Cause No. 309657-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

ROBIN JOHNSON, Respondent /Appellant

v.

PETER JOHNSON, Petitioner/ Respondent

REPLY BRIEF OF APPELLANT

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I. REPLY TO PROCEDURAL FACTS:

Mr. Johnson would like to prejudice the appellate court against Ms. Johnson with his recitation of the procedural facts. This matter came before the lower court based on Judge Triplet's earlier memorandum decision of the court's inability to determine if all maintenance had been paid per the decree and facts presented. *See* CP 20 ln 4-12. That earlier denial of contempt matter was based on the decree of separation and order of dissolution not specifying the length of time for maintenance. Without an end to maintenance clearly specified in the decree, the decree would then, as a matter of law, incorporate the statutory end to maintenance of a change of circumstances or death. Judge Triplet did not agree and, instead, relied on the Findings. But, he could not determine if all the maintenance owed had actually been paid.

Mr. Johnson, in response briefing here, emphasizes the "death" part of the statutory right, with his continuous reference to Ms. Johnson's request for finding life-time maintenance in that earlier motion – as if the request is ludicrous. The request for continued maintenance payments is and continues to be necessary

given Ms. Johnson's circumstances - both financial and health. *See* e.g., Declaration of Financial Need filed on appeal.

But first, she requests that this court determine a judgment is necessary against Mr. Johnson, as a matter of law, for unpaid maintenance and interest per the findings and the decree of legal separation, and remand for entry of that judgment.

II. INVALIDATION OF THE LOCAL RULE IN QUESTION IS NECESSARY HERE

Respondent argues that the local rule in question is unquestioningly valid. Respondent provides no precedent showing that the local rule in question has been questioned and upheld by a higher court. To the contrary, Respondent's entire section of legal authority and argument at his Motion's pages 7-8 is completely and perfectly plagiarized[1] from a court of appeals decision overturned by the Supreme Court of the State of Washington. *See In re*

[1] "**Plagiarism** is the 'wrongful appropriation' and 'purloining and publication' of another author's 'language, thoughts, ideas, or expressions,' and the representation of them as one's own original work. . . . Plagiarism is considered academic dishonesty and a breach of journalistic ethics. It is subject to sanctions like expulsion. Plagiarism is not a crime *per se* but in academia and industry it is a serious moral offence, and cases of plagiarism can constitute copyright infringement." Wikepedia on-line article of March 12, 2013 regarding "plagiarism"(*Internal citations and footnotes omitted.)*

Marriage of Lemon, 59 Wn.App. 568, 573-74, 799 P.2d 748 (Div 2, 1990), reversed by In re Marriage of Lemon, 118 Wn.2d 422, 823 P.2ed 1100 (1992). Respondent's response on appeal is based entirely on overturned argument and precedent.

Appellant has not misapplied the authority of *In re Marriage of Lemon,* 59 Wn.App. 568, 799 P.2d 748 (1990). *In re Marriage of Lemon*, our Supreme Court slashed through all the rhetoric and cases that have been cited by Respondent, and getting down to basics, simply held that a local rule, on its own, could not restrict the time criteria of a statutory right. Our Supreme Court in *In re Marriage of Lemon* repeats the holding of *Harbor Enterprises Inc. v. Gudjonsson,* 116 Wn.2d 283, 293, 803 P.2d 798:

"The statute grants a valuable right to a litigant; a local rule cannot restrict the exercise of that right by imposing a time requirement different from the statute."

This maxim is applicable to more than just affidavit of prejudice review. Division 1 also cites to the standard to justify remanding to require oral testimony in a dependency hearing, when a judge interpreted a local King County rule to restrict oral testimony. "But where a statute grants a valuable right to a litigant, a local rule cannot restrict the exercise of that right." *In re Dependency of: R.L.*

and I.L., 123 Wn.App., 215, 98 P.3d 75 (2004)(citing *In re the Marriage of Lemon*, 118 Wn.2d 422, 424, 823 P.2d 1100 (1992)).

Although the supreme court cases of *Lemon* and *Harbor* address affidavits of prejudice, the parallel issues between local rules impermissibly restricting affidavits of prejudice and impermissibly restricting rights to revision are the same. The parallels are the lack of supreme court rules specifically governing the exercise of an important statutory right that contains a jurisdictional element of timing. Washington State Court Rules do not govern any timing of affidavits of prejudice, just like they do not govern any timing issues on motions to revise. The Division 2 court, attempting to run with this void, noted in its now overturned decision that the local rule was consistent because no portion of the court rule dealt with the subject. *In re Marriage of Lemon*, 59 Wn.App. 568, 799 P.2d 748 (1990) *reversed by Supreme Court*. The Supreme Court did not agree with Division 2. It found that the right to relief accrued when the statutory criteria were met, and a local rule could not remove that right by applying local rule restrictions, as the additional restrictions are contrary to the statutory right. *See In re Marriage of Lemon,* 118 Wn.2d 244, 823 P.2d 1100 (1992).

Here the issue is not whether local rules are inconsistent with state wide superior court rules, so that the local rule must yield. See e.g. *City of Seattle v. Kohles,* 81 Wn.App. 678, 916 P.2d 440 (Div. 1, 1996). Since there are no superior court rules regarding revision, like in *In re Marriage of Lemon*, the question is not whether the local rule is consistent with other court rules, it is whether the local rule restricts valuable statutory rights. *See In re Marriage of Lemon*, 118 Wn.2d 244, 823 P.2d 1100 (1992). Our State Supreme Court noted that all citations to cases comparing local rules to other court rules were not applicable. *Id.* at 423-24. The issue was determining if the local rules restricted valuable, granted, statutory rights. *Id.* The subsequent Division 2 court in *Smukalla v. Barth*, 73 Wn.App. 240, 245, n.3, 868 P.2d 888 (1994) noticed this difference, ruled by our Washington Supreme Court, as well.

Here, the valuable right to revision is set forth in RCW 2.24.050.

RCW 2.24.050 states that:

> All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior

court, within ten days after the entry of any order or judgment of the court commissioner.

Here, the local rule 0.7 restricted Appellants statutory right to revision when the court followed the authority of the local rule to strike the motion to revise if the status of the motion was not called in to his judicial assistant before noon, two days prior to the revision hearing. *See* CP 152 and CP 211-212. Appellant had fulfilled the requirements of RCW 2.24.050 with service and filing the motion to revise within 10 days of the hearing at issue. Appellant had even followed the local rule 0.7 requirements for two call-in-status's in earlier weeks when the motion was scheduled but then continued. *See* CP 150. She just accidentally missed the call-in process by 2 hours (due to a calendaring error) on the third week the motion was set. *See* RP of April 19th hearing (which, contrary to the assertion of Respondent, was transcribed and filed) and CP 150 lines 10-13.

Considering influence from the older Washington case of *Heaney v. Seattle Mun. Court, 35 Wn.App.* 150, 665 P.2d 918, 921 (1983), a California Court of Appeals notes that California measures a challenged court rule against the statutory scheme to determine if the rule is consistent or inconsistent. *California Court Reporters Association, Inc., v. Judicial Council of California et al.*,

39 Cal.App.4th, 15, 24, 46 Cal.Rptr.2d 44 (1996). Where a rule is inconsistent with the statutory scheme and legislature's intention intended to be implemented, it is deemed invalid." *Id.* at 25-26.

Post *Lemon,* Washington decisions follow the same view. Division I in I*n re Dependency of: R.L. and I.L.*, 123 Wn.App. 215, 222-223, 98 P.3d 75 (2004) notes that local rules designed for efficiency must have plenty of flexibility in order to fulfill statutory promises of valuable rights. That flexibility may include permission for "substantial compliance" of overly restrictive local rules, as necessary. Division II in *Sorenson v. Dahlen*, 136 Wn.App. 844, 854 and n. 4, 149 P.3d 394 (2006), notes that once the court has "acquired the ability to hear and decide the aggrieved party's claim on the merits," then only substantial compliance to the local rules is required.

It is the harshness of the result that leads to concluding that the local rule is inconsistent with the statute and needs to be invalidated. In *Hessler Construction Co., Inc., v. Looney*, 52 Wn.App. 110, 757 P.2d 988 (Div. 1, 1988), it was the harshness of the local rule therein too that made it inconsistent with other rules. The court determined the local rule permitted a sanction without the process of notice and hearing, and noted it also violated the

purpose and spirit of the Civil Rules, which purpose is to allow the court to reach the merits, when the local rule precluded that.

Here, it is the harshness of requiring a call in or notification procedure, or the matter would be stricken, that is also impermissibly harsh and inconsistent with other court rules and statute. Appellant asserts that nowhere, in any state court rule across the country does failure to follow a local rule requiring communication of the status of the case to the judicial assistant require dismissal of the action. Although such lack is not dispositive, it does suggest that the local rule here is so extreme as to violate procedural due process, fundamental fairness, or is just contrary to all general court rules across the country.

Respondent's contention that *Lemon* and *Harbor* concerned timing issues but this matter does not is not correct. It was entirely the timing of the failure to communicate the status of the hearing, per the local rule, that caused the court to strike the matter. Appellant's dilemma and issue has everything to do with impermissible restrictions in timing by local rules.

Spokane County Local rule 0.7 requires a time certain to communicate the status of the motion or the whole motion (in this case the whole action) would be stricken. The call-in status report

then, acts like a judicially created jurisdictional bar. It is a timing issue that is so harsh as to confer and remove jurisdiction from the superior court not permitted by the statute.

Respondent claims that by Appellant's theory, many other portions of local rule 0.7 would also be invalid. Appellant lacks standing to seek invalidation of the entirety of Spokane County Local Rule 0.7 (d). She also has no desire or motive to further burden superior court judges by not following their requested processes. All she seeks is that the absolute rule of "striking" the motion to revise if the status is not called in as ready by a certain exact time, be invalidated as impermissibly harsh, restrictive, and contrary to the intent of the legislature, given the valuable right to revise at stake.

Here, appellant advocated for a less harsh result by requesting that the judge order a continuance of the hearing. See CP 149 – 151. LAR 0.7 (d) dictates that the "Judge scheduled to conduct the hearing shall approve any order of continuance." LAR 0.7 (d). Here the continuance was not granted. CP 152 and RP of 4/19/12. Granting a continuance would have saved this matter from the impermissibly harsh result of dismissal. Division 2 in *Sorenson v. Dahlen*, 136 Wn.App. 8344, 149 P.3d 394 (2006)

amended on reconsideration (2007), reversed a trial court decision to strike a request for a trial de novo following arbitration, for failure of Defendant to strictly comply with a local rule. The appellate court deemed the result too harsh and found that strict compliance was not required. *Id.* Here, a less harsh result was possible for the superior court judge, if emphasis on another sentence in LAR 0.7 had been relied upon and ordered.

If Spokane County's local rule 0.7, requiring striking of the hearing if not called in by noon two days prior to the hearing, cannot be mitigated with a continuance that is freely given (per the same local rule) – no matter when the continuance is requested – striking the matter for failure to call in by noon is too harsh, too restrictive, and impermissibly removed a valuable statutory right from Appellant - like a jurisdictional bar. Since the continuance, apparently, is not mandatory if the hearing was already stricken, the local rule must then be invalidated and this case remanded.

III. THE LOWER COURT'S ORDER ON CONTEMPT IS IN ERROR

In response to the issue of abuse of discretion on contempt, Mr. Johnson provides the same "evidence" he provided to the trial court. This evidence has already been addressed. He provides

no actual legal basis for contending that his position or the court's position is correct.

A. Judgment on unpaid Maintenance is still owed. Mr. Johnson's defense to the commissioner's decision fraught with errors is without merit.

First Mr. Johnson claims that proof of compliance of paying $1,200 in maintenance and $260/ month on a visa has been provided to the court in the form of financial records. He lists the records. None of the records show $1,200/mo. in maintenance and $260/mo. in visa payments being made by Mr. Johnson to Ms. Johnson or directly to a credit card processing unit.

Mr. Johnson's suggestions of the in lieu of maintenance idea are factually bellied by his paying bills from the joint checking account post separation of CP 61-99, which was owned by both parties as tenants in common and as joint tenants and into which both parties deposited or transferred funds. Paying maintenance from that account is then a legal impossibility.

Next Mr. Johnson's attorney suggests that the Commissioner's acceptance of or belief in the parties' coming to "a mutual agreement that all of the benefits that Mr. Johnson was transferring to Ms. Johnson constituted in-kind payments and contributions towards the maintenance obligations," CP 137 lns.

20-24, and rubber stamping that agreement, is not some sort of modification of the decree. The commissioner's acceptance of his belief in an agreement that modifies the decree, as a reason to not enforce the decree, is, in essence, modifying the decree by refusing to enforce the decree. It is a ratification of an alleged prior modification without specifying any equitable principle to justify his action. Per Ms. Johnson's opening brief at 14-20, that is impermissible and an abuse of discretion.

Next Mr. Johnson claims that the Court Commissioner's **not** finding that the reason for all of the changes from that which is stated in the decree, was consideration for forestalling the maintenance transfer payment, is an o.k. basis for the Commissioner's other decisions. Ms. Johnson's position of forestalling maintenance collection, was not contrary to law and did not modify the maintenance provision of the decree. But Ms. Johnson's position is the only factual position that is not contrary to law on modifications. Mr. Johnson's position, that the bill paying was substitute for maintenance, would, in fact, modify the maintenance provision and is impermissible. Mr. Johnson's factual assertions of justification are contrary to law. The court's acceptance of Mr. Johnson's facts that are contrary to law, lead to

the court's impermissible modification to the maintenance provisions of the decree. Mr. Johnson's offered facts are a legal impossibility for the court's justification to rubberstamp a modification.

In summary, the court abused its discretion by not enforcing the decree of dissolution as written, but, instead, allowing one parties' asserted version of an informal modification to trump the decree.

B. No $260/Month VISA Payments Have Been Made, Still

Mr. Johnson's factual assertions prove Ms. Johnson's claim that Mr. Johnson should be given a judgment and specific performance order to pay a Visa.

Mr. Johnson claims that there were two visa's, the Horizon Visa, and then another visa at the time of the decree. The decree requires Mr. Johnson to make $260/month payments on a Visa. Mr. Johnson has NEVER made any $260/month payment on any visa.

Mr. Johnson claims that some $7,352.36 in the home loan proceeds applied to a Horizon Visa, was not warranted by the decree and Ms. Johnson was not entitled to this benefit. And he

apparently uses that claim as an excuse that he has no obligation to pay $260/month. Mr. Johnson's claim is non-sensical.

If each party was entitled to 50% of the home proceeds, as the decree says, then the amount of the $7,352.36 that can be attributed to Mr. Johnson, as his portion, is only $3676.18. Ms. Johnson testified that both parties had charged on the Horizon Visa's during separation to help make the home repairs and financially survive while the house was for sale, and that is why the Horizon Visa was so high when the house sold. Therefore, it makes sense that both parties agreed to apply house proceeds to pay down the Horizon Visa because the credit account contained house improvement costs and sale preparation expenses costs.

Given the record here, it is also not rational to believe Mr. Johnson was just very generous without rationality, when he paid $3676.18 on the Horizon Visa without obligation.

Conceivably, per Mr. Johnson's version of the facts, none of the $7,352.36 allegedly spent to pay off a credit card, with charges incurred post separation, included any of the charges for which the $260/month was to be directed. Consider the following math: Between the time of the separation decree of October 2003 and the house sale of March 2005 is 17 months. $260/mo. x 17 mos. =

$4420. $4420 is not equal to ½ the $7,352.36 allegedly paid, or $3676.18. Therefore, even by using the very formula and excuse Mr. Johnson infers, that he paid on a Visa with the use of house proceeds – in substitution for a Visa on which he was to pay $260/ month, the amount he applied from his portion of the house proceeds was less than his obligation. No equitable principles can apply here. Using the house proceeds to pay on the Horizon Credit Card cannot be substitution for Mr. Johnson's requirement that he pay $260/month.

The undisputed evidence shows that Mr. Johnson was suppose to pay $260/month on a visa and has never paid $260/month on a visa. The court should have entered an order requiring specific performance and entered a judgment as calculated and presented by Ms. Johnson. Instead, the court simply refused to enforce its decree.

If Mr. Johnson desires to modify the decree now, because he would like his obligation of $260/month to end and thinks the decree is unfair or unfair when it was entered, he could petition the court to do so under CR 60. But, not enforcing its own decree because the husband has not provided sufficient evidence that he has paid $260/month, is an abuse of discretion.

See, Petitioner's Opening Brief at 20-28, including, specifically, *Martin v. Martin*, 59 Wn.2d 468, 472-76, 368 P.2d 170 (1962). The decision of the commissioner must be reversed and Ms. Johnson requests that it be so.

In sum, the court allowing a factually contested modification between the parties to simply trump the decree is allowing an impermissible modification. The unambiguous terms of the decree must be enforced. Mr. Johnson cannot rely on excuses of bill paying substitutions without a petition to modify the decree. Mr. Johnson cannot rely on insufficient proof of $260/month payment on the VISA as an excuse to not have a judgment entered against him for missed payments.

IV. ATTORNEY FEES

Appellant is in need of financial assistance with this appeal and the defense of the motion on the merits under RCW 26.09.140, and RAP 18.1 (b). Respondent has the ability to pay. Per RAP 18.1 (c), Appellant filed an Affidavit of Financial Need concurrently with her filing of the Response to Motion on the Merits.

The court commissioner ignored Ms. Johnson's request for attorney fees and did not comment. That was an abuse of

discretion. Mr. Johnson also ignores Ms. Johnson's request for attorney fees and does not contest them. Ms. Johnson's request should then be granted.

V. CONCLUSION

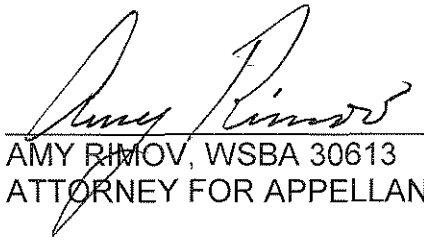
In conclusion, the Spokane County's local rule's timing issue of a noon deadline two days prior to the scheduled hearing, to communicate the motion's status to the judicial assistant or the matter is stricken, harshly restricts the exercise of a valuable statutory and constitutional right to revision and is therefore impermissible and invalid. Additionally, the local rule is not consistent with the court rules because the court rules do not harshly restrict the statutory rights, but the local rule does. The local rule is also invalid because the harsh result for accidental failure to comply generally cannot be mitigated with a continuance, as demonstrated by the record. There is no settled law validating Spokane County's local rule 0.7, it is necessary to invalidate it and remand this case.

The lower court commissioner invalidly affected a modification to the decree to void Mr. Johnson's requirement to pay maintenance and credit card payments since June 2003. Such is

an abuse of discretion and this court should remand with directions to enter a judgment per the undisputed facts.

Attorney fees to Ms. Johnson are financially necessary here, both for the appellate work in chief and the defense to the motion on the merits. Ms. Johnson's request and proof of need and contention that Mr. Johnson has the ability to pay has not been disputed by Mr. Johnson. Her request should be granted.

Respectfully Submitted this 29th day of May, 2013



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