

74331-7

NO. 74331-7-1

74331-7

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

---

KIMBERLY ARZABAL

Petitioner/Appellant

v.

CHRISTOPHER ARZABAL

Respondent

2016 JUN 10 AM 9:59  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

---

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

The Honorable Charles Snyder

---

BRIEF OF PETITIONER/APPELLANT

---

LYNETTE M PHILIP, WSBA#34346

Attorney for Petitioner/Appellant

119 N. Commercial Street, Suite #820

Bellingham, WA 98225

(360) 392-3988

**ORIGINAL**

**Table of Contents**

**A. ASSIGNMENT OF ERROR.....1**

That the court erred in failing to consider the principles of Res Judicata and Estoppel by Judgment when it denied Kimberly's CR 60(b) motion to vacate.....1

That the court erred when it failed to enforce the Orders entered by Commissioner Heydrich on April 7<sup>th</sup>, 2015 denying Christopher's motion to modify spousal maintenance. The court erred when it modified Commissioner Heydrich's order entered 4/7/2015, which order became a final judgment of the Superior Court when Christopher failed to file a motion for Revision within 10 days pursuant to CR 59 and WCCR 53.2.....1

That the court erred when it considered Christopher's second motion to modify spousal maintenance, which motion was filed 29 days after entry of Commissioner Heydrich's order denying his first motion to modify spousal maintenance.....1

The court erred when it failed to consider the provisions of CR 60(b) and (c) when it denied Kimberly’s CR 60(b) motion to vacate.....1

The court erred when it failed to make findings when it denied Kimberly’s CR 60(b) motion to vacate.....2

**B. ISSUES PRESENTED.....2**

1. Whether Commissioner Heydrich’s Order denying Christopher’s motion to modify spousal maintenance entered on 4/7/2015 became a final judgment of the Superior Court, thus barring the court from considering a virtually identical motion to modify spousal maintenance filed by Christopher twenty nine (29) days later when Christopher failed to allege or provide evidence of a substantial change in circumstances between the date his motion to modify was denied (4/7/2015) and the date of the filing of his second motion twenty nine days later (5/6/2015).....2
2. Whether the court erred when it denied Kimberly’s CR 60(b) motion to vacate Commissioner Henley’s orders granting

Christopher's second motion to modify spousal maintenance.....2

3. Whether the court erred when it denied Kimberly's CR 60(b) motion to vacate the Order on Revision entered by Judge Snyder on 9/18/15, which order stemmed from Christopher's second motion to modify spousal maintenance. This order granted Kimberly's motion on revision (wherein she raised the issue of Res Judicata and Estoppel by Judgment), but remanded the issue back to the commissioner for fact finding. Judge Snyder's Order on revision did not vacate Commissioner Henley's order of 6/2/2015. Did the court err when it failed to consider the issue of Res Judicata and Estoppel by Judgment raised by Kimberly in her motion for Revision? Was Kimberly's CR 60(b) motion to vacate this order well-grounded in law and in fact and should the court have vacated the Order on Revision entered on 9/18/14? .....3

4. Whether the court erred in denying Kimberly's CR 60(b) motion to vacate/strike from the record, Christopher's second motion to modify and all subsequent orders filed by Christopher to modify spousal maintenance (herein

“Respondent’s 2<sup>nd</sup> motion”) when Respondent’s 2<sup>nd</sup> motion was filed 29 days after entry of Commissioner Heydrich’s order of 4/7/15 denying Christopher’s first motion to modify spousal maintenance. The second motion was filed on 5/6/15 and did not allege a substantial change in circumstance having occurred in the 29 day period between entry of the order denying a modification and Respondent’s filing of his second, virtually identical motion to modify.....3

**C. STATEMENT OF CASE.....49**  
**D. ARGUMENT.....9-15**  
**E. CONCLUSION.....15**

**TABLE OF AUTHORITIES**

**Washington State Appellant Cases**

*Robertson v. Robertson*, 113 Wn. App. 711  
(2002).....10

*In re Marriage of Spreen*, 107. Wn. App. 341, 28P.3d 769  
(2001).....11

In re Marriage of Coyle, 61 Wn. App. 653, 811 P.2d 244, review denied, 117 Wn. 2d 1017 (1991).....	11
AIMCOR V. Melton, 74 Wn. App 73, 872 P.3d 87 (1994) .....	12
Meridian Minerals Co. V. King Cy., 61 Wn. App. 195 203, 810 P.2d 31, review denied, 117 Wn. 2d 1017 (1991).....	12
Felsman v. Kessler, 2 Wn. App. 493, 498, 468 P.2d 691, review denied, 78 Wn.2d 994 (1970).....	12
Kelley-Hansen v. Kelley-Hansen, 87 Wn. App. 320, 327-28, 941 P.2d 1108 (1997).....	14
In re Ellern, 23 Wn.2d 219, 222, 160 P.2d 639 (1945). ....	13

**Washington State Statutes**

RCW	
2.25.050.....	10
RCW	
6.09.170(1)(b).....	11

**Washington State Court Rules**

CR 60(b).....1, 2, 3, 9, 11, 13, 14, 15

CR 60(c).....1

CR 59.....1

**Whatcom County Local Rules**

WCCR 53.2.....1

**Other Authorities**

*Jack H. Friedenthal et al.*, Civil Procedure, § 14.1, at 607 (1985)

.....14

## **A. ASSIGNMENT OF ERROR**

The court erred in failing to consider the principles of Res Judicata and Estoppel by Judgment when it denied Kimberly's CR 60(b) motion to vacate.

The court erred when it failed to enforce the Orders entered by Commissioner Heydrich on April 7<sup>th</sup>, 2015 denying Christopher's motion to modify spousal maintenance. The court erred when it modified Commissioner Heydrich's order entered 4/7/2015, which order became a final judgment of the Superior Court when Christopher failed to file a motion for Revision within 10 days pursuant to CR 59 and WCCR 53.2.

The court erred when it considered Christopher's second motion to modify spousal maintenance, which motion was filed 29 days after entry of Commissioner Heydrich's order denying his first motion to modify spousal maintenance.

The court erred when it failed to consider the provisions of CR 60(b) and (c) when it denied Kimberly's CR 60(b) motion to vacate.

The court erred when it failed to make findings when it denied Kimberly's CR 60(b) motion to vacate.

## **B. ISSUES PRESENTED**

1. Whether Commissioner Heydrich's Order denying Christopher's motion to modify spousal maintenance entered on 4/7/2015 became a final judgment of the Superior Court, thus barring the court from considering a virtually identical motion to modify spousal maintenance filed by Christopher twenty nine (29) days later when Christopher failed to allege or provide evidence of a substantial change in circumstances between the date his motion to modify was denied (4/7/2015) and the date of the filing of his second motion twenty nine days later (5/6/2015).
2. Whether the court erred when it denied Kimberly's CR 60(b) motion to vacate Commissioner Henley's orders granting Christopher's second motion to modify spousal maintenance.
3. Whether the court erred when it denied Kimberly's CR 60(b) motion to vacate the Order on Revision entered by Judge Snyder on 9/18/15, which order stemmed from Christopher's second motion to modify spousal maintenance. This order

granted Kimberly's motion on revision (wherein she raised the issue of Res Judicata and Estoppel by Judgment), but remanded the issue back to the commissioner for fact finding. Judge Snyder's Order on revision did not vacate Commissioner Henley's order of 6/2/2015. Did the court err when it failed to consider the issue of Res Judicata and Estoppel by Judgment raised by Kimberly in her motion for Revision? Was Kimberly's CR 60(b) motion to vacate this order well-grounded in law and in fact and should the court have vacated the Order on Revision entered on 9/18/15?

4. Whether the court erred in denying Kimberly's CR 60(b) motion to vacate/strike from the record, Christopher's second motion to modify and all subsequent orders filed by Christopher to modify spousal maintenance (herein "Respondent's 2<sup>nd</sup> motion") when Respondent's 2<sup>nd</sup> motion was filed 29 days after entry of Commissioner Heydrich's order of 4/7/15 denying Christopher's first motion to modify spousal maintenance. The second motion was filed on 5/6/15 and did not allege a substantial change in circumstance having occurred in the 29 day period between entry of the order denying a modification and Respondent's filing of his second, virtually identical motion to modify. 4

### **C. STATEMENT OF CASE**

On 3/28/2013 the marriage of Kimberly and Christopher Arzabal was dissolved. Kimberly was awarded spousal maintenance of \$2,000 per month for a period of five (5) years. Paragraph 2.12 of the Findings of Fact and Conclusions of Law, CP 98, and paragraph 3.7 of the Decree of Dissolution, CP100.

In pertinent part, Paragraph 2.12 of the Findings of Fact and Conclusions of Law provides as follows: "Maintenance should be ordered because, considering the statutory factors and need versus the ability to pay, maintenance is appropriate. The following findings are made:

1. The length of the relationship, being sixteen years married plus the five years before the date of marriage when the parties lived in a mutually exclusive relationship, falls within the mid-range to long term category of marriage"
2. The wife has not worked very much since the start of the relationship and when she did work it was at basic entry level jobs paying her minimum wages. In the last decade or more all of the marital income came from the husband while the wife raised the children and maintained the family home.

3. The wife has had little or no post secondary education and has a limited ability to work at present. She needs training and the opportunity to go to school to get an education to improve her work skills in order to sustain herself.
4. Given the financial data of the wife's needs and the income of the husband it is found that \$2,000 a month in maintenance for a period of five years is appropriate for a maintenance award. The award shall be increased to \$2,500 a month for the first twelve months if the parties cannot obtain, conclude or re-instate the home loan modification spoken of at trial; in such event, after 12 months the maintenance sum will be reduced to \$2,000 a month for the remaining 48 months." CP 98.

On 3/23/2015 Christopher filed a Motion to Remove Spousal Maintenance, CP 157 (hereinafter referred to as Christopher's first motion to modify spousal maintenance). In his declaration in support of the motion, Christopher alleged reduced income, that "It's been over five years supporting Kimberly during separation and divorce", and "It's time for Kimberly Arzabal to start supporting herself." CP 157. Kimberly opposed the motion *pro se*. Hearing on the motion was scheduled for 4/7/2015 in

front of Commissioner Heydrich, CP 160. Christopher's first motion to modify spousal maintenance was denied by Commissioner Heydrich on 4/7/2015, CP 161. The order reads: "Mr. Arazbal has not established a substantial change of circumstances other than a decrease in his income." CP 161. On the same day, Commissioner Heydrich signed a Wage Assignment Order/Garnishment for Lien on Earnings, CP 162. Both parties were advised from the bench that they had 10 days to file a motion for revision if they were not satisfied with the courts' orders. See Transcript of hearing on 4/7/2015. Christopher did not file a motion for revision.

On 5/6/2015, twenty nine (29) days after entry of Commissioner Heydrich's Order denying Christopher's first motion to modify spousal maintenance, Christopher filed a virtually identical Motion for Modification of Orders, CP 167 (Hereinafter referred to as Christopher's second motion to modify spousal maintenance). Hearing on this motion was scheduled to be heard by Commissioner Henley on 5/21/15, CP 182. At the hearing Commissioner Henley stated that he was taking the matter of Christopher's second motion to modify spousal maintenance under advisement and that he would be issuing a

written ruling within a week. He ordered the parties to file financial declarations within five (5) business days, CP 182.

On 6/2/2015 Commissioner Henley entered his Decision on Motion for Modification of Orders, CP 185. Christopher's second motion to modify spousal maintenance was granted and his obligation was reduced from \$2,000 per month to \$598.85, CP 185.

On 6/12/2015 Kimberly, *pro se*, filed a Motion for Revision, CP 188. In support of her motion, she raised the legal principle of Res Judicata. She argued that because Christopher had not filed a motion for Revision within the statutory ten (10) days after entry of the April 7<sup>th</sup>, 2015 order denying modification, the orders denying modification became a final judgment of the Superior Court, CP 188. She argued that Christopher's second motion to modify spousal maintenance, filed twenty nine (29) days later should not have been considered by the court, CP 188.

On 6/26/2015 The Honorable Judge Charles R. Snyder orally granted Kimberly's motion and set aside the Commissioner's ruling. He remanded back to the Commissioner for a more

complete fact-finding and determination if there should be reduction in spousal maintenance or a suspension in spousal maintenance, CP 196. Judge Snyder did not make any ruling or findings regarding the issue of Res Judicata argued by Kimberly, CP 204.

On 9/18/2015 the Order on Motion for Revision was entered by the court, CP 204, and Christopher's second motion to modify spousal maintenance was remanded to Commissioner Henley for fact-finding.

On 10/2/2015 the undersigned filed a Notice of Limited Appearance, CP 211.

On 10/12/2015 Kimberly filed a CR 60(b) Motion to vacate the following orders:

1. Order entered by Commissioner Henley on 6/16/2015 (granting Christopher's second Motion for Modification of Orders), CP 213
2. Order entered by Judge Snyder on 9/18/15 (Order on Revision of Commissioner Henley's Order of 6/16/15), CP 213.

3. An order striking Christopher's second motion for modification of spousal maintenance filed on 5/6/15, CP 213.

On 10/30/2015 the Honorable Judge Snyder denied Kimberly's CR 60(b) motion and declined to make findings, CP 222 and 223. It is this Order denying Kimberly's CR 60(b) motion to vacate that is the subject of this appeal.

#### **D. ARGUMENT**

**Commissioner Heydrich's Order entered 4/7/2015 denying Christopher's motion to modify spousal maintenance became a final judgment of the Superior Court, precluding/barring Christopher from re-litigating the very same issue absent a claim of a substantial change in Christopher's financial circumstances. Kimberly's CR 60(b) motion to vacate all subsequent orders entered pursuant to Christopher's 2<sup>nd</sup> motion to modify spousal maintenance should have been granted.**

Christopher's first Motion to Remove Spousal Maintenance was filed on 3/23/2015, CP 157. In support of his motion he filed paystubs and some medical information indicating that he was having a problem with his shoulder, CP 157. On 4/7/2015

Commissioner Heydrich denied his motion for modification, CP 161 and stated that there had not been a substantial change in circumstances. When Christopher failed to file a motion for Revision, Commissioner Heydrich's orders became an order of the Superior Court. Appellate review was not sought by Christopher within 30 days, thus Commissioner Heydrich's order denying a modification of spousal maintenance became a final judgment of the Superior Court. RCW 2.25.050

A superior court has no jurisdiction to revise a commissioner's ruling after expiration of 10-day time limit. *Robertson v. Robertson*, 113 Wn. App. 711 at 714 (2002). "A court may not ignore a statutory dictate without first finding that the statute was unconstitutional." When a deadline passes for moving for revision, an aggrieved party's only recourse is to seek appellate review. *Robertson*, 113 Wn. App 711 (2002).

Christopher did not file a motion for revision. He did not file an appeal. The issue of modification of spousal maintenance was litigated before Commissioner Heydrich.

Twenty nine (29) days after entry of Commissioner Heydrich's order denying his first motion to modify, Christopher

retained counsel and filed a second, virtually identical motion to modify spousal maintenance, CP 166 and 167. This motion was filed on 5/6/2015. Christopher's second motion to modify spousal maintenance did not allege a substantial change in circumstances between 4/7/2015 and 5/6/2015.

No substantive new evidence was provided in support of Christopher's second motion indicating that there had been a substantial change in circumstances justifying a modification action pursuant to RCW 26.09.170(1)(b). Maintenance may be modified only upon a showing of an unanticipated, substantial change in circumstances, *In re Marriage of Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001); *In re Marriage of Coyle*, 61 Wn. App. 653, 811 P.2d 244, *review denied*, 117 Wn.2d 1017 (1991).

Commissioner Henley made a finding that there had been a substantial change in his circumstances since entry of the decree, CP 192. This is important, as he did not find that there had been a substantial change in circumstances subsequent to Commissioner Heydrich's orders denying the motion on 4/7/2015.

During argument on Kimberly's CR 60(b) motion to vacate, Judge Snyder indicated that he felt that as additional financial

documents had been submitted in Christopher's second motion, it warranted hearing the motion again. See transcript of the hearing on 10/30/2015. There was no evidence presented nor finding made that those documents were not available to Christopher at the time he filed his first motion to modify. There was no motion for Revision nor motion for Reconsideration before the court.

After a formal order has been entered, it is improper to offer new evidence. New evidence may not be submitted to a court for purposes of reconsideration after a formal order has been entered. Commissioner Heydrich's order denying Christopher's motion to modify spousal maintenance entered on 4/7/2015 became a final order of the Superior Court when no motion for revision or reconsideration had been filed by Christopher thus precluding Judge Snyder from considering any additional documentation. *AIMCOR v. Melton*, 74 Wn. App 73, 872 P.2d 87 (1994); *Meridian Minerals Co. v. King Cy.*, 61 Wn. App. 195, 203, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991); *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691, *review denied*, 78 Wn.2d 994 (1970).

The principles of Res Judicata and Estoppel by Judgment, would still apply and Kimberly's CR 60(b) motion to vacate should have been granted.

The court erred when it did not vacate all orders entered based on and subsequent to Christopher's second motion to modify spousal maintenance. Those orders should be vacated per Kimberly's CR 60(b) motion to vacate.

CR 60(b)(1) provides for relief when an order or judgment has resulted from a mistake, irregularity in the proceeding or the excusable neglect of a party or attorney. Procedural irregularities may justify vacation of a judgment under CR 60(b)(1). A procedural irregularity is defined as a "want of adherence to some prescribed rule or mode of proceeding." *In re Ellern*, 23 Wn.2d 219, 222, 160 P.2d 639 (1945). In this case, Christopher's second motion to modify spousal maintenance should never have been granted as there was already an order in place denying his motion to modify spousal maintenance. Kimberly was representing herself *pro se*. It was only when she retained counsel, that she was made aware of the fact that there were procedural irregularities that would justify

vacating the orders entered pursuant to Christopher's second motion to modify spousal maintenance.

Res judicata and Estoppel by judgment refer to two ways that a judgment may preclude a future action. Res judicata prevents a plaintiff from suing on a claim that already has been decided. Estoppel by judgment precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. If a party loses the first suit, he is barred by the adverse judgment from raising the same cause of action again, even if he can present new grounds for recovery. Jack H. Friedenthal et al., *Civil Procedure*, sub paragraph 14.1, at 607 (1985); *Kelley-Hansen v. Kelley-Hansen*, 87 Wn. App. 320, 327-28, 941 P.2d 1108 (1997).

In the present case, Christopher is barred by the adverse judgment of Commissioner Heydrich on 4/7/2015 from re-litigating the same issue. Thus, Kimberly's CR 60(b) motion to vacate Commissioner Henley's order granting Christopher's second motion to modify entered with the court on 6/16/15 should be granted, as should Judge Snyder's order entered on 9/18/2015. Both orders

were premised on Christopher's second motion to modify spousal maintenance when there was already an order entered by Commissioner Henley, denying Christopher's first motion to modify spousal maintenance. That order became a final judgment precluding Christopher from re-litigating the issue of modification.

### E. CONCLUSION

The principles of Res Judicata and Estoppel by Judgment precluded Christopher from re-litigating the issue of modification of spousal maintenance. The Superior Court should have granted Kimberley's CR 60(b) motion to vacate all orders based on and subsequent to Christopher's second motion to modify spousal maintenance.

Respectfully submitted this 9<sup>th</sup> day of June, 2016.

  
LYNETTE PHILIP WSBA#34346  
Attorney for Kimberly Arzabal

DECLARATION OF SERVICE

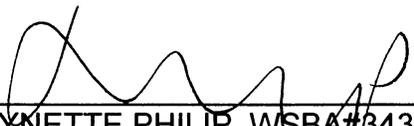
The undersigned declares under penalty of perjury,  
under the laws of the State of Washington, that the following  
is true and correct:

On June 9<sup>th</sup>, 2016, I arranged for service of the  
Foregoing Appellant's Brief via U.S. Mail, as follows:

Office of Clerk (via U.S. Mail)  
Washington State Court of Appeals, Division 1  
One Union Square  
600 University Street  
Seattle, WA 98101

Rajeev D. Majumdar, Esq.  
289 H Street  
P.O. Box 1258  
Blaine, WA 98231-1258  
Attorney for Respondent

DATED: June 9<sup>th</sup>, 2016 at Bellingham, Washington.

  
\_\_\_\_\_  
LYNETTE PHILIP, WSBA#34346  
Attorney for Petitioner/Appellant