COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38831-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GLENN DAVID MCDERMOTT,

Appellant/Cross Respondent,

and

KRISTEN JENKINSON-MCDERMOTT,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S REPLY TO RESPONSE TO CROSS APPEAL

JAMES R. TOMLINSON
WSBA No. 14559
DAVIES PEARSON, P.C.
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98401
(253) 620-1500

Attorneys for Respondent/Cross Appellant

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1. REPLY TO APPELLANT/CROSS RESPONDENT'S RESPONSE TO CROSS APPEAL

A. It was error for the trial court to admit the FERS Order and other "Declarations and Exhibits" on the husband's motion for reconsideration over the wife's objection when (1) the evidence was available but not timely offered by the husband in the original hearing, (2) the husband admits the evidence is not "newly discovered evidence", and (3) the husband cites no other authority for the admission of the evidence on reconsideration.

The husband did not submit the FERS Order, the FERS pension valuation, or the other "Declaration and Exhibits" now at issue to either the wife or the court prior to the time of the husband's oral argument on the original motion for presentation. During oral argument, husband's counsel offered the FERS pension valuation and FERS Order; however, the court refused to admit the documents because they had not been timely submitted prior to the hearing. (CP 129-134, 38; RP 13-15, 23, 28-30.) The other "Declarations and Exhibits" were never offered into evidence at the original hearing.

It was error for the trial court to admitted the FERS Order and the other "Declaration and Exhibits" for the first time on reconsideration. Husband admits the FERS Order and other "Declaration and Exhibits" were not submitted on reconsideration as "newly discovered" evidence (Response Brief at 11); yet, husband cites no other authority to support the

admission of the evidence. No Court Rule allows the court to enter new evidence on reconsideration when (1) the evidence was not submitted to either opposing counsel or the court prior to oral argument at the original hearing; (2) the court refused to admit the evidence at the oral argument because it had not been supplied prior to the hearing as required by Rule; (3) the evidence is not "newly discovered evidence" as defined by CR 59(a)(4); and (4) there is no other basis to admit the evidence on reconsideration.

New evidence is admissible on a motion for reconsideration only where the evidence could not with reasonable diligence have been sooner discovered. CR 59(a)(4); *See also Go2Net, Inc. v. C I Host, Inc.,* 115 Wn. App. 73, 90-91, 60 P.3d 1245 (2003); *Adams v. Western Host, Inc.,* 55 Wn. App. 601, 608, 779 P.2d 281 (1989). Here, husband admits the evidence in question is not "newly discovered evidence." If the evidence was available but was not offered until after that opportunity has passed, that party is not entitled to another opportunity to submit that evidence. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31, review denied, 117 Wn.2d 1017 (1991); *Adams v. Western Host, Inc.,* 55 Wn. App. at 608. The wife timely filed a written motion to strike the new evidence prior to the hearing on the motion for reconsideration.

(CP 214-215.) The trial court abused its discretion by denying the wife's motion to strike the new evidence on reconsideration.

Husband now asserts in his Response Brief that admission of the new evidence was proper under CR 59(a)(7) which allows reconsideration when "there is no evidence or reasonable inference from the evidence to justify the verdict or decision or that it is contrary to law." In order to prevail on a reconsideration under CR 59(a)(7), the husband must show that the court's decision was contrary to the evidence. That "evidence," however, must be evidence that was properly offered and admitted by the court at the original hearing. CR 59(a)(7) does not authorize the court to admit new evidence on reconsideration that was never admitted at the original hearing. Neither CR 59(a)(7) nor any other section of CR 59 allows the admission of the new evidence in question on reconsideration.

Without citation to any authority, husband asserts that the FERS order was not "new evidence," but a "re-submission of evidence" because the FERS Order had been mentioned in, but not attached to, the husband's declaration admitted in the original hearing. (Response Brief at 6.) Nothing in CR 57 or the case law, however, supports the husband's position. The portions of the FERS Order relied on by the husband in his opening brief are not contained in the husband's declaration. That argument relied entirely on the body of the FERS Order, which was never

admitted. The FERS Order is entirely new evidence contained nowhere else in the record. It is "new evidence," and the husband must show it could not have been discovered and produced with reasonable diligence at the time of the original hearing. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland,* 95 Wn. App. 896, 906, 977 P.2d 639 (1999); *Morinaga v. Vue,* 85 Wn. App. 822, 831, 935 P.2d 637, (1997). The husband's comment on the FERS Order in his declaration does not change that requirement. His argument that the FERS Order may have been helpful to the court does not change the fact the Order was not admitted into evidence at the original hearing. It was a manifest abuse of discretion for the trial court to admit the FERS Order on reconsideration when it had not been admitted at the original hearing and it was not "newly discovered evidence" as defined by CR 59(a)(4).

2. CONCLUSION

The FERS pension valuation, the FERS Order, and the new "Declarations and Exhibits" offered by the husband in support of his Motion for Reconsideration were "new evidence" and should not have been admitted absent a showing they were not available at the time of the original hearing. No such showing was made or attempted. The husband could have properly submitted the evidence to the court at the time of the original hearing, but did not do so. The husband has cited no recognized

authority for the admission of the new evidence on reconsideration. The trial court abused its discretion when it failed to strike the Declarations and Exhibits as requested by the wife.

Respectfully submitted this 23 day of November, 2009.

DAVIES PEARSON, P.C.

JAMES R. TOMLINSON, WSB #14559
Attorneys for Respondent/Cross Appellant

CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury under the laws of the State of Washington in the County of Pierce that on November 23, 2009, I personally served via Legal Link a true and correct copy of the Respondent/Cross-Appellant's Reply to Response to Cross Appeal addressed to the following:

Charles F. Schmidt, Jr.
Morton McGoldrick, P.S.
820 "A" Street, Suite #600
Tacoma, WA 98402

DATED at Tacoma, Washington, this 23rd day of November 2009.

Sondra Lee

Sondra Lee
Legal Assistant

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