

Court of Appeals No. 45275-8-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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ANTHONY J. BUDZIUS and MONICA BUDZIUS,  
Husband and wife,  
Plaintiffs/Appellants,

vs.

LESLIE D. MILLER (fka BUDZIUS),  
Respondent.

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**APPELLANTS' REPLY BRIEF**

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By:

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### III. ARGUMENT

#### A. **The trial court erred by misinterpreting the Decree of Dissolution.**

Appellants argued at pages 11 and 12 of their opening brief that the trial court erred in its Findings 1 and 6 by misinterpreting the Decree by finding that the Decree contemplated a “*subsequent order*” or a “*further order*” instead of the Qualified Domestic Relations Order called for in Paragraph 3.13 of the Decree. Leslie presents no contrary argument in her brief. The Court may therefore decide this issue on the argument and record before it. *Adams v. Dep't of Labor & Indus.*, 128 Wash. 2d 224, 229, 905 P.2d 1220 (1995).

#### B. **The trial court erred by mischaracterizing the Amendment to Decree of Dissolution Re Division of Retirement Benefits as a QDRO.**

Appellants argued at pages 13 and 14 of their opening brief that the trial court erred in in Findings 3, 5, and 7 by characterizing the Amendment to the Decree of Dissolution Re Division of Retirement Benefits as a QDRO. Leslie presents no contrary argument in her brief. The Court may therefore decide this issue on the argument and record before it. *Adams v. Dep't of Labor & Indus.*, 128 Wash. 2d 229.

**C. The trial court abused its discretion by refusing to apply either *Graves v. Taggares*, 94 Wn. 2d 298, 616 P. 2d 1223 (1980), or other Washington cases that require express authority from a client to enable an attorney to surrender a substantial right of a client.**

Leslie's argument consists primarily of quotations from three reported appellate decisions, *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P. 2d 1040, *review denied*, 129 Wn. 2d 1028 (1996), *Estate of Harford*, 86 Wn. App. 259, 936 P. 2d 48, *review denied*, 135 Wn. 2d 1011 (1998), and *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 728, 987 P. 2d 634 (1999). BR 4, 5, 7. Each of those decisions is factually distinguishable and therefore, each is not controlling here.

In *Lane*, the court reversed an order vacating judgment because the plaintiff's attorney in that case, unlike the facts in *Graves v. Taggares* or the facts of this case, did not enter into a stipulation or compromise with the defendant, and therefore, the attorney could not be said to have waived any of the plaintiffs' substantial rights. 81 Wn. App. 108. Here, in contrast, by signing the Amendment to the Decree, Tony Budzius' former attorney, Mr. Lombino, entered into a stipulation or compromise with Leslie that substantially altered the Decree and deprived the Budziuses of one fifth of the pension that had been awarded to Tony Budzius by the Decree. Thus, the facts of this case are controlled by *Graves* and not *Lane*.

*Estate of Harford*, 86 Wn. App. 259, 936 P. 2d 48, review denied, 135 Wn. 2d 1011 (1998), and *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 728, 987 P. 2d 634 (1999), share a common feature with *Lane* and *Haller v. Wallis*, 89 Wn. 2d 539, 573 P. 2d 1302 (1978). In each of those cases, the party sought to vacate the judgment for conduct of his attorney that occurred *before* entry of a final judgment. None of those cases involved the post-judgment actions of a party's attorney in affecting a change of an existing judgment. And in none of those cases was the existing judgment governed by RCW 26.09.170 (1). Leslie has thus provided no authority that Mr. Lombino's authority to take action on behalf of Tony Budzius was the same after entry of the Decree as it was before entry of that judgment.

After entry of the Decree, Mr. Lombino handled child support issues for Tony Budzius. RP 22 lines 10-16. The fact that Tony Budzius retained Mr. Lombino after the trial to handle child support issues does nothing to establish that he gave the express consent to Mr. Lombino required to alter the property division in the Decree.

To allow Tony Budzius' former attorney to unilaterally alter post-entry the property distribution in the Decree violates a fundamental policy of the law in favor of finality of judgments. *Haller v. Wallis*, 89 Wn. 2d 543-44; *Lane v. Brown & Haley*, 81 Wn. App. 106. That policy of finality

is reinforced here by RCW 26.09.170 (1): “...*The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.*”

The actions of the attorneys in *Lane, Harford, Nguyen and Haller* did not violate the finality of any judgment, as no final judgment had yet been issued. In this case, the actions of Mr. Lombino and Leslie occurred after entry of the Decree, and clearly violated the finality due the Decree. Thus, *Lane, Harford, Nguyen and Haller* are not controlling here.

Rights in a pension awarded by a decree of dissolution constitute property. *Marriage of Smith*, 158 Wn. App. 248, 261, 241 P. 3d 449 (2010). The actions of the attorneys in *Lane, Harford, Nguyen and Haller* did not impair an established property right of any party. Here, in contrast, the actions of Mr. Lombino, in giving away one fifth of Tony Budzius’ pension without his express consent, clearly impaired Tony’s property right in the pension awarded to him under the Decree. Thus, *Lane, Harford, Nguyen and Haller* are not controlling here.

The finality due the Decree and Tony Budzius’ property right in the pension awarded to him by the Decree require greater protection than that offered by *Lane, Harford, Nguyen and Haller*. Thus, any change in that pension could only have been accomplished by a petition under RCW

26.09.170 (1) to modify the property distribution or by an agreement made with Tony Budzius' express consent. Leslie failed to employ either such method to change the pension. The Amended Decree must therefore be vacated.

Leslie argues that the Amended Decree was necessary to obtain the consent of DRS. RB 3-4. In the June 9, 1992 letter from Nancy Rushton at DRS to her attorney, Leslie was advised that Chapter 365, Laws of 1991, allowed DRS to make direct payment of a portion of the member's monthly retirement allowance or lump sum withdrawal to the member's ex-spouse in certain circumstances. EX 5. Therefore, there was never a need to change the distribution of Tony's retirement benefit from the lump sum called for in the original Decree to the monthly percentage payment authorized by the Amended Decree. But even if DRS required a monthly percentage payment, that does not excuse Leslie's failure to secure Tony Budzius' express consent required under *Graves v. Taggares* for such a change.

Leslie cites *Christensen v. Grant County Hospital District No. 1*, 152 Wn. 2d 299, 96 P. 3d 957 (2004) in support of collateral estoppel. RB p. 6. Leslie fails to support her argument with any citation to the record, so her argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wash. App. 809, 824, 103 P.3d 232 (2004).

Collateral estoppel is an affirmative defense. *Petcu v. State*, 121 Wn. App. 36, 69-70, 86 P. 3d 1234 (2004). Leslie did not plead collateral estoppel as an affirmative defense in her Answer. CP 37-39. Leslie thereby waived the affirmative defense of collateral estoppel. CR 8 (c); *Henderson v. Tyrell*, 80 Wn. App. 592, 624, 910 P. 2d 522 (1996).

Beyond quoting *Christensen v. Grant County Hospital District No. 1*, Leslie fails to provide any argument in support of collateral estoppel. Leslie does not even discuss whether the elements of collateral estoppel are satisfied in this case. Without adequate, cogent argument and briefing, Leslie's argument regarding collateral estoppel should not be considered. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 808, 225 P.3d 213 (2009).

Leslie misplaces reliance upon CR 2A and RCW 2.44.040<sup>1</sup>, as neither provides the authority for an attorney to surrender a client's substantial right absent the client's express consent. *Morgan v. Burks*, 17 Wn. App. 193, 199-200, 563 P. 2d 1260 (1977).

Leslie argues that by retiring for a number of years without advising her of his retirements or sharing any benefits with her, Tony Budzius was guilty of unclean hands. RB at 8. Leslie fails to cite any provision of the Decree or any other order of the trial court that obligated

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<sup>1</sup> RB at 7-8.

Mr. Budzius to keep her informed of his retirement or when payment of the amount owed to her would be made. As Leslie fails to support her argument with any citation to the record, her argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wash. App. 824.

Leslie alleged unclean hands as an affirmative defense in her answer. CP 39. The trial court failed to enter a finding on that affirmative defense. The trial court's failure to enter a finding regarding the defense of unclean hands constitutes an implied negative finding against Leslie on this issue. *In re: Welfare of A.B.*, 168 Wn. 2d 908, 927, 232 P. 3d 1104 (2010).

Leslie had every reason to expect that the Department of Retirement Systems (DRS) would keep her informed of events. In its letter of July 30, 1993 to her attorney, DRS stated that “[i]t is important that Leslie keep this office notified in writing of her mailing address at all times.” EX 24. *See also* EX 5, 6, 7. Given the extensive correspondence between Leslie's counsel and Nancy Rushton at DRS, it is inconceivable that Leslie did not know whom to contact to find out information regarding the amount that she was owed from Tony Budzius' retirement.

Tony Budzius testified at trial that at the time of his retirement, he did not know how to contact Leslie. RP 26 lines 7-9. Tony Budzius also testified that his son knew about his retirement and that his son was in

contact with Respondent. RP 26 line 13. Tony Budzius also testified that he encountered Leslie's parents several times and told them of his retirement and the reason therefor. RP 26 lines 14-15.

The failure of DRS to process the Amended Decree for many years also undoubtedly contributed to the delay in Leslie's receipt of the amount owed to her from Tony Budzius' state retirement. Despite having received a copy of the Amended Decree in July, 1993, DRS did not process the Amended Decree until September, 2011. "*Unfortunately, the Department failed to process the order at the time that Anthony retired.*") EX 8, 9. *See also, EX 14 ("Amended Decree, Not Processed at Retirement in Error")*.

In light of the foregoing Leslie's argument regarding unclean hands fails.

Leslie argues that the doctrine of laches should apply. RB p. 9. Laches is an extraordinary remedy. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 376, 680 P. 2d 453 (1984). Laches requires three factual elements, knowledge of a cause of action, unreasonable delay and prejudice. *Davidson v. State* 116 Wn. 2d 13, 25, 802 P. 2d 1374 (1991). The trial court made no findings as to those elements. The trial court's failure to enter findings regarding any of the elements of the defense of laches

constitutes an implied negative finding against Leslie as to each of those elements. *In re: Welfare of A.B.*, 168 Wn. 2d 927.

Laches cannot apply where a plaintiff has no reason to believe that legal action is necessary. *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 79, 277 P. 3d 18 (2012). It was not until September, 2011, for the first time, Tony Budzius and his wife, Monica, learned from DRS that the Amended Decree had been entered giving Leslie a right to monthly payments out of his retirement. RP 23. At no time prior to September, 2011, did Mr. Lombino or anyone else inform Tony or Monica of the existence of the Amended Decree or the alleged amount owed to Leslie. At no time prior to September, 2011 were Tony or Monica Budzius provided with a copy of the Amended Decree. RP 24. Thus, the record in this case does not support a finding that Appellants knew of their claim until September, 2011.

Nor did anything prevent Leslie from seeking the aid of DRS or the court in timely resolving when the funds due her from Tony Budzius' state retirement were available to her. Leslie should not be rewarded for her inaction by allowing her the defense of laches. *Brost v. LAND, Inc.*, 37 Wn. App. 377 (“[T]he defense of laches is improperly invoked when both parties are equally at fault in creating the delay.”); *McKnight v.*

*Basilides*, 19 Wn. 2d 391, 403, 143 P. 2d 307 (1943).

As it was Leslie who sought the Amend Decree that illegally deprived Tony Budzius of his property, laches is not available to her.

*Rutter v. Rutter's Estate*, 59 Wn. 2d 781, 785, 370 P. 2d 862 (1962).

Further, as set forth in Appellant's opening brief at page 29, the Amended Decree is void for lack of express authority from Tony Budzius, and because the trial court lacked authority to make a post-decree modification of paragraph 3.13 of the Decree, and because the Amendment violated Tony's right to due process of law. Therefore, the trial court has a mandatory duty to vacate the Amended Decree as a void order. *Marriage of Maxfield*, 47 Wn. App. 699, 703, 988 P. 2d 499 (1999). A void order may be vacated irrespective of the lapse of time. *Marriage of Leslie*, 112 Wn. 2d 612, 618, 772 P. 2d 1013 (1989).

Respondent speculates that given the short distance between the Fife Police Department where Tony Budzius worked and the law office where Tony's attorney worked, it is "*rather doubtful*" that there would have been a lack of communication in this case. BR 10. Leslie fails to support her argument with either citation to the record or authority, so it should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wash. App. 824.

Leslie argues that she was entitled to share in post-dissolution annual adjustments of cost of living increases in pension benefits. RB p. 11. In this regard, Leslie misplaces reliance upon *Marriage of Lee and Kennard*, 176 Wn. App. 678, 310 P. 3d 845 (2013). In *Lee*, the appellate court upheld the trial court's decision to modify a proposed QDRO to limit the former wife's interest in the former husband's pension to the value as of the date of separation, in view of the parties' separation agreement in which each party released any and all rights in personal property after the date of separation of the parties. 176 Wn. App. 689.

In *Lee v. Kennard*, the parties' separation agreement was incorporated into the decree of dissolution. The Court upheld the modification of the decree to comply with the language of the decree limiting the spouse's interest to its value as of the date of separation, notwithstanding *In re Chavez*, 80 Wn. App. 432, 436, 909 P. 2d 314 (1996) and *In re Marriage of Bulicek*, 59 Wn. App. 630, 638, 800 P. 2d 394 (1990), which recognized a spouse's right to share in post dissolution annual adjustments or costs of living increases to pension benefits, but not increase due solely to additional years of service. 176 Wn. App. 689. *Lee v. Kennard* thus recognizes the discretion given a trial court in a dissolution proceeding to make a distribution of the parties' pension

benefits that does not recognize a spouse's participation in increases in post-dissolution pension benefits accrued by the other spouse.

*See also Marriage of Moore*, 99 Wn. App. 144, 147, 993 P. 2d 271, *review denied*, 145 Wn. 2d 1036 (2002) (The decree awarded to the wife one-half of the present value of the community's interest in the husband's pension, and therefore the wife was entitled to the post-dissolution increase in value of the pension, "*absent a contrary expression in the decree.*").

That is precisely what the trial court did in this case. In paragraph 3.13 of the Decree the trial court ordered that a qualified domestic relations order should issue, such that Leslie should be awarded fifty percent of the \$27,210.00 value of the community interest in Tony's retirement rights with the State of Washington. EX 3 p. 4. In paragraph 3.4 of the Decree, the trial court awarded to Tony Budzius the property in Exhibit A thereto, including "[a]ny pension, ...*except as otherwise specifically set forth herein.*" EX 3 p. 2; EX 2 p. 10-11. The trial court also awarded to Leslie "[a]ny pension...*or any other type of employment benefit in the wife's name.*" EX 3 p. 2; EX 2 p. 14. Thus, the Decree demonstrates the trial court's intent that Leslie was to get a specific amount from Tony Budzius' state retirement, and that Tony was to receive the remainder, including any post-dissolution increase. At the same time,

Leslie was to also receive her entire pension, including any post-dissolution increase. Under *Lee v. Kennard* and *Marriage of Moore*, the trial court acted within its discretion in making such a distribution.

Leslie cites *Lee v. Kennard* in support of her request for sanctions under RAP 18.9 (a). RB p 11-12. In *Lee v. Kennard*, the court found no abuse of discretion in the trial court's award of CR 11 sanctions against the former wife's attorney, who filed a QDRO eleven years after entry of the decree of dissolution that was clearly contrary to the decree. 176 Wn. App. 691. Leslie's attorney did the same thing in this case by filing a QDRO that was contrary to paragraph 3.13 of the Decree, without complying with RCW 26.09.170 (1) or without obtaining the Tony Budzius' express consent to the Amended Decree. *Lee v. Kennard* thus supports sanctions in this case against Leslie's attorney.

Leslie argues that the trial court commented on the fact that the appellant's attorney claimed the privilege and did not testify. RB p. 12. As Leslie fails to support her argument with any citation to the record, her argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wash. App. 824. An inference drawn from failure to call a particular witness is not mandatory. Instead, such an inference may only be drawn when, under all the circumstances, such failure creates a suspicion of a willful attempt to withhold competent testimony. *Wright v.*

*Safeway Stores, Inc.*, 7 Wn. 2d 341, 352, 109 P. 2d 542 (1941); *Williams v. Kingston Inn, Inc.*, 58 Wn. App. 348, 356, 792 P. 2d 1282 (1990). It is undisputed that Mr. Lombino had no independent recollection of the events in this case. RB p. 9 (“*As a result of the time delay, Mr. Luce and Mr. Lombino have no files, no meaningful recollection.*”). There is thus no suspicion in this case of a willful attempt to withhold competent testimony.

The Missing Witness Doctrine does not apply if the uncalled witness is equally available to the parties. *State v. Blair*, 117 Wn. 2d 479, 490, 816 P. 2d 718 (1991); *State v. French*, 101 Wn. App. 380, 389, 4 P. 3d 857 (2000). Leslie provides neither argument nor evidence to suggest that Mr. Lombino was any less available to them as he was to Tony Budzius. It was Leslie’s attorney who noted Mr. Lombino’s deposition. CP 42-43. Leslie’s argument on the Missing Witness Doctrine therefore fails.

**D. Respondent fails to address Appellants’ challenges to the trial court’s findings, conclusions and judgment.**

At pages 20 through 27 of their opening brief, Appellants present arguments against the trial court’s Findings Nos. 5, 7, and 9, Conclusions 1, 2, 3 and 4, and the Judgment. Leslie fails to provide any contrary argument or authority regarding those findings, conclusions and judgment.

The Court may therefore decide those issues on the argument and record before it. *Adams v. Dep't of Labor & Indus.*, 128 Wash. 2d 229.

**E. Respondent's request for attorney fees on appeal should be denied.**

Leslie misplaces reliance upon CR 11 and RCW 4.84.185. RB 10-11. CR 11 applies only to proceedings in Superior Court. RCW 4.84.185 applies to a "*civil action*". The statute makes no mention of whether it applies to an appeal. In any event, the arguments and authorities in Paragraphs III A through D above compel the conclusion that this appeal is not frivolous.

Nor are sanctions under RAP 18.9 appropriate here. Under that rule, an appeal is frivolous only if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Granville Condominium Homeowners Association v. Kuehner*, 173 Wn. App. 543, 312 P. 2d 702, 710 (2013). As more fully set forth in Paragraphs III A through D above and in Appellants' opening brief, debatable issues are present here, and there exists a substantial possibility for reversal. Leslie's request for sanctions under RAP 18.9 should be denied.

**F. Appellants request an award of attorney fees on appeal**

Appellants renew their request that the Court, pursuant to RAP 18.1 and *Graves v. Taggares* award Appellants attorney fees on appeal.

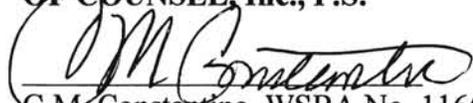
Appellants are entitled to an award of attorney fees in order to place appellants in the same position as if the Amendment had never been entered. *See Graves v. Taggares*, 94 Wn. 2d 306.

#### IV. CONCLUSION

The trial court's Findings 1, 3, 5, 6, 7, 9 and Conclusions 1, 2, 3, 4, 6 and the Judgment should be reversed. The Amendment to Decree of Dissolution Re Division of Retirement Benefits should be vacated. The case should be remanded to the trial court with instructions to allow Appellants restitution of the amounts that Respondent has received from DRS in excess of the \$13,605.00 awarded by the Decree of Dissolution. Appellants should be awarded their attorney fees in the trial court and in this appeal.

Respectfully submitted,

**OF COUNSEL, Inc., P.S.**



C.M. Constantine, WSBA No. 11650  
Attorney for Appellants Anthony and  
Monica Budzius

V. CERTIFICATE OF MAILING

The undersigned does hereby declare that on February 13, 2014, the undersigned deposited a copy of APPELLANTS' REPLY BRIEF filed in the above-entitled case into the United States mail, first-class postage addressed to the following persons:

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DATED this 13 day of February, 2014.

By:   
Christopher M. Constantine