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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 287360

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

IN RE MARRIAGE OF:

NUTHAVADEE SLANE, Respondent,

and

STEPHEN SLANE, Petitioner.

RESPONSIVE BRIEF OF RESPONDENT

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I. STATEMENT OF ISSUES

A. DID CR 55(f)(1) REQUIRE MRS. KUKES TO PROVIDE MR. SLANE WITH NOTICE OF ENTRY OF FINAL ORDERS WHERE MR. SLANE APPEARED PRIOR TO THE FINAL ORDERS, AND WHERE HE EXPRESSLY WAIVED NOTICE OF ENTRY OF THE DECREE AND JOINED IN THE PETITION BY SIGNING AND FILING THE JOINDER, AND WHERE HE SIGNED THE DECREE OF DISSOLUTION, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PARENTING PLAN?

B. WAS THE TRIAL COURT'S DENIAL OF MR. SLANE'S MOTION TO VACATE JUDGMENT/ORDER AN ABUSE OF DISCRETION?

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E. IS MRS. KUKES ENTITLED TO AN AWARD FOR COSTS AND ATTORNEY'S FEES ON APPEAL?

II. STATEMENT OF THE CASE

Mrs. Kukes and Mr. Slane were married in 1994. CP 1. They had two daughters as a result of their marriage, ES (16 y.o.) and PS (14 y.o.). CP 2.

On January 27, 2000, Mrs. Kukes filed for divorce in Kittitas County Superior Court (herein, the "Kittitas Court"). CP 1.

Mr. Slane was properly served with copies of the Summons and Petition for Dissolution, and proposed Parenting Plan on February 8, 2000. CP 21. Because Mr. Slane did not answer or otherwise appear, he was defaulted on April 12, 2000. CP 37.

On November 18, 2000, Mr. Slane signed the joinder in the Petition for Dissolution of Marriage and filed it with the court on November 28, 2000. CP 39-44. The joinder stated:

The respondent joins in the petition. By joining in the petition, the respondent agrees to the entry of a decree in accordance with the petition, without further notice.

CP 44.

Sometime in early December 2000, Mr. Slane permanently relocated to St. Louis, Missouri, where he continues to reside. CP 76.

On January 28, 2002, the Kittitas Court entered the Decree of Dissolution, Findings of Fact and Conclusions of Law, Parenting Plan,

Order of Child Support, and Child Support Worksheets. CP 47-74. Prior to presentment, Mr. Slane signed the Decree of Dissolution, Findings of Fact and Conclusions of Law, and Parenting Plan. CP 66; CP 70; CP 74. The Child Support Worksheets and the Order of Child Support were not signed by Mr. Slane because he did not want court ordered child support. CP 311.

Mrs. Kukes was awarded custody of the parties' children (CP 60, 62), and Mr. Slane was ordered to pay \$878 a month in child support. CP 56.

Mrs. Kukes mailed copies of the final dissolution orders to Mr. Slane a couple days after entry. CP 312. Mr. Slane had actual knowledge of the final dissolution orders no later than April 2002. CP 75; CP 116; CP 281.

In August 2003, the parties signed a written agreement (herein, the "2003 Agreement") reducing child support to \$500 per month. CP 76.

From June 2005 until June 2008, ES resided with Mr. Slane in Missouri. CP 76.

In July 2008, Mrs. Kukes and Mr. Slane agreed that PS would visit Mr. Slane in Missouri for a couple weeks. CP 261. Mr. Slane promised to

return PS at least two-weeks prior to school starting, *i.e.*, August 14, 2008.

CP 261. PS flew to Mr. Slane's on July 13, 2008. CP 261.

Mr. Slane, however, refused to return PS as agreed. CP 261. Therefore, in August 2008, Mrs. Kukes obtained an Order to Show Cause Re: Contempt of Court¹ in order to compel Mr. Slane to return PS, and filed petitions for Modification of Parenting Plan and Modification of Child Support. CP 261. Mrs. Kukes filed these actions in Grant County Superior Court pursuant RCW 26.09.280. CP 261.

On September 26, 2008, the Show Cause hearing regarding the contempts was held. CP 261. The Grant County court found Mr. Slane in contempt for violating the Parenting Plan by refusing to return PS. CP 261. The Grant County Court also found Mr. Slane in contempt of court for non-payment of child support and ordered him to pay Mrs. Kukes \$26,076 for unpaid child support. CP 61; CP 77.

In April 2009, the Grant County court again found Mr. Slane in contempt for failure to pay child support and entered a second judgment against Mr. Slane in the amount of \$9,700 for back child support. CP 117.

¹ Mrs. Kukes' contempt of court proceedings were for violations of the Parenting Plan and non-payment of child support. CP 261.

On April 17, 2009, the Grant County court entered a temporary Parenting Plan and temporary Order of Child Support (CP 207-213), which increased Mr. Slane's child support payments to \$1,721 a month and awarded Mrs. Kukes the tax exemptions for the children (CP 223). Mr. Slane appealed the temporary orders and two of the three contempt of court findings. CP 262.

In May 2009, Division of Child Support began withholding Mr. Slane's wages in the amount of \$2,220 a month. CP 223.

During July and August 2009, through various communications with Mrs. Kukes and her counsel, Mr. Slane made it clear that he intended to "needlessly increase" Mrs. Kukes' costs of litigation in order to force her to settle the matters pending in Grant County and on appeal. CP 257.

In early August 2009, Mr. Slane filed two separate motions for order to show cause re: contempt of court in Grant County. CP 224. Both motions were denied. CP 224. Mr. Slane then filed a Motion for Recusal against the presiding court commissioner, which was denied. CP 491-498.

Disgruntled with his lack of success in Grant County, Mr. Slane obtained an Order to Show Cause Re: Contempt of Court in Kittitas County Superior Court on August 17, 2009. CP 81.

Then, on August 31, 2009, Mr. Slane filed a motion to vacate the Decree of Dissolution, Parenting Plan, and Order of Child Support in Kittitas County. CP 88. The Kittitas Court never issued an Order to Show Cause Re: Motion to Vacate Judgment/Order.

In his Motion to Vacate, Mr. Slane alleged that all final dissolution orders were void because (1) they did not conform with the joinder, (2) Mrs. Kukes allegedly committed fraud and/or perjury, (3) the Order of Default was entered “prematurely” and without notice (CP 89), (4) he was entitled to notice of entry of final orders, (5) insufficient service of process (CP 90), and (6) lack of jurisdiction (CP 88-93).

In both the contempt and motion to vacate, Mr. Slane requested the following relief: \$36,796.00 judgment for “overpayment of child support” (CP 75); \$4,038.46 for “vacation time lost to date” (CP 75); \$3,550 for attorney’s fees and costs (CP 82); termination of the wage withholding (CP 135); jail time (CP 135); appointment of special counsel to prosecute Mrs. Kukes for contempt of court and perjury (CP 75-82); and sanctions against Mrs. Kukes’ counsel for alleged fraud and misconduct (CP 447).

Despite Mr. Slane filing nearly 400 pages of materials, the Kittitas Court denied his motions for contempt and to vacate. CP 528. The Kittitas Court further found Mr. Slane’s motions were frivolous and brought

without any reasonable basis, and awarded Mrs. Kukes her attorney's fees and costs in the amount of \$3,920.84. CP 526-528.

III. ARGUMENT

A. CR 55(f)(1) DID NOT REQUIRE MRS. KUKES TO PROVIDE MR. SLANE WITH NOTICE OF ENTRY OF FINAL ORDERS BECAUSE MR. SLANE APPEARED PRIOR TO THE FINAL ORDERS, HE EXPRESSLY WAIVED NOTICE OF ENTRY OF THE DECREE AND JOINED IN THE PETITION BY SIGNING AND FILING THE JOINDER, AND HE SIGNED THE DECREE OF DISSOLUTION, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PARENTING PLAN.

1. Standard of Review.

The interpretation of CR 55 is a question of law reviewed de novo.

Gourley v. Gourley, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006).

2. Argument.

CR 55(f)(1) provides, in relevant part:

When more than 1 year has elapsed after service of summons with no appearance being made, the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry.

CR 55(f)(1) (2011).

Here, by signing and filing the joinder, and by signing the Decree of Dissolution, Findings of Fact and Conclusions of Law and Parenting Plan, Mr. Slane “appeared” in the dissolution. In fact, Mr. Slane pointed

out to the Kittitas Court that his joinder constituted an appearance. CP 334; CP 339. But the joinder was filed *after* the order of default and Mr. Slane never moved for leave of court. See, CR 55(a)(2). Therefore, under the plain language of CR 55(f)(1), Mr. Slane was not entitled to notice because he appeared before entry of the final orders.

Also, by signing and filing the joinder to the Petition for Dissolution, Mr. Slane expressly waived notice of entry of the final orders and joined in the Petition for Dissolution. CP 44. “[W]hen parties petition jointly for relief, neither party is entitled to notice before a decree of dissolution is granted pursuant to an ex parte hearing.” In re Whereley, 24 Wn.App. 344, 345, 661 P.2d 155 (1983).

In addition, Mr. Slane signed the Decree of Dissolution, Findings of Fact and Conclusions of Law, and Parenting Plan. CP 66; CP 70; CP 74. His signature expressly waived notice of presentment of these orders.

Therefore, because Mr. Slane clearly and unequivocally waived notice of entry of the final orders, he was not entitled to notice under CR 55(f)(1).

B. THE TRIAL COURT'S DENIAL OF MR. SLANE'S MOTION TO VACATE JUDGMENT/ORDER WAS NOT AN ABUSE OF DISCRETION.

1. Standard of Review.

It has long been the rule in Washington that motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion. Hope v. Larry's Markets, 108 Wn.App. 185, 197, 29 P.3d 1268 (2001). "An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court." Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

2. Argument.

A party asking a court to set aside a default judgment under CR 60 must show four factors:

The primary factors are: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) the reason for the party's failure to timely appear, i.e., whether it was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party.

Calhoun v. Merritt, 46 Wn.App. 616, 619, 731 P.2d 1094 (1986).

The grounds for vacating a default judgment are the same as those grounds set forth in CR 60. Little v. King, 160 Wn.2d 696, 161 P.3d 345 (2007).

CR 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

.....

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

.....

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b) (2011).

Here, Mr. Slane failed to demonstrate substantial evidence of a prima facie defense to any of the final orders. Mr. Slane's assertion that evidence regarding health insurance coverage, his children from another relationship, and that Mrs. Kukes was voluntarily unemployed would have

reduced his monthly child support amount is pure speculation. First, Mr. Slane never produced any evidence regarding health insurance coverage for the children. Second, Mr. Slane's assertion that he was legally obligated to financially support his *girlfriend's* son and thus he would have been entitled to a downward deviation is utter non-sense.² *App.'s Brief p. 8.* Third, Mrs. Kukes was not voluntarily unemployed. CP 443-444; CP 265; CP 280. Mr. Slane's assertion to the contrary is belied by the record.

Even if he did show a meritorious defense, it doesn't matter because there cannot now be a hearing on the merits.

Mr. Slane didn't appear in the dissolution until eleven months after being served. CP 21-22; CP 39-44. He offers absolutely no reason for his very belated appearance in the dissolution. Even after he filed the joinder, Mr. Slane had ample opportunity to participate in the case but elected not to do so. Therefore, he did not meet his burden under the second primary factor.

"Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake,

² Mr. Slane misleadingly refers to his girlfriend's son as his "stepson." *App.'s Brief, pg. 8.* Mr. Slane did not marry his girlfriend until the end of 2002. CP 116.

inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment.” Little, 160 Wn.2d at 706.

Clearly, Mr. Slane was not diligent in asking for relief following notice of entry of the final orders. He filed his motion to vacate nearly eight years after he received notice of the final orders. CP 88-93; CP 312.

In light of the seven years that the final orders were in effect, as well as the 13-months of litigation in Grant County, the effect of vacating the orders in this case is far from minimal.

Mr. Slane brought his motion to vacate under CR 60(b)(1), (b)(4) and (5).

CR 60(b)(1) is not available to Mr. Slane because a motion to vacate under CR 60(b)(1), (2), or (3) must be brought no later than one year after the judgment is entered. Here, the motion was filed nearly eight years after the judgment was entered. CP 88-93; CP 71. Consequently, Mr. Slane’s motion for relief based on CR 60(b)(1) is time barred. Also, even assuming Mrs. Kukes violated CR 55(f)(1), the orders cannot be vacated as a result because said violation would be an “irregularity in the proceeding” under CR 60(b)(1).

CR 60(b)(4) and (5) requires a motion to vacate to be filed within a reasonable time, which is determined by examining the facts and

circumstance of the case. The critical period is the interval between when the party became aware of the judgment and when he filed the motion to vacate the judgment. Luckett v. Boeing Co., 98 Wn.App. 307, 312, 989 P.2d 1144 (1999). The record indicates that Mr. Slane became aware of the judgment sometime between February 2002 and April 2002. CP 312; CP 75; CP 116; CP 281. He filed his motion to set aside default on August 31, 2009—nearly eight years later. CP 88. Eight years is not a reasonable amount of time, especially in light of the facts and circumstances of this case.

Even if Mr. Slane had filed his motion to vacate within a reasonable amount of time, his allegations of fraud/perjury do not constitute grounds to vacate under CR 60(b)(4).

It is well established that, while CR 60(b) authorizes a court to vacate a judgment for fraud, such fraud must relate to the procurement of the judgment, not to an underlying cause of action for fraud. In re Toth, 91 Wn.App. 204, 211, 955 P.2d 856 (1998); Farley v. Davis, 10 Wn.2d 62, 116 P.2d 263 (1941); Tonga v. Fowler, 118 Wn.2d 718, 729, 826 P.2d 204 (1992) (“[A] claim of fraud in the obtaining of the judgment has been limited to cases of ‘extrinsic fraud’; that is, fraudulent conduct by the prevailing party that deprived the losing party of an adequate opportunity

to present its case to the court (as opposed to ‘intrinsic fraud’, *i.e.*, cases in which the judgment was based on the prevailing party’s submission of perjured testimony or falsified documents).”); Lindgren v. Lindgren, 58 Wn.App. 588, 596, 794 P.2d 526 (1990) (“the fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.”); Momah v. Bahrti, 182 P.3d 455, 469 (2008) (“Under CR 60(b)(4), ‘the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.’” (Emphasis in original)).

Also, “when fraud is alleged as the basis for collateral attack upon a judgment or decree, the fraud alleged and sought to be established must be *extrinsic* or *collateral* to the issues tried in the proceedings which are attacked, or, as sometimes stated, there must have been fraud in *procuring* the original judgment or decree.” Farley, 10 Wn.2d at 65. (Emphasis added).

It is likewise well established that perjured testimony cannot constitute such fraud as would warrant the vacation of a judgment. Doss v. Schuller, 47 Wn.2d 520, 526, 288 P.2d 475 (1955); McDougall v.

Wailing, 21 Wash. 478, 486, 58 P. 669 (1899) (“Perjury is not specified in our statute as a distinctive ground for vacating a judgment.”).

The party alleging fraud must establish it by clear, cogent and convincing evidence. Tonga, 118 Wn.2d at 730; Lindgren, 58 Wn.App. at 596.

Here, Mr. Slane alleged the Kittitas Court’s finding of fact that he was a resident of Washington State constitutes fraud and/or perjury by Mrs. Kukes. *App.’s Brief*, p. 8. This allegation is patently frivolous. Findings of Fact and Conclusions of Law cannot, as a matter of law and fact, constitute fraud or perjury because they are the trial court’s, and not Mrs. Kukes’. Moreover, Mrs. Kukes did not commit perjury. She did not sign the Findings of Fact and Conclusions of Law under penalty of perjury. CP 70. It should be noted that Mr. Slane signed the very same Findings of Fact and Conclusions of Law, and Decree of Dissolution. CP 70. Thus, even if Mrs. Kukes committed perjury, so did Mr. Slane. In any event, the Order of Child Support specified a Missouri address for Mr. Slane. CP 53.

Mr. Slane’s allegations of fraud or perjury in the Child Support Worksheets are likewise patently frivolous. *App.’s Brief*, p. 8. First and foremost, Mrs. Kukes committed absolutely no fraud or perjury: Mrs.

Kukes was in fact *not* employed during the time in question³ (CP 443-444; CP 265; CP 280); nor was Mrs. Kukes receiving unemployment at the time because her unemployment application was denied on January 25, 2002 (CP 280); Mr. Slane was *not* providing health insurance for the children; and Mrs. Kukes did *not* aver that Mr. Slane had no other children dependent on him for support. CP 50. Mrs. Kukes merely left the corresponding box blank. CP 50. Mr. Slane's bare, self-serving and conclusory allegations to the contrary fall woefully short of establishing fraud by clear, cogent, and convincing evidence. Second, even if Mr. Slane's bare allegations were true, they simply do not constitute *extrinsic* fraud as a matter of law. Mr. Slane's reliance on the nine elements of the common law tort of fraud is misplaced.

Without citation to authority, Mr. Slane claims that Mrs. Kukes owed him an affirmative duty to disclose all information helpful in his defense to the Kittitas Court. *App.'s Brief*, p. 8. This is patently absurd. Mr. Slane's position is essentially that Mrs. Kukes had a duty to represent him in the dissolution.

³ Mrs. Kukes did not work from August 31, 2001 (CP 265) until February 25, 2002. CP 266.

And Mr. Slane's broad assertion that Mrs. Kukes' alleged fraud *procured* the final orders is mystifying. *App.'s Brief, p. 9*. He obviously doesn't understand the meaning of the word "procured."

In sum, there is absolutely no evidence that the order of default or final orders were entered as a result of fraud, misrepresentation, or misconduct by Mrs. Kukes. Therefore, there is nothing justifying a vacation of the orders under CR 60(b)(4).

CR 60(b)(5) authorizes vacations of void judgments. A judgment is void if the court lacked personal jurisdiction, subject matter jurisdiction, or the judgment provided greater relief than the petition requested. In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989).

Here, Mr. Slane (1) was properly served the summons and petition for dissolution on February 8, 2000 (CP 21-22); (2) he was served in and while a resident of Washington (CP 21-22); and (3) the parties conceived two children in Washington (CP 66-71). The Kittitas Court clearly had personal jurisdiction over Mr. Slane and the children, as well as subject matter jurisdiction.

Without citation to authority, Mr. Slane erroneously claims that a trial court is somehow divested of jurisdiction if a final judgment is entered in violation of CR 55(f)(1). *App.'s Brief, p. 6*. The service

required by CR 55(f)(1) is motion service under the civil rules, not original process. Thus, because the court had both personal and subject matter jurisdiction, a violation of CR 55(f)(1)'s notice requirements merely renders a decree voidable, not void. See, In re Marriage of Mu Chai, 122 Wn.App. 247, 254-55, 93 P.3d 936 (2004).

Again without citation to authority, Mr. Slane claims that the Kittitas Court lacked "the inherent authority" to enter the final orders. *App.'s Brief, p. 6*. This is categorically absurd. The superior court absolutely has the *inherent* authority to enter decrees of dissolution, parenting plans, and child support orders in dissolution of marriage proceedings.

Therefore, the Kittitas Court clearly had jurisdiction and the "inherent authority" to enter the final orders.

CR 54(c) provides, "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

Here, the dissolution decree provided the exact same relief as prayed for in the petition, CP 1-6; CP 71-74. Mr. Slane's claims to the contrary are belied by the record. Accordingly, the decree is not void.

Under CR 60(b)(11), a motion to vacate may be made for “[a]ny other reason justifying relief from the operation of the judgment.” In re Marriage of Tang, 57 Wn.App. 648, 656, 789 P.2d 118 (1990). This ground is narrowly limited to situations involving extraordinary circumstances that do not fall within any other provision of the Rule. Tang, 57 Wn.App. at 656. Motions under CR 60(b)(11) are also circumscribed by the general doctrine: the reasons for vacation must be extraneous to the court’s actions or must affect the regularity of the proceedings. Id. at 656.

Here, the circumstances do not justify relief under CR 60(b)(11). Mr. Slane proffers absolutely no reason or circumstance extraneous to the Kittitas Court’s actions. Nor does Mr. Slane claim relief under CR 60(b)(11).

Therefore, the Kittitas Court’s denial of Mr. Slane’s motion to vacate was not an abuse of discretion.

C. THE TRIAL COURT'S CONCLUSION THAT MR. SLANE'S MOTION TO VACATE HAD NO BASIS IN LAW OR FACT, AND WAS INTERPOSED FOR IMPROPER PURPOSES WAS NOT AN ABUSE OF DISCRETION.

1. Standard of Review.

A trial court's decision regarding sanctions is reviewed for abuse of discretion. Roeber v. Dowty Aerospace Yakima, 116 Wn.App. 127, 64 P.3d 691 (2002).

2. Argument.

CR 11(a) provides, in pertinent part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a) (2009).

“CR 11 addresses two types of problems relating to pleadings, motions, and legal memoranda: filings which are not ‘well grounded in fact and . . . warranted by . . . law’ and filings interposed for ‘any improper purpose.’” Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992).

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. Bryant, 119 Wn.2d at 219. Both the federal rule and CR 11 were designed to reduce “delaying tactics, procedural harassment, and mounting legal costs.” Id. at 219. CR 11 requires litigants to “stop, think and investigate more carefully before serving and filing papers.” Id. at 219.

Kittitas County Local Court Rule 10(b) provides, in pertinent part:

(1) Frivolous Motions. If the Court finds a motion is frivolous, terms may be imposed against the moving party and/or the party’s attorney.

As noted above, Mr. Slane’s allegations of fraud and perjury had no basis in law or fact. And there is no basis in law to vacate final orders 7 1/2 years after receiving notice of the orders.

Furthermore, it should be noted that Mr. Slane circumvented the court rules by not obtaining an order to show cause from the Kittitas Court and failing to properly serve Mrs. Kukes with the Motion to Vacate.

Also, Mr. Slane filed his motion to vacate while attempting to enforce the exact same orders through his contempt of court action against Mrs. Kukes. CP 81; CP 88. The two motions are completely incongruent.

Mr. Slane procrastinated nearly eight years before bringing his motion to vacate. And during the thirteen (13) months immediately preceding the motion to vacate, the parties were engaged in extensive litigation in Grant County regarding enforcement and modification of the very orders Mr. Slane now seeks to vacate. CP 260-262. Yet Mr. Slane never raised the issue of fraud or void judgments during the Grant County litigation. CP 312. He certainly had ample opportunity to do so. Notably, it was only after the Grant County Court's numerous adverse rulings did Mr. Slane file his motion to vacate in Kittitas County.

It is a mystery as to what Mr. Slane was hoping to accomplish by attempting to vacate the orders. By August 2009, it was absolutely pointless to vacate the Parenting Plan or Child Support Order. These orders had been superseded by the Grant County Court's entry of a temporary Parenting Plan and temporary Order of Child Support five (5) months earlier. CP 260-262. And vacating the orders would have had no effect on the contempt findings or the judgments against Mr. Slane. Mr.

Slane's motion to vacate was nothing more than an exhaustive exercise in wasting judicial time and resources.

Furthermore, Mr. Slane filed this motion in bad faith and for improper purposes, *i.e.*, to harass and annoy Mrs. Kukes, and to needlessly increase her litigation costs. Through various communications with Mrs. Kukes and her counsel, Mr. Slane made it clear that he intended to "needlessly increase" Mrs. Kukes's costs of litigation in order to force her to settle the matters currently pending in Grant County and on appeal. CP 257; CP 344. It is difficult to fathom a more improper purpose than that of Mr. Slane's in this case.

Therefore, the Kittitas Court did not abuse its discretion in concluding that Mr. Slane's motion to vacate was frivolous and awarding Mrs. Kukes her attorney's fees and costs.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT MR. SLANE'S MOTION FOR CONTEMPT WAS BROUGHT WITHOUT A REASONABLE BASIS AND AWARDING ATTORNEY'S FEES AND COSTS TO MRS. KUKES.

1. Standard of Review.

We review an award of attorney fees for abuse of discretion. Bay v. Jensen, 147 Wn.App. 641, 660, 196 P.3d 753 (2008). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. Jensen, 147 Wn.App. at 660.

2. Argument.

RCW 26.09.160(7) provides:

Upon motion for contempt of court under subsections (1) through (3) of this section, if the court finds the motion was brought without reasonable basis, the court shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars.

RCW § 26.09.160(7) (2011).

The grounds for Mr. Slane's motion for contempt were: (1) Mrs. Kukes' alleged perjury and fraud in her dissolution filings of 2002 (CP 75); (2) Mrs. Kukes allegedly violated the Parenting Plan by never allowing any visitation outside of summer visitation (CP 76); and (3) Mrs.

Kukes allegedly violated the Order of Child Support by claiming the tax exemption for ES in 2005 (CP 75).

As noted above, Mrs. Kukes did not commit perjury or fraud in her dissolution filings. In any event, Mr. Slane's claim here and in the trial court that Mrs. Kukes' alleged perjury constitutes contempt of court is patently frivolous. Perjury does not constitute contempt of court unless two additional elements are present: (1) the court must have judicial knowledge of the falsity; and (2) the false testimony must obstruct the court in performance of a judicial function. State v. Estill, 55 Wn.2d 576, 577, 349 P.2d 210 (1960). Here, the Kittitas Court obviously could not judicially know any information regarding the parties was false unless testimony was taken to establish the falsity. Therefore, it was not a direct contempt. Further, assuming that Mrs. Kukes' information was false, there is no showing that it obstructed the court in the performance of its duty. See, Estill, 55 Wn.2d at 577. It should also be noted that this alleged contemptuous conduct occurred nearly eight years ago. CP 71-74.

Mr. Slane's allegation regarding violation of the parenting plan had no basis in fact because, as the record shows, he never attempted to exercise holiday or special occasion visitation. CP 259; CP 458. Nor was there any evidence indicating bad faith or intentional misconduct on the

part of Mrs. Kukes. Furthermore, it's bewildering how Mr. Slane could claim that the children were never with him outside of "summer visitations" when it is undisputed that ES lived with Mr. Slane for three years. CP 261; CP 76.

Mr. Slane's contempt of court action for Mrs. Kukes use of ES' tax exemption is likewise frivolous. Mrs. Kukes inadvertently claimed ES on her tax returns in 2005. CP 260. It's undisputed that she never claimed ES for any other year. CP 260. And Mr. Slane didn't file a motion for contempt until more than four years after the fact.

Further, since all these alleged contemptuous actions occurred several years ago, there was no compliance to be compelled. In re Marriage of Farr, 87 Wn.App. 177, 187, 940 P.2d 679 (1997) (citing, RCW § 26.09.160(2)(a)) (RCW 26.09.160 "allows contempt proceedings solely for the purpose of coercing compliance with a parenting plan.").

Mr. Slane filed his motion for contempt of court in Kittitas County only after he was found in contempt three times and his child support was increased from \$500 to \$1,721 by the Grant County Court. CP 223. Coincidentally, he requested judgment against Mrs. Kukes in the exact amount entered against him in Grant County. CP 75. Mr. Slane also requested jail time and appointment of "special counsel" to prosecute Mrs.

Kukes, and sanctions against Mrs. Kukes' counsel. CP 138-140. This was nothing less than an attempt by Mr. Slane to exact revenge on Mrs. Kukes and intimidate her, and to purposefully increase her litigation costs. CP 257; CP 344.

Moreover, Mr. Slane filed his motion for contempt of court in Kittitas County only after receiving several adverse rulings in Grant County (CP 207-214) and immediately after two of his motions for contempt of court were denied in Grant County (CP 224). This was blatant forum shopping.

Accordingly, the Kittitas Court did not abuse its discretion by finding that Mr. Slane's motion for contempt of court was brought without reasonable basis and awarding attorney's fees and costs to Mrs. Kukes.

E. MRS. KUKES IS ENTITLED TO HER COSTS AND ATTORNEY'S FEES ON APPEAL.

Mrs. Kukes seeks costs and attorney fees on appeal under CR 11, KCLCR 10(b), and RCW 26.09.160(7).

If the Court decides this appeal in Mrs. Kukes' favor, then she is entitled to an award of reasonable attorney's fees and costs on appeal.

IV. CONCLUSION

For the reasons stated above, Mrs. Kukes respectfully requests that the Court affirm the Kittitas Court's denial of Mr. Slane's motions for contempt of court and to vacate judgments/orders, affirm the Kittitas Court's award of attorney's fees and costs, and award Mrs. Kukes her reasonable costs and fees on appeal.

DATED this 31st day of OCTOBER 2011.

RESPECTFULLY SUBMITTED,



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Attorney for Respondent