No. 97200-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 77967-2-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEPHEN EARL WHITTED,

Petitioner,

v.

LORI JONES JORDAN,

Respondent.

LORI JORDAN'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Lori Jones Jordan ("Ms. Jordan"), who was the respondent / cross-appellant in the Court of Appeals and the defendant in the underlying Superior Court action.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision is the unpublished opinion filed in the matter of *Stephen Earl Whitted v. Lori Jones Jordan*, 77967-2-I, 2019 WL 1785618 (Wash. Ct. App. April 22, 2019).

III. ISSUE PRESENTED FOR REVIEW BY MR. WHITTED

Petitioner Stephen Whitted ("Mr. Whitted") seeks review of an issue he has framed as follows: "Was it error for the Superior Court of King County to set off a final judgment made in favor of Petitioner, Stephen Whitted, against an award made in favor of Respondent, Lori Jordan, from a separate action that was not then final but on appeal, when Jordan never pled setoff?"[1]

Ms. Jordan denies that Mr. Whitted has accurately stated an issue that arose below (because the judgment in the other action *was* final, and because Ms. Jordan *did* plead set-off), and asks that the Court deny discretionary review for the reasons stated below.

IV. MS. JORDAN'S RE-STATEMENT OF THE CASE

This is the second Washington state court appeal involving the enforcement of a decree dissolving the parties' marriage entered by a

[1] *See* Petition for Discretionary Review, at pp. 5-6.

Georgia court more than a decade ago.[2] In the first appeal, the Court of Appeals confirmed the trial court's judgment in favor of Ms. Jordan and against Mr. Whitted for approximately $165,000 in unpaid child support, and also awarded Ms. Jordan her reasonable attorney's fees on appeal.[3]

In the matter subject to this current appeal, the trial court entered judgment against Ms. Jordan for a principal sum of $55,000 to enforce a provision of the decree that required Ms. Jordan to transfer certain retirement account funds to Mr. Whitted. CP 76-77. The court allowed Ms. Jordan to offset the amount she owed to Mr. Whitted against the larger amount Mr. Whitted owed to her due to the first judgment. CP 77. Both parties appealed, but the Court of Appeals affirmed the trial court in all respects on April 22, 2019.[4]

On May 1, 2019, Mr. Whitted filed a one-page "Notice of Appeal to the Supreme Court of Washington." By letter dated May 15, 2019, the Supreme Court Deputy Clerk informed the parties that "[t]he Rules of Appellate Procedure . . . do not provide for such a notice procedure to be used to seek review of a Court of Appeals opinion."[5] The Supreme Court Deputy Clerk explicitly pointed the parties to RAP 13.4, and stated that any petition for review was due "not later than May 22, 2019."[6]

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[2] *See Whitted v Jordan*, 2019 WL 1785618 at *1.
[3] *See Jordan v. Whitted*, 76168-4-I, 2018 WL 824556 (Wash. Ct. App. Feb. 12, 2018), at * 5. *See also Whitted v Jordan*, 2019 WL 1785618 at *1.
[4] *Whitted v Jordan*, 2019 WL 1785618.
[5] Letter dated May 15, 2019 from Supreme Court Deputy Clerk Erin Lennon to Mr. Whitted and Ms. Jordan, at p. 1.
[6] *Id.*

Despite this Court having reminded Mr. Whitted of the May 22, 2019 deadline for the submission of any petition for review, Mr. Whitted chose to wait until May 21, 2019 to mail his Petition for Discretionary Review ("Petition") to the Court.[7] The Court did not receive the Petition for Discretionary Review until May 23, 2019, one day past the 30-day deadline set by RAP 13.4(a).[8]

Mr. Whitted subsequently filed a motion for extension, and Ms. Jordan responded, requesting that Mr. Whitted's motion for extension be denied, and that his petition for review be dismissed as untimely.[9] On June 20, 2019, Supreme Court Deputy Clerk Erin L. Lennon informed the parties by letter that both the motion for extension to file a petition for review and Mr. Whitted's untimely petition would be set for consideration by a Department of the Court.[10] Ms. Jordan was given until July 22, 2019 to serve and file an answer to Mr. Whitted's petition for review.[11]

V. ARGUMENT WHY THE COURT SHOULD DENY MR. WHITTED'S PETITION FOR DISCRETIONARY REVIEW

1. Mr. Whitted's Petition for Discretionary Review is untimely, and the Court should dismiss his Petition for this reason alone.

[7] *See* Motion to Enlarge Time to File Petition for Review, dated June 3, 2019, at p. 2, ¶ 5.
[8] *See* Letter dated May 28, 2019 from Supreme Court Clerk Susan Carlson to the parties in this matter.
[9] *See* Mr. Whitted's Motion to Enlarge Time to File Petition for Review, dated June 3, 2019, *and* Ms. Jordan's Response to Petitioner's Motion to Enlarge Time to File Petition for Review, at p.1.
[10] Letter dated June 20, 2019 from Supreme Court Deputy Clerk Erin L. Lennon to the parties.
[11] *Id.*

There is no dispute that Mr. Whitted did not file his Petition for Discretionary Review until one day after the 30-day deadline set by RAP 13.4(a).[12] For the reasons set forth in more detail in her Response to Petitioner's Motion to Enlarge Time to File Petition for Review, Ms. Jordan submits that Mr. Whitted has demonstrated neither "extraordinary circumstances" nor any looming "gross miscarriage of justice," and thus fails to meet the criteria for an extension of time set by RAP 18.8(b). The Court should deny Mr. Whitted's Petition for Discretionary Review for this reason alone.

2. Even if Mr. Whitted's Petition for Discretionary Review were timely, it fails to meet the criteria for discretionary review set by RAP 13.4(b).

As the Court reminded Mr. Whitted on May 15, the "contents . . . of a petition for review should conform to the requirements of RAP 13.4."[13] RAP 13.4(b) states in pertinent part as follows:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[14]

[12] *See* Letter dated May 28, 2019 from Supreme Court Clerk Susan Carlson to the parties.
[13] Letter dated May 15, 2019 from Supreme Court Deputy Clerk Erin L. Lennon to the parties.
[14] RAP 13.4(b).

Mr. Whitted's Petition for Discretionary Review never cites RAP 13.4(b). However, read with charity, the Petition can be construed as arguing that RAP 13.4(b)(1) and (2) are satisfied, as Mr. Whitted alleges that the decision of the Court of Appeals allowing a set-off conflicts with both *Reichlin v. First National Bank*, 184 Wash. 304 (1935), and *Seth Burrill Prods., Inc. v. Rebel Creek Tackle, Inc.*, 198 Wn. App. 1038, 2017 WL 1334440 (unpublished).[15]

Unfortunately for Mr. Whitted, the Court of Appeals carefully considered, and properly rejected, precisely these arguments.[16] The Court of Appeals distinguished both *Reichlin* and *Seth Burrill* in the process of pointing out that "[n]o persuasive authority supports [Mr.] Whitted's position that a pending appeal precludes an offset," particularly when—as here—no effort was made to stay enforcement of the offsetting judgment on appeal.[17]

Much of Mr. Whitted's argument in his Petition for Discretionary Review effectively reduces to doubling-down on a misrepresentation of the holding in *Reichlin.*[18] As the Court of Appeals explained in the decision proposed for review, *Reichlin* does <u>not</u> hold that the pendency of

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[15] *See, e.g.*, Petition for Discretionary Review, at p. and pp. 11-14.
[16] *See Whitted v. Jordan*, 2019 WL 1785618, at *2-3.
[17] *Id.* at *2. *See also* RAP 8.1(b) (expressly stating that "[a] trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule").
[18] *See, e.g.*, Petition for Discretionary Review at p. 15 (improperly citing to *Reichlin* in support of the proposition that "[w]hen matters are on appeal, finality is not established").

an appeal prevents finality.[19] Mr. Whitted's argument to the contrary relies on dicta which he clearly takes out of context.[20]

Similarly, nothing in the unpublished case of *Seth Burrill Prods., Inc. v. Rebel Creek Tackle, Inc.* supports Mr. Whitted's claim that the mere pendency of an appeal prevents the set-off a judgment.[21] In *Seth Burrill,* the Court of Appeals affirmed the trial court's rejection of mere *claims* for set-offs which had neither been properly pleaded below nor reduced to judgment.[22] Here, contrary to Mr. Whitted's demonstrably false assertion, Ms. Jordan did plead set-off in her first submission to the trial court in response to Mr. Whitted's writ of garnishment. CP 103, 109.[23] And the set-off she requested was a claim that had already been

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[19] *Whitted v. Jordan*, 2019 WL 1785618, at *2 (citing to *Reichlin*, 184 Wash. at 314). *Compare* Petition for Discretionary Review, at p. 13.

[20] *Id.* As Mr. Whitted surely understands, the statement from the treatise quoted by *Reichlin* does not say "because the pendency of an appeal prevents . . . finality," but rather says "where the pendency of an appeal prevents . . . finality," and goes on to note the importance of whether execution of the judgment on appeal has been stayed. *Reichlin*, 184 Wash. at 314 (quoting from 2 Freeman on Judgments (5th Ed.) § 1143, p. 2383) (emphasis added). Not least because of RAP 8.1(b)'s statement that "[a] trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule," Washington is not a state where the pendency of an appeal suffices to prevent finality. Mr. Whitted's continued citation to an Oregon statute that has no equivalent in Washington provides more proof of this point. *See* Petition for Discretionary Review, at p. 14. *Cf. Whitted v. Jordan*, 2019 WL 1785618, at *2, note 3.

[21] *See* Petition for Discretionary Review, at pp. 13-14, citing to *Seth Burrill Prods., Inc. v. Rebel Creek Tackle, Inc.*, 198 Wn. App. 1038, 2017 WL 1334440.

[22] *See Seth Burrill Prods.*, 2017 WL 1334440 at *6 (noting that "Rebel does not explain how asserting a *new claim* for relief in the case below, three years after final judgment, was legally possible") (emphasis added).

[23] Ms. Jordan had also sought to set-off the child support and retirement account amounts in the action that she brought in King County Superior Court Case No. 16–3–03678–7. *See* CP 109, lines 10-12. *See also Jordan v. Whitted*, 2018 WL 824556, at *1 (observing that the trial court in that action had "declined to offset the $164,868.85 arrearage by Lori's unpaid retirement account obligations, finding that the retirement transfer was not properly before it").

reduced to judgment. CP 76 at ¶ 3.[24] Thus, even if *Seth Burrill* were a published decision—and the fact that it is not renders it incapable of satisfying RAP 13.4(b)(2)—it would not support a grant of discretionary review, because it is not in conflict with the decision proposed for review.

Finally, even Mr. Whitted does not dispute that the judgment entered by the trial court in Ms. Jordan's favor in King County Superior Court Case No. 16–3–03678–7, and affirmed by the Court of Appeals in *Jordan v. Whitted*, 76168-4-I, 2018 WL 824556 (Feb. 12, 2018), is currently final and enforceable. Mr. Whitted did not seek discretionary review by this Court of that decision, and the time for doing so is long past.[25] Accordingly, no conceivable equitable purpose would be served by disallowing the set-off permitted by the trial court in King County Superior Court Case No. 16-2-18167-8, and affirmed by the Court of Appeals in the decision proposed for review, *Whitted v. Jordan*, 77967-2-I, 2019 WL 1785618 (Apr. 22, 2019). Granting review here, and granting Mr. Whitted the relief he seeks, would only lead to a needless additional legal expense, since Ms. Jordan would be clearly entitled to set-off the two indisputably final judgments if she brought a new action for this relief.[26]

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[24] *See also* CP 68 (Mr. Whitted acknowledging on November 10, 2017 that judgment had already been entered against him in the child support case).

[25] *See* RAP 13.4(a) (stating that petition for review must be filed within 30 days after the decision is filed"). This Court may take judicial notice of its own records to establish that Mr. Whitted did not seek review of *Jordan v. Whitted*, 76168-4-I, 2018 WL 824556 (Feb. 12, 2018).

[26] *See, e.g.*, *Reichlin*, 184 Wash. at 313 (holding that "a judgment, especially a judgment entered by the same court, when pleaded as a set-off must as a matter of law be credited upon any recovery which the judgment debtor, as plaintiff, may establish against the judgment creditor as defendant," and noting that "[n]o other course would be equitable").

This point relates back to and confirms Mr. Whitted's inability to meet the criteria for an extension of time to file his untimely Petition for Discretionary Review, since maintaining the set-off awarded below would in no way be a "gross miscarriage of justice."[27]

VI. CONCLUSION

For the reasons set-forth above and in Ms. Jordan's Response to Petitioner's Motion to Enlarge Time to File Petition for Review, the Court should dismiss Mr. Whitted's Petition for Discretionary Review as untimely. In the alternative, the Court should deny the Petition for Discretionary Review because it fails to satisfy any of the criteria set by RAP 13.4(b).

DATED this 17th day of July 2019.

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By

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[27] RAP 18.8(b).

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on July 17, 2019 I emailed a PDF copy of the attached Answer to Petition for Discretionary Review, to Petitioner Stephen Whitted at the following email addresses:

attyswhitted@yahoo.com.

On this same date, I also placed a copy of the attached Answer to Petition for Discretionary Review in the United States mail, for pre-paid first-class delivery to:

Mr. Stephen Whitted
1 Stratford Garden Court
Silver Spring, MD 20774

Dated this 17th day of July 2019.

By: David J. Corbett
David J. Corbett

DAVID CORBETT PLLC

July 17, 2019 - 10:14 AM

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