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Court of Appeals
Division II
State of Washington
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NO. 53501-7-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

MARGARET GARRISON,

Respondent,

v.

DELBERT LEE MCGILL, ET AL.,

Appellant.

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

The Honorable John Skinder, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION

The Court has requested supplemental briefing on the question of whether the issue brought for review is appealable under RAP 2.2, and if not, if the Court should grant discretionary review under RAP 2.3.

The lower court designated the orders that form the basis of this appeal “judgments.” Because a judgment is by definition a “final determination” of the court, the assignments of error are properly reviewed under RAP 2.2.

However, Mr. McGill assigned error to the trial court’s designation the orders below as “judgments.” If this Court agrees with his analysis that the orders were interlocutory, not final and enforceable, then his assignments of error are properly reviewed at the discretion of the Court under RAP 2.3.

Additionally, Ms. Garrison supplemented the record, and in so doing, introduced a question of law that this Division 2 of the Washington Court of Appeals has not expressly resolved. To wit: whether a monetary award is enforceable when the court grants it prior to trial; does not include findings and fact; and does not certify it is a final order under CR 54(b)?

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III. SUPPLEMENTAL STATEMENT OF FACTS

Specific procedural history relevant to the standard of review.

On March 29, 2019, the trial court granted Ms. Garrison's Motion to Show Cause Regarding Restraining Order. The court signed a Judgment and Order that restrains Mr. McGill and his counsel from contact with Mr. Horst. The Judgment and Order additionally holds them jointly and severally liable to Ms. Garrison for \$4,562.50 in costs and attorney's fees. CP 258–259. The Judgment and Order lacks findings of fact. *See id.* The court expressly requested additional language in the order that either party may seek relief from the restraining order. *Id.* at 259. The court said, "The only issue I have...was the no contact provision. I do think there needs to be some opportunity...if [Mr. McGill's attorney] wants to bring a motion to modify..." RP v.2, 3:21–4:4.

Also on March 29, 2019, the court denied Mr. McGill's Motion to Compel Discovery. The court signed a Judgment and Order denying the motion and holding Mr. McGill liable to Ms. Garrison for \$2,050.00 in attorney's fees. CP 260–262. The order similarly lacked findings of fact. *See id.* Responding to Mr. McGill's request for certification of finality, the court said, "I don't believe it's a final judgment." RP v. 2, 8:9–10.

On April 8, 2019, along with a Motion to Reconsider, Mr. McGill filed a Motion to Stay Proceedings to Enforce Judgment, as Ms. Garrison

indicated was her intent. CP 293–294. The Motion to Stay Proceedings was supported by the Memorandum in Support of Motion to Stay Proceedings. CP 290–292. Mr. McGill argued a stay of execution was unnecessary, but for Ms. Garrison’s off-the-record stated intent to execute those pre-trial orders, which lacked certifications of finality under CR 54(b). CP 290:24–291:8. In Respondent’s Brief, Ms. Garrison admits she has repeatedly attempted to collect against Mr. McGill, in advance of trial. Resp. Br. 23.

On April 19, 2019, the court declined to rule on whether the two Judgments and Orders pending reconsideration were final and/or executable. *See* Resp. RP v.1, 1–8. The trial court was prepared to sign an order for relief from enforcement of the judgments. *Id.* at 3:11–21. However, the court flatly refused to consider Mr. McGill’s legal argument that the judgments were neither final nor enforceable, which was set forth in his Memorandum in Support of Motion to Stay Proceedings. Resp. RP v.1, 4:20–7:11; *see also* Ap. Reply Br. 2, n. 3.

IV. SUPPLEMENTAL ARGUMENT

An appellate court may review a superior court decision as a matter of right (an “appeal”) or at its discretion (a “discretionary review”). RAP 2.1(a). A decision that is appealable is one that is final as to one or all

claims. RAP 2.2. The standard of review in an appeal is either *de novo* review of the trial court's ruling as the trier-of-law or abuse of the court's broad discretion as the finder-of-fact. *See* discussion *supra*, Ap. Br. 11–13.

In the absence of finality, the appellate court may use its discretion to review an order the trial court may still modify. RAP 2.3. The standard of review for discretionary review is obvious error. RAP 2.3(b)(1). Appellate courts have found obvious error in cases where a trial court has obviously misapplied the relevant law, or failed to take relevant law into account. *E.g. In re P.P.T.*, 155 Wn. App. 257, 229 P.3d 818 (2010); *see also* discussion *supra*, Ap. Br. 11–13.

A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review. RAP 5.1(c).

- 1.1 This Court should review the trial court's decision as a matter of right, because the decisions of which the trial court denied reconsideration were designated judgments, which are a) by definition final determinations and b) enforceable and therefore final.

A judgment is defined as a “final determination of the rights of the parties in the action.” CR 54(a)(1) . Under RAP 2.2(a)(3), an aggrieved party may seek review as a matter of right from “[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” The

“action” can refer to the dispute as a whole or an issue governed by a separate statutory scheme and is independent of the merits of the case, *E.g. Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 783 P.2d 1124 (1989). (order denying motion to compel arbitration discontinues any proceeding for arbitration and does not allow review other than immediate appeal); *e.g. State v. Hecht*, 2 Wn.2d 359, 364, 409 P.3d 1146 (2018) (order denying restitution affects substantial right to return of appellant’s property is final and appealable).

The entry of a final judgment should await the resolution of all claims for and against all parties. *Fluor Enterprises, Inc. v. Walter Const.*, 141 Wn. App. 761, 762, 172 P.3d 368, (2007); *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 694, 82 P.3d 1199, *review denied*, 152 Wn.2d 1023 (2004) (final judgment should await resolution of all claims to offset judgments favorable to each side before enforcement takes place); *see also, OB-1, LLC v. Pinson*, No. 29077-8-III, (Wn. App. Div. 3, May 17, 2011) (corporate parties had offsetting claims, which should be resolved before entering judgment net any offset.).

In this case, the orders Mr. McGill asked the trial court to reconsider were designated “judgments” and are therefore final determinations by definition. Mr. McGill assigned error to designating

them as such. In the absence of instruction from this Court regarding the trial court's designation of the orders as final determinations, review of the Order Denying Reconsideration is as a matter of right.

Like in *Herzog*, the trial court closed off any available remedy other than an immediate appeal of the decision. In *Herzog*, denying a motion to compel arbitration prevented an alternative to litigation and forced the parties to incur the time and expense of litigation, leaving immediate appeal the only means of review. Here, the trial court burdened Mr. McGill and his counsel with debts and denied an opportunity for review in the trial court. The lower court also restrained Mr. McGill from having any contact with Mr. Horst—who lives on the same property—without findings of fact or opportunity for review.

Further, as shown by Ms. Garrison's own supplement to the record, the Order Denying Reconsideration is reviewable as a matter of right because the trial court deemed the underlying judgments enforceable, which means they are therefore final. Mr. McGill requested a ruling from the trial court as to whether the orders were enforceable. Although the court was prepared to treat the orders as enforceable by imposing a bond to supersede enforcement, it refused to hear argument that the judgments were not enforceable in the first place.

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- 1.2 In the alternative, this Court should review the trial court’s decision as a discretionary review, because the decisions of which it denied reconsideration lacked findings of fact and lacked CR 54(b) finality.

Unless it is a final determination, a written direction of a court, “however designated,” is an order. CR 54(a)(2); 54(b); *see* discussion *supra*, Ap. Br. 13–15. In absence of a certification of finality, supported by written findings, an order remains subject to revision by the trial court at any time before final disposition of the case. *Id.*; *see* discussion *supra*, Ap. Br. 13–15.

In limited circumstances, an appellate court may exercise its discretion to review a decision that is not otherwise final. RAP 2.3, *see e.g. State v. Lee*, 158 Wn. App. 513, 516, 243 P.3d 929 (2010) (oral advisement is not an appealable final judgment, so any relief could only be granted pursuant to discretionary review). Reviewing a decision while the lower court retains the opportunity to review risks confusing the functions of trial and appellate courts. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010). An appellate court reviews those rulings for legal error. *Id.*

In this case, the orders Mr. McGill asks this Court to review were designated final “judgments” but were in practical effect interlocutory. He asks this court for discretionary review of the Order Denying

Reconsideration for obvious error. Mr. McGill assigned error to the trial court's designation of the underlying orders as judgments. The orders lacked findings or a written determination sufficient for a reviewing court. The trial court erroneously directed the Clerk to enter insufficient orders as "judgments," wrongly permitted enforcement activity on those "judgments", and the court admitted on the record, "I do not think it is a final order."

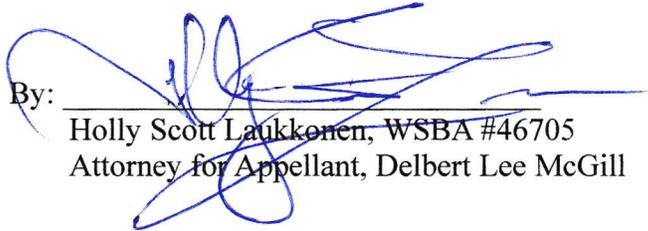
V. CONCLUSION

Mr. McGill respectfully asks the court to review the determination of the trial court as a matter of right under RAP 2.2, *de novo*. The orders of which the trial court denied reconsideration were "judgments" and by definition final determinations of the court. Furthermore, despite the lack of a thorough record for review, the trial court was prepared to proceed with enforcement of its judgments against Mr. McGill and his counsel, as if the judgments were final.

In the alternative, Mr. McGill respectfully asks the Court to review the determination of the trial court at its discretion under RAP 2.3 for obvious error. The trial court erred as a matter of law in treating interlocutory orders as final and enforceable orders.

Mr. McGill respectfully renews his request for an award of attorney's fees incurred in this appeal and the underlying motions and orders, and he respectfully asks the Court order any and all other such remedies as the interest of justice requires.

Respectfully submitted this *26th* day of April, 2020.

By: 

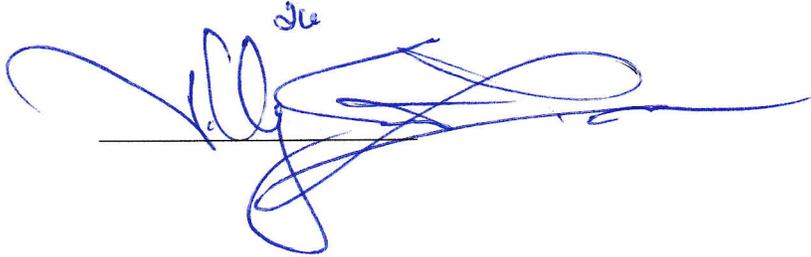
Holly Scott Laukkonen, WSBA #46705
Attorney for Appellant, Delbert Lee McGill

CERTIFICATE OF SERVICE

I, Holly Scott Laukkonen, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on April 26, 2020, I caused the Appellant's Supplemental Brief to be served on the following in the manner indicated:

<p>Joe Frawley Attorney for Petitioner Shefter & Frawley 1415 College Street SE Lacey, WA 98503 joedfrawley@gmail.com (360) 491-6666</p>	<p><input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail <input checked="" type="checkbox"/> E-Service</p>
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DATED April ~~22~~²⁶, 2020, in Olympia, Washington.



A handwritten signature in blue ink, appearing to be 'Holly Scott Laukkonen', is written over a horizontal line. The signature is stylized and includes a small '26' written above the main signature.

LAUKKONEN LAW, PLLC

April 27, 2020 - 8:32 AM

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