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STATE OF WASHINGTON
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No. 61737-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HAZEL DIANE MURRAY,

Appellant,

v.

BRIAN HENRY MURRAY

Respondent.

RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

On February 14, 2003, Hazel Murray (Hazel) appeared before the Whatcom County Superior Court and asked that her marriage to Brian Murray (Brian) be dissolved, CP 8-9. The final decree was agreed to by the parties and a final decree of dissolution was entered that same date, CP 8-9. Brian was not present in court. Hazel and Brian had no children together, CP 8. On October 31, 2007, Hazel filed a motion with Whatcom County Superior Court seeking to have the dissolution set aside, CP 13. Hazel Murray was represented by Eric Weight who filed the motion to set aside on her behalf. On November 13, 2007, Matthew Peach appeared on behalf of Brian Murray, CP 16. While the motion was pending, Hazel Murray and Brian Murray met, without either attorney being present, and entered into an agreement whereby Brian Murray agreed to pay Hazel Murray Twenty-Thousand Dollars (\$20,000.00). They wrote up their agreement on a piece of paper, CP 17A. Later, Hazel told Brian that she no longer wished to be bound by the agreement, CP 25. Brian then took the position that he did not want to be bound by the agreement and hired new counsel. Hazel filed a motion to enforce the agreement, CP 23. Commissioner Alfred Heydrich ruled that the agreement was enforceable

and awarded Hazel attorney's fees, CP 36. On a motion for Revision, Judge Mura upheld the ruling that the agreement was binding but noted that there was no provision in the agreement for an award of attorney's fees and revised Commissioner Heydrich's ruling regarding the award of attorney's fees, CP 42. Hazel appealed that denial of attorney's fees.

II.

ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT IT DID NOT HAVE AUTHORITY TO AWARD ATTORNEY'S FEES.

The appellant seeks attorney's fees under RCW 26.09.140 and other equitable theories of law. The appellant cites no authority for treating this matter as anything other than a contract dispute. She cites no authority for the proposition that an action under CR 60 RELIEF FROM JUDGMENT OR ORDER, is treated any differently if it involves a judgment from Title 26 than it would for an effort to set aside any other type of judgment or order. There are no special statutes under Title 26 that call for an application of a different standard for setting aside a decree than what would apply to the setting aside of any other type of judgment or order.

1. Contract Law Applies to CR 2A Agreements. This case is governed by contract law, Marriage of Ferree, 71, Wn. App. 35,

856 P.2d 706 (1993), which stated "...CR 2A supplements but does not supplant the common law of contracts," at page 39. Judge Mura correctly concluded that the action before the court was no longer an effort to set aside the Decree of Dissolution but, rather, was an effort to enforce a contract between Hazel and Brian to avoid having the Decree of Dissolution set aside. The consideration for Hazel was receiving Twenty-Thousand Dollars. The consideration for Brian was to not have the final divorce decree set aside pursuant to the CR 60 application. After the execution of the CR 2A agreement, Hazel abandoned her request to set aside the divorce decree and opted, instead, to enforce the CR 2A agreement. This is demonstrated by the letter written by Mr. Weight, Hazel's attorney, on November 15, 2007. In that letter Mr. Weight indicated to then opposing counsel stating that he was striking the hearing on CR 60 motion and further indicated that it may or may not be necessary to enter an order to reflect the agreement, (Appendix C of Appellant's Brief). Judge Mura correctly concluded that Hazel had elected to take the Twenty-Thousand Dollars offered to her by Brian rather than proceed with her effort to attempt to set aside the dissolution decree. RP April 18, 2008, pg. 11, lines 12-20.

2. This is not an Action to Enforce a Dissolution Decree.

Appellant cites RCW 26.09.140 as the authority for the court awarding attorney's fees. That statute provides:

Payment of costs, attorney's fees, etc.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

When Hazel moved to have the CR 2A agreement enforced, she was not seeking to enforce or modify the Decree that was entered when she divorced Brian. The Twenty Thousand Dollar agreement was not entered into to enforce any of the provisions of the decree. Judge Mura correctly ruled that the agreement was entered into to avoid having to litigate whether or not the dissolution decree entered into three years earlier should be set aside. Hazel sought to disavow the decree not enforce it or modify it.

CR 60(b) provides in relevant part that a "...court may relieve a party from a final judgment...for the following reasons." Appellant seeks

to have the court treat the CR 60 application as a modification action in which the CR 2A Agreement is made a part of the final Dissolution Decree.

Judge Mura gave Hazel the choice to either enforce the contract that was intended to avoid litigation (CR 2A Agreement) or to have a hearing on the motion to set aside the parties' dissolution decree. Perhaps if Hazel was successful in having the Decree set aside on one of the grounds set out in CR 60(b), she would have then had the opportunity to apply to the court for some relief under RCW 26.09.140.

3. The American Rule of Contracts Applies. The case cited by Hazel Murray for an equitable award of attorney's fees is Snyder v. Topkins, 20 Wn. App. 167, 175, 579 P.2d 994 (1978). It is noteworthy that in that case, the court stated the rule as follows: "Generally, to create liability for reasonable attorney's fees there must be a wrongful act by one party toward the another which exposes or involves the other in litigation with a third party who is not connected to the wrongful act. In appropriate circumstances, however, equity may allow reimbursement of attorney's fees whenever overriding considerations, such as oppressive behavior on the part of a party, indicated the need for such a recover," (citations omitted) at page 175. Attorney's fees were not awarded by either the trial court or the appellate court. Hazel provides no proof or evidence upon

which Judge Mura or this court could conclude that Brian engaged in “oppressive behavior” that would justify the award of attorney’s fees. Asserting his belief that the CR 2A Agreement was not an enforceable contract does not amount to oppressive behavior. In his declaration, Brian claimed that Hazel phoned him the day after the CR 2A Agreement was reached and told him that she had reviewed the agreement with her attorney and did not believe that the agreement was binding, CP 25. Brian Murray’s argument that the contract was not binding until he tendered Twenty-Thousand Dollars to Hazel Murray was rejected by Judge Mura. Ironically, the basis for wanting to set aside the Decree is Hazel’s claim that she was not competent to enter into an agreement regarding her dissolution of marriage to Brian but, the court apparently believed that she was competent to enter into an agreement to settle any claims she had for \$20,000, despite the fact that she did so without her counsel present.

The Court of Appeals recently addressed the issue of when it was appropriate to award attorney’s fees in the case of Marriage of Freeman, 146 Wn. App. 250, 258-59, 192 P.3d 369 (2008). In Freeman, the ex-husband sought to modify a provision in the parties’ dissolution decree that imposed a permanent order of protection against him. In the modification action, the ex-wife sought attorney’s fees based on a provision in RCW 26.50.060(3) which provides in relevant part “[u]pon

notice and after hearing, the court may” order attorney fees upon the issuance of a protection order... The Freeman, court held as follows:

Washington follows the American rule—that each party in a civil action will pay its own attorney fees and costs—unless modified by contract, statute, or a recognized ground in equity. *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). Our courts decline to award attorneys fees under a statute unless there is a clear expression of intent from the legislature authorizing such an award, *Id.* at 303, 149 P.3 666. There are express provisions for attorney fees upon the issuance of an order for protection and upon its renewal. But there is no mention of an award for modifications of such orders. We can, therefore, presume no legislative intent for an award of attorney fees,” at page 259.

Similarly, Hazel seeks attorney’s fees under RCW 26.09.140. But the matter before the court was not enforcement or modification of an existing decree, rather it was an effort to set aside that decree which is not an action controlled by Title 26. There is no provision for attorney’s fees in such circumstances and the American Rule applies.

B. HAZEL WAIVED HER CLAIM FOR ATTORNEY’S FEES.

Hazel asserts that she is entitled to enforce the contract for the Twenty- Thousand Dollars and seek attorney's fees under Title 26. Judge Mura ruled that once Hazel elected to accept the benefits of the CR 2A agreement, she was precluded from proceeding with her effort to set aside the Decree of Dissolution. Judge Mura correctly ruled that the gravamen of the contract between the Murrays was the payment of money for keeping the door to the decree shut.

Hazel elected her remedy to take the money and forgo the claim for fees, CP 32 and RP April 25, 2008, pg. 5, lines 9-16. Hazel took the option of taking the Twenty-Thousand Dollars in exchange for giving up her claim for attorney's fees. She elected her remedy in this case and is now bound by that election. In Lange v. Woodway, 79 Wn.2d 45, 483 P.2d 116 (1971), the court described the general law of election of remedies as having the sole purpose of preventing a double redress for a single wrong and indicated that three elements must be present for an election of remedies. First, there must be two or more remedies. Second, the remedies must be repugnant and inconsistent with each other. Third, the party must have chosen one of them. In our case, Judge Mura gave Hazel two choices, to take the Twenty-Thousand Dollars and forgo her claim for attorney's fees or to proceed with her action to set aside the decree and not take the Twenty-Thousand Dollars. Second, the choices

were inconsistent and repugnant because Judge Mura had ruled that Hazel was not entitled to an award of attorney's fees if the Decree was not set aside. In her brief, Hazel describes this as a *Hobson's choice* (pg 12 of Brief of Appellant) thus admitting that the election was repugnant to Hazel and inconsistent with her desire to get the money and the attorney's fees. Finally, it is clear from the face of the document that Hazel elected to choose to take the money CP 32-33. Hazel's election to take the money binds her such that she is not allowed to now assert her rights to attorney's fees.

III.

CONCLUSION

Hazel asserts that it was inequitable for the court to not grant her demand for attorney's fees. Hazel's application to the court for relief under CR 60, was not for a specific award of money, rather it was to set aside the Dissolution Decree based on her claim that she was not mentally competent to represent herself at the time that the Decree was entered CP 119-126. That issue was never addressed because Hazel, without the aid of her attorney, met with Brian and agreed to a payment of \$20,000 to end the dispute (Appendix A of Appellant's Brief). The merits of her claim were never reached because she elected to take money rather than risk not having the Dissolution Decree set aside CP 32-33.

Brian's agreement to pay Hazel Murray Twenty-Thousand Dollars had nothing to do with the merits of Hazel's claim that the dissolution decree should be set aside so that she could get a better settlement. The payment had everything to do with avoiding the prospect of having the Decree set aside. The CR 2A Agreement did not empower the court or the parties to set aside the Dissolution Decree and Judge Mura clearly understood that avoiding this possibility was the consideration for Brian in entering into the Agreement, RP April 18, 2008, pg. 9, lines 15-17 and page 10, lines 6-10. Brian Murray understood that his payment would avoid having the Dissolution set aside and so, apparently did Eric Weight based on his letter of November 15, 2007 (Appendix C of Appellant's Brief).

Finally, Hazel Murray elected to take the CR 2A money rather than follow through with her attempt to open the Decree. In essence, Hazel abandoned her efforts to set aside the Decree and possibly avail herself the attorney's fees statute in Title 26, RCW 26.09.140.



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Appellant,

v.

BRIAN HENRY MURRAY

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura

DECLARATION OF SERVICE

ANDREW D. PEACH
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My Name is Rita Blair. I am a citizen of the United States, a resident of Bellingham, Washington, over the age of 18 years and not a party to this case. On this date I caused a copy of the following document to be delivered to the address below via First Class U.S. Mail:
Respondent's Brief:

Eric M. Weight
119 North Commercial Street
Suite 1400 Bellingham Towers
Bellingham, WA 98225

I declare under penalty of perjury that the foregoing is true and correct.

Signed in Bellingham, Washington on June 11, 2009.

A handwritten signature in cursive script that reads "Rita Blair". The signature is written in black ink and is positioned above a horizontal line.

Rita Blair