

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 317242

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

RENÉ MILLER n/k/a RENÉ M. VERCOE,

Appellant,

v.

MICHAEL D. MILLER

Respondent.

REPLY BRIEF OF THE APPELLANT

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I. REPLY TO RESPONDENTS COUNTER-STATEMENT OF THE CASE.

Respondents counter-statement of the case is hardly an objective assessment of the facts of the case. *See*, RAP 10.3(5). The statement of the case should be confined to objective facts and not argument. To the extent that Respondent’s Counter-Statement of the Case introduces argument, it should be ignored.

Additionally, the main reason one would make a counter-statement of the case is to set up straw-man arguments. Because the Respondent could not refute many of the points in the Appellant’s Brief, the Respondent used straw-man arguments throughout his brief. Examples of straw man arguments are as follows:

Mr. MILLER was forced to file a Chapter 13 bankruptcy petition.

Responsive Brief of Respondent Michael D. Miller, p. 4 (emphasis added.) His Petition for Chapter 13 Relief is called “Voluntary Petition”. No one “forced” the Respondent to file a voluntary bankruptcy petition.

Respondents states:

Contrary to Ms. VERCOE’s representation otherwise, the Chapter 13 plan only restructured, and did not discharge, the

subject credit card debt at issue.

Id., p. 5.

As discussed below, the Respondent will receive a Chapter 13 Discharge, pursuant to his confirmed chapter 13 plan.

Respondent states:

Thus, in her view and continuing on into this appeal, the bankruptcy filing amounted to a substantial change in circumstances contemplated under RCW 26.09.170(1).

Id., p. 5.

This statement oversimplifies and misrepresents the Appellant's argument. The Appellant pointed out the five major tools used by Judge Tompkins in the original Decree of Dissolution. The Respondent's actions, including the filing of a voluntary bankruptcy petition, frustrated three of the five tools used by Judge Tompkins to bring about lifetime financial equality between the parties. The Respondent didn't even address this argument in his brief. He did not discuss how he voluntarily let the parties home go into foreclosure while he had the means to pay the mortgage. He did not explain why he was subject to a show-cause order on contempt for failing to obey the Decree and filed a voluntary bankruptcy petition the day before his

contempt hearing. He did not explain why a few months after the trial his income was substantially more than represented to the Court. He made up a new argument and attacked it.

No claim was made by anyone that CR 12(b)(6) had, in fact, served as a basis for the court commissioner's ruling.

Id., p. 9.

The commissioner's ruling certainly left open the possibility that she was ruling on the pleadings under CR 12:

THE COURT: . . .

What we've got here is a motion on the stand alone motion that cites CR 56, which is the summary judgment proceedings. **But we also have in the response to the petition, which was filed almost immediately after the summons and petition to modify parenting plan [sic] is a motion to dismiss** based on the fact that this issue was already addressed and litigated and resolved through the bankruptcy and the state court, and also that there's no circumstances -- change in circumstances to warrant a petition to modify maintenance.

. . .

So I don't think I need to go to summary judgment. I think I can rule on this very clear and on the fact that there is not a significant and unintended or unanticipated change in circumstance..

CP 387, 389-390 (emphasis added.)

The commissioner indicated that she did not "need to go to

summary judgment”, based in part because of the fact that there was a “response to the petition” which was a “motion to dismiss”. If she is not going to follow the provisions of CR 56 (which she did not), then the only alternative is that she was deciding the motion under CR 12(b)(6) based on the pleadings.

These misrepresentations and arguments are all contained within the Respondent’s counter-statement of facts. They are not within the spirit or letter of RAP 10.3(5) and should be ignored by the Court. Additionally, these are only examples. The Respondent’s counter-statement of facts is replete with statements like these.

II. ARGUMENT.

The Respondent’s brief appears to be devoid of an essential element contained in most useful memoranda - legal analysis. Respondent believes that conclusory language and string cites, with no analysis, make a good argument.

First, Respondent claims that his motion to dismiss was decided as a summary judgment motion based on the legal principles of *res judicata*. The record contains nothing which would allow this Court to draw that conclusion. Neither the court commissioner nor the

reviewing judge made any determination as to whether there were undisputed issues of fact. This is an essential conclusion that must be drawn before summary judgment may be ordered. Neither jurist even mentioned the four elements of the doctrine of *res judicata* in each respective decision.

Second, Respondent demonstrates a complete ignorance of bankruptcy jurisprudence. The errors in the Respondent's brief are alarming; so alarming that the Court should disregard the Respondent's briefing when it makes any reference to bankruptcy law which is not supported by a direct reference to an independent verifiable source.

Third, Respondent uses classic straw-man techniques in an attempt to mislead this Court. One after another, the Respondent creates a false arguments which he attempts to shoot down. In the final analysis, the Respondent failed to establish that there is a set of undisputed facts which would allow the Court to dismiss this matter in summary fashion.

A. THE COURT COMMISSIONER AND REVIEWING JUDGE DID NOT ADDRESS THE MOTION TO DISMISS AS A SUMMARY JUDGMENT MOTION.

Respondent claims that the "record on appeal clearly reflects the

commissioner did, in fact, address the motion to dismiss. . . under the principles of CR 56 as to the precise legal issue posed under the doctrine of res judicata." *Responsive Brief of Respondent Michael D. Miller*, p. 13. If this were true, the Respondent would be able to quote some clear language that would support this position. He did not. The Respondent ignores the record and offers only his conclusions on the subject. Appellant offers the following cites to the record which indicate that CR 56 was not followed:

First, consider the commissioner's oral ruling:

So I don't think I need to go to summary judgment. I think I can rule on this very clear and on the fact that there is not a significant and unintended or unanticipated change in circumstance. Where you were at before is where you are now. And so I'm going to dismiss the petition based on no significant change in circumstance and if, as I said before, if there's no pending petition, there is no basis for discovery. We don't allow people to go on fishing expeditions unless there's a pending petition. With the dismissal of this there's no pending petition and therefore no discovery motion. So if you get an order ready I'm prepared to sign it.

CP 389-390.

Second, consider the reviewing Judge's assessment of the decision:

Although the pleadings were couched as a summary

judgment motion pursuant to CR56, Commissioner Jolicoeur's dismissal essentially grants the same relief that would be provided had she directed full summary judgment on the Respondent's request.

CP 397.

The reviewing judge states that the dismissal was "couched as a summary judgment motion". This statement indicates that the decision was not one for summary judgment; it was merely couched as one. This Court must also be mindful of the revision process. In this matter, the reviewing judge did not modify the ruling of the court commissioner in any form and accepted it as the decision of the Court. Thus the decision of Commissioner Jolicoeur is the decision of the Superior Court on review. RCW 2.24.060.

Third, consider the form of the order dismissing this matter: CR 56(h) requires the order granting summary judgment to "designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." The order dismissing the matter was devoid of any reference to documents and evidence from which the decision was based. CP 376.

If the Respondent's motion had been treated as a motion for

summary judgment, the Court would have indicated that there were no disputed material facts, what those facts were, and why they supported the granting of the motion. Additionally, the order would have been more clear and defined the documents from which the Court discerned the undisputed facts. CR56(h).

B. THE COURT COMMISSIONER AND REVIEWING JUDGE DID NOT ADDRESS THE ISSUE OF *RES JUDICATA*.

The main reason the Respondent gives for reaffirming the decision of the Superior Court is that the petition was dismissed on the basis of *res judicata*. However, the Court Commissioner never stated that she was even considering the doctrine at the hearing in which she dismissed the petition. She did not address the four elements that must be present to make such a ruling. There is nothing in the record to indicate she even considered the doctrine as a viable option. She simply made a summary determination to dismiss based on the merits:

THE COURT: . . .

What we've got here is a motion on the stand alone motion that cites CR 56, which is the summary judgment proceedings. But we also have in the response to the petition, which was filed almost immediately after the summons and petition to modify parenting plan [sic] is a motion to dismiss based on the fact that

this issue was already addressed and litigated and resolved through the bankruptcy and the state court, and also that there's no circumstances -- change in circumstances to warrant a petition to modify maintenance.

...

So I don't think I need to go to summary judgment. I think I can rule on this very clear and on the fact that there is not a significant and unintended or unanticipated change in circumstance. Where you were at before is where you are now. **And so I'm going to dismiss the petition based on no significant change in circumstance** and if, as I said before, if there's no pending petition, there is no basis for discovery.

CP 387, 389-390 (emphasis added.)

The commissioner said that she “did not need to go to summary judgment” because she was “going to dismiss the petition based on no significant change of circumstance”. The record indicates that the doctrine of *res judicata* did not come into play in her thought process. She did not discuss the four elements and how they were fulfilled. She simply made a summary decision based on her review of the file. Thus the main reason the Respondent gives for reaffirming the commissioner’s decision was not even the basis for that decision. It is a straw man argument. The reality is that there is no basis for granting the motion, and *res judicata* cannot save the commissioner’s ruling.

**C. RESPONDENT DEMONSTRATES A COMPLETE
IGNORANCE OF THE BANKRUPTCY PROCESS.**

Respondent's discussion on bankruptcy contains so much erroneous information that the Court should simply ignore it. Respondent states that Appellant's reliance on *In re Marriage of Myers*, 54 Wn.App. 223, 773 P.2d 118 (1989) is misplaced and that the *Myers* case is simply not germane to the analysis herein. *Responsive Brief of Respondent Michael D. Miller*, pp. 14-15. Then he offers some erroneous conclusions about *Myers* and the application of bankruptcy law.

Respondent states that "Myers involved a Chapter 9 bankruptcy". *Responsive Brief of Respondent Michael D. Miller*, p. 14. This is not true. Chapter 9 bankruptcy is limited to municipalities.

- (c) An entity may be a debtor under chapter 9 of this title if and only if such entity—
 - (1) is a municipality; . . .

11 U. S. C. § 109(c)(1).

Respondent also states that:

By the same measure, the respondent continued to honor his maintenance obligation throughout the bankruptcy process and beyond, *whereas the husband in Myers was discharged from such obligation.*

Responsive Brief of Respondent Michael D. Miller, p. 14 (italics and emphasis added.)

This statement is not true as well. In all chapters of personal bankruptcy, family support obligations are not dischargeable. There is no way that Mr. Myers was discharged from his maintenance obligations.

(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—

...
(5) for a domestic support obligation;

11 U. S. C. § 523(a)(5)¹.

Additionally, while the Respondent is busy singing his own accolades about paying his domestic support obligations, he **MUST** pay all these obligations if he wants to receive a chapter 13 discharge and complete his voluntary bankruptcy:

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and **in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all**

¹ This section of the bankruptcy code did not change in October of 2005 when the Bankruptcy Reform Act took effect. The code was the same when *Myers* was decided.

amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

11 U. S. C. § 1328(a).

Respondent states:

Contrary to Ms. VERCOE's representations otherwise, the Chapter 13 plan only restructured, and did not discharge, the subject credit card debt at issue. See, "brief [sic] of the Appellant," at page 5.

Responsive Brief of Respondent Michael D. Miller, p. 5.

This can only be taken as a deliberately false twist on the facts.

Appellant's Brief at page 5 states:

The Respondent's refusal to pay the mortgage and discharge that obligation through bankruptcy meant that the Respondent's contemplated income increased by \$2,458.23, his share of the payment order by the Decree.

Brief of the Appellant, p. 5.

This is Appellant's only mention of discharge. Moreover, the Respondent DOES receive a discharge upon successful completion of his plan. See, 11 U. S. C. § 1328(a) *infra*. Any debts which the

Respondent owed at the time he filed his voluntary bankruptcy petition and which are not paid through his Chapter 13 Plan are discharged, i.e. the continuing late charges and interest on \$63,000 in credit card debt that he was ordered to pay and the balance of the mortgage on the parties' former residence. To the extent these obligations are discharged, the Appellant will be responsible to pay them. Is the Respondent suggesting that he only restructured his mortgage and is paying it in full? That is simply not true. If that were the case, Ms. Vercoe would have continued living in the house until it was sold and the equity was divided pursuant to the Decree of Dissolution. Instead, the house was forfeited as part of the Respondents voluntary bankruptcy proceeding, relieving him of his obligation to pay the mortgage.

Respondent also proffers to this Court that the bankruptcy claim process under 11 U. S. C. § 502 precludes modifications to spousal maintenance in state court. Again, this proposition demonstrates complete ignorance as to how the bankruptcy claims procedure works. The bankruptcy court determines only what the debtor owed to each creditor on the day he filed his petition. That's it.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, **shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition**, and shall allow such claim in such amount, . . .

11 U. S. C. § 502(b).

In this matter, the only function of the bankruptcy court was to determine how much the Respondent owed the Appellant based on the circumstances which were in place “as of the date of the filing of the petition”. The bankruptcy court cannot and did not make any determination as to future obligations between these two parties. The distinction is very simple. The bankruptcy court determines what was owed, the family court determines if more should be owed based on changed circumstances. It is absolutely necessary to establish the nature of each of the bankruptcy claims if the defense of *res judicata* is to be enforced. The court commissioner failed to do this and the Respondent is now claiming that she did. Respondent’s discussion of bankruptcy should be ignored as it is completely unreliable. Additionally, the underlying principal of the *Myers* case is germane. A bankruptcy can be the sole basis for a modification of spousal

maintenance. In this case, the Respondent's voluntary bankruptcy petition is only one of several factors which demonstrates a substantial change of circumstances. These include his deliberate failure to obey the Decree of Dissolution from the moment it was entered. His voluntary bankruptcy petition was the culmination of a plan to avoid his responsibilities pursuant to the court's order.

D. RESPONDENT FAILS TO ESTABLISH UNDISPUTED FACTS WHICH ALLOW THE GRANTING OF A SUMMARY JUDGMENT MOTION.

Because this Court is conducting a de novo review of the granting of a summary dismissal, whether it be through CR 12(b)(6) or CR 56, the Respondent bears the burden of demonstrating that he is entitled to dismissal. The Respondent failed to address dismissal under CR 12 and essentially concedes that he cannot prevail if the motion is founded on CR 12(b)(6). Thus, the Respondent must demonstrate a set of undisputed facts which supports summary judgment.

The Supreme Court has ruled that the function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not to resolve issues of fact or to arrive at conclusions based thereon. *Duckworth v. Bonney Lake*, 91 Wn.2d 19,

21, 586 P.2d 860 (1978) citing *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962). In *Landberg v. Carlson*, 108 Wn.App. 749, 753, 33 P.3d 406 (Div. III, 2001) the Court ruled that summary judgment is a procedure for testing the existence of a party's evidence.

In *Bates v. Grace United Methodist Church*, 12 Wn.App. 111, 112-3, 529 P.2d 466 (Div. II, 1974) the Court ruled in a summary judgment context it must accept as true the evidence asserted by the nonmoving party and it must give the nonmoving party the benefit of all reasonable inferences therefrom.

Respondent's discussion at pages 20 and 21 of his brief defines the facts of this case as they apply to CR 56. Or does it? The Respondent speaks in vague platitudes about the commissioner's ability to look beyond the pleadings and that the Appellant's claim is not supported by the record. Respondent did not cite the record or recite any facts which support the granting of the motion. Appellant spent 12 pages in her initial brief with citations to the record which established the posture of the factual background at the time the case came before the court commissioner. *Brief of the Appellant* p.p. 33-45. The

Respondent does not cite the record, basically says a whole lot of nothing, and uses big words like “unsupported” and “superfluous” to describe Appellant’s analysis. However, there is no substance to his arguments.

Respondent says nothing to refute the factual background spelled out by Appellant, nor does he point to any part of the record which would refute the commissioner’s reading of the facts in a light most favorable to the Respondent.

Her debt which is primarily what she cited, as far as the debt, the impact to her when he filed bankruptcy then shifting her is, as I said was already place. That debt was already in place and so that is not a new circumstance.

The damage to credit is also not new. Here's the deal. By the time you got to divorce both your credit was already damaged. It's clear in the documents. You were already struggling. You were already in over your head. You were already in on a house you couldn't afford. So that damage was a long time ago. And it might of gotten worse through the divorce, which is does with most families, but it doesn't -- but that damage was already there.

CP 388-389.

These facts were not supported by the record and the commissioner erred in her analysis. The house payments were current until February 2010. CP 426. There is nothing in the record to suggest

that the parties were "in over their head". The trial court found that the husband had made lifestyle choices which might inhibit his ability to pay his obligations, but that he could manage. CP 419, ¶35. On June 16, 2010, Appellant filed a declaration noting that she was paying her credit cards to maintain her excellent credit rating, despite the fact that the Respondent was ordered to pay them. CP 427. Appellant demonstrated that the commissioner erred when she looked at these facts in favor of the Respondent. Respondent did not refute this in any way.

Respondent is the moving party. In this Court as in the Superior Court he bears the burden of establishing the undisputed material facts which would require the dismissal of this matter. He has not met that burden. This matter will require a trial to determine the impact of the matters discussed in Appellant's opening Brief.

E. RESPONDENT SHOULD NOT BE AWARDED ATTORNEY FEES.

Appellant makes a request for attorney fees pursuant to RCW 4.84.185 and CR11. Both of these provisions require a finding of frivolity. In support of this position Respondent uses RP 17 and 26 as

support for his frivolity argument. It certainly appears that Respondent's Counsel is attempting to make it look like the Court made that statement. However, after reviewing RP 17 and 26, this Court can see that Respondent's Counsel is quoting himself in narcissistic fashion from his oral argument at the revision hearing:

Mr. Maxey: So, I'll try to be brief, your Honor. . .
You know that the Court is not to be used as simply an arena for parties to play out their ongoing personal vendettas against one another and to continually rehash the history . .

RP 17 (emphasis added.)

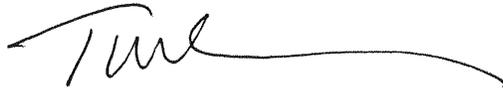
RP 26 contains no such quote, but the only record on RP 26 is Mr. Maxey speaking at the revision hearing. It is never necessary for the author of a document to quote himself from another document to support his position. In this case it is misleading. There is nothing in the record to indicate that Commissioner Jolicoeur or Judge Price made any finding of frivolity, nor should this Court make such a finding.

III. CONCLUSION

The Respondent has failed to establish a set of undisputed facts which allows the granting of summary judgment. The court commissioner's decision is the final decision of the Superior Court, and

cannot be supported by the record. The most critical error is that the commissioner read the facts and inferences therefrom in a light most favorable to the Respondent. This Court should reverse the decision of the court commissioner and allow this matter to proceed to trial.

Respectfully Submitted, on
March 7, 2014.

A handwritten signature in black ink, appearing to read 'Tim', with a long horizontal flourish extending to the right.

Timothy W. Durkop, WSBA #22985
Attorney for Appellant