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DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

MICHAEL A. TIPPIE, APPELLANT
v.
MARY V. WILSON, RESPONDENT

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondent (Ms. Wilson) attempts to tug at the Court's heart-strings by invoking her economic plight of being a single mother raising a daughter on her own. In fact, Ms. Wilson is an attorney who works for the State of Washington, has significant seniority, and is very high on her wage scale. Indeed, for the entire duration of this economic downturn, she has enjoyed far better wealth than the appellant (me).

All divorces are hard on the parties, but it was I who ended up in a deficit equity situation for the house in Edmonds, which lost more than \$200,000 in value since the original decree. She states that the transfer of \$87,000 was part of an "equal division of the marital property," but she not only got the \$87,000 in cash, she has also kept her job while my pay was cut in half, then ended with my loss of my job. I was out of work for 11 months, surviving on unemployment insurance and the sale of virtually all of my liquid and liquidatable assets, many of which she cites as if I still owned them. Ms. Wilson further states that she is at a disadvantage as she has not been trained in family law. If she is really disadvantaged in filing her *pro se* brief, armed with a Georgetown law degree and years of employment as an attorney, I am doubly disadvantaged as I am not an attorney and have no training in the law.

The record shows my attempts to refinance or sell the Edmonds house with no takers, while the price had to be lowered several times, ultimately resulting in a short sale. Brief of Appellant (BA) at 15-16. The court failed to take account of the recession, which is still claiming its victims, and that is why this appeal was filed.

I sought bankruptcy protection for many carefully examined and well thought-out reasons, not the least of which is to protect both Ms. Wilson and myself with the stay orders to the Chase and Flagstar banks. It was impossible to keep up payments on the Edmonds property and indeed any of my other debts (save my essential car payment, food, and utilities), when I was getting about \$2000 a month in unemployment to support myself and five dependents. Without the bankruptcy filing, the Edmonds house likely would have been foreclosed, and that would have meant a huge financial loss to Ms. Wilson as well as to me. Ultimately a short sale was completed in August; as a result, Chase and Flagstar both settled the mortgages for less than amount owed, relieving Ms. Wilson and me of our debt on a property that had lost nearly half its value. A fifty percent loss of value in real estate is not unusual under the current economic conditions.

I felt it was necessary to take this appeal to preserve the issues pending the bankruptcy filing.

Ms. Wilson aptly characterizes my invocation of the bankruptcy code, BA at 28-29, as a motion to suspend hearing this appeal until the bankruptcy court acts.¹ She is incorrect, however, in stating that the motion "relating to the CR 70 remedy," if granted, would not preclude hearing this appeal. On the contrary, the issues on appeal here arise entirely from her motion under CR 70. If they are removed, no issues are left.

ARGUMENTS IN REPLY TO RESPONDENT

A. Respondent's Arguments Outside the Record Should Be Stricken

Ms. Wilson asserts that the commissioner called my actions "an issue of support and maintenance." Brief of Respondent (BR) at 15. This comment should be disregarded because she cites no reference. If the commissioner said that, she never set it out as a finding or a ruling. CP 9, 15-19, 22-25, 30-39. In fact, the divorce trial judge was very clear that because the marriage was short and we were both working professionals, support and maintenance were inappropriate. In all the Commissioner's orders, she dealt with the issues strictly as enforcement of a property division, which is the way they were presented to her.

¹ A hearing in that court occurred Oct. 11, 2011, and Ms. Wilson's motion to convert my Chapter 13 to a Chapter 7 and insert herself as a preferred creditor was denied.

In Ms. Wilson's brief at BR 11, in the paragraph beginning "Issues discussed, but not ruled on..," she discusses issues that were not ruled on, are not on appeal, and are not relevant to the appeal. This entire paragraph should be stricken.

Again, Ms. Wilson's Section E on my alleged conversion is entirely outside the record and should be stricken. BR at 22-24. She even admits "The parties did not argue about conversion and the trial court made no determination in that regard...." The lower court also made no determination regarding the GET accounts, which she discusses in this section. This is patently scandalous material, inserted only to inflame this Court and bias it against me.

She misuses *Huber v. Coast Inv. Co., Inc.*, 30 Wn.App. 804, 638 P.2d 609 (1981), as authority. That authority applies only where the trial court *made a decision*. *Id.* at 309 n.2. Obviously if conversion was not argued and the trial court "made no determination," it never made a decision about conversion on which to hang any theory. The same is true of the GET accounts, which were discussed but never argued. BR at 11.

B. Respondent Wrongly Asserts That Certain Findings Must Stand Because I Did Not Quote Them

Ms. Wilson states that certain findings are unreviewable because I did not list them, citing *Bennett v. Brandrug Mfg. Co.*, 1 Wn.App. 183,

184, 459 P.2d 977 (1969). Brief of Respondent (BR) at 15-16. This case is not only old authority, it is obsolete. *Bennett* states that a finding of fact will be a verity on appeal unless it is set out verbatim in the brief. *Id.* The ruling is based on former CAROA 43, which merely stated "the findings of fact made by the court will be accepted as the established facts in the case unless error is assigned thereto." *Kelso v. Consolidated Beverages, Inc.*, 7 Wn.App. 87, 89 fn. 1, 497 P.2d 1336 (1972). *Kelso* is the only case that ever followed *Bennett*, and even *Kelso* did not require a verbatim quote. *Id.* at 89. The Rules on Appeal, superseding the CAROA, require only that a claim of error be raised in the trial court. RAP 2.5(a); they do not require a verbatim quote.

I met the standard of RAP 2.5(a) by assigning error below to the findings that (a) I was in contempt; and (b) my failure to take steps was knowing and willful. CP 10 (Motion for Revision). In addition, I challenged the grant of CR 70 authority when I asked that "the order to turn over property be vacated." CP 10. That order was issued pursuant to Ms. Wilson's motion invoking CR 70. Only by adhering to the ancient and largely ignored ruling of *Bennett* could one say that I have failed to assign error to the application of contempt to the facts of this case.

C. Respondent Wrongly Distinguishes *Britannia*, *Phipps*, and *Snook*

I cited those three cases for the proposition that, as stated in *Britannia*,

...exercise of the contempt power is appropriate only when " *the court finds* that the person has failed or refused to perform an act that *is yet within the person's power to perform...*" Thus, a threshold requirement is a finding of *current* ability to perform the act previously ordered.

Britannia Holdings Ltd. v. Greer, 127 Wn.App. 926, 933-34, 113 P.3d 1041 (2005). Ms. Wilson would distinguish *Britannia* and the other cases because the debtors there had no ability to pay and thus no power to perform. BR at 18. That is off point. My point is that the court has to *decide* whether the debtor has the power to perform.

The commissioner in the Snohomish County Court did not do that in her order. She castigated me for "knowing and willful failure to take steps" (which I of course dispute); however, she never made the threshold finding that I had the present power to perform. CP 15-21. Nor would it be reasonable if she had: I did not have the financial resources at that time to comply with the demands to bring the Chase, Flagstar, and Boals payments current, and even now, nearly a year later, do not have that much cash. I have limited amounts of property, but even were that property marketable at a premium price, it would not produce enough cash to

satisfy the entirety of the commissioner's orders. Eleven months of unemployment devastated my savings, my property, and my resources, and made it impossible for me to comply with the court's orders for which I am held in contempt. I was able to do some of it, and I have complied with the order to that extent.

D. Respondent Wrongly Reasserts That I Acted in Bad Faith

Her statements are a rehash of the rulings and are answered by standing on what I have already said. I would add, however, that this Court has power to "perform all acts necessary and appropriate to secure the fair and orderly review of a case." RAP 7.3 This includes the power to allow additional evidence if it would be inequitable to decide the case solely on the evidence already taken. RAP 9.11(a)(6).

I have already presented such evidence, by pointing out that this recession is the greatest downturn in the economy, especially in the sphere of real estate, since the Great Depression. BA at 17, 22; CP 11. I did not give citations, but we can see the truth of it in the newspaper, on television, and in briefings from the White House and the Fed on the economy nearly every day. That truth is admissible as judicial notice because the fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evidence Rule (ER) 201(b).

Judicial notice may be taken at any stage of the proceeding, ER 201(f), and shall be taken if requested by a party and supplied with the necessary information, ER 201(d). I am requesting it; and I requested it below, both at the hearings and in the Motion for Revision. CP 11. The necessary information is bombarding us every day. The Court could also take judicial notice that lenders will not make refinancing loans to persons with unstable credit--at least, not since the Great Crash of 2007.

The court could also note that new loan guidelines were established in the wake of this now famous real-estate crash and no more than 41% of a person's gross pay may be used for credit payments, whether those debts are secured or unsecured. As more than \$400,000 was owed on the two mortgages, plus about \$100,000 in revolving debt, my gross wages would have had to be \$140,000 per year to have any chance of refinancing the loans for which I am found in contempt. From January 2009 my wages were cut to \$80,000, and then my employment ended entirely that November. During the time that Ms. Wilson says I was not acting with "due diligence" with respect to refinancing these loans, I did consult an expert who said that until my total debt went down to the 41% threshold, there was no point in trying to refinance. *It is impossible to refinance*

a real estate loan while unemployed. No one has disputed that I was unemployed for about a year.

E. The Purge Clause Was Unreasonable in Its Timing

Ms. Wilson attempts to distinguish my cited cases regarding purge clauses, namely *State ex rel. Schafer v. Bloomer*, 94 Wn.App. 246, 973 P.2d 1062 (1999) and *Interest of Rebecca K.*, 101 Wn.App. 309, 2 P.3d 501 (2000). " She asserts that in those cases, jail was an option. I fail to see the significance of the difference: jail was an option here too, but Ms. Wilson did not ask for it. CP 16 at 1.3. The contempt statute does not distinguish between civil and criminal contempt. RCW 7.21.010, .030; *Rebecca K.* at 313. In *Schafer*, the contempt proceeding was entirely civil, with jail not being seriously considered. *Id.* at 253 ("The court's findings speak of the civil nature of the hearings").

The point I want the Court to take away from these citations is expressed in *Schafer* as: "An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt...." *Id.* at 253. I did not have the ability. As I mentioned before, I had been back at work less than a month, had not had my first paycheck, had spent all my savings and most of my liquid assets, and

had been cheated out of pay owed from my prior job.² BA at 20-21. Ms. Wilson asserts that I was allowed to purge my contempt in "specific small steps," BR at 11, but that is not what the order says. It says I am to "bring... the Chase and Flagstar obligations... current." CP 16 at 1.1 B. In the absence of any specified timeline, this would mean to make up the deficit by the next due payment. No "small steps" were allowed for that. At the end of the order, under "Further steps required to purge contempt," it says "Maintain the payments on the Flagstar Bank liability to avoid default." But that obligation was *already* in default and required many thousands of dollars to bring to current status.

F. The Bankruptcy Information Is Pertinent Even If Outside the Record

My bankruptcy case and the findings of the bankruptcy court are supremely material to this case. The bankruptcy filing occurred after the appeal was taken, therefore is not in the record, and therefore, according to Ms. Wilson, is barred from discussion. Not only does that go against common sense, it also ignores this court's power to perform all necessary acts, RAP 7.3, and the right of a party to raise a claim of error for lack of trial court jurisdiction, RAP 2.5(a)(1).

² I sued for those back wages and won; however, even today the money is not forthcoming. The bankruptcy court considers the debt uncollectible.

The trial court of course had jurisdiction on Oct. 28, 2010, because the bankruptcy case had not yet been filed, but if the case is remanded for further proceedings, the trial court's hand may be stayed by the bankruptcy court's decisions. 11 U.S.C. § 362.

There is also the question of this Court's jurisdiction, which may be raised at any time under RAP 2.5(a). I believe I already raised the question, but I raise it again: If the bankruptcy court makes an order affecting the issues herein by the time of the hearing in April, I will present it.³ My position is that it will moot any decision of this Court that conflicts with it. 11 U.S.C. § 362.

Ms. Wilson asserts that I filed bankruptcy "in spite of" the restrictions placed on my property. On the contrary, the restrictions were that I was not to deplete or encumber my assets. BR at 8. As I explained, I filed to keep assets from being foreclosed. It is a fundamental right of any American citizen to seek protection and aid from any court for legitimate purposes. The stay order from the bankruptcy court protected both Ms. Wilson and me for the time necessary to secure the short sale and resolve both the Chase and Flagstar loans.

³ RAP 18.14 authorizes a Motion on the Merits regarding developments affecting the Appellate Court's jurisdiction. The bankruptcy court is expected to rule in December on whether to approve my Chapter 13 plan.

G. Deferral of the CR 70 Order Would Leave No Issues in This Court

Ms. Wilson is correct that a motion in a brief must be one that would preclude a hearing on the merits. RAP 17.4(d). That said, my motion to defer the CR 70 order to the bankruptcy court is just such a motion. Note that all three hearings resulted from Ms. Wilson's Motion to Enforce the Decree. BR at 6 ("Ms. Wilson asked the Commissioner for Civil Rule 70 authority...."). CR 70 was the vehicle of enforcement. CR 70 was also the vehicle by which the court ordered costs against me and found me in contempt. All those powers are subsumed under CR 70 as part of its sweeping powers to enforce a judgment⁴, and therefore are the basis of the trial court's rulings against me.

H. A Fee Award to Me Is Warranted

Assuming I prevail, there are equities on my side at least as good as the equities Ms. Wilson expounds on her behalf. I am not an attorney, but I too have had to use my professional time to work on my case, plus I paid fees to paralegals for help in preparing my briefs.

I think it is worth restating that Ms. Wilson got \$87,000 in cash out of the divorce when I handed over a cashier's check. Despite her gripe about my taking that money from the line of credit, the fact of the matter

⁴ "...[T]he court may direct the act to be done at the cost of the disobedient party...."; "The court may also... adjudge the party in contempt." CR 70.

was that this was a time of financial crisis when even highly paid professionals were having their credit lines reduced. It was my considered business opinion that this was likely to happen to our line of credit too. Withdrawing the money protected it; she got it; and I was ordered to repay it.

Ms. Wilson's actions are in fact the proximal reason I was driven to bankruptcy. We had a prenuptial agreement that stipulated how I would be allowed visitation with my daughter in the event of a divorce. She breached that contract, and the ensuing attorney fees to try to gain some access to a child whom I dearly love, and to whom I have been the only father since the age of 4 months, are a large source of my financial distress.

On the contempt of court charge, even though the penalty is only \$100, it can materially affect me in my business. I start biotechnology and medical device companies for a living. Any prospective investor who does a search on me is going to find that contempt charge and be influenced by it.

I. The Equities Do Not Favor an Attorney Fee Award to Respondent

If I do not prevail, my arguments in Section H above should indicate that comparative hardships do not justify an attorney fee award to Ms. Wilson. RCW 26.09.140 requires consideration of the comparative resources of the parties.

Nor does intransigence apply here. I have already been sanctioned in the court below for alleged footdragging (although the term "intransigence" was never used), and to sanction me again is a double penalty. Under RCW 26.09.140, this Court *can* (but is not required to) use intransigence at trial to support a fee award. *Mattson v. Mattson*, 95 Wn.App. 592, 606, 976 P.2d 157 (1999). It would be unfair to double my penalty unless my appeal is itself an instance of intransigence. That would imply that it was frivolous. It is not frivolous, however, to appeal an order that, it is argued, (a) was an abuse of discretion, (b) lacked proper findings of fact, including a threshold finding, (c) contained an impossible purge clause, (d) may be mooted or partly mooted by the bankruptcy court, and (e) stands to hurt me in my business, thereby making it still harder to comply.

CONCLUSION

I stand to suffer financially from a contempt of court charge that I contend was imposed in abuse of discretion because the financial milieu—and my particular plight--were ignored by the court. I am proceeding to comply with the court's enforcement order, but it is slowed by my lack of funds and will likely be slowed even more, to the damage of both myself and Ms. Wilson, if/when my business relations are affected by that blot on my public record.

I contend also that the findings of the Federal Bankruptcy Court may render moot many of the decisions of this court, at least to the extent they are inconsistent.

I contend that if I prevail, the equities on my side entitle me to an award of attorney fees and costs.

Respectfully submitted this 14th day of October, 2011.

A handwritten signature in black ink that reads "Michael A. Tippie". The signature is written in a cursive, flowing style.

Michael A. Tippie
Petitioner *pro se*

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CERTIFICATE OF SERVICE

TO: Clerk of the Court;
AND TO: Mary V. Wilson

I, Brian J. Roberts, hereby certify under penalty of perjury pursuant to Washington state law that on October 14, 2011, I caused a copy of REPLY BRIEF OF APPELLANT to be served upon the following party herein by placing it in the United States Mail, postage prepaid, return receipt requested, to:

Mary V. Wilson
13318 31st Ave. NE
Seattle, WA 98125

DATED this 14TH day of October 2011 in LAKewood, Washington.



Brian J. Roberts