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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 281248
Grant County Cause No. 08-3-00262-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

Stephen Slane, Petitioner,
v.
Nuthavadee Slane, Respondent

PETITIONER'S REPLY BRIEF

Stephen Slane
Pro Se

13421 Woodstle Court
Saint Louis, MO 63128
(314) 609-3566

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I. STATEMENT OF ISSUES

- a. WERE THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPER AND SUFFICIENT?
- b. WERE MRS. KUKES' CLAIMS AND EVIDENCE SUFFICIENT TO SUPPORT FINDINGS OF CONTEMPT?
- c. DOES THE TRIAL COURT'S VIOLATION OF RCW 2.08.240 HAVE ANY IMPACT ON THE VALIDITY OF ITS ORDERS, JUDGMENTS OR JURISDICTION?
- d. DID THE TRIAL COURT ABUSE ITS DISCRETION BY NOT ALLOWING MORE EVIDENCE OR BY MISCONSTRUING THE EVIDENCE ON RECORD?
- e. DID THE TRIAL COURT ABUSE ITS DISCRETION BY NOT APPLYING THE DOCTRINE OF LACHES OR EQUITABLE ESTOPPEL?
- f. DID THE COURT ERROR IN ITS JUDGMENTS FOR ARREARAGES BASED ON THE EVIDENCE IN THE RECORD?
- g. DID THE COURT ACT THROUGH BIAS OR WITHOUT JURISDICTION?
- h. ARE THE ORDERS ENTERED ON APRIL 17, 2009 VOID BASED ON VIOLATIONS OF CR54 OR DUE PROCESS?
- i. IS MRS. KUKES ENTITLED TO AN AWARD FOR ATTORNEY FEES ON APPEAL, OR IS MR. SLANE?

II. STATEMENT OF FACTS

First of all, Mr. Slane had representation at the initial hearing and that attorney informed him as we waited in the court room that he suddenly realizes he aided Mrs. Kukes in filing her *dissolution*. Mrs. Kukes waived objection to any conflict, on the record, not in writing as required, but no one asked Mr. Slane if he waived any objection (RP I 2). This attorney subsequently withdrew after the September 2008 hearing, without explanation and kept his fees.

Mrs. Kukes' procedural statement is entirely inaccurate, with many things stated in reverse chronological order or with incorrect dates (Resp.'s Brief 2-7). Mr. Chase is merely trying to cloud the record and the issues. The court decided both contempt of court motions on the same day and stated the total amount of judgment through that date was approximately \$35,076 and that I should be credited 50% of \$600 for a three (3) year period where one child resided with me, which would reduce the judgment by \$10,800, for a total arrearages of \$24, 276 RP II 2 - 10. Even if contempt was indeed proper, which it is not, this fictitious additional \$10,000 is a key point here on appeal. Mrs. Kukes' brief appears to be two or three times larger than mine with facts largely twisted as if to confuse the court.

III. ARGUMENT

a. WERE THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPER AND SUFFICIENT?

The findings of fact and conclusions of law are insufficient for several reasons. The order the contempt sought to enforce wasn't even ever entered into the record until Mr. Slane filed a

motion to vacate, several months later, which was never heard because counsel filed an affidavit of prejudice against the new judge after I flew out for the hearing. (CP 298 Exhibit C). In that motion, Mr. Slane showed the court that the order for support was never served on him, though it was a default order entered almost two years after default, and that the order was also void due to fraud as Mrs. Kukes' income was stated as \$0. The order being void was the reason Mrs. Kukes' agreed to and signed the out of court agreement. Mr. Slane brought this up in the record during the September hearing.

The court referenced findings that it failed to enter into court (RP II 8). When challenged, the court failed to count payments from 2007, saying they didn't exist, though they clearly do (CP 19-41). The court claimed I received credit for all checks and deposit slips. Clearly this isn't the case if the court claims it didn't see any from 2007. It was a mistake for the court to rely on and *reference findings and not enter those findings into the record.*

Both orders of contempt reference contempt of the parenting plan (CP145-159, 150-154). This gives the appearance that Mr. Slane had been found in contempt of the parenting plan three times. In fact, Mrs. Kukes' counsel has been repeatedly trying to limit my visitation using just such an argument, see Petitioners Trial Brief dated 8-19-2010 (ID).

Mr. Slane's income was inflated in each order, as it was in the child support order, and contradicts the evidence the court relied on to decide his income. The court initially said it didn't have enough information to decide Mr. Slane's income and required that his employer provide a statement as to his frequency of pay CP 294. That proof was provided (CP 55-63 & 66-67) and the court did orally state what Mr. Slane's gross income was, but didn't specifically state his net income (RP II 12). However, with a paystub showing all deductions from income and now knowing the frequency of pay, the same method used to calculate my annual gross salary would be applied to calculate my annual and monthly net salary. My net salary is clearly inflated by nearly \$1,000, giving the appearance that Mr. Slane had enough disposable income to afford to purge the contempt, and Mr. Slane's expenses ignored when compared to his financial declaration

which did not account for a \$2,000 child support order CP 286. With total disregard to Mr. Slane's net income and expenses, by signing these orders and child support order, the court in effect took nearly \$3,000 from Mr. Slane's family of six here in St. Louis, which has bankrupted them.

b. WERE MRS. KUKES' CLAIMS AND EVIDENCE SUFFICIENT TO SUPPORT FINDINGS OF CONTEMPT?

First of all, the standard for contempt should be "Clear and convincing" evidence, as it is in the federal courts and in many other states (App. Brief 7-10). *Birchall*, 454 Mass. 837, 852,853(2009). Here, no court order at all was even presented to the court, but rather a contract which was withheld by Mrs. Kukes in bad faith. In addition, with her claims disproven, how could even a preponderance of the evidence have been met?

It would be absurd to say Mrs. Kukes' claims and evidence were sufficient to support a finding of contempt when she not only withheld the fact that she had signed an out of court agreement central to her claim, none of the supporting statements she made were true either. I utterly defeated all of her claims. "A [sic] court abuses its discretion when it misconstrues its proper role, *ignores or misunderstands* the relevant evidence, and *bases its decision upon considerations having little factual support.*" *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 374 (11th Cir. 1992). [Emphasis added mine].

Instead, the court ignored the fact that Mrs. Kukes' claims were defeated, though the court acknowledged Mrs. Kukes' claims were inaccurate. "it appears that I agree with Mr. Slane that it's not exactly as Ms. Kukes had presented it to the Court" RP II 7. Mrs. Kukes offered no explanation and made no argument whatsoever concerning the emails submitted or the out of court contract. The evidence before the court defeated her claims and she should have been required to adjust her claims, rather the court seemingly adjusted her position for her and gave me no chance whatsoever to rebut this new position.

c. DOES THE TRIAL COURT'S VIOLATION OF RCW 2.08.240 HAVE ANY IMPACT ON THE VALIDITY OF ITS ORDERS, JUDGMENTS OR JURISDICTION?

All of Washington case law on this topic centers around cases where a decision or verdict was reached, but no sentence or order/judgment entered. Washington state courts generally hold in those situations, that the court did not lose jurisdiction over the sentence or judgment since the decision had already been reached. However, in this case, no decision had been made for 180 days, twice what the Washington State Constitution requires. Both the RCW and the Constitution state that a judicial official not deciding a matter in 90 days "shall forfeit his or her office". I think the mildest translation of that is that this particular judicial official had lost jurisdiction to act without explicitly re-hearing the matter, which she should have done with such a lacking complaint. She rendered a decision while breaking the law, and it can hardly be argued that a judicial official breaking the law in order to decide in favor of the benefited party doesn't show prejudice toward the other party. The commission later agreed and recused herself though stopped short of vacating any of her orders CP 297. The court stated that it was reserving judgment for the first contempt on the issue of child support (RP I 35), meaning, the court hadn't decided whether or not there was contempt. Then when court convened for the second contempt, she stated that we had a continuation from the first (RP II 2) as though this date had been set prior to this point, yet, allowed no argument whatsoever concerning the first contempt.

**d. DID THE TRIAL COURT ABUSE ITS DISCRETION BY NOT
ALLOWING MORE EVIDENCE OR BY MISCONSTRUING THE
EVIDENCE ON RECORD?**

In the review of a contempt proceeding 'the evidence, the findings, and the judgment are all to be strictly construed in favor of the accused, and no intendments or presumptions can be indulged in aid of their sufficiency. If the record of the proceedings, reviewed in the light of the foregoing rules, fails ... the order must be annulled.'" *Mitchell v. Superior Court* (1989) 49 Cal. 3d 1230, 1256, quoting *Hotaling v. Superior Court*, *supra*, 191 Cal. at 506 (citations omitted). [Emphasis Added].

Much of the evidence Mr. Slane submitted was missed. There were two sets of emails from the same timeframe, 2004, one discussing a dispute over approximately \$60-\$200 in arrears, and another discussing payments made to make up for the discrepancies. CP 10-18 and 19-41. The court apparently only saw one of those emails and decided a new contract amount of \$600 existed CP 9. Mrs. Kukes never made this contention, let alone acknowledged any contract at all. And the court ignored two points in the missed email: the increased transfer amount had no contract and was intended to make up for Mrs. Kukes' alleged arrears of a few hundred dollars; why in 2004 was Mrs. Kukes' contention was that I was a couple hundred dollars in arrears, and the court decided to make me prove payments made before that? The court also missed ALL payments from 2007 (CP 19-41) when it stated it counted and credited ALL checks and deposit slips but didn't see any from this timeframe RP II 8. Also, the order for support exists nowhere in the record prior to me entering it under a motion to vacate, which was after being found in contempt and after the commissioner recused herself (CP 192, 342, 362)

The trial court should have considered more evidence for several reasons, but the three most glaring reasons were that Mr. Slane stated from the onset that what he was submitting was not a complete record of all payments (CP 10-18, bullets #6 -7), the order Mrs. Kukes' sought to

enforce was not valid as a contract between the parties existed (CP 10-18), and the sufficiency of Mrs. Kukes' claim was lacking (CP 1-2, 3-9). The court was left to make argument for Mrs. Kukes' with respects to all of Mr. Slane's evidence, including a second, imaginary contract (RP II 9).

There were several things that were misconstrued, or missed altogether in Mr. Slane's evidence. The standard for construing the evidence is to be in the light most favorable to the contemnor. Mr. Slane first points out that since the court is insisting on a finding of contempt, that there is more evidence that he would like to submit (RP II 11). The court only referenced one of the two emails in the record that Mr. Slane was referring to. One email discussed a different and temporary transfer amount (CP 10-18), while another discussed ALL arrearages to that date, sometime in 2004 (CP 19-41), highlighting payments made and not refuted of which there existed *no other document evidence of those payments. First, the whole reason there was a temporary change in the transfer amount was because Mrs. Kukes alleged arrearages to me (CP 19-41). Second, the emails at CP 10-18 and 19-41 show that Mr. Slane was current at the time of the emails, or mostly current, within some insignificant amount. Mrs. Kukes mentioned exactly how much she thought Mr. Slane was behind to the date of that email.*

**e. DID THE TRIAL COURT ABUSE ITS DISCRETION BY NOT
APPLYING THE DOCTRINE OF LACHES OR EQUITABLE
ESTOPPEL?**

At the very minimum, the evidence before the court showed that in mid 2004, Mrs. Kukes' only complaint concerning arrears was between \$66-200 and those emails contained payments that Mrs. Kukes' didn't dispute, yet were not part of the payment evidence (CP 10-18, 19-41). Why then would the court go prior to that date, clear back to January of 2003? I believe most reasonable people would have considered anything before the date of those emails as moot, hence, an abuse of discretion of the part of the court to ignore this fact.

The fact that there was a split custody arrangement between the parties and a contract governing custody and support should have also raised more potential for laches or estoppel in the minds of most reasonable people. The contract itself states that it CAN be enforced by the State, (CP 10-18) which would include the court, but that Mrs. Kukes agreed not to try and enforce the amount stated therein, which is exactly what she did. She went to court with a contempt motion to enforce some void order that she never even presented to the court. The date of the contract itself should have provided another stopping point when calculating arrears. I believe that most reasonable people would think so. The contract provided the estoppel for seeking any amount contrary therein when enforced. The court was not prohibited from raising the amount at the time Mrs. Kukes' sought enforcement, Mrs. Kukes was prevented from recovering anything other than what she agreed to until another contract or court order replaced it.

Just the mere fact alone that she waited until there was a custody dispute and then withheld the contract from the court should have raised more suspicion than support for her cause.

**f. DID THE COURT ERROR IN ITS JUDGMENTS FOR ARREARAGES
BASED ON THE EVIDENCE IN THE RECORD?**

If you first look at the fact that the orders for contempt overlap by one month (CP145-159, 150-154) and then when you factor in that the court backdated a new child support order to be overlapped by the smaller of the two orders (RP II 17), Mr. Slane paid double child support judgments for several months, confirmed by the Child Support Enforcement's own records (CP 342-361 exhibit D). A person cannot be made to pay child support for the same month, twice. Child support payments are vested judgments as they become due . RCW 26.09.170; In re Marriage of Jarvis, 58 Wn. App. 342, 792 P.2d 1259 (1990). It should be very clear that with the judgments and child support order overlapping that a double judgment exists.

The total amount ruled by the court was approximately \$35,000, with a credit due for three (3) years of split custody, which would have made a total judgment of about \$24,000 (RP II 2 – 10). The two judgments total well over \$24,000, in fact, they total over \$37,000 (CP145-159, 150-154). The second contempt order was originally raised on motion for a period of August 2008 to Jan 31 2009 (CP 64-65). The order and judgment state they are through April 2009, and the transfer amount the court ruled on for that time period was \$600 (RP II 9). The total of the second order could not exceeded \$5400 if it were from August 2008 through April 2009 (\$600 x 9 months), so how it exceeds \$9,000 is a mystery. And if it was to only cover September-December of 2008, that second judgment amount becomes \$2,400, even further away from the nearly \$10,000 it states.

If you examine Mr. Slane's motion to vacate (CP 298-399), the hearing for which was never reset by the court after Mrs. Kukes filed an affidavit of prejudice, you can plainly see in the certified accounting provided by the State of Washington that Mr. Slane was in fact charged child support twice for overlapping months, once in the judgments before this court, and once by an order of support the State is enforcing (CP 342-361 Exhibit D) and the record states that the order of support began in January 2009 (RP II 17). The record and evidence completely debunks Mrs. Kukes' bare and unsupported argument that there are mere scriveners errors in the judgments and that I did not pay child support twice for certain time periods (Resp.'s Brief at 33).

**g. DID THE COURT ACT THROUGH BIAS OR WITHOUT
JURISDICTION?**

It is uncontested that the commissioner did recuse herself based on Mr. Slane's motion for reconsideration, which stated that she was had acted through bias. This type of removal of a judicial official is far more difficult and rare than other types since we had already been a year into litigation. It was a pattern of behaviors and inconsistencies that had to be shown to prompt her to recuse herself. No judicial official is just going to step aside after a year without some solid

proof that the official had acted in a manner that most reasonable people would consider biased (CP 112-122). When a judicial official acts from a position of bias, that official acts as a private citizen and has no jurisdiction (App.'s Brief 14-22).

h. ARE THE ORDERS ENTERED ON APRIL 17, 2009 VOID BASED ON VIOLATIONS OF CR54 OR DUE PROCESS?

An order or judgment entered without the notice required by CR 54(£)(2) is not invalid where the complaining party shows no resulting prejudice. *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986). Mrs. Kukes' counsel wants to argue both sides of this issue. On one hand they want to persuade the court to not consider any issue not raised in the trial court. On another they exert every effort to keep any issues from being heard in the trial court, such as the motion to vacate Mr. Slane raised and set (CP 298-399). They had the hearing stricken by filing a motion and affidavit of prejudice, see sub 213Mtn & Aff Of Prejudice 09-29-2009 (CP ID) and sub 221 Hearing Cancelled: Court's Request 10-02-2009 (CP ID). Then he wants to argue to this court that he served me the exact orders he presented, though my motion to vacate proves he didn't, and *all the while he argues that he had no requirement to serve me because I am not a lawyer*. See sub 205 Petitioners Brief In Response To Motion To Vacate 09-28-2009 (CP ID). It's also interesting to note that no affidavit of service existed in the record, though it's entirely deficient anyway, until Mr. Slane raised the issue in a hearing for Discretionary Review with this court.

The process to be followed for serving Mr. Slane the orders was highlighted and agreed upon in court (RP II 16). Mrs. Kukes' counsel never claims to have followed it, and in fact, he did not. My position has not once waivered, the orders presented to the court were NEVER presented or served to me in ANY manner, whatsoever (CP 298-399). The court minutes from April 10, 2009 (ID) state that no part was present when the case was called. April 10 was the date the court gave for presentment, so no noteup was required (RP II 18). Mr. Chase and Mrs. Kukes instead set another date, 17 April 2009 for presenting orders that had still not been presented to me. I

haven't denied that I didn't receive something in the form of orders. I have maintained all along that those orders and the orders presented are not the same (CP 298-399).

Mrs. Kukes' counsel tries to say Mr. Kukes served me the orders and points to an affidavit signed by Mr. Kukes several months after the presentment hearing. There are three major problems with this. Mr. Kukes has financial interest in this case and cannot serve me with any document whatsoever. His financial interest is that under WA law, he has a financial responsibility for the child in these proceedings. Therefore, the outcome of the issues before the court impact him financially. Next, he is Mrs. Kukes' husband. Spousal privileges protect him from even testifying to any matter concerning his wife. And lastly, would be the "affidavit of service" Mrs. Kukes' counsel points to in the record. This is completely insufficient for service of anything at all. The "affidavit" might as well have stated "I handed Mr. Slane a pile of orders...for McDonald's cheeseburgers".

**i. IS MRS. KUKES ENTITLED TO AN AWARD FOR ATTORNEY FEES
ON APPEAL, OR IS MR. SLANE?**

If anyone should be entitled fees on appeal, it is Mr. Slane.

IV. CONCLUSION

The orders before this court should be vacated and the case remanded for further proceedings, after Mrs. Kukes adjusts her claims. Mr. Slane's appeal or discretionary review should be granted in his favor.

Respectfully submitted this 23rd day of March, 2011.

A handwritten signature in black ink, appearing to read 'S. Slane', written over a horizontal line.

Stephen James Slane, Petitioner, Pro Se