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NO. 64521-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK STEVEN WYSLING, Appellant,

v.

BONNIE LEE ANDERSON fka WYSLING, Respondent.

On Appeal from Snohomish County Superior Court
Honorable Kenneth L. Cowser

REPLY BRIEF OF APPELLANT MARK STEVEN WYSLING

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I. THE APPELLANT WAS NOT REQUIRED TO ASSERT THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS IN HIS RESPONSE

To determine whether Appellant Mark Wysling (“Mark”) was required to assert the statute of limitations defense in his Response to the Respondent’s Petition for Modification of Child Support, this Court should review the following rules of civil procedure:

In pleading to a proceeding pleading, a party shall set forth affirmatively statute of limitations, . . . and any other matter constituting an avoidance or affirmative defense. [CR 8(c)]

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the response pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. [CR 8(d)]

Every defense, in law or fact, to a claim for relief in any pleading, shall be asserted in the responsive pleading thereto if one is required, . . . [CR 12(b)]

It is undisputed that Respondent Bonnie Anderson’s Petition, filed in October 2003 (CP 266-270), did not include as a “claim for relief” any request for a recovery for back child support. Mark therefore had no obligation to plead the statute of limitations defense in his Response.

II. THE STATUTE OF LIMITATIONS DEFENSE WAS ADEQUATELY ASSERTED

As the Washington Supreme Court held in Mahoney v. Tingley, 85

Wn. 2d 95, 100, 529 P.2d 1068 (1975):

It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. *Tillman v. National City Bank*, 118 F.2d 631, 635 (2d Cir. 1941) [Cited with approval and applied in Bernsen v. Big Bend Electric, 68 Wn. App. 427, 434, 842 P.2d 1047 (1993).]

Mr. Wysling's Response was filed in April 2004 (CP 285), almost five years before the trial on Ms. Anderson's Petition. It was not until February 2008, almost four years later, that Ms. Anderson ("Bonnie") first alleged that Mr. Wysling owed back child support for the 1984–1989 time period. (CP 232-238) Mark immediately responded with a memorandum contending that the claim was barred by the statute of limitations. (CP 211-212)

Even if Mark were required to assert the statute of limitations defense in his 2004 Response, Bonnie was not prejudiced by his failure to do so because she was aware of that defense more than a year before trial. In fact, at the arbitration hearing held four months after he asserted the defense, Bonnie specifically and expressly chose not to ask that Mark be

ordered to pay her those 1984–1989 arrearages (CP 84), and the award did not include them. (CP 287-292)

It was not even clear at trial, or for that matter after the trial, that Bonnie was seeking the \$3,400 in 1984–1989 arrearages, as reflected by the trial court’s questions and Bonnie’s answers quoted at pages 4 – 6 of the Brief of Appellant, and the fact that the trial court did not even address the issue in his Memorandum Opinion.

III. MR. WYSLING’S RESPONSE WAS NOT A COUNTERCLAIM

Bonnie asserts that Mark’s Response, in which he merely asked the court to determine that he owes no accrued child support, was a counterclaim, citing In Re Marriage of Parker, 78 Wn. App. 405, 897 P.2d 402 (1995). In Parker, the court had no difficulty agreeing with the trial court’s conclusion that when a Respondent requests spousal maintenance, child support, a parenting plan, and an alternative division of property, she has asserted a “claim” which meets the CR 13(a) definition of a counterclaim.

Mark’s vague request, on the other hand, was made solely because Bonnie’s Petition alluded to “a substantial child support arrearage”, without describing the time period during which that arrearage allegedly accrued or asking that Mark pay it.

Even if Mark’s Response were a counterclaim, that would have no

bearing on whether he should have asserted a statute of limitations defense in his Response.

IV. THE STATUTE OF LIMITATIONS RAN ON THE 1984 – 1989 ARREARAGES

As stated in the Brief of Appellant at pages 9–10, Valley v. Selfridge, 30 Wn. App. 908, 639 P.2d 225 (1982) conclusively establishes that the parties’ agreed 1989 order was nothing more than an ancillary proceeding that, among other things, clarified the amount of the arrearage, not a judgment in lieu of the parties’ 1985 divorce decree.

In the Brief of Respondent, Bonnie does not discuss or try to distinguish Valley. She simply says at page ten that the 1984-1989 support arrearages of \$4,045 accrued under the 1989 order. The Brief contains no apparent basis for that statement unless it can be found at page 11, where Bonnie states, again without explanation, that “[t]here is no indication when Ms. Anderson could have applied to the court for relief prior to July 28, 1989.”

This is a strange statement, because in her trial brief Ms. Anderson correctly asserted that “. . . Each monthly installment of support when unpaid becomes a separate judgment and bears interest from the due date. *Koon v. Koon*, 50 Wn.2d 577, 579, 313 P.2d 369 (1957).”

Each payment for child support and day care that Mark did not pay Bonnie between 1984 through 1989, which in the 1989 order they agreed totaled \$4,045, became a separate judgment on the date it was due and not paid. RCW 4.16.020(2) – establishing the 10-year statute of limitations for each judgment – applies to those arrearages. RCW 4.16.020(3) only

applies to “child support that has accrued under an order after July 23, 1989”. Valley tells us the parties’ 1989 stipulated order is not such an order, so that statute does not apply. The statute of limitations on the last of the 1984-1989 arrearages ran in 1999.

V. SUMMARY

The Respondent’s arguments in her appellate brief are groundless and would border on the frivolous if it weren’t for the fact that she prevailed below, for reasons the trial court never explained.

The trial court’s award of a judgment in favor of Respondent Bonnie against Appellant Mark Wysling in the principal amount of \$4,045, plus interest through the date of judgment in the amount of \$9,708 (CP 92) must be reversed.

DATED this 4th day of June, 2010.

THE HUNSINGER LAW FIRM
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By: 

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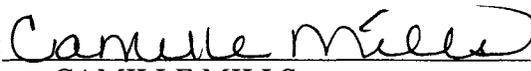
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 4, 2010, the original and one copy of the accompanying Reply Brief of Appellant Mark Steven Wysling were given to ABC Legal Messengers for delivery and filing on or before June 8, 2010, with the Court of Appeals, Division I. I further certify that on June 4, 2010, a copy of the Reply Brief of Appellant Mark Steven Wysling was sent out to be delivered on or before June 8, 2010, by ABC Legal Messengers, to the attorney for the Respondent:

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1604 Hewitt Avenue
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DATED this 4th day of June, 2010.

THE HUNSINGER LAW FIRM
Attorneys for Appellant

By: 
CAMILLE MILLS
Legal Assistant