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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 313654

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

Jamie Stillman, Respondent

v.

Doug Lee, Appellant

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION TO REPLY BRIEF OF DOUG LEE

Summary of Doug Lee's Appeal: Doug Lee's appeal was simple and clear, and Ms. Stillman has dragged the case through multiple additional motions (and a separate appeal), apparently to evade Mr. Lee's simple and clear questions for review, summarized, below:

A. CONTRACT ISSUE: (1) Mr. Lee, through counsel, had a settlement agreement with Ms. Stillman, in which, as his consideration for the agreement, Mr. Lee would not seek (a) a trial continuance, nor (b) sanctions for discovery rule violations, and in exchange, Ms. Stillman offered to allow Mr. Lee to proceed to trial based upon his pay stubs, without his tax returns. Mr. Lee had no way of knowing until the presentment of final orders that the agreement would be breached, and the court then erred as a matter of law in contract interpretation to fail to enforce the agreement, and then the court abused its discretion under this error of law to penalize Mr. Lee (by not allowing him income tax deductions) for not having his tax returns available for trial.

B. ISSUE ON TAXES OF NO PREJUDICE TO MS. STILLMAN: Next, Ms. Stillman had no baseline right to exclude Mr. Lee's income tax deductions from his child support calculations, because she suffered no prejudice from his usual and normal income taxes from being entered into the calculation of Mr. Lee's net income on the Child Support Worksheet (CSWS). It was an abuse of discretion for the trial court to penalize Mr.

Lee (by not allowing him income tax deductions) for not having his tax returns available for trial.

C. ISSUE OF JAMIE STILLMAN'S INTRANSIGENCE ON VISITATION: It is clear that Ms. Stillman openly and repeatedly defied court orders on visitation, and Mr. Lee should have been entitled to legal fees for Ms. Stillman's intransigence. However, out of kindness and good faith, Mr. Lee only requested as a remedy for Ms. Stillman's intransigence that he not be required to pay Ms. Stillman's legal fees (Doug forewent fees he should have been owed). Additionally, Ms. Stillman's fees were inordinate for the nature of this action, due to Ms. Stillman's energetic request that Division III defer to Judge Tompkins, which it did, after which Ms. Stillman appealed Judge Thompkin's decision, forcing yet more briefing, and numerous responses to motions filed by Ms. Stillman.

Mr. Lee asks that he not pay any of Ms. Stillman's fees here, or in the trial court.

D. CONCLUSION OF INTRODUCTION TO THE APPEAL OF DOUG LEE: Mr. Lee simply sought appellate review of these concise issues, and he filed his Opening Brief over two years ago on 4/3/13. At that point, his legal bill for the appeal was minimal, as would have been Ms. Stillman's own legal bill for her own clear and concise Response.

Instead of allowing this simple appeal to proceed, Ms. Stillman again engaged in wildly litigious behavior, sending the case up and down

various byways, with multiple motions in this case, and in case no. 318117 (which Ms. Stillman ultimately dismissed). This grossly litigious behavior delayed by over two years Mr. Lee receiving an economical answer to the foregoing clear and simple questions.

Summary of Jamie Stillman's Response: Ms. Stillman raises eight issues on the first page of her Response. *Stillman Issue #1* is the question of the standard of review. However, the standard of review varies by the issue on appeal, and will be addressed, below. *Stillman Issue #2* involves allegations about the record for review, and the Commissioner's Ruling of 7/22/15 is an excellent and sufficient response; *Stillman Issues #3, #4 and #7* address the intransigence of Ms. Stillman and will be argued, *infra*. *Stillman Issue #5* has already been addressed by the Commissioner's Ruling of 7/22/15, and by Ms. Stillman not bringing any cross appeal. However, this issue, too, will be briefly re-argued, below. Finally, *Stillman Issue #8* alleges that Mr. Lee's appeal was frivolous, and violated the RAPs. Mr. Lee will be forced to address these allegations in his Reply; however, Mr. Lee asks the panel to review the file in this case, and in Division III case no. 318117, and asks that he be awarded fees for the inordinate litigation in which Ms. Stillman engaged, none of it to any good purpose, ending in her withdrawing appeal no. 318117, which concluded her other motions being denied in this case on 7/22/15.

Conclusion to Introduction and Outline of Argument to Follow: Mr.

Lee will begin this Reply by revisiting the issue of the settlement contract upon which he relied in proceeding to trial without his tax returns, arguing this agreement should have been enforced by the trial court, and should be reviewed as a question of law. Then, he will turn to the issue of Ms. Stillman's intransigence and its standard of review. Finally, he will conclude with the lack of prejudice to Ms. Stillman from the fact that his tax returns were not ready by trial, and Mr. Lee believes his (Idaho) state and federal taxes should have been deducted in calculating child support under RCW 26.19.071(5), also as a question of law.

II. REPLY OF DOUG LEE TO RESPONSE OF JAMIE STILLMAN

A. Standard of Review: De Novo on Contracts and Law

Contract interpretation is a question of law, and review is de novo:

We review questions of law de novo. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). A court's purpose in interpreting a contract is to ascertain the parties' intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 569, 919 P.2d 594 (1996). "Absent disputed facts, the legal effect of a contract is a question of law to be reviewed de novo." *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wash.App. 286, 295, 991 P.2d 638 (1999).

Graoch Associates No. 5 Ltd. P'ship v. Titan Const. Corp., 126 Wash. App. 856, 861, 109 P.3d 830, 832 (2005). See also, *Martinez v. Miller Indus., Inc.*, 94 Wash. App. 935, 943-44, 974 P.2d 1261, 1266 (1999).

Application of Graoch: Prior to trial, Ms. Hendrick had agreed that Mr. Lee could rely upon his pay stubs at trial, and as consideration this was in exchange for Mr. Lee dropping his request for a continuance (to get his taxes done for trial) and for Mr. Lee dropping his motion for discovery sanctions. Mr. Lee presented the correspondence in his Opening Brief, and there is no substantial contrary evidence. Review is de novo on the settlement agreement.

It is not reasonable to believe that Mr. Lee would have foregone trial continuance if it meant that he could not deduct his state (Idaho) and federal income taxes. The "intent of the parties" at the time that Mr. Lee provided his consideration for the agreement -- of giving up his motion for sanctions against Ms. Stillman and of giving up his motion for trial continuance -- must be reasonably inferred to be that Mr. Lee's pay stubs would be the only wage and income information he would have to provide at trial. (And Mr. Lee's prompt submission of his tax returns on post-trial motions shows that only a short continuance would have been needed for him to have the returns at trial.)

Enforcement of this agreement is requested.

B. Finding of Intransigence as a Mixed Question of Law and Fact

It is unrebutted in the file that Ms. Stillman repeatedly defied the court's orders on visitation. (See citations to Clerk's Papers in Mr. Lee's

Opening Brief.) Mr. Lee asked for only "half a sanction" in an act of kindness and good faith to reduce contention in the relationship between these parents. Doug Lee asked only that he not pay fees because of Ms. Stillman's intransigence, but he did not seek any fees from Ms. Stillman, as an act of conciliation. This relief should have been granted.

As to the standard of review, on the one hand, this decision could appear to be subject to an abuse of discretion standard:

A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons."⁶ We will reverse a trial court's factual findings only if they are unsupported by substantial evidence.⁷ We review whether the trial court's conclusions of law flow from its findings *de novo*.⁸ Unchallenged factual findings are verities on appeal.⁹

In re Marriage of Raskob, 182 Wash. App. 1028 (2014) (cases cited in footnotes omitted). By that standard, the trial court should be reversed. On the other hand, the trial court could also be reversed as a matter of substantial evidence shows that Ms. Stillman was intransigent, and there is no contrary evidence. That, too, provides a basis for reversing the trial court.

Application of *Raskob*: Applying *Raskob* to this case, Mr. Lee challenged the factual findings of the trial court that Ms. Stillman had not been intransigent, and he asks this court to find that Ms. Stillman has been intransigent, and that such intransigence should have precluded Mr. Lee

from owing any attorney's fees at trial. The decision is to be based upon the court file, and the question is very amenable to de novo review.

Here the trial court was merely reviewing a court file, as opposed to the great deference shown the trial court, if the trial court is making credibility judgments. For an example, in jury selection, the trial court makes credibility judgments, deserving deference:

Because the trial court observes the juror answering questions when asked about possible bias, we accord great deference to its factual determinations about a juror's ability to serve impartially. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); *Ottis*, 61 Wn.App. at 755–56.

State v. Wolter, No. 45041-1-II, 2015 WL 3422142, at *11 (Wash. Ct. App. May 27, 2015).

Here, by contrast, Mr. Lee asks this court to review the clear court record of the repeated efforts Mr. Lee had to make to get Ms. Stillman to obey court-ordered visitation with his son, and he asks this court to find her intransigent as a matter of law.

Reply Note on Attorney's Fees: Mr. Lee also asks the court not to award Ms. Stillman any fees on appeal, but, instead, to award him fees for the breath-taking procedural complexity and extensive briefing that Ms. Stillman imposed upon Mr. Lee as Ms. Stillman ran this case in many directions, which all were simply obstructionist to try to keep Doug Lee from getting his simple appeal reviewed by this court. (See Mr. Lee's cost

bill, filed separately, for fees up through August 12, 2015; additional fees have accrued since that bill.)

C. The Lack of Prejudice is a Mostly a Question of Law, and to the Extent It is a Question of Fact, Ms. Stillman Had the Burden to Show that Using the Pay Stubs Would Prejudice Her.

The court was able to fully calculate Mr. Lee's child support obligation and proper deductions based upon his last several years of pay stubs. As Mr. Lee testified, and then submitted, his tax returns were being prepared for the recent years, but were not yet ready for trial if he forewent continuance. These tax returns were submitted shortly after trial, during post-trial motions, once Ms. Stillman's breach of the settlement agreement became clear in the orders requested by Ms. Stillman.

Ms. Stillman can show no prejudice to her ability to calculate child support from those calculations being based upon Mr. Lee's pay stubs from the years prior to, and up to, trial.

Mr. Lee was severely prejudiced by his inability to deduct his taxes from his income, contrary to the relevant statute. RCW 26.19.071(5).

The court's definitional treatment of "prejudice" in the published case law is rare, but there are examples from the insurance context. In such cases the burden of proof is upon the party wanting to show

prejudice. *Pulse v. Nw. Farm Bureau Ins. Co.*, 18 Wash. App. 59, 61-62, 566 P.2d 577, 579 (1977).

Application of *Pulse v. Nw. Farm Bureau Ins. Co.*: Here, Ms. Stillman was able to have the trial court determine Mr. Lee's income, and his net income should have been used for the child support calculation. RCW 26.19.071(5). Ms. Stillman can show no prejudice from using Mr. Lee's paystubs to calculate net income and tax deductions.

RCW 26.19.071(5) reads (emphasis added by underlining):

(5) **Determination of net income.** The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

- (a) Federal and state income taxes;
- (b) Federal insurance contributions act deductions;
- (c) Mandatory pension plan payments;
- (d) Mandatory union or professional dues;
- (e) State industrial insurance premiums;
- (f) Court-ordered maintenance to the extent actually paid;
- (g) Up to five thousand dollars per year in voluntary retirement contributions actually made if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a determination that the contributions were made for the purpose of reducing child support; and
- (h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

Applying RCW 26.09.071(5): By statute, Mr. Lee had the right to have his state and federal income taxes deducted from his standard calculation,

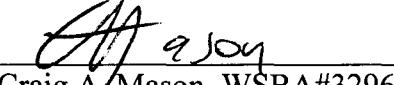
and Ms. Stillman had agreed to proceeding to the trial on child support based upon Mr. Lee's pay stubs. It was legal error and abuse of discretion for the trial court not to allow Mr. Lee to deduct state and federal income taxes. This argument is all the stronger still when (a) Ms. Stillman agreed to proceed to trial without Mr. Lee's tax returns (in exchange for consideration) and (b) Ms. Stillman was not prejudiced by proceeding with only pay stubs.

Mr. Lee asks this court to reverse the trial court under both (a) RCW 26.09.071(5) and on the basis of a lack of prejudice to Ms. Stillman, and, (b) as an independent basis to reverse the trial court on his tax deductions, by enforcing his settlement agreement with Ms. Stillman.

III. CONCLUSION

Based upon the foregoing, and upon his opening brief and the supporting clerk's papers, Mr. Lee asks that he be allowed to deduct his state and federal income taxes, per RCW 26.19.071(5), that his settlement agreement be enforced, and that Ms. Stillman's intransigence be held to bar her from the receipt of fees, including on this appeal.

Respectfully submitted on 8/25/15,



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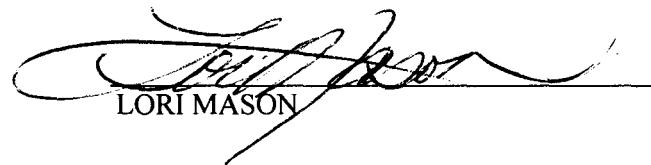
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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

)
Jamie Stillman,) No. 313654
) Certificate of Service re
Respondent,) Reply Brief of Appellant
)
Douglas Lee,)
)
Appellant.)

I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on August 28, 2015, I provided to Eastern WA Attorney Services a copy of Mr. Lee's Reply Brief to be delivered to the following:

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