no reason for the months of delay, much less a circumstance beyond her control such as the inability to secure counsel. In fact, throughout this entire period she was continuously represented by her original counsel, Brad Manson, who did not withdraw from the case until March 30, 2017, over a month after Appellant filed her Rule 74.06(b) motion.

Preservation issues aside and regardless of the trial court’s substantive grounds for denying Appellant’s Rule 74.04(b) motion, this Court should affirm the decision below because she waited 364 days to file it for no reason apparent in the record. As the court concluded in *First Bank of the Lake*, “[a]t a minimum, reasonable minds could differ as to the propriety of such a wait, and, as such, the motion court could not have abused its discretion in determining that it was an unreasonable delay.” 302 S.W.3d 168. *See, e.g., Amoco Overseas Oil Co v Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 656 (2d Cir. 1979) (noting that “although [the district court] was incorrect in his

determination that the Rule 60(b)(1) motion was filed over a year after judgment, its ultimate holding that the motion was untimely can be founded upon the alternative requirement that motions under the Rule be made within "a reasonable time.")

CONCLUSION

For all of the foregoing reasons, the trial court's order denying Appellant's Motion to Set Aside Judgment should be affirmed.

Respectfully submitted,

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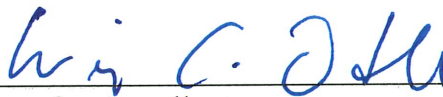
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CERTIFICATE OF COMPLIANCE

I hereby certify I prepared this brief using Microsoft Word in Times Roman 13 point type and that this brief complies with the word limitations of the Western District of Missouri Local Rule 41. This brief contains 12,783 words.

CERTIFICATE OF SERVICE

I certify that I signed the original of this brief of respondent, which is being maintained by William C. Odle per Rule 55.03(a) and that on January 13, 2018, I filed a true and accurate Adobe PDF copy of this brief via the Court's electronic filing system, which notified the following of that filing: Jonathan Sternberg, Esq., 2323 Grand Boulevard, Suite 100, Kansas City, Missouri 64108, jonathan@sternberg-law.com, attorney for Appellant.



Attorney for Appellant