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No. 67550-8-I

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

MICHAEL LEVITZ,
Appellant,
v.

DR. INESA LEVITZ,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Deborah Fleck, Judge

APPELLANT'S REPLY BRIEF

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I.
REPLY STATEMENT OF THE CASE

Michael will respond to Dr. Levitz's responsive statement of the case as necessary in the relevant sections below. However, he urges this Court to view with caution assertions made by Dr. Levitz that are supported only by her own declarations. The record contains statements by Dr. Levitz that call her credibility into question. For example, despite her medical degree, residence in Hilo, Hawaii and substantial earnings, Dr. Levitz wrote to Judge Spearman that she could not afford a lawyer and was "practically homeless." CP 140. She later asserted under oath that she had not received actual notice of Michael's Motion to Compel, the Motion to Adjudicate or Judge Spearman's orders. However, once presented with evidence that she had not only received these materials, but also actually responded to Michael's trial counsel about them, she changed her story. Her new complaint was that she did not speak English well. She has previously claimed that Michael, who is currently living in a house that is in foreclosure proceedings, is an heir to a fortune by virtue of his membership in the family that owned Levitz Furniture. Michael is not related to any such family (if one exists) and not an heir to any such fortune (if it exists). In light of these previous statements, Dr. Levitz's current, uncorroborated claims that 1) she was "undergoing

chemotherapy”,¹ Respondent’s Brief at 1 [hereinafter ROB]; 2) she was changing jobs, Id.; 3) that Michael engaged in “past violent assaultive behavior”, ROB 5; 4) that there was an “agreement to move to Hawaii”, ROB 8; 5) that she believed her prior counsel has answered the interrogatories, ROB 10; 6) that her computer was not working, ROB 29; and 7) that she provided anyone with a new address, ROB 11, should be viewed by this Court as not credible.

II.
REPLY ARGUMENT

**A. THE RELIEF AFFORDED MICHAEL DID NOT EXCEED
THAT REQUESTED IN HIS PETITION**

1. The relief granted did not vary from the relief requested.

Dr. Levitz insists on labeling Michael’s Petition for Dissolution as a “generic” petition. It is unclear what she means by this phrase. Michael’s petition for dissolution was made on the form required by law. Legislation enacted in 1990 directed the Office of the Administrator for the Courts to develop standardized forms for most family law proceedings, including dissolutions. RCWA 26.18.220, RCWA 26.26.065. These

¹ Undersigned counsel is absolutely certain that had Dr. Levitz provided credible evidence that she was ill and undergoing chemotherapy, Judge Spearman would have granted her a continuance of her discovery obligations and of the trial court proceedings. But, Dr. Levitz never provided any credible proof of this claim.

forms have now been promulgated and, with few exceptions, their use is mandatory. *Id.*

Dr. Levitz complains that Michael did not assign error to Judge Fleck's use of the word "generic" in her findings. But that word has no legal relevance. There is only one kind of petition for dissolution in Washington – that made on a mandatory form as required by law. Michael's argument is this: Judge Fleck's ruling states that when a party uses the request for relief mandated by the form, but later obtains default orders that provide for specific distribution of the parties assets and a detailed parenting plan, the default order is void or voidable. Because all petitions for dissolution in this state are made on the same form that Michael used, there are many, many void or voidable final orders entered by default in this state.

Michael's petition identified the parties, their child, the date of the marriage and the date of their separation. CP 1-4. Michael requested child support, maintenance, division of the community property and entry of a parenting plan at a later date. The petition specifically noted that Michael was seeking child support and maintenance because he had been out of the labor market for seven years. The petition concluded with a request for "fair equitable relief." The final orders entered were "fair and equitable." In short, there was no deviation from the relief requested.

2. Moreover, an order entered by default is not void simply because it varies in some small ways from the relief demanded in the complaint.

In entering a default judgment, a court may not grant relief in *excess of or substantially different* from that described in the complaint. *Sceva Steel Bldgs., Inc. v. Weitz*, 66 Wn.2d 260, 262, 401 P.2d 980 (1965). The rule is premised on the principle that, without notice and an opportunity to be heard denies procedural due process. *See Conner v. Universal Utils.*, 105 Wn.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wn.2d 879, 884, 468 P.2d 444 (1970). But simply complaining that Michael did not provide a detailed request on each and every issue to be decided in this litigation in his initial pleadings and calling Michael's petition "generic" does not establish a due process violation. Dr. Levitz acknowledges that "in subsequent months the parties vigorously litigated over the parenting of and child support for their young son . . ." ROB at 4. Based upon this admission, her suggestion that somehow she did not know the nature and extent of their dispute is simply disingenuous. Dr. Levitz clearly knew what was at stake in this litigation and that Michael was seeking residential custody, substantial child support and maintenance. She had actual knowledge of the orders in place pending trial. She knew that trial was scheduled to determine the terms

and conditions of any permanent orders on these subjects. She knew that trial was scheduled for early November 2010, and she knew that she had not provided the court ordered discovery.

Dr. Levitz makes much of the fact that Michael did not propose a parenting plan when he filed for dissolution, but this is irrelevant. She had every opportunity to bring her own motion for default on this issue but she did not. RCW 26.09.181.

Moreover, as she acknowledges – after extensive litigation and a full airing of her complaints that Michael had engaged in domestic violence and “coerced” her into signing documents – the Commissioner *adopted Dr. Levitz’s proposed parenting plan*. CP 8-13. Based upon these facts, the complaint that Michael did not propose a parenting plan has no relevance to resolving this case.²

Dr. Levitz’s citation to *In Re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989), does not help her. In *Leslie*, the main issue considered by the Court of Appeals was whether the husband’s Motion to

² In another of her incredible statements, Dr. Levitz argued that she was “forced by Michael to agree to the prior temporary order.” ROB at 10-11. This is simply not true. The controlling temporary orders were entered by a Commissioner after full and fair litigation. Dr. Levitz may not have liked the terms and conditions of the temporary orders entered by the Commissioner, but she was certainly not “forced to agree to them” by Michael.

Vacate the final orders was timely. The Court concluded that: “Even though the original default dissolution decree *appears to be void* as to petitioner Leslie’s liability for medical expenses and insurance . . . ,” Thus, that Court did not reach the question of whether the order was void. Instead, the Court went on to find that even an apparently void order could be remedied by subsequent litigation over that portion that exceeded the relief requested in the original complaint. Thus, in *Leslie*, the Superior Court’s later order represented a valid modification of the decree to include the “orthodontic treatment requested by [respondent Hartman] in her affidavit executed on June 26, 1985.”

In *In Re Marriage of Hughes*, 128 Wn. App. 650, 116 P.3d 1042 (2005), *review denied*, 156 Wn.2d 1031, 133 P.3d 474 (2006), the Court found that the decree differed from the dissolution petition served on the husband and violated due process and fairness principles in dealing with the State. The wife alleged in the petition that she was not pregnant. She later changed her status to “pregnant” and denied husband’s paternity without providing husband with notice and an opportunity to be heard. The variances that Dr. Levitz alleges simply do not raise to the level of failing to disclose a pregnancy.

In Re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985), the joint petition filed by Hardt and his wife stated specifically that

he had no child support obligations as to one child. Mrs. Hardt later fraudulently entered the child support amount as \$50 per month in the do-it-yourself decree.

The variances complained of by Dr. Levitz are not “substantial” in comparison to those found in *Hardt* and *Hughes*. In those cases, the actual number children involved in the dissolution proceedings changed between the Petition and final orders. In this case, Dr. Levitz complains only about the details of her visitation and decision-making set forth in the parenting plan.

In sum, Dr. Levitz’s argument that Michael filed a “generic petition” and failed to file a parenting plan is an attempt to misdirect this Court’s attention away from her complete failure to participate in discovery. On the one hand, she argues that Michael, who never had full and fair disclosure from Dr. Levitz about her job status, salary and financial assets, should have nonetheless come up with a comprehensive proposal for ending the marriage at the inception of the proceedings. Absent answers from Dr. Levitz about her life and employment in Hawaii, he could not do so. If Dr. Levitz had made the smallest of efforts to provide pretrial discovery and prepare for trial, she might have a point. Instead, despite her substantial financial assets, she failed to hire new counsel, failed to pay court-ordered child support and maintenance,

refused to provide court-ordered discovery, refused to attend telephonic hearings and did not file a motion to vacate until 7 months after the final orders were entered. This Court should not grant her relief when she does not come before the Court with “clean hands.”

3. Assuming that there was issue with Michael’s failure to file a parenting plan with his petition, Judge Fleck abused her discretion in vacating the orders regarding child support, maintenance and property division.

Assuming, without conceding, that Dr. Levitz may have had an argument that the parenting plan was void, Judge Fleck abused her discretion in vacating the related orders which in no way varied from the relief requested in the Petition. The trial court can vacate the proceedings to the extent it varied from the Petition. Here, Dr. Levitz’s primary complaint is that she had no notice of Michael’s proposed parenting plan. Assuming that is a “substantial variance” from the relief requested and assuming that Dr. Levitz’s complaints that she did not know Michael was seeking primary residential custody are credible, that provided a basis to vacate only the parenting plan. Judge Fleck had no basis to disturb the other orders. Thus, her orders vacating the orders concerning child support, maintenance and the property division were an abuse of discretion. *See In Re Marriage of Johnson*, 107 Wn. App. 500, 27 P.3d 654 (2001).

B. DR. LEVITZ RECEIVED ACTUAL NOTICE OF EVERY MOTION AND HEARING HELD IN THIS CASE

Judge Fleck never made a finding that Dr. Levitz did not have actual notice of the proceedings. Instead, her orders contain a discussion of the alleged change of address and an “issue with a personal computer.” CP 30-35. Her only finding regarding notice was that Michael failed to “provide any notice by due process of what he was seeking in terms of all issues related to this dissolution.” CP 935. Thus Dr. Levitz’s argument at pages 26-29 is simply irrelevant to this appeal. Judge Fleck made her rulings even though she appeared to concede that Dr. Levitz had actual notice of all of the proceedings in late October, 2010.

On the record presented, there can be little dispute that Dr. Levitz had actual notice. Due process is satisfied by actual notice. *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1991). If the adversary party has insufficient time to prepare for the motion because of defective service, this objection can be made so that the trial court can grant a continuance. *Id.* at 593.

Dr. Levitz responded to Judge Spearman directly on October 20, 2010. She did not ask for a continuance or object to the notice she had been given. Any determination by Judge Fleck that Dr. Levitz did not receive notice would have been an abuse of discretion when the record

reflects that she did receive notice, including telephone calls from court staff and emails from the Court and opposing counsel. Judge Spearman's court staff made sure that Dr. Levitz was provided with a copy of the order to comply or risk default via email. CP 834. As set forth in Michael's opening brief, Dr. Levitz responded to Michael's lawyer via her email and she wrote to Judge Spearman in response to the Judge's order for a status conference.

On October 25 Dr. Levitz (using inesainesa5@gmail.com) also responded to Michael's lawyers email informing her that the trial date had been stricken. CP 847. At that time, Dr. Levitz responded by stating that she would sign a parenting plan but only if it did not contain spousal support, provided for child support based upon what she represented as her \$7,000 a year income, provided her with 100 days of visitation per year with K.L. in Hawaii and permission for her to travel with K.L. out of the country. She also acknowledged that she had by that time seen Michael's proposed parenting plan because she stated that "by my calculation according to *your* submitted parenting plan I accumulated a total of 8 weeks since I left Seattle on April 11." CP 847 (emphasis added). She also seemed to acknowledge that final orders were imminent as she stated: "Please, talk to Michael to wrap it up." *Id.*

Dr. Levitz's argument that she was entitled to 14 days' notice under the facts of this case is absurd. At the time Michael sought to compel her response to discovery on pain of default, trial was 11 days away. Essentially, it is Dr. Levitz's argument that, because she evaded her duty to provide discovery and defied the court's orders until the eve of trial, refused to provide the court and counsel with a good address and phone number, no default or order to compel could be heard and Michael was required to proceed to trial without discovery.

C. THE ENTRY OF THE DEFAULT ORDERS WAS ENTIRELY APPROPRIATE GIVEN DR. LEVITZ'S FAILURE TO PROVIDE DISCOVERY, FAILURE TO ATTEND THE COURT PROCEEDINGS, FAILURE TO PAY CHILD SUPPORT AND FAILURE TO PAY MAINTENANCE

Dr. Levitz's most far-fetched argument is that equity required Judge Fleck to vacate the default orders. At some point Dr. Levitz realized that final orders were actually going to be enforced against her. Until that time she had complete contempt for the trial court proceedings and the Court's orders. Between July 2010 and May 11, 2011, she refused to hire counsel, refused to comply with discovery requests, refused to pay child support or maintenance and ignored the scheduled hearings. Michael, on the other hand, retained counsel, provided discovery, housed, clothed, fed and cared for K.L. and otherwise prepared for trial. The equities are entirely in Michael's favor.

Teter v. Deck, -- Wn.2d -- , 274 P.3d 336 (2012), cited by Dr. Levitz is distinguishable. In that case, a medical malpractice action, the Supreme Court reiterated that, when excluding a witness as a sanction for discovery violations, the trial court must make findings that the violation was willful and prejudicial and was imposed only after explicitly considering less severe sanctions. The Teters timely hired their first expert who became unavailable when he was injured. They hired a second expert who unexpectedly withdrew after citing a conflict of interest. Finally, the Teters notified Dr. Deck that they had retained Dr. Thomas Fairchild to replace the previous experts. They told Dr. Deck that Dr. Fairchild would testify to the liability and causation issues previously identified. The Teters offered several dates for Dr. Deck to take Dr. Fairchild's deposition. Although Dr. Deck tentatively agreed to one of those dates, he later refused all of the proposed dates. Instead, Dr. Deck moved to strike Dr. Fairchild on December 29, 2008. *Id.* at 339. On the first day of trial, Judge Christopher Washington granted the motion to strike Dr. Fairchild as the Teters' expert witness.

The Supreme Court reversed because Judge Washington's order excluding Dr. Fairchild did not contain the required written findings. Although Judge Washington found that the Teters failed to comply with discovery orders and that Dr. Deck was prejudiced in his trial preparation,

Judge Washington made no record other than the order: he held no colloquy with counsel and heard no oral argument on the motion. In addition he did not explicitly consider less severe sanctions.

The Teters' failures to comply were external to them. They had little control over the issues that arose with their experts. Not so in this case. Dr. Levitz could have complied with the Court's orders. She had ample notice of all of the proceedings. She simply failed to participate, refused to hire a lawyer and refused to return phone calls. For example, when Michael's lawyer contacted Dr. Levitz to discuss her failure to answer the interrogatories she told him to "stop harassing her." She went on to state that "all documents were sent to Judge Spearman. . . . I think the judge can see the horror the Jerk has created. 2M gone disappeared." CP 832. Based upon ample evidence, Judge Spearman found that Dr. Levitz's discovery violations were willful. And Judge Spearman specifically found that lesser sanctions were not available because trial was less than 14 days away.

D. DR. LEVITZ'S CONTENTION THAT HER ONLY CONCERN IS THE BEST INTERESTS OF K.L. IS BELIED BY HER BEHAVIOR

Dr. Levitz does not dispute that between April 2010 and the entry of the default orders, she visited K.L. for a total of 6 hours. CP 794-98. She does not dispute that by the fall of October 2010 she had failed to

pay \$12,900 in child support and maintenance. While Dr. Levitz is free to make any contention she likes, her actions speak far louder than her words. K.L.'s best interests were served by placing him in the care and custody of his father and by giving his father the proper decision-making authority.

**E. MICHAEL LEVITZ IS ENTITLED TO FEES AND COSTS
IN THIS APPEAL**

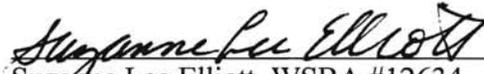
The continuation of the litigation in this case has been occasioned by Dr. Levitz's intransigence and her contempt for the trial court proceedings. Had she promptly complied with Michael's discovery requests the case would have gone to trial in November, 2010. Now, Dr. Levitz – who makes more than \$150,000 a year in salary alone – not only wants a second bite at the appeal, she wants Michael to pay for it. This Court should deny her request.

**III.
CONCLUSION**

Judge Fleck erred in vacating the orders of default in this matter. This Court should reserve Judge Fleck's order and reinstate all of the orders entered on October 27, 1010.

DATED this 31st day of May, 2012.

Respectfully submitted,


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Attorney for Michael Levitz

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following:

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