

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

In re: Receivership of:

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP,

Respondent,

and

DEONNE MOE,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION:

This appeal raises the question of what process is due to a non-debtor spouse before that spouse's 1/2 share of community property can be used to satisfy a debt incurred by the other spouse for committing contempt of court. Appellant Deonne Moe contends that a non-debtor spouse must be given adequate notice and opportunity to be heard before any judgment can be entered against the marital community as a whole, including the non-debtor spouse's 1/2 interest. Respondent Washington Motorsports Limited Partnership ("WML") contends that remedial sanctions for contempt imposed against one spouse automatically becomes a judgment against the entire community, even if that spouse had no notice of the action and no opportunity to object in an appropriate setting or in an appropriate manner.

WML has included in its Response Brief facts relating to efforts it has undertaken to collect judgments entered against the community of Orville and Deonne Moe based on findings of contempt by Mr. Moe. (Brief of Respondent WML, p. 9-10) Those collection efforts include the garnishment of bank accounts and execution sale of real properties owned by Mr. and Mrs. Moe. It is not disputed that those bank accounts and real properties were held as community property and that Deonne Moe had a 1/2 interest in those accounts and properties at the time they were attached and/or sold.

The present appeal is directed only to the validity of that portion of the Final Judgment (paragraph 14) entered by the trial court on June 21, 2011, imposing liability on the entire community of Orville and Deonne Moe for remedial sanctions entered against Orville Moe. CP 26-27. The liability of the entire marital community is based solely on a legal presumption, the applicability of which was never actually litigated.

This appeal does not challenge the validity of any collection actions already undertaken by WML. Nor does this appeal challenge any ruling by the trial court in this matter other than the denial of Mrs. Moe's motion to vacate judgment pursuant to CR 60(b) for lack of due process. CP 29-34; 100-102.

II. ARGUMENT:

1. A Notice of Presentment Does Not Provide Adequate Due Process Notice for the Determination of Issues of Fact or Law not Previously Decided.

Respondent WML argues that the Notice of Presentment served on the Moe's attorney provided adequate notice to Mrs. Moe that the remedial sanctions imposed on her husband would result in a judgment against her half interest in the marital community. Respondents cite no authority in support of that position and Appellant is aware of none. Moreover, accepting WML's position would lead to absurd results and would greatly diminish the due

process protections provided to an innocent spouse.

As WML necessarily concedes, due process requires "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In the context of contempt proceedings, due process requires that notice of the proceedings be complete and unambiguous and served in the form of a motion, show cause, or equivalent legal process stating how, when, and by what means the party committed the alleged contempt. *See, In re: Acceptance Insurance Co.*, 33 S.W.3d 443, 448 (CA Tex. 2000). In addition to notice, due process requires that any deprivation of liberty or property be preceded by the opportunity for a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314.

A "Notice of Presentment" is notice only that a proposed order will be presented to the court for entry based on ruling previously made. It is not notice that any issues of law or fact will be presented to the court for resolution and determination. Nor does a Notice of Presentment inform the person on whom it is served that they have a right to a hearing or the right to present evidence or argument as to any issues of law or fact.

Here, the Order of Presentment served on Mrs. Moe states as follows:

PLEASE BE ADVISED that the "Final Judgment Against Orville Moe and Deonne Moe for Sanctions" (attached hereto as **Exhibit A**) will be presented for entry before the Honorable Annette S. Plese for entry on June 21, 2011, at 8:30 a.m., or as soon thereafter as counsel may be heard, at Spokane County Courthouse, 1116 West Broadway, Room 305, Spokane, Washington.

The requested Judgment is based upon, among other things, the below-referenced Orders which are attached hereto as exhibits for ease of reference for the Court. A copy of the Order Granting WML's Fourth Motion for Supplemental Proceedings against Orville Moe, Third Motion for Supplemental Proceedings against Deonne Moe, Eighth Motion for Remediation Sanctions Against Orville Moe, and First Motion for Remedial Sanctions Against Deonne Moe, and Motion for an Award of Attorney Fees (Clerk's Side #1837) is attached hereto as **Exhibit B**. A copy of the Order Finding Orville Moe in Contempt for Disobeying this Court's Orders for Supplemental Proceedings and Order for Award of Attorneys' Fees and Costs Re: Same (Clerk's Side #1843) is attached hereto as **Exhibit C**. A copy of the Order Granting WML's Motion for Order Quantifying the Attorneys' Fees and Costs Already Ordered to be Paid to WML by Orville Moe and Deonne Moe Based Upon Their Disobedience of Supplemental Proceedings Orders (Clerk's Side #1900) is attached hereto as **Exhibit D**.

CP 351 -353 (underline added)

Nothing in the foregoing Notice indicates in that any new issues will be presented to the court for determination or that the court will enter any order based on legal theories not previously argued or otherwise presented to the court. In fact, the Notice states very clearly that the order to be presented for entry is be based on the prior orders of the court. Thus, the Notice did not apprise Mrs. Moe that the court would be asked to rule on any new issues of fact or law.

Nevertheless, WML included in its proposed order as a conclusion of law that the remedial sanctions imposed solely on Mr. Moe created a

community debt by applying a legal presumption. Whether or not that presumption should be applied under the circumstances of this case was not previously raised by WML in any motion for relief and the trial court had not been asked at any time prior to presentment to rule on that issue. Thus, no hearing was ever held at which either Mr. or Mrs. Moe was given the opportunity to present evidence or argument that the presumption should not apply.

Respondent's position, if accepted would lead to absurd results and would make a mockery of the concept of due process. If a mere notice of presentment is sufficient to satisfy due process, then attorneys will be encouraged, if not required by their duty of zealous advocacy, to skip the normal procedure of bringing issues of law and fact before the trial court by filing a motion specifically stating the relief sought and the grounds for relief, thereby giving the opposing party opportunity to respond with respect to both the facts and law. Instead, attorneys will simply prepare an order with the relief sought, file a notice of presentment, and ask the trial court to enter the order without any real hearing.

At a minimum, attorneys will be encouraged to not include in their motions a clear statement of all the relief being sought. Then, following a ruling on the issues raised by the motion, insert into the proposed order whatever findings or conclusions are needed to support any additional relief that may be desired.

That is exactly what WML did here. WML never filed a motion seeking a ruling that the remedial sanctions imposed on Mr. Moe created a community debt and never presented any factual or legal argument in support of a ruling in its favor on that issue. No hearing was ever held at which either Mr. or Mrs. Moe was given the opportunity to argue against WML's assertion that the presumption of a community debt applied in this particular case or in contempt proceedings generally.

The procedure employed by WML to obtain a judgment against Mrs. Moe's share of the community property clearly did not provide her an opportunity to present objections "at a meaningful time and in a meaningful manner appropriate to the case." *See, Amunrud v. Board of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2012). Whether Mrs. Moe's share of community assets could be used to satisfy any of the sanctions imposed for a contempt committed only by her husband is clearly an issue of great importance to Mrs. Moe and one that requires consideration of the relevant facts and applicable law. The presentment of a proposed final order or judgment is not an appropriate setting for resolution of such issues.

The Final Judgment entered by the trial court on June 21, 2011, includes the following statement:

A debt incurred during marriage is presumed to be a community obligation; the burden of proving that a debt is not a community obligation rests on the community. *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 343 (1980). Neither Orville Moe nor Deonne Moe has rebutted that presumption.

CP 26-27.

While it may be true that neither Mr. or Mrs. Moe rebutted the presumption, the question that this Court must answer is at what point was Mrs. Moe given a **meaningful opportunity in an appropriate setting** to do so? The clear answer as is that she was not.

Moreover, nothing in the Notice to Presentment to Mrs. Moe told her that she would ever have that opportunity. Nowhere in the Notice is Mrs. Moe informed that she would be able to present testimony or other evidence to overcome the presumption of community liability or that she would be allowed to make legal arguments that the presumption should not apply. There is nothing in the record to indicate that the trial court was ever prepared to hear any evidence or consider any legal argument on that issue at the presentment or at any other time. Under these facts, WML's assertion that the procedure complied with the requirements of due process is clearly without merit.

2. The Imposition of Remedial Sanctions Upon One Spouse Does Not Create a Community Obligation as a Matter of Law.

WML next argues that no notice was required to inform Mrs. Moe that contempt sanctions against her husband would become a judgment against her share of community property because all debts incurred by either spouse during a marriage are presumed to be debts of the community. That argument

is without merit for two reasons. First, the imposition sanctions for contempt is not a debt incurred for the benefit of the community. Second, even if WML's claim that the contempt sanctions against Mr. Moe created a presumptively community debt, WML failed to give Mrs. Moe notice that it was seeking to impose liability against her share of the community based that presumption.

A debt incurred by one spouse during marriage is presumptively a community obligation only when the debt is incurred for the benefit of the community or there was an expectation of benefit to the community. *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn.App. 351, 353, 613 P.2d 169 (1980) citing, *Malotte v. Gorton*, 75 Wn.2d 306, 309, 450 P.2d 820 (1969). The rule applies only to debts voluntarily incurred by a spouse or incurred when acting on behalf of and for the benefit of the community. See, e.g., *Fies v. Storey*, 37 Wn.2d 105, 221 P.2d 1031 (1950)(debt incurred by husband in conducting construction business); *National Bank of Commerce v. Green*, 1 Wn.App. 713, 463 P.2d 187 (1969)(promissory note); *Oregon Improvement Co. v. Safmeister*, 4 Wash. 710, 30 P.1058 (1892)(promissory note).

When a debt is incurred involuntarily as the result of tortious conduct by one spouse acting in his or her separate capacity, only the tortfeasor's share of the community property can be used to satisfy the debt, and then only after the tortfeasor's separate property has been exhausted. See, *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980); *Keene v. Edie*, 131 Wn.2d

822, 935 P.2d 588 (1997).

Even when the presumption applies, the presumption merely establishes the proof necessary to impose liability on the community. Contrary to WML's assertion, a judgment entered against one spouse is not, as a matter of law, a judgment against the community, and WML cites no authority to support that proposition. The sole case cited by WML, *La Framboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953), involved a claim against a married couple employed to care for a six year old girl, who was molested by the husband. Liability against the community in that case was based solely on the theory of *respondeat superior* and had nothing to do with community property law. *See, Id.*, 42 Wn.2d at 200.

In any event, the holding of *La Framboise* is irrelevant to the issues raised in this appeal. *La Framboise*, merely states that a judgment against the husband can become a judgment against the community because, at the time that case was decided the husband was deemed to represent the wife in any legal proceedings. *See, Id.*, 42 Wn.2d at 200-201. *La Framboise* does not state that all judgments against one spouse are automatically judgments against the entire community, nor does it address the issue of what process is due to a non-debtor spouse prior to deprivation of that spouse's interest in community property.

Mrs. Moe does not challenge the judgment against her husband or the ability of WML to reach Mr. Moe's half of the community property to satisfy

that judgment. Mrs. Moe challenges only the imposition of a judgment against the entire marital community without proper notice to her.

Under the rule announced in *deElche v. Jacobsen* and *Keene v. Edie*, the trial court was required to make appropriate findings of fact and conclusions of law before entering judgment against the marital community based solely on the conduct of Mr. Moe. Due process requires that those findings and conclusions be made only after notice to Mrs. Moe and opportunity to be heard in an appropriate setting. A presentment is not an appropriate setting for resolution of factual issues, such as whether a contempt by one spouse was committed for the benefit of the community or in anticipation of a benefit to the community. Thus, even if WML arguably would or could have prevailed on that issue at an appropriately held hearing after adequate notice to Mrs. Moe, no such notice was given and no such hearing was ever held.

3. There Can be No "Joint and Several" Liability Imposed on Mrs. Moe Because She Was Not Found to Be In Contempt.

WML argues that Mrs. Moe was on notice that she could be personally held responsible for her husband's separate contempt because WML's motion for contempt requested remedial sanctions to be imposed "jointly and severally." That argument is completely specious.

The term "joint and several" applies to the obligation of multiple parties to satisfy a judgment when each of those parties has been found liable

under the law. The term is usually applied in situations involving joint tortfeasors. *Kottler v. State*, 136 Wn.2d 437, 442-43, 963 P.2d 834 (1998)(joint and several liability arises when more than one tortfeasor causes an indivisible injury). "Joint and several" does not mean that a person not found to be at fault can be held liable to pay all or part a judgment entered against an at-fault party. *Id.*

WML completely misreads the definition of "joint and several" that appears in Black's Law Dictionary. Black's Law Dictionary 837 (6th Ed. 1990). That definition states only that a creditor can demand payment separately from one party to an obligation or liability or from all parties jointly, at the creditor's option. It does not state that a creditor can demand payment from someone who is not a party to the obligation or liability.

Here, Mrs. Moe is not a party to any obligation or liability, since she was never found to be in contempt. CP 373-379. The use of the phrase "Orville Moe and/or Deonne Moe" in the court's Order of June 4, 2010, (CP 363-371) imposing sanctions for any future violations of the court's order is hardly sufficient to convert a finding of contempt by Mr. Moe into a finding of contempt by both. Had the trial court intended to find both Mr. and Mrs. Moe in contempt, it would have done so with clear and unambiguous language. On the contrary, the Order Entered on June 11, 2011, states very clearly that only Mr. Moe was in contempt for failing to obey the court's previous orders. CP 374-378.

The June 4, 2010, Order further states that both Orville Moe and Deonne Moe can avoid imposition of sanctions by complying with the terms and conditions of the Order. CP 367. Thus, Mrs. Moe would reasonably expect that she could avoid any sanctions against her personally or against her share of community property so long as she complied with the order and was not in contempt. There is no evidence that Mrs. Moe failed to comply with the order, and the trial court did not find her to be in contempt.

At best, the notice provided by WML and the trial court's Order of June 4, 2010, imposing remedial sanctions are ambiguous as to whether Mrs. Moe would be personally responsible for any sanctions imposed for contempt committed only by her husband and whether her interest in community property would be at risk, even if she fully complied with the court's orders. Thus, neither WML's Notice nor the trial court's Order imposing remedial sanctions provided adequate notice to Mrs. Moe.

4. The Law of the Case Doctrine Does Not Apply.

WML argues that the present appeal is barred by the Law of the Case doctrine, citing *State v. Bailey*, 35 Wn.App. 592, 668 P.2d 1285 (1983) and *State v. Suave*, 100 Wn.2d 84, 666 P.2d 894 (1983). Neither of those cases even mentions the Law of the Case doctrine, and neither supports WML's position in any way.

The Law of the Case doctrine states that once there is an appellate holding enunciating a principle of law in a case, that holding will be followed

in subsequent stages of the same litigation. *Robertson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) *citing*, 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55-56 (4th ed. 1986). There is no prior enunciation of a principle of law by an appellate court in this case regarding any of the issues raised by this appeal. Thus, the Law of the Case doctrine simply does not apply.

The two cases cited by WML are criminal cases that concern whether, in a subsequent appeal following remand to the trial court for further proceedings, a criminal defendant can raise issues that were or could have been raised in the first appeal. Those cases do not involve application of the Law of the Case doctrine in any manner and have no applicability in a civil case.

WML seems to complain that Mrs. Moe should be limited to only one appeal with respect to the judgment at issue here or that she should be allowed to bring only one motion under CR 60 from which an appeal would lie. WML cites no authority whatsoever to support that position. Nor does WML present any argument in support of creating new law or extending existing law to limit the number of motions that can be brought under Rule 60.

WML's argument is also contrary to the rule that a judgment entered without due process is void and cannot be enforced. *See, Summers v. Dept. of Revenue*, 104 Wn.2d 87, 90, 15 P.3d 902 (2001). If accepted, WML's argument would lead to the absurd result that a judgment could not be

challenged under Rule 60 as being void for lack of jurisdiction, lack of due process, or lack of legal authority to enter the judgment, if it had previously been challenged on other grounds. Thus, a judgment would be insulated from any attack despite being void as a matter of law. WML's argument that the present appeal is barred by the Law of the Case doctrine is completely without merit.

5. WML's Request for Attorney Fees and Costs for Responding to a Frivolous Appeal is Itself Frivolous and Should Be Denied.

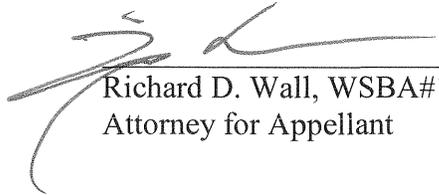
WML requests attorney fees and costs be awarded against Mrs. Moe and her counsel because this appeal is "clearly barred by the law of the case doctrine." (Brief of Respondent WML, p. 24) As noted above, the Law of the Case doctrine has no applicability to this appeal. The cases cited by WML do not support WML's position and do not even mention the Law of the Case doctrine. Thus, WML's argument that the present appeal is frivolous because it is barred by the Law of the Case doctrine is itself frivolous. The request for attorney fees and costs should be denied.

III. CONCLUSION

For the foregoing reasons, this court should reverse the trial court's order denying the motion to vacate judgment pursuant to CR 60 (b) and enter an order vacating that part of the Final Judgment entered on June 21, 2011, imposing remedial sanctions in the amount of \$730,000 against Deonne Moe

and against her interest in the marital community.

Respectfully submitted this 28th day of April, 2016.

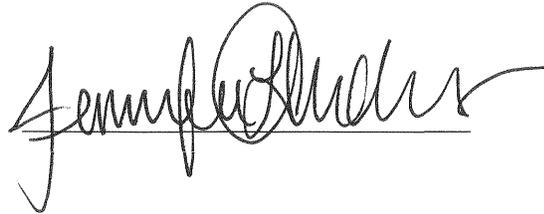


Richard D. Wall, WSBA#16581
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of April, 2016, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent via legal messenger to the following:

AARON D. GOFORTH
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Davidson Backman Medeiros, PLLC.
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A handwritten signature in black ink, appearing to read "Jennifer A. Backman", written over a horizontal line.