

No. 42906-3-II

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

ROBERT ROSS

Respondent

v

TONI HAMILTON

Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
2012 JUN 18 PM 3:36  
STATE OF WASHINGTON  
BY CA  
DEPUTY

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ON APPEAL FROM THE SUPERIOR COURT FOR WAHKIAKUM  
COUNTY

The Honorable Michael Sullivan  
Superior Court No. 07 2 00002 9

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RESPONDENT'S OPENING BRIEF

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**I. RESPONSE TO ASSIGNMENTS OF ERROR**

A. The trial court made no error. The trial court properly ordered the release of all or a portion of the funds held in the Clerk's trust account to Robert Ross' attorney.

B. The trial court did not err by ordering the release of all remaining funds held by the Clerk when the Court of Appeals vacated a \$17,500 award to Mr. Ross that was part of those funds. The trial court did not release all of the remaining funds held by the Clerk.

C. The trial court did not err by ordering the release of all remaining funds held by the Clerk when the parties and the court contemplated the preservation and calculation of Toni Hamilton's interest in those funds. The trial court did not release all of the remaining funds held by the Clerk.

D. The appeal of Hamilton is not properly before the Court under the Rules of Appellate Procedure.

E. Ross should be awarded attorney's fees on this appeal.

## II. STATEMENT OF THE CASE

Respondent, Robert Ross, prevailed at trial with the trial court entering a Decree of Dissolution of a committed intimate relationship which distributed the property acquired during that relationship. (CP 86). Paragraph 3.2 of the Decree awards Robert Ross a 50% undivided ownership of the proceeds of the sale of certain real property. (CP 86). Paragraph 3.12 of the Decree indicates that the funds held by the Wahkiakum Superior Court Clerk's Office under this cause shall be released. (CP 86).

Appellant, Toni Hamilton, appealed the Decree entered by the trial court to the Court of Appeals, Division II, and further petitioned for review by the Supreme Court of the State of Washington. (CP 88). Hamilton did not prevail at either level with the exception of a minor judgment reversal. A mandate was returned to Wahkiakum County Superior Court. (CP 109). After the mandate was entered, Respondent, Robert Ross, filed a Motion for the Release of Funds. (CP 110). The Motion for Release of Funds was merely making operative the terms of the Decree of Dissolution. The objection to Motion for Distribution of Appellant, Toni Hamilton, included a

variety of objections based on claims and allegations that should have been made or were made to the trial court prior to the entry of the Decree. (CP 113). Respondent, Robert Ross, submitted a Motion and Declaration for Order Limiting Application of Stay, Reject Supersedeas and for CR 11 Sanctions. (CP 125). After hearing argument on this issue, the Court entered an Order Limiting Application of Stay, Rejecting Supersedeas and Allowing Disbursal of Funds. (CP 129). The Order Limiting Application of Stay, Rejecting Supersedeas and Allowing Disbursal of Funds and for CR 11 Sanctions does not distribute all of the funds held by the Clerk. (CP 129). The amount of \$137,000 is held by the Clerk as a result of this Order. (CP 129).

The argument regarding the disbursal of funds was initially argued on November 7, 2011. (11/7/11 RP 2). Ross argued at the Motion hearing that the Decree in this case was final and post-appeal should not be disturbed. (11/7/11 RP 3). Ross also pointed out that while Hamilton objected, no affirmative relief was sought at the hearing of the Motion for the Disbursal of Funds by Hamilton. (11/7/11 RP 3-4). The notion that the objections of Hamilton were

not properly before the Court for any affirmative relief was also stated as part of Ross' argument regarding the individual objections made by Hamilton. (11/7/11 RP 5). The trial court questioned Ross' counsel about the issue of the 401k plan of Ross and how it should be valued. (11/7/11 RP 7-8).

The mandate from the Court of Appeals included a reversal of the trial court's judgment in the amount of \$17,500. (CP 109).

Ross' position was that the \$17,500 was not part of the funds held by the Clerk. (12/13/11 RP 13-14). For the sake of argument, Ross argued that each party should receive \$8,750 or half of the \$17,500 amount from the funds held by the Clerk.

Ross further argued that the entry of the Decree was res judicata to all of the claimed offsets by Hamilton. (11/7/11 RP 18-20). The trial court also considered a substantial amount of argument and analysis regarding the value of the 401k and Hamilton's potential offset against money held by the Clerk. (11/7/11 RP 38-67). The trial court ultimately requests additional information regarding the 401k from Ross. (11/7/11 RP 68, 70-72).

The trial court acknowledged that changing the Decree would not be appropriate. (11/7/11 RP 68-69).

Ross argued at the hearing regarding the Order Limiting Application of Stay, Rejecting Supersedeas and Allowing Disbursal of Funds that the appeal by Hamilton cannot appeal the mandate from the Court of Appeals. (12/13/11 RP 3-5). Ross also argued that disbursal of money pursuant to the Decree is a separate issue from the post-Decree issues that have been raised by Hamilton. (12/13/11 RP 4). Ross continued to argue before the trial court that the mandate from the Court of Appeals should be upheld and cannot be appealed. (12/13/11 RP 11-12).

### III. ARGUMENT

A. The trial court made no error. The trial court properly ordered the release of all or a portion of the funds held in the Clerk's trust account to Robert Ross' attorney.

The trial court has not released all funds. (CP 129). One Hundred Thirty-Five Thousand and No/100ths (\$135,000.00) Dollars is still held by the Clerk. (CP 129).

Res judicata prevents relitigation of the same claim where a subsequent claim involves the same: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. State v Hawkins, 164 Wn. App. 705, 715, 265 P.3d 185 (2011). Res judicata has been applied to prevent issues from being raised on appeal. *Id.* The present appeal involves the same subject matter, cause of action, persons and parties and the same quality of the persons against whom the claims are made as the prior appeal. The Decree states: "The funds held by the Wahkiakum County Superior Court Clerk's Office under this cause shall be released to Craig M. McReary, P.S. in trust for Robert

Ross, Petitioner.” (CP 86). The present appeal seeks to reappeal this issue.

B. The trial court did not err by ordering the release of all remaining funds held by the Clerk when the Court of Appeals vacated a \$17,500 award to Mr. Ross that was part of those funds. Hamilton’s argument that the trial court erred by releasing all of the funds held by the Clerk because a vacated award of \$17,500 was part of those funds is unsupported. Hamilton makes reference to clerk’s papers number 136 as proof that the above-referenced \$17,500 was part of the funds held by the Clerk. Clerk’s papers 136 is dated January 3, 2012 and is a receipt from the Court of Appeals. This receipt has nothing to do with the \$17,500. There is no principle of law supportive of Hamilton’s case in Dowler v Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 258 P.3d 676 (2011) and Matsyuk v State Farm Fire & Cas. Co. of Ill., 173 Wn.2d 643, 272 P.3d 802 (2012). It is unclear why these cases are claimed to be supportive of Hamilton’s case or why this Court should reverse based upon such cases.

C. The trial court did not err by ordering the release of all remaining funds held by the Clerk when the parties and the court contemplated the preservation and calculation of Toni Hamilton's interest in those funds. The trial court did not release all of the remaining funds held by the Clerk.

The Decree of Dissolution in this cause did not contemplate the preservation and calculation of Toni Hamilton's interest in the funds held by the Clerk. (CP 86). With regard to the disbursal of funds from the Clerk, any arguments by Ross to the trial court contemplating funds being held were in the context of the trial court considering such an option. (11/7/11 RP 70-71). After considering the arguments and information before the trial court, the trial court entered the Order Releasing Funds. (CP 119). Hamilton provides no authority for the assertion that the money held by the Clerk was, in any way, legally subject to offsets presented by Hamilton in her objection to Ross' Motion for Distribution of Funds.

Based on the language of the Decree, the trial court's disbursal of funds was a ministerial act. (CP 86). Hamilton relies on State v Rodriguez Ramos, 171 Wn.2d 46, 246 P.3d 811 (2011).

Ramos involved the resentencing of a criminal defendant on remand. Id. The present case is distinguishable as there is a Decree that states specifically what needed to happen with regard to the funds held by the Clerk. (CP 86). There was no resentencing or reworking of the Decree on remand other than the fact that Ross could no longer pursue a \$17,500 judgment against Hamilton. (CP 109). The Ramos, supra case does not provide authority to reverse the trial court in this appeal.

Hamilton argues that the trial court should have determined her interest in the funds held by the Clerk. The trial court did determine Hamilton's interest in the funds in the Decree. (CP 86). The manifest abuse of discretion standard is appropriate as stated by Hamilton. The trial court's decision will not be disturbed on review unless there has been a clear showing of abusive discretion that is manifestly unreasonable or exercised on untenable grounds. State ex rel Carroll v Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). Hamilton refers to multiple arguments made before the trial court by both parties and the record of proceedings has multiple comments made by the trial court, yet Hamilton asserts that the trial court did not

exercise its discretion pursuant to Bowcutt v Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999). The trial court had the parties' arguments before it and ruled in favor of Ross. A failure to exercise discretion would have necessarily required some strict preclusion of an issue or argument. By Hamilton's standard, any litigant could claim that a trial court did not exercise any discretion therefore an abuse of discretion occurred.

D. The appeal of Hamilton is not properly before the Court under the Rules of Appellate Procedure. The December 12, 2011 Wahkiakum County Superior Court Order releasing the funds held in the clerk's trust account is not an order subject to appeal. The Order Releasing Funds was a ministerial act in compliance with the Decree of Dissolution. All issues relating to the Decree of Dissolution have already been appealed by Appellant and a mandate was issued. The Court of Appeals' decision is final. The Appellant cannot appeal the matter further. RAP 12.7(a). In fact, RAP 12.7(a) indicates that the Court of Appeals loses the power to change or modify its decision upon issuance of the mandate. The Appellant cannot appeal the same issue twice.

The basis of this appeal is the Appellant's dispute over the disbursement of funds pursuant to the Decree. Under RAP 8.6, the stay relevant to the appeal of the Decree was terminated. The Appellant is merely trying to use the stay set forth in RAP 8 to hold money from the Decree as an offset against new and untimely allegations made in Appellant's Petition for Division of Undisclosed and Undivided Assets. (CP 113). The Appellant has not demonstrated any entitlement nor shown any authority for such an offset. As Respondent, Robert Ross, argued in his Motion and Declaration for Order Limiting Application of Stay, Reject Supersedeas and for CR 11 Sanctions, Appellant has not met the requirements of CR 62 and RAP 2.2. (CP 125). It is clear that the Appellant is not entitled to a stay under CR 62. RAP 2.2 sets forth the decisions of the Superior Court that may be appealed. The substance of this appeal is not listed in RAP 2.2. RAP 12.7(a) makes it clear that there can be no further review of the trial court's decision in this matter. RAP 8.1(b) specifically references a "pending appeal" in reference to a trial court's decision. Hamilton does not have a proper appeal of the trial court's decision relating to the Decree. Accordingly, RAP 8.1(b) has

no application. RAP 8.1(b) also indicates that a stay of a decision in other cases is a matter of discretion. The trial court decided to limit the application of the stay.

Under RAP 7.2(e) the trial court has authority to hear a post-judgment motion to the extent that it does not change or modify the decision, in this case the Decree. The court's ruling on the release of funds and the order limiting the scope of the stay do not change the outcome of the Decree. The orders merely provide for partial payment of the amounts required under the Decree. The Appellant must prove that under RAP 7.2(e) the orders of the trial court affect the outcome of an issue accepted for review. State ex rel. Shafer v Bloomer, 94 Wash.App. 246, 250 (1999). The trial court in this case did not violate RAP 7.2(e) because it did not need permission from the Court of Appeals to enter the subject orders. In re:Marriage of Grimsley-LaVergne and LaVergne, 156 Wash.App. 735 (2010). RAP 7.2(e) also punctuates the importance of Respondent's arguments above regarding the fact that this is a second appeal of this issue and that Appellant should be required to petition for

discretionary review as this matter is not a matter properly reviewable under RAP 2.2.

E. Attorney's fees. Ross should be awarded attorney's fees as a result of having to defend this frivolous appeal. RAP 18.1 and RCW 4.84.185. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and the appeal is totally devoid of merit such that there is no reasonable possibility of reversal. Wright v Dave Johnson Ins., Inc., 275 P.3d 339, 356 (2012). Based on the arguments set forth above regarding res judicata, procedural issues involving the Rules of Appellate Procedure and the substance of this case, Ross requests that the Court award attorney fees for having to defend this frivolous appeal.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ross respectfully urges this Court to affirm the Order Releasing Funds

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held by the Clerk. Mr. Ross further respectfully urges this Court to grant his request for attorney's fees.

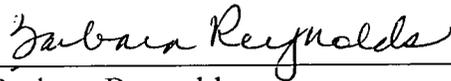
Dated this 15th day of June, 2012.



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CERTIFICATE OF SERVICE

I, Barbara Reynolds, certify that on the 15th day of June, 2012, I served a copy of the Respondent's Opening Brief by first class mail, postage prepaid, on Kenneth H. Kato, Attorney at Law, 1020 North Washington, Spokane, WA 99201.



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