

NO. 66856-1-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In Re the Marriage of:

CHRISTOPHER ANDREW HEATH,

Respondent,

vs.

BARBARA JEAN LATHAM (f/k/a Heath),

Appellant

OPENING BRIEF OF APPELLANT BARBARA JEAN LATHAM

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COURT OF APPEALS
DIVISION I

No. 66856-1-I

King County Superior Court No. 04-3-01407-1 SEA

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred by entering its Order Denying Motion for Order Compelling Accounting of Pension Funds and Order Granting Motion to Enforce Decree and Awarding Fees/Sanctions on January 26, 2011 and its Order Denying Respondent's Motion for Reconsideration of Court Orders entered on February 23, 2011. These orders were entered even though there were disputed issues of material fact and were entered without an evidentiary hearing or oral argument. These orders incorrectly distributed property, improperly denied the Appellant the right to an evidentiary hearing and incorrectly assessed attorney fees and sanctions.

Issues Pertaining to Assignment of Error

1. Did the trial court err by concluding that Appellant's attorney had the sole responsibility for preparing appropriate orders dividing the property of the parties (or Qualified Domestic Relations Orders), when the Decree specifically stated at Paragraph 7 of Exhibit C that, "The parties shall draft appropriate Qualified Domestic Relations Orders to accomplish these distributions"?

2. Did the trial court err by concluding that Appellant's attorney had not prepared appropriate orders when it was uncontroverted that he had done so and had sent his drafts of these orders to counsel for Respondent sixteen months

earlier, which proposed orders counsel for Respondent completely ignored, and that Appellant's attorney had later sent other proposed drafts of these orders to counsel for Respondent that he had attorney Jerry Scowcroft prepare?

3. Did the trial court err in not ordering an evidentiary hearing on the appropriate terms of the orders when expert testimony was necessary, when expert opinion was in conflict, when testimony from Respondent's expert was kept secret and could not be disputed, when no discovery was allowed, when no accounting of the retirement accounts was permitted and when the trial court failed to take into consideration the contributions of Appellant's new husband to the value of the house?

4. Did the trial court err by denying Appellant's motion to compel an accounting of pension/retirement funds that were the community property of the parties?

5. Did the trial court err by awarding CR 11 sanctions for bringing a motion to compel?

6. Did the trial court err by awarding attorney fees against Appellant?

B. STATEMENT OF THE CASE

This case involves the post-Decree of Dissolution distribution of property and the appropriate method for resolving disputes relating to that distribution.

The marriage of Respondent Christopher Heath (referred to herein as “Mr. Heath”) and Appellant Barbara Heath (now known as Latham and referred to herein as Ms. Latham”) was dissolved by a Decree of Dissolution entered on February 28, 2005. CP 1-8. That Decree awarded some of the property as follows:

7. The parties hereto shall divide the family home, the husband’s 401K, pension and retirement funds 55/45, with 55% going to the wife. The wife shall be quitclaimed the family residence by the husband and the parties stipulate that the house has a fair-market value of \$360,000 as of this date and a mortgage of approximately \$117,000. Pension and retirement funds have the following values: LEOFF 2 Plan is valued at \$327,646 and the value of the MEBT is \$240,339. The parties shall draft appropriate Qualified Domestic Relation Orders to accomplish these distributions. Wife’s attorney shall prepare the the appropriate Orders (sic).

CP 8.

Mr. Heath failed to quitclaim the house to Ms. Latham until 2008. Ms. Latham remarried and her new husband contributed to the mortgage, repairs and maintenance. CP 80. Ms. Latham and her new husband sold the house, which was now in both of their names, on or about August 14, 2008, incurring the usual closing costs. CP 80. Mr. Heath moved from King County to Yakima County and purchased a house in July of 2008. Yakima County real property records indicate that he was the Grantor of a Deed of Trust that was recorded on July 3, 2008, and the Grantor of a Deed on March 26, 2009. CP 109, 146-148. It was alleged by Ms. Latham that at

least some of these funds used to purchase this home came from Mr. Heath's retirement funds, 55% of which belonged to Ms. Latham pursuant to the terms of their Dissolution Decree. CP 108-109. Mr. Heath refused to provide Ms. Latham with an accounting of these retirement funds which were solely in his name. CP 107-109.

On June 19, 2009, Paul E. Simmerly, attorney for Ms. Latham drafted and sent to Camden Hall, attorney for Mr. Heath, the appropriate orders and forms for dividing Mr. Heath's retirement benefits. CP 95-99. The forms of the orders used by Mr. Simmerly were the templates provided by the Plan Administrators of the retirement plans. These proposed orders drafted by Mr. Simmerly contained the mandatory language that the Plans required. These proposed orders were faxed to Mr. Heath's attorney on June 19, 2009, along with explanatory materials received from the Plan Administrators, and Mr. Simmerly asked Mr. Heath's attorney for his input into the language of the orders. CP 97, 98, 99. No input into the proposed language of these orders was ever received. CP 97.

Sixteen months went by. Then, on October 21, 2010, Mr. Heath brought a Motion to Enforce Decree and For Attorney Fees. CP 35-59. This Motion completely ignored the fact that Mr. Simmerly had prepared the proposed orders sixteen months earlier. Mr. Heath's attorney retained a

C.P.A., Louise Green, as an expert witness to file a Declaration which proposed a resolution of the division of the Heath house proceeds and the Heath retirement funds. CP 230-247. Ms. Green's billing records indicate that she had been working on this matter since October of 2009. Neither Mr. Heath's attorney nor the trial court afforded Ms. Latham an opportunity to work with C.P.A. Green or even talk to her. Ms. Green's analysis completely ignored the contribution of Ms. Latham's new husband to the value of the house. Ms. Green failed to provide the financial source documents she used to Ms. Latham or her attorney. Ms. Green's declaration contained many findings, assumptions and conclusions that she alone came up with. At one point in her declaration she even acknowledged that "Calculations of the account are available upon request." CP 243. These were never provided.

In November of 2010, Ms. Latham employed the services of perhaps the leading authority in Washington on orders dividing retirement plans, attorney Jerry Scowcroft. CP 137-143. Mr. Scowcroft was employed to draft additional proposed orders dividing these retirement plans, which he did, and these were provided to the attorney for Mr. Heath. CP 107-147. Mr. Heath's attorney, once again, completely ignored this work. Efforts by

Ms. Latham to obtain discovery and more time to allow Mr. Scowcroft, or other experts, to review the work of Ms. Green were rebuffed. CP 95-99.

On January 26, 2011, the trial court also completely ignored the proposed orders of Mr. Simmerly and Mr. Scowcroft and entered an Order Denying Motion for Order Compelling Accounting of Pension Funds (CP 184-186) and an Order Granting Motion to Enforce Decree and Awarding Attorney Fees/Sanctions. CP 187-199. The disputed findings, assumptions and conclusions of C.P.A. Green were adopted without alteration and Mr. Heath received everything he had requested. The Order Denying Motion for Order Compelling Accounting of Pension Funds also ordered CR 11 sanctions against Ms. Latham. Ms. Latham brought a Motion for Reconsideration of these orders (CP 200-201, 202-208) which was denied on February 23, 2011. CP 219-220. A timely Notice of Appeal was filed on March 22, 2011. CP 248-267.

C. ARGUMENT

Standard of review

The orders which are the subjects of this appeal were entered without an evidentiary hearing and without oral argument. The standard of review, like that for summary judgments, is de-novo review. *Wilson v. Steinbach*, 98 Wn. 2d 434,

656 P.2d 1030 (1982); *Highline School District 401 v. Port of Seattle*, 87 Wn. 2d 6, 458 P.2d 1085 (1976).

1. **Did the trial court err by concluding that Appellant’s attorney had the sole responsibility for preparing appropriate orders dividing the property of the parties (or Qualified Domestic Relations Orders), when the Decree specifically stated at Paragraph 7 of Exhibit C that, “The parties shall draft appropriate Qualified Domestic Relations Orders to accomplish these distributions”?**

Exhibit C to the Decree (CP 8) clearly states that *both* parties share the responsibility for drafting the appropriate orders:

7. The parties hereto shall divide the family home, the husband’s 401K, pension and retirement funds 55/45, with 55% going to the wife. The wife shall be quitclaimed the family residence by the husband and the parties stipulate that the house has a fair-market value of \$360,000 as of this date and a mortgage of approximately \$117,000. Pension and retirement funds have the following values: LEOFF 2 Plan is valued at \$327,646 and the value of the MEBT is \$240,339. ***The parties shall draft appropriate Qualified Domestic Relation Orders to accomplish these distributions.*** Wife’s attorney shall prepare the the appropriate Orders (sic) (emphasis added).

CP 8.

The Decree was drafted by the former attorney for Mr. Heath. Any ambiguities must be construed against the drafting party. For unknown reasons, this language in the Decree has been interpreted to solely require Ms. Latham to prepare the orders dividing these pensions, even though it clearly states that “the *parties* shall draft appropriate ... Orders....” This

language, by itself, should require denial of Mr. Heath's Motion to Enforce because he had just as much an obligation to draft these Orders as Ms. Latham had.

- 2. Did the trial court err by concluding that Appellant's attorney had not prepared appropriate orders when it was uncontroverted that he had done so and had sent his drafts of these orders to counsel for Respondent sixteen months earlier, which proposed orders counsel for Respondent completely ignored, and that Appellant's attorney had later sent other proposed drafts of these orders to counsel for Respondent that he had attorney Jerry Scowcroft prepare?**

Counsel for Ms. Latham prepared proposed orders and delivered them to opposing counsel Hall on June 29, 2009 for his input. No input was received from Mr. Heath or his attorney until Ms. Latham's counsel received Mr. Heath's October 21, 2010 Motion to Enforce. This conduct, by itself, should also require the denial of Mr. Heath's Motion. These orders could obviously not be entered without agreement or until the Court made rulings on these orders after an evidentiary hearing. Ms. Latham was in full compliance with the terms of the Decree - even if this Court determines that she had the sole responsibility to draft these proposed orders - well before opposing counsel drafted his present October 21, 2010 Motion to Enforce.

3. Did the trial court err in not ordering an evidentiary hearing on the appropriate terms of the orders when expert testimony was necessary, when expert opinion was in conflict, when testimony from Respondent's expert was kept secret and could not be disputed, when no discovery was allowed, when no accounting of the retirement accounts was permitted and when the trial court failed to take into consideration the contributions of Appellant's new husband to the value of the house?

This matter simply cannot be resolved by treating it as a civil motion or as a summary judgment motion - there are far too many factual issues that need to be resolved. The proper way to do this is in an evidentiary hearing with discovery, testimony and cross-examination. Contested issues of fact cannot be resolved in a motion.

Expert testimony is required to resolve this matter. This was made obvious by the trial court's ruling which adopted the opinion of Mr. Heath's expert, C.P.A. Louise Green. Mr. Heath did not produce this opinion until he filed his Motion to Enforce. Even after receiving the opinions of the experts the parties were unable to resolve this matter. Ms. Latham disagreed with the assumptions and analysis of Mr. Heath's expert. She had that right. Ms. Latham refused to accept Mr. Heath's settlement proposals. She has that right as well and should be able to exercise that right without being called intransigent.

If a party in litigation, like Mr. Heath, is unhappy with the length of time something is taking, there is a remedy - bring a motion and ***bring it as soon as you become unhappy***. Mr. Heath did not do this. It is readily apparent that whatever Ms. Latham submitted in the way of a proposed order dividing the pensions, Mr. Heath would have found fault with it and there would have been no agreement. A motion brought by one or both of the parties would have been required. Mr. Heath would have had to obtain the same expert opinion no matter what.

Ms. Latham has, at all times, acted in good faith. She had the right to take the position she has taken in this matter, even if the trial court or this Court disagrees with it. Ms. Latham has consistently maintained this position by acknowledging Mr. Heath's right to provide his input into the orders dividing the pensions. This matter, like all legal matters, can only be resolved in one of two ways - by agreement or by hearing.

The trial court has essentially determined that Ms. Latham should not be allowed to have any input into the terms of the orders dividing the pensions. We do not understand this. Whether or not Ms. Latham was intransigent should have no effect on her ability to present evidence.

Many factual matters were raised, as well as factual matters that had little bearing on the Motion to Enforce. Without discovery, an evidentiary

hearing and/or oral argument it is extremely difficult to know what the trial court felt was important to a resolution of this matter.

The trial court failed to consider the intransigence of Mr. Heath and his former counsel, Mr. Trujillo, and the intransigence of Mr. Hall since June 29, 2009, when proposed orders were submitted to him. Attachments to the Petitioner's Expert's Declaration indicate that she has been involved in this matter since at least October of 2009. Yet, the Motion to Enforce – brought in October of 2010 - was the first time anything was received from her.

4. Did the trial court err by denying Appellant's Motion to Compel an accounting of pension/retirement funds that were the community property of the parties?

A Motion to Compel is a standard, well-accepted method to force the other side in litigation to do what they are required to do. Here, Ms. Latham was requesting an accounting of the pension funds that were community property with 55% belonging to her, but that were under the sole control of her former husband, Mr. Heath. Obtaining an accurate accounting of these retirement funds is absolutely critical to this process. This is confirmed by both experts, Ms. Green (CP 231) and Mr. Scowcroft. CP 145.

5. Did the trial court err by awarding CR 11 sanctions for bringing a motion to compel?

A leading case in the area of the appropriateness of CR 11 sanctions is *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). In that case, our Supreme Court held that:

(T)he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. . . . The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 5 Wn.App. 106, 111, 780 P.2d 853 (1989).

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, at 219-220.

Specific factual findings and conclusions of law must be made before sanctions under CR 11 can be made. The sanctionable conduct must be clearly identified by the sanctioning Court. If fees are granted under CR 11, the fees must be limited to the amount reasonably expended in responding to the sanctionable filings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 157 P.3d 431 (2007).

In making its rulings, the trial court did not provide an explanation of the bases for its rulings. The trial court also made its CR 11 rulings despite the fact that Mr. Heath never denied the basic allegation made by Ms. Latham in her Motion to Compel – that she believed Mr. Heath cashed

in pension funds and used them to purchase a house in Yakima. In order to have a CR 11 claim you obviously have to deny the basic allegation or you have no claim. It is uncontroverted that a party in a Dissolution proceeding is entitled to the accounting requested here by Ms. Latham. CP 145, 231. Mr. Heath refused to provide such an accounting. Why a Motion to Compel was not an appropriate vehicle for obtaining such an accounting was not explained by the trial court. CP 184-186.

It is difficult to respond to a CR 11 Motion – or to appeal an adverse order – if you do not know the basis for the trial court’s rulings. In order to enter sanctions for violation of CR 11, the trial court must explain its reasons. It is error for a court imposing CR 11 sanctions to not enter findings identifying exactly what sanctionable actions took place. If it is alleged that opposition to a motion is in bad faith or solely for purposes of delay, in violation of the civil rules, a citation to a specific declaration that Defendant filed in bad faith or for the sole purpose of delay must be made. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 157 P.3d 431(2007).

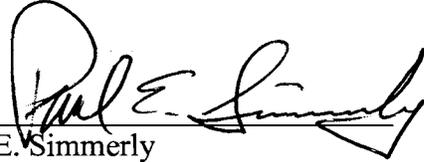
6. Did the trial court err by awarding attorney fees against Appellant?

There was no bad faith or intransigence on the part of Ms. Latham. She drafted proposed orders which were ignored by opposing counsel. A Motion to Compel is a standard legal device for obtaining information to which she is entitled and which was refused by her ex-husband, who owes her a fiduciary duty in this regard. Bringing a well-recognized, standard motion, like a Motion to Compel – cannot form the basis for a CR 11 violation. Incredibly, Mr. Heath’s attorney had also filed his own Motion to Compel earlier in this action. Personal identifiers of Mr. Heath were accidentally used in some pleadings by Mr. Simmerly. However, Mr. Heath’s attorney, Mr. Hall, also used personal identifiers of his client in two of his pleadings as well. Given that, any requests from Mr. Hall for sanctions seem disingenuous at best and no sanctions are therefore appropriate. CP 206-207.

D. CONCLUSION

The orders entered by the trial court should be reversed in all respects, the awards of attorneys fees and sanctions should be vacated and the matter remanded to the trial court for an evidentiary hearing.

Respectfully submitted this 21st day of June, 2011.

A handwritten signature in black ink, appearing to read "Paul E. Simmerly". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

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