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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 44197-7-II

THE COURT OF APPEALS, DIVISION II

State of Washington

MARIUSZ K. KOWALEWSKI,

PETITIONER

Vs.

BARBARA B. KOWALEWSKA,

RESPONDENT

APPELLANT'S OPENING BRIEF

J. Mills
WSBA# 15842
Attorney For Appellant
201 Atrium Court
705 S. 9th Street
Tacoma, Washington 98405
(253) 226-6362
jmills@jmills.pro

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ASSIGNMENTS OF ERROR

The Superior Court erred by refusing to find certain collection activities engaged in by Ms. Kowalewska were intransigent, and needlessly costly to Mr. Kowalewski and therefore erred in failing to award to Mr. Kowalewski fees incurred in defending.

The Superior Court erred in failing to award fees to Mr. Kowalewski in this case pursuant to paragraph 3.6 of the Decree which provides that each party is to hold the other harmless from defending against attempts to collect obligations not theirs under the Decree.

The trial court erred in failing to find that Ms. Kowalewska's actions in trying to collect the old \$952.79 judgment is frivolous and advanced without proper cause and therefore is compensable under RCW 4.86.185.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Ms. Kowalewska files for divorce and a temporary support order is entered, including a judgment for back support in the amount of \$952.78; that entire case is

dismissed when the parties reconcile. Years later a second divorce is completed and a final post-trial Decree is entered, not including (or merging) any claims for support owed, including the \$953.78 awarded in the first divorce that was dismissed. Later, she files a new action in the original divorce case seeking recovery of the \$952.78 along with some \$40,000 in “temporary support” allegedly not discharged by the dismissal. That request is denied. An appeal is taken by Ms. Kowalewska; it is dismissed. If, after all that, Ms. Kowalewska requests and obtains a garnishment of Mr. Kowalewski’s bank accounts through Support Enforcement for the \$952.78 is he entitled to his fees incurred in defending the garnishment and collection effort?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court’s decision respecting enforcement of a divorce Decree. In this case, because the appellate court is in part called upon to review the interpretation of a Decree, the trial court’s ruling is de novo. See *In re Marriage of Thompson*, 988 P.2d 499,

97 Wn.App. 873, 875-76 (Wash.App. Div. 1 1999). (“The interpretation of a dissolution decree is a question of law. *Chavez v. Chavez*, 80 Wash.App. 432, 435, 909 P.2d 314, *review denied*, 129 Wash.2d 1016, 917 P.2d 576 (1996)). Questions of law are subject to de novo review by the appellate court. *McDonald v. State Farm Fire and Casualty Co.*, 119 Wash.2d 724, 730-31, 837 P.2d 1000 (1992). If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. *See In re Marriage of Gimlett*, 95 Wash.2d 699, 704-05, 629 P.2d 450 (1981); *Kruger v. Kruger*, 37 Wash.App. 329, 331, 679 P.2d 961 (1984).”).

A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. RCW 26.09.170(1); *Kern v. Kern*, 28 Wash.2d 617, 619, 183 P.2d 811 (1947). An ambiguous decree may be clarified, but not modified. RCW 26.09.170(1); *In re Marriage of Greenlee*, 65 Wash.App. 703, 710, 829 P.2d 1120, *review denied*, 120 Wash.2d 1002, 838 P.2d 1143 (1992). A decree is modified when rights given to one party are extended beyond the scope originally

intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. *Rivard v. Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969).

To some extent, this case calls on the appellate court to review issues of intransigence and frivolousness, which are akin to issues of contempt, and to that extent, the trial court's decision is reviewed for abuse of discretion. *See State v. Caffrey*, 70 Wash.2d 120, 122, 422 P.2d 307 (1966) (contempt order reviewed for abuse of discretion).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

IMPORTANT FACTS

This is the second of two divorce case pertaining to the Kowalewski family.

As would be expected, a variety of temporary orders were entered in the first case directing the payment of

temporary support, and on 1/8/1997, a judgment was even entered for unpaid back support in the amount of \$952.78. The judgment was not collected because the parties reconciled; on 7/12/1999, the entire case was dismissed. CP

On 12/01/2003 a *second* divorce was filed. This second case was completely litigated. There was a trial, a decision, an appeal all the way to the Supreme Court and a final mandate was issued 7/12/2010. All of that is apparent from the court's file No. 34256-1-II. See also *In re Marriage of Kowalewski*, 182 P.3d 959, 163 Wn.2d 542 (Wash. 2008)

In this second divorce, after appeals were exhausted, Ms. Kowalewska filed a variety of post-trial motions seeking to have Mr. Kowalewski found in contempt, and trying to modify the Decree. All of those motions were rejected by the court. An appeal was taken, which was ultimately dismissed by the Court of Appeals. See this court's file No. 39256-9-II.

While Ms. Kowalewska's appeal in the 2003 divorce was being prosecuted, her then attorney filed a motion *in the first divorce case* seeking to reduce to judgment money allegedly due under the old temporary order of child support – asserting that despite dismissal of the case, that support was nonetheless owed under the *first* divorce case

dating back all the way to 1996. Ms. Kowalewska sought nearly \$40,000 in back support. That issue was heard and an order entered on April 30, 2008 denying the request for back support on the basis that Judge Nelson specifically addressed all this in the later 2003 divorce and in its Findings and Conclusions. CP 23.

An Appeal was taken of the decision denying any request for back support. That was filed 5/30/2008. That appeal was dismissed. See this court's docket No. 37803-5-II. It was eventually dismissed by agreement. Id.

On the *very day* the Court of Appeals dismissed Ms. Kowalewska's appeal of the decision denying her demand for back support, Ms. Kowalewska appeared pro se at ex-parte and obtained an order extending the old judgment for unpaid temporary support in the first divorce case. CP 27-28.

Ms. Kowalewski then began working with DCS to attempt enforcement of the judgment and is taking other actions to enforce the so-called judgment. CP 30-31.

The the trial court should should have awarded to Mr. Kowalewski all his fees and costs because the Final Decree in this case, as has been recognized often, is a final binding resolution of all the claims by and between the parties arising

out of their marriage. To the extent the dismissal of the first divorce does not extinguish its judgments for support, certainly the second filing and the Decree in that case resolves all claims that were made or could have been made.

A part of the Decree contains a routine Hold Harmless provision indicating as follows:

9	3.6	HOLD HARMLESS PROVISION.
10		Each party shall hold the other party harmless from any collection action relating
11		to separate or community liabilities set forth above, including reasonable
12		attorney's fees and costs incurred in defending against any attempts to collect an
		obligation of the other party.

CP 4.

Pursuant to that provision, as well as all of the law presented below, Mr. Kowalewski should be compensated for all of the fees, costs and expenses incurred in responding to Ms. Kowalewska's efforts to collect a judgment long ago dismissed, or merged in their final Divorce decree.

APPLICABLE LAW AND ARGUMENT

Ms. Kowalewska's collection action was frivolous, advanced without reasonable cause and needlessly increased the cost of litigation and accordingly Mr. Kowalewski should have been awarded his fees and costs.

Temporary orders don't automatically merge in a final decree. That's because of 26.09.060(11) which changes the common law rule on merger in final judgments as to child support. But, there is a huge difference between what happens to temporary orders in cases prosecuted to a final decree, and cases that are **dismissed**.

RCW 26.09.060(10) demonstrates that difference; it says:

(10) A temporary order, temporary restraining order, or preliminary injunction . . .

(c) Terminates [1] when the final decree is entered, except as provided under subsection (11) of this section, **or [2] when the petition for dissolution, legal separation, or declaration of invalidity is dismissed;**

Grammatically, the clause pertaining to "subsection 11" modifies the phrase pertaining "the final decree is

entered.” It does not modify the phrase pertaining to dismissed petitions.

Moreover, subsection 11 says: “(11) Delinquent support payments accrued under an order for temporary support remain collectible and are not extinguished when a final decree is entered unless the decree contains specific language to the contrary.” And, because subsection 11 indicates that a temporary support order doesn’t merge in the final Decree, obviously it applies cases where there is a final Decree entered – not cases like the first divorce – a case that was ***dismissed***.

Frankly, both of the parties – including Ms. Kowalewska when she was represented by an attorney – have all been through all this. Not only did Ms. Kowalewska lose in the Superior Court (CP 23) she lost in the Court of Appeals which dismissed their appeal on the issue. CP .

An effort to extend the judgment, and to then enlist DCS to try collecting a judgment from a case formally dismissed, and to do that after motions in multiple proceedings have already been denied, and after Ms. Kowalewska has been told multiple times by multiple courts, that she has no further claims against Mr. Kowalewski and

specifically that claims in this case were extinguished by the rulings and the Decree in her second divorce, is all simply frivolous and advanced without reasonable cause.

This state permits the award of fees for having to defend frivolous claims. See RCW 4.84.185. Fees are also awarded for needlessly increasing the cost of litigation. See *Eide v. Eide*, 1 Wn.App. 440, 445, 462 P.2d 562 (1969). "When intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *In re Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989). Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in "foot-dragging" and as an "obstructionist," as in *Eide*, 1 Wn.App. at 445; when a party filed repeated motions which were unnecessary, as in *Chapman v. Perera*, 41 Wn.App. 444, 455-456, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *Morrow*, 53 Wn.App. at 591.

Ms. Kowalewska's behavior here is completely without justification in law and can only be explained as an effort to punish Mr. Kowalewska because she's not prevailed on a raft

of other claims – including a claim seeking to have the second divorce Decree modified to add a judgment for \$167,000. Those claims were all rejected, and it seems, failing to get money that way, Ms. Kowalewska is now seeking to collect the old judgments in this case long ago dismissed. That is not a proper basis for litigating.

Ms. Kowalewska's collection action was a collection action relating to liabilities disposed of in the Decree and accordingly Mr. Kowalewski should have been awarded his fees and costs.

Regardless of whether the action is frivolous, this is an collection action relating to separate or community liabilities (really the absence of a separate liability) set out in the Decree, and accordingly, unless circumstances exist as would justify modifying the Decree, all of Mr. Kowalewski's fees and costs incurred in defending should be awarded pursuant to paragraph 3.6 of the Decree.

CONCLUSION

The trial court in this case, formally ordered the \$952 judgment be vacated, and directed Ms. Kowalewski to repay \$300 actually garnished by the Department of Child

Support. But, that leaves Mr. Kowalewski with thousands and thousands of dollars in fees and expenses attendant to dealing with this problem. That's grossly inequitable, and the trial court decision should be reversed with directions to award to Mr. Kowalewski all of his reasonable fees and expenses incurred in defending the collection action.

Obviously, this court must be disappointed in the fact that somehow, against all good judgment, \$952.78 has somehow got all of the parties wrapped up in thousands and thousands of dollars in fees. That is – quite obviously – ridiculous. On the other hand, what exactly can Mr. Kowalewski do in this situation? Either he just pays the nearly thousand dollars his ex-wife is seeking to collect, or he is stuck incurring disproportionate fees and expenses.

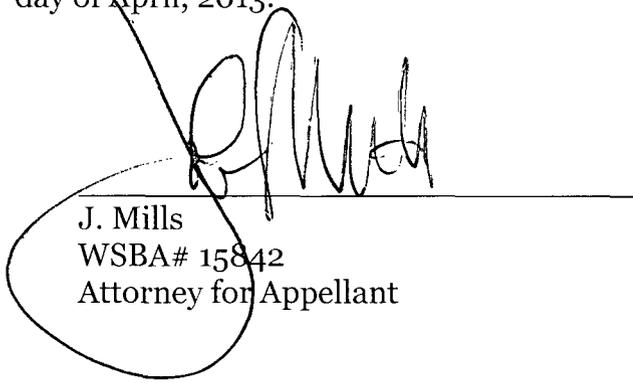
From a purely economic point of view, many people in Mr. Kowalewski's position would just give up, and pay up, even though the claim is completely unjustified.

But, the repeated attempts to collect this money by Ms. Kowalewska is just a form of abuse, and if Mr. Kowalewski just pays, likely there will be other and additional claims made by Ms. Kowalewska. If analyzed

from a purely economic perspective, there could be no end to frivolous claims asserted by Ms. Kowalewska.

What this case is about is exactly the reasoning why insurance companies don't just pay frivolous claims to make them go away – doing so, simply encourages the filing of additional frivolous claims. The only way to put an end to that behavior is to draw a line and for this court to actually enforce the Decree, and to award fees and costs for having to defend . . . **again** . . . the claim made by Ms. Kowalewska which has been rejected already many times for \$952.78.

DATED this 8th day of April, 2013.

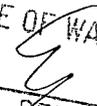


J. Mills
WSBA# 15842
Attorney for Appellant

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STATE OF WASHINGTON

BY 
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4 **WASHINGTON STATE COURT OF APPEALS**
5 **Division Two**

6 In re the Marriage of:

NO. 44197-7-II

7 BARBARA B. KOWALEWSKA
8 Petitioner,

DECLARATION OF SERVICE

9 vs.

10 MARIUSZ K. KOWALEWSKI
Respondent,

11 **DECLARATION OF SERVICE**

12 The undersigned certifies that on today's date a true copy of Appellant's
13 Opening Brief was served on Barbara Kowalewska by delivery to her attorney, Ms.
14 Powell at her regular email address and email is our customary means of
communication.

15 DATED this 8th day of April, 2013

16
17 
18 J. Mills
19 WSBA# 15842
Attorney for Mr. Kowalewski