

NO. 72709-5-I

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

AZEEM KHAN,

Appellant,

v.

ALINA FAROOQ,

Respondent.

2016 FEB 16 PM 2:30

COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Kimberly Prochnau

REPLY BRIEF OF APPELLANT

Azeem Khan
pro se

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In addition to the issues and arguments presented in the Appellant's Opening Brief, Mr. Khan respectfully offers the following for the consideration of this Court.

A. INTRODUCTION

Ms. Farooq fails to rebut Mr. Khan's argument that CR 6(b)(2) prohibits the trial court from extending the time to file a motion for reconsideration; instead she discusses a motion for withdrawal and claims that Mr. Khan agreed to extend the deadline for her motion to reconsider for 38 days. Brief of Respondent at 6.

Regarding the child support claim, Ms. Farooq admits on appeal that Mr. Khan paid her \$42,700 post-separation. Brief of Respondent at 10, Section C, Issues Pertaining #2. Ms. Farooq focuses on disputing the trial court's finding that the couple only had an intimate committed relationship, although she has not filed a cross-appeal nor made a counter-assignment of error on this point. It must be taken as a verity on appeal that the parties were never married. Brief of Respondent at 8. Ms. Farooq's "Assignments of Error" do not assign error to any trial court rulings and therefore cannot be considered by this Court. The original case in trial court was filed as Committed Intimate Relationship and cohabitation between MS Farooq and Mr. Khan lasted only 8 months. Mr. Khan is not sure where MS Farooq had come up with fictitious marriage certificate

that she has submitted to Court of Appeals without service to all parties. Ms. Farooq have extensive history of submission of fraudulent documents, Forged text messages and fabricated emails to trial court. She was caught in elaborate scheme of fake child supervise exchange company by trial court. She confessed during the trial and was admonished by trial court.

(CP-1-18 Findings Facts & Conclusion of Law Section 2.12

Ms. Farooq's brief alleges various acts of wrongdoing to Mr. Khan. These alleged acts were not found by the trial court nor are they within the scope of the issues on appeal. For this reason, while Mr. Khan admits none of the wrongdoing Ms. Farooq accuses him of, this Reply Brief will focus only on the issues raised in this appeal.

The trial court concluded that Ms. Farooq was using Domestic Violence as a sword not shield and issued a DV restraining order asking MS Farooq to stay away from Mr. Khan. Mr. Khan was named as protected person in this restraining order. Ms. Farooq didn't comply and was recently arrested for Domestic violence protection order violation and spent few nights in jail. See Exhibit 1 for DV Protection order.

B. ARGUMENT

- 1. THE TRIAL COURT LACKED AUTHORITY TO ENLARGE TIME FOR FILING MS. FAROOQ'S MOTION TO RECONSIDER**

Ms. Farooq challenges Mr. Khan's assertion that this issue is subject to *de novo* review. Brief of Respondent at 19. The core of Mr. Khan's issue regarding CR 59 and CR 6(b)(2), however, is that the trial court failed to recognize that these two rules applied and to apply them to the facts of this case. Washington cases clearly state that "[t]he process of determining the applicable law and applying it to the facts is a question of law that we review *de novo*. Erwin v. Cotter Health Ctrs., Inc., 161 Wn.2d 676, 687, 167 P.3d 1112 (2007); cited in Kitsap County v. Kitsap Rifle & Revolver Club, 184 Wn. App. 252, 267, 337 P.3d 328 (2014). Therefore this issue, and Mr. Khan's issue regarding the applicability of RCW 26.09.060, are subject to *de novo* review.

Washington has long recognized that a trial court lacks authority to grant a request to enlarge the time for filing a motion for reconsideration. In Metz v. Sarandos, 91 Wn.App. 357, 957 P.2d 795 (1998), a trial court accepted a motion for reconsideration 13 days after the underlying ruling had been entered. Id. at 359. This Court held that "CR 6(b) does not permit enlargement of the time for filing a motion to reconsider. Thus the trial court had no discretionary authority to extend the time period for filing a motion for reconsideration" Id. at 360.

Similarly, in Moore v. Wentz, 11 Wn.App. 796, 799, 525 P.2d 290 (1974), this Court looked to the Federal Rules of Civil Procedure to

support its strict interpretation of CR 6(b), quoting the seminal federal practice guide which notes: "As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it [citations omitted]."ⁱⁱ

While Ms. Farooq claims that the trial court had "discretion" to enlarge the time for filing the motion to reconsider (Brief of Respondent at 14), Ms. Farooq has not cited, nor is there, any case or statute which gives the trial court discretion to enlarge the time for filing a motion for reconsideration. To the contrary, the rule is that the trial court has no discretion at all to enlarge time to file such a motion. This Court has demonstrated its willingness to strictly enforce this rule, as demonstrated in Metz, Moore, and Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 23 P.3d 529, 534 (2001). Both filing and service must be accomplished within 10 days of entry of the final orders; when that is not done, the court lacks authority to enlarge time.

Ms. Farooq points to footnote 1 of the trial court's order denying reconsideration and, although she does not articulate it as such, appears to be making an argument of either invited error or waiver based on this footnote. Brief of Respondent at 15. In this footnote, the trial court writes:

"By email, the parties agreed to waive any objections to timeliness of the motions [for reconsideration]."

This footnote will not support application of either the invited error or waiver doctrines. There is no indication of exactly what each party agreed to; Mr. Khan filed his motion for reconsideration as to the Order of Child Support 10 days after entry of the final orders, while Ms. Farooq filed hers 38 days after entry. It is not possible to tell from the trial court's rather cryptic footnote whether Mr. Khan agreed to a certain number of extra days for filing a motion for reconsideration; but certainly it is not reasonable to read the trial court's footnote as saying that Mr. Khan agreed to an indefinite or infinite amount of time for Ms. Farooq to file a motion to reconsider; and it is not reasonable to infer that Mr. Khan agreed to extend the 10 day deadline by an additional 28 days.

The doctrine of waiver is "designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002), (citing Lybbert v. Grant County, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000)). The doctrine is also intended to encourage the assertion of procedural defenses "before any significant expenditures of time and money [have] occurred." *Id.* at 426.

Here, Mr. Khan filed his motion to reconsider 10 days after entry of the Order For Support but 11 days after the entry of the Findings of Fact & Conclusions of Law and the Child Support Worksheet. Therefore, as to the Order of Child Support, Mr. Khan's motion to reconsider was timely and he expected the trial court to rule on it. Yet after several weeks passed, Mr. Farooq suddenly filed a very late motion to reconsider and the court issued a written ruling 3 days later; indeed the trial court signed new orders on reconsideration only 2 days after Ms. Farooq filed her motion to reconsider.

This record shows that Mr. Khan did not "ambush" Ms. Farooq in any way. He filed his motion for reconsideration timely as to the Order of Child Support and arguably one day late as to the other orders, then waited for the court to take action. Nothing about these actions would misdirect Ms. Farooq away from her own right or ability to file her own timely motion for reconsideration. to the contrary, it is Ms. Farooq who "ambushed" Mr. Khan with a very late motion to reconsider which was then very quickly ruled on by the court. Notwithstanding the trial court's vague footnote, Mr. Khan did not agree to Ms. Farooq filing a motion for reconsideration 28 days late, nor did he have adequate time to object given how quickly the trial court ruled. He did not waive any objection to the trial court enlarging time to file Ms. Farooq's late motion. Even if the

evidence clearly showed that Mr. Khan had agreed to Ms. Farooq filing a 28 day late motion for reconsideration, which it does not, such an agreement would have had no effect, since Mr. Khan did not have it within his power to waive the dictates of CR 59(b).

Similarly, Mr. Khan did not invite this error. The original goal of the invited error doctrine was to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." City of Seattle v. Patu, 58 P.3d 273, 147 Wn.2d 717, 720 (2002). "The invited error doctrine precludes review of an error that the appealing party caused at trial." State v. Jones, 144 Wn.App. 284, 298, 183 P.3d 307 (2008). The classic invited error is one in which a trial litigant proposes a jury instruction, then argues on appeal that the court erred in giving the litigant's proposed instruction. State v. Studd, 137 Wash.2d 533, 547, 973 P.2d 1049 (1999); State v. Pam, 101 Wn.2d 507, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). In Pam, the State intentionally set up an error in order to create a test case for appeal; the invited error doctrine was applied to bar consideration of the issue on appeal. Id.

Here, Mr. Khan did not cause the error at trial. He filed his motion for reconsideration timely within the 10 day time limit as to the Order of Child Support. He did not set up any error. If there was any email

agreement, which is unclear, it is unknown when such an agreement would have occurred, whether before or after the 10 day time limit had elapsed. If it occurred after the 10 day time limit elapsed, then no agreement could have had any bearing on Ms. Farooq's motion to reconsider, because the time limit had passed and the trial court simply had no authority to enlarge it.

In any case, the court had no authority to enlarge the time for reconsideration, and questions of waiver or invited error cannot retroactively provide authority where none existed.

2. MS. FAROOQ ACKNOWLEDGES THAT MR. KHAN PAID TO HOUSE THE PARTIES' SON AND PAID ADDITIONAL CASH CHILD SUPPORT TO HER; YET SHE FAILS TO ACKNOWLEDGE THAT PAYING TO HOUSE THEIR SON IS A FORM OF CHILD SUPPORT

Ms. Farooq fails to respond to Mr. Khan's points regarding application of RCW 26.09.060 except to assert that the parties were married. Yet it is a verity on appeal that the parties were not married. Ms. Farooq points to no properly filed marriage certificate, nor has she cross-appealed that issue, therefore this Court cannot consider it. Mr. Khan briefly addresses Ms. Farooq's other chief point below.

Ms. Farooq's Brief of Respondent acknowledges that he has paid the amount in dispute and is paying to house the parties' son. On Page 10

of Brief of Respondent, Ms. Farooq admits that Mr. Khan has paid \$42,700 for support of their son. She writes: "... while Mr. Khan did not pay \$42,700 in child support, he only paid roughly \$13k. The remainder of the proceeds he used to pay and maintain the property that is titled under his name." The "property" Ms. Farooq refers to is the house that the parties' son (and Ms. Farooq) live in.

Ms. Farooq's statements to this Court regarding Mr. Khan's payment of child support are internally inconsistent. While she admits on page 11 that he paid "roughly \$13k" in child support, she tells this Court on page 13 that "[t]he cold hard reality is that Mr. Khan hasn't paid for 3 years a penny towards support for his son," on page 18 she states, "until this day Ms. Farooq has still not seen a penny of child support" and on the same page tells this Court "Mr. Khan has not paid any monies to Ms. Farooq for the past three years including as of today."

Mr. Khan does not pay to maintain the house that Ms. Farooq and the parties' son live in as maintenance, as RCW 26.09.060 precludes payment of maintenance in committed intimate relationship dissolutions. Neither was that amount of almost \$30,000 characterized by the court as a redistribution of property from the eight month period during which the parties accumulated community property. Logically, therefore, if the payments could not have been maintenance, and the sum Mr. Khan paid

was not considered to be a redistribution of property, and the money was used to house the parties' son, the only reasonable conclusion is that the money was in fact child support.

F. CONCLUSION

Mr. Khan respectfully requests this court reverse the portions of the Order on Reconsideration that grant relief to Ms. Farooq, remanding if necessary, and further requests this Court remand for recalculation of the Order of Child Support to take into account the 15 months of child support already paid by Mr. Khan.

DATED this 15th day of February, 2016.

Respectfully submitted:



Azeem Khan
pro se

¹ Quoting 2 J. Moore, Federal Practice, History of Rule; Committee Notes, 6.01(6) (2d ed. 1974) at page 1427. Moore v. Wentz was decided in 1974, when the timeframe for filing and serving a motion for reconsideration under the rule was 5 days, not 10. Yet the Moore court applied then-CR 6(b) in exactly the same way as it is applied in Metz and Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 23 P.3d 529, 534 (2001)(discussed in Opening Brief of Appellant).

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Superior Court of Washington
County of KING

In re the Committed Intimate
Relationship of:

ALINA FAROOQ

Petitioner,

and

AZEEM AHMED KHAN

Respondent.

No. 13-2-00841-6 SEA

Restraining Order

Temporary (TRO)

Final (RSTO)

Clerk's Action Required

Law Enforcement Notification

AGREED ORDER

This is a temporary restraining order the final restraining order signed by the court pursuant to a decree or final order, dated Sept. 6, 2014.

Use a separate order for each restrained person.

Name of person restrained: ALINA FAROOQ. Name of person(s) protected: AZEEM KHAN

Names of Protected Children:

Does not apply. The child DANİYAL KHAN is not protected by this order.

Restrained Party's Identifiers:

Sex: F Race: Pakistani Hair: brown (bleached blonde)
Height: 5'6" Weight: 135 Eyes: brown

Restrained Party's Distinguishing Features: medium build, light brown skin

Caution: Access to weapons: yes no unknown

1 The court finds: this order is necessary based on the evidence presented and: the court has
2 jurisdiction over the parties, the children, and the subject matter; the restrained party had
3 reasonable notice and an opportunity to be heard. Notice of this hearing was served on the
4 restrained person by personal service service by mail pursuant to court order service
by publication pursuant to court order other: The Court ordered mutual restraining orders
after an 8-day trial.

5 This order is issued in accordance with the Full Faith and Credit provisions of VAWA 18 U.S.C.
6 § 2265.

7 **Violation of this Restraining Order with actual notice of its terms is a criminal offense
under Chapter 26.50 RCW and will subject the violator to arrest. RCW 26.09.060.**

8 **This restraining order is effective immediately and expires on:** This order shall not
9 automatically expire on any date. If the either party wishes to vacate this order, that party shall
10 note a motion before Judge Prochnau, the parties trial judge. If Judge Prochnau has retired or
is otherwise unavailable, the party shall note the motion before the IC judge.

11 ***It Is Ordered, Adjudged and Decreed:***

12 (Name) ALINA FAROOQ is restrained and enjoined from:

- 13 disturbing the peace of the protected party or child.
14 going onto the grounds of or entering the home, work place or school of the protected
party.
15 knowingly coming within or knowingly remaining within (distance) 500
YARDS 500 Feet of the home, work place or school of the
16 protected party.
17 assaulting, harassing, stalking, or molesting the protected party or child, or using,
attempting to use, or threatening to use physical force against the protected party or child
that would reasonably be expected to cause bodily injury, or engaging in other conduct
that would place a protected party in reasonable fear of bodily injury to the protected party
or child.

18 If the restrained person had actual notice and the restrained person represents a
credible threat, then the Mandatory Surrender of Weapons and Restrictions apply.

19 ***The protected party or the protected party's attorney must complete a law enforcement
20 information sheet and provide it with this order before this order will be entered into the
law enforcement computer system.***

21 **Surrender of Weapons**

22 Does not apply.
23
24
25

1 **Warnings to Restrained Person**

2 A violation of any provision of this order with actual notice of its terms is a criminal offense under chapter
3 26.50 RCW and will subject you to arrest. If the violation of this restraining order involves travel across a
4 state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and
5 territorial jurisdiction of the United States, which includes tribal lands, you may be subject to criminal
6 prosecution in federal court under 18 U.S.C. §§ 2261, 2261A, or 2262.

7 A violation of any provision of this order is a gross misdemeanor unless one of the following conditions
8 apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or
9 second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this
10 order that is reckless and creates a substantial risk of death or serious physical injury to another person is
11 a class C felony. Also, a violation of this order is a class C felony if you have at least two previous
12 convictions for violating a protection order issued under Titles 7, 10, 26 or 74 RCW.

13 Federal law: effective immediately and continuing as long as this restraining order is in effect, the restrained
14 person may not possess a firearm or ammunition. 18. U.S.C. § 922(g)(8). A violation of this federal
15 firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception
16 exists for law enforcement officers and military personnel when carrying department/government-issue
17 firearms. 18 U.S.C. § 925(a)(1).

18 State law: If mandatory firearm surrender and restrictions under state law apply: It is unlawful for the
19 restrained person to own, possess, or have under his/her control a firearm while this order is in effect. A
20 violation is a class C felony.

21 ***You Can Be Arrested Even if the Person or Persons Who Obtained the Order Invite or Allow You
22 to Violate the Order's Prohibitions.*** You have the sole responsibility to avoid or refrain from violating
23 the order's provisions. Only the court can change the order upon written application.

24 Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any
25 United States territory, and any tribal land within the United States shall accord full faith and credit to the
order.

14 **Previous Order**

15 [X] There are no prior Restraining Orders *restraining the same person* issued under this
16 cause number.

17 **Clerk's Action/Law Enforcement Action**

18 This order shall be filed forthwith in the clerk's office and entered of record. The clerk of the court
19 shall forward a copy of this order on or before the next judicial day to (name of appropriate law
20 enforcement agency) King County Sheriff's Office, Sammamish Police
21 Department law enforcement agency where ***the protected party resides*** which shall
22 forthwith enter this order into any computer-based criminal intelligence system available in this
23 state used by law enforcement agencies to list outstanding warrants.

22 **Service**

23 [X] The restrained party or attorney appeared in court or signed this order; service of this
24 order is not required.

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I did the following:

On the 16th day of February, 2016, I mailed by certified mail U.S. Mail, postage prepaid a true copy of the Appellant Letter to court clerk in regards to COURT OF APPEALS 72709-5-I In re Marriage of: Alina Farooq, Resp. vs. Azeem Khan, App in the above-entitled matter to Alina Farooq at the following address: 1530 east lake Sammamish Pkwy NE Sammamish, WA 98074

Please see the attached Receipt from Post office.

Dated: 2/16/16


Signature

Karen Rhodes
Print or Type Name

Seattle, WA 98134
Place signed