

66525-1

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

CECIL T. HERRIDGE, Appellant

v.

STACEY A. HERRIDGE, Respondent

BRIEF OF RESPONDENT

APPEAL FROM ISLAND COUNTY SUPERIOR COURT

HONORABLE VICKIE I. CHURCHILL

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I. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court abuse its discretion by declining to vacate the final Order of Child Support from a modification proceeding when the Appellant did not properly apply for a stay under the Servicemembers Civil Relief Act?
2. Did the court abuse its discretion by declining to vacate the final Order of Child Support when the Appellant asserted his non-attorney wife should have been able to argue his case in court?
3. Did the Appellant waive the issue of conflict of interest and fail to preserve the issue for appeal by failing to appeal an order denying a motion for disqualification and failing to raise the issue again until 2 ½ years later?
4. Should the Appellant's request for attorney's fees be denied?
5. Should the Respondent be awarded attorneys fees?

II. RESTATEMENT OF THE CASE

The matter on appeal is the court's denial of the Appellant's motion to vacate a final order of child support entered on 11/16/09 in a proceeding for modification of child support and parenting plan. Specifically, the Appellant disagrees with the trial court's determination that he did not properly apply for a stay of proceedings under the

provisions of the Servicemembers Civil Relief Act (hereafter referred to as “SCRA”).

The parties, Stacey Herridge and Cecil Herridge, were divorced on 12/21/04, at which time a final Order of Child support and Parenting Plan were entered concerning their two children. CP 303-309, 316-323. Ms. Herridge, the primary residential parent, is a single parent and lives with the children in Florida. Mr. Herridge is enlisted in the U.S. Navy. On April 25, 2008, Ms. Herridge filed a petition to modify the parenting plan and to modify child support. CP 293-299.

On May 27, 2008, the Court heard Ms. Herridge’s motion to address adequate cause, temporary child support, temporary parenting plan, and transportation issues. CP [--].¹ At the May 27, 2008 hearing, Mr. Herridge was represented by an attorney, Paula McCandlis, and the court ruled on the temporary support and parenting plan. *Id.* On May 29, 2008, (before the temporary orders from the previous hearing were noted for presentation), Mr. Herridge, acting *pro se*, filed a motion requesting a

¹ Respondents have filed a Supplemental Designation of Clerk’s Papers with the Island County Superior Court and the Washington State Court of Appeals, Division One. Respondents are supplementing the Clerk’s Papers to include (1) Judge Churchill’s Order re: Motion to Vacate Final Orders filed December 10, 2010, (the order on appeal); (2) Clerk’s minutes dated May 27, 2008; (3) Mr. Herridge’s Motion and Declaration for Temporary Order re: Daycare filed August 6, 2008; (4) Ms. Herridge’s Motion to Compel Production dated October 1, 2008; and (5) Mr. Herridge’s Note for Calendar (Motion to Vacate Final Orders) filed December 11, 2009.

deviation in the temporary order of child support based on the whole family method (due to having another child with his current wife). CP 286-289. In that motion, he also requested the Court to disqualify Ms. Herridge's attorney for an alleged conflict of interest. *Id.* The Court specifically denied the motion for disqualification as set forth in an order dated June 16, 2008, and granted Mr. Herridge a temporary deviation in the order of child support. CP 268-270. Although the Court granted the temporary deviation, the Court pointed out that Mr. Herridge had not provided what other income his wife had. RP 6/9/08, p. 6.

Mr. Herridge did not move for reconsideration of the June 16, 2008, order denying the motion for disqualification, nor did he appeal it. On July 16, 2008, Ms. Herridge's attorney sent Mr. Herridge a First Set of Interrogatories and Request for Production of Documents. CP 199. These interrogatories and requests for production specifically asked for information about Mr. Herridge's wife's income relevant to the deviation issue as well extra income from Mr. Herridge's deployments. CP 200-203. Mr. Herridge did not answer the interrogatories, but did file a motion requesting reimbursement of daycare. CP [--]. The motion was heard on August 18, 2008 and the Court awarded Ms. Herridge \$500 in attorney's fees after finding that Mr. Herridge filed the motion without basis. CP 240-241. Mr. Herridge did not pay the fees. CP 193.

On October 1, 2008, Ms. Herridge's attorney filed a motion to compel discovery due to lack of response to the interrogatories and requests for production. CP [--]. In response to the motion, Mr. Herridge's wife, Barbara Herridge, filed a declaration with the court indicating that her husband was deployed, and asking that the motion be denied due to his absence. CP 242-243. Barbara Herridge referred any further matters to Mr. Herridge's command and stating that further contact with her about the case was "harassment." *Id.* After being informed that Ms. Herridge was on deployment, the attorney for Ms. Herridge voluntarily struck the motion to compel and it was not heard. CP 239. According to the information provided by Barbara Herridge, Mr. Herridge had left for deployment on September 9, 2008, long after the interrogatories were due. CP 244. Mr. Herridge returned from that deployment on March 14, 2009. CP 194. However, Mr. Herridge did not answer discovery or otherwise take action in the case.

On November 5, 2009, the Respondent's attorney filed a motion for a final hearing on both the parenting plan and child support modification matters. CP 237-238. Ms. Herridge's declaration in support of the motion addressed, among other things, her request that the whole deviation be denied in the final papers. CP 193. Specifically, Ms. Herridge pointed out that, in the motion for temporary orders, Mr.

Herridge had submitted a tax return showing that this family's total income for 2007 was \$88,852. *Id.* Ms. Herridge pointed out that Mr. Herridge did not submit a complete financial declaration showing his spouse's income, including the child support she receives. *Id.* In addition, Ms. Herridge pointed out that Mr. Herridge had not responded to discovery regarding his wife's income. *Id.*

Ms. Herridge's motion for a hearing on the child support and parenting plan matters was noted for 11/16/09. CP 150-151. Mr. Herridge received the copy of the motion on November 3, 2009. CP 49-50. Three days later on November 6, 2009, Mr. Herridge signed and filed a response to the motion. CP 147-149. In his declaration, he stated that he was not going to be able to attend the hearing on November 16, 2009, due to deployment. CP 147. A letter from his command was attached. CP 149. The redacted letter by C. R. Fowler was dated October 30, 2009 and simply stated "A01 Herridge is an active member of the U.S. Navy and attached to _____[redacted]. He will be deployed November 2009 to June 2010." *Id.* Mr. Herridge did not actually deploy until November 13, 2009, after his response was due to be filed in court. CP 76-85, Island County LCR 6(d).

On November 16, 2009, the day of the scheduled hearing, counsel for Ms. Herridge appeared in Island County Superior Court, Judge Vickie

Churchill presiding. RP 11/16/09, p. 1. Mr. Herridge did not appear. Counsel for Ms. Herridge had received Mr. Herridge's declaration with the attached letter from Mr. Herridge's command. *Id.*, p.2. Counsel brought the letter to the attention of the judge and indicated that the redacted letter did not conform with the Servicemembers Civil Relief Act, pointing out that the required language and information was not in the letter. *Id.* The Court asked what the required language was and counsel read from the statute, providing a copy to the Court. *Id.*, pp. 2-3. The Court indicated that the letter did not comply. *Id.*, p. 3. Counsel then explained to the Court the relief that was being requesting with regard to both the parenting plan and the child support. The court entered the final Order of Child Support and modified Parenting Plan. *Id.*, pp. 3-5. Mr. Herridge was not defaulted. Instead, he was given notice of a final hearing and final papers were entered.

Mr. Herridge did not file a motion for reconsideration within 10 days of the November 16, 2009, orders and did not file an appeal. Instead, Mr. Herridge filed a motion to vacate final orders on December 11, 2009 and the motion was noted for 12/28/09. CP [--].

On 12/28/09, counsel for Ms. Herridge appeared in Island County Superior Court, Judge Alan R. Hancock presiding. RP 12/28/09, p. 1. The Court acknowledged that Mr. Herridge was making the motion and

wanted it heard that day. *Id.*, p. 2. However, the Court did not permit his wife (who held a power of attorney) to make oral argument because she is not an attorney. *Id.* Counsel for Ms. Herridge argued to the Court that the time for reconsideration had elapsed and the proper procedures for a motion to vacate under CR 60 had not been followed. *Id.*, p. 3. In addition, counsel pointed out that Mr. Herridge had not been defaulted and did, in fact, have time to file a response to the motion prior to leaving. *Id.* Judge Hancock indicated that he had carefully reviewed the record in the case and agreed that the time for reconsideration had elapsed and that the proper procedures under CR 60 to bring a motion to vacate had not been met. *Id.*, pp. 3-4. The Court stated:

The Court was well within its authority and discretion to enter the previous order. Mr. Herridge did not comply with the Servicemembers Civil Relief Act in seeking the stay previously. He was not defaulted, as Mr. Lyons pointed out. Accordingly, I'm going to deny his motion.

Id. The Court awarded attorney's fees of \$500 to Ms. Herridge under CR 11 due to the fact that Mr. Herridge's motion was "not supported by any proper factual investigation." *Id.*, pp. 4-5, CP 87-88. Mr. Herridge did not bring a motion for reconsideration or an appeal. Mr. Herridge did not pay this second judgment for attorney's fees. CP 41.

Mr. Herridge did not take any further court action between December 28, 2009 and September 27, 2010. He also refused to pay the

new amount of child support that was ordered in the Final Order of Child Support entered on November 16, 2009. CP 41. On September 27, 2010, his new attorney, Paula Plumer, filed a motion to vacate the 11/16/09 final orders and the 12/28/09 Judgment for Attorneys fees under, *inter alia* CR 60 (b) (6). CP 66-68. The hearing took place on November 8, 2010 and the report of that proceeding is not part of the record. The Court issued a written ruling dated 12/10/10. CP [--]. In the ruling, the Court denied Mr. Herridge's request to vacate Judge Hancock's order or the final Child Support Order. *Id.* The Court did grant the motion to vacate the parenting plan because "Mr. Herridge was entitled to an evidentiary hearing on the modification of the parenting plan." *Id.* However, the court indicated that Mr. Herridge had not requested to present oral testimony on the child support matter pursuant to RCW 26.09.175 and had not properly applied for a stay of proceedings under the Servicemembers Civil Relief Act to stay proceedings. *Id.* The Court awarded attorneys fees to Ms. Herridge again under CR 11 in the amount of \$750. *Id.* Mr. Herridge filed this appeal.

III. ARGUMENT

- A. *An appellate Court Reviews a CR 60 (b) ruling for abuse of discretion.*

Mr. Herridge's Motion to Vacate dated September 24, 2010, cited various authorities as grounds for relief (RCW 26.33.040 (an adoption statute), RCW 73.16.070 (applying the SCRA to all proper cases in Washington), Island County Local Rules 16 and 7, CR 8, CR 52, CR 60 (b) (6) and the SCRA). CP 66-68. Although the Appellant does not specifically discuss the authorities to vacate in his opening brief, the only possible one would be CR 60 (b) in this case. However, in the motion to vacate, the Appellant cited CR 60 (b) (6), stating the judgment was "void." CP 67. Presumably the Appellant intended to cite CR 60 (b) (5). CR 52 does not apply because a motion to vacate the 2009 order, based on a lack of findings, would have to be brought within the time limit for appeal. No appeal was brought within 30 days of the 2009 order.

This court reviews a CR 60 (b) ruling for abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's determination on a motion to stay proceedings is discretionary and is reviewed only for abuse of discretion." *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 16 P. 3d 45, 50 (2000).

B. Judge Churchill did not abuse her discretion by declining to vacate the final Order of Child Support.

In his opening brief, Mr. Herridge argues that a stay of the entire proceedings should have been granted under that SCRA and that the application for the stay was adequate. Mr. Herridge acknowledges in his brief that the request for a stay under the SCRA is mandatory “if the motion includes the information required by the statute for the court to determine whether a stay is needed.” Brief of Appellant, p. 10. The relevant portion of the SCRA, 50 U.S.C. App. § 522 addressing the information required for an application for a stay is as follows:

- (b) Stay of proceedings
- (1) Authority for stay

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

- (2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

- (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
- (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance

and that military leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. § 522 (b). In his brief, Mr. Herridge states why he thinks Judge Churchill was wrong in denying the stay:

There is no dispute that the father was deployed on active duty and that he requested a stay, that he verified his deployment with a letter from his commanding officer, and that he was deployed overseas until June, 2010. The declaration father and CO Fowler, (CP 147-149) were filed before the hearing. To conclude that the letter was insufficient was error (Order on Motion to Vacate, COL #14, 21 and 24).

Brief of Appellant, p. 12. However, the Appellant does not show how he met the requirements of §522 in requesting the stay. The redacted application for the stay simply stated “A01 Herridge is an active member of the U.S. Navy and attached to _____[redacted]. He will be deployed November 2009 to June 2010.” CP 149. The letter from C. R. Fowler and the declaration from Mr. Herridge filed on November 6, 2009, do not state a date when Mr. Herridge would be available to appear as required by the Act. CP 147-149. The letter did not indicate when in November, 2009, Mr. Herridge was leaving. The letter from C. R. Fowler also does not state that military leave is not authorized for the servicemember or that military duty prevented appearance. The declaration from Mr. Herridge and the attached redacted letter from his

commander simply do not have the information required by § 522 of the Act. Thus, it was not an abuse of discretion for Judge Churchill to decline to vacate the order under CR 60.

The Appellant has not cited any authority to show that the application for a stay was adequate to fulfill the requirements of the Act. Apparently the Washington courts have not had to address this issue. However, courts in other states have addressed the issue. These decisions further illustrate that Judge Churchill did not abuse her discretion. In *City of Pendergrass v. Skelton*, 278 Ga. App. 37, 628 S.E. 2d 136 (2006), the Court of Appeals in Georgia specifically analyzed the adequacy of an application for a stay under the Servicemembers Civil Relief Act. In that case, a letter from the defendant's commanding officer was attached to the motion for a stay indicating, "Skelton is a member of my command and is currently attending training at Fort Irwin, CA until 30 April 2005. Due to the circumstances of training SPC Skelton is unable to attend any legal proceedings." *Pendergrass*, 628 S.E. 2d at 138. The Court addressed the sufficiency of that application. After citing the provisions of § 522 of the Act, the court stated:

Although earlier cases construing the Soldiers' and Sailor's Civil Relief Act have stated that a request for relief under the Act could be upon a bare statement of active military service, [cite omitted], Congress has now amended the Act

to require that servicemembers include in their stay applications specific information supporting their request. *King v. Irvin, supra*, 273 Ga. Ap. At 67, 614 S.E.2d 190...The commanding officer's letter did not mention whether or when Skelton would be deploying to Iraq, and did not state that Skelton could not take leave after that date. Therefore, we find that the application was not sufficient under the Act...

Id., at 140. Thus, as the *Pendergrass* court noted, the law is not the same as it was previously under the Soldier's and Sailors Civil Relief Act. A service member must include specific information in the stay application. *See also In re Walter*, 234 S.W.3d 836 (Tex. 2007). In *Pendergrass*, as in this case, the commanding officer's letter did not specifically state exactly when the servicemember was deploying and did not state he could not take leave after that date. Thus, Judge Churchill did not abuse her discretion in denying the stay and did not abuse her discretion in declining to vacate the final child support orders.

Mr. Herridge points out that the court received additional letters requesting a stay from Mr. Herridge's Command dated December 1, 2009 and December 27, 2009. Brief of Appellant, p. 12. However, the final orders had already been entered prior to these letters being submitted. There were no proceedings to stay.

Mr. Herridge also contends that the Court's ruling is not consistent with the Act in that the Court found that Mr. Herridge had waived reliance

on the SCRA when he filed his motion to vacate on December 11, 2009. Brief of Appellant, p. 13. Mr. Herridge points out that the Act permits a service member to request a stay without waiting defenses. However, the issue is not whether Mr. Herridge waived a defense. The issue is that he filed papers requesting a stay and then filed his own motion requesting affirmative relief. He cannot stop and start proceedings at the same time.

The Appellant also complains that the Court advised him in June of 2008 that he could give testimony at trial if he filed a motion to present testimony at trial. Brief of Appellant, p. 14. However, that hearing took place in June 2008, and the final orders were entered in November of 2009. Mr. Herridge never requested a hearing with oral testimony on the child support matters pursuant to RCW 26.09.175. He had ample time to do so.

Mr. Herridge also argues that the relief granted to the mother in the final orders prejudiced the father because it was beyond the scope of the relief requested in her petition. Brief of Appellant, p. 14. Mr. Herridge states that Ms. Herridge requested that the support be modified “consistent with the modified parenting plan.” However, the request was that the Court enter an order “establishing child support in conjunction with the proposed parenting plan...” CP 298. The argument does not have any

merit. The request for relief simply states that the mother was asking that the court modify child support as well as the parenting plan.

Finally, Mr. Herridge generally argues that it was error to deny the father a deviation in the Order of Child Support based on his other minor child. A trial court's decision to award child support is reviewed for abuse of discretion. *In re Marriage of Pollard*, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000). Mr. Herridge states that this request for deviation was not proposed or granted in the final order and that he was prejudiced by the argument and facts presented by the mother's attorney at the final hearing. Brief of Appellant, 15. He complains about Ms. Herridge's attorney's statement to the court that Mr. Herridge had not conducted discovery, yet the record does not indicate that Mr. Herridge conducted discovery. Again, the standard is abuse of discretion. In her moving papers, Ms. Herridge set forth many reasons why the deviation should be denied. CP 193. The Court set forth numerous reasons in the decision as to why the deviation should not have been ordered. CP [--]. The court found that Mr. Herridge was intransigent by failing to provide updated Leave and Earnings statements to the court, failing to provide a financial declaration, and failing to provide financial information concerning his wife's income or the child support she receives. *Id.* This was not an abuse of discretion. Mr. Herridge failed to answer interrogatories and requests for discovery

upon his return from deployment and otherwise declined to take action on the case.

The Appellant has not shown that Judge Churchill's decisions were exercised on untenable grounds or for untenable reasons.

C. The Court did not abuse its discretion by declining to vacate the order on the grounds that Mr. Herridge's wife was not allowed to argue his case in court.

The Appellant has assigned error based on his assertion that his wife should have been permitted to argue his case in court at the December 28, 2009, hearing. Brief of Appellant, p. 15. The appellant does not offer any authority for this proposition and the record indicates that Judge Hancock fully considered Mr. Herridge's motion to vacate. RP 12/28/09, pp. 3-4. In the decision on appeal, the Judge Churchill indicated that it is well-established under Washington law that a person may practice law on his own behalf but "cannot transfer his *pro se* right to practice law to any other person," citing *State v. Hunt*, 75 Wn.App. 795, 805, 880 P.2d 96 (1994). CP [--]. Mr. Herridge cites the SCRA, indicating that a "legal representative" for the purposes of the Act is an attorney or an individual possessing a power of attorney. Brief of Appellant, p. 16. However, the Appellant does not explain how this means that a non-attorney can argue a case in superior court on the law and motions calendar on behalf of a *pro se* servicemember. Mr.

Herridge's wife was not appearing in court at the December 28, 2009, hearing to ask for a stay. She was appearing on Mr. Herridge's motion to vacate final orders. To the extent that Washington's statutes allowing use of powers of attorney would allow the unlicensed practice of law, they are unconstitutional. *See Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443,451-53, 635 P.2d 730 (1981).

Finally, the Appellant cites the SCRA for the proposition that, if the court refuses to grant an additional stay of proceedings, the court shall appoint counsel. Brief of Appellant, p. 16. However, this provision applies to cases where an initial stay has already been granted. 50 U.S.C. § 522 (d) (2). The provision does not apply here because an initial stay was not granted.

D. The Appellant's assignment of error regarding an alleged conflict of interest is not an issue preserved for appeal and has also been waived.

On May 29, 2008, Mr. Herridge specifically filed a motion for disqualification of Ms. Herridge's attorney. CP [--]. The motion was heard and was denied by the court. A transcript of that part of the proceedings is not part of the record on appeal. An order was entered denying the motion for disqualification on June 16, 2008. CP 268-270. Mr. Herridge did not move for reconsideration or file an appeal. Mr. Herridge continued to litigate as a *pro se* without raising the issue again.

When his new attorney entered the case in 2010, she did not re-visit the issue. The Motion and Declaration to Vacate filed on September 24, 2010, does not contain a motion for disqualification or cite it as grounds to vacate the prior orders. CP 66-68. There is no record of proceedings indicating that the issue of disqualification was argued at the hearing on the motion to vacate. The decision on appeal dated December 10, 2010 does not address the issue of disqualification because it was not raised in the motion to vacate. CP [--]. This appeal was filed on January 4, 2011. Counsel for the appellant did not raise the issue of disqualification until it was set forth as one of the issues in the opening brief filed on December 16, 2011. The issue has not been preserved for appeal. Under RAP 2.5(a), an appellate court is not required to review an alleged error if the claim of error is not preserved.

A failure to act promptly in filing a motion for disqualification may warrant denial of a motion. *First Small Business Inv. Co. of Ca. v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987). In *First Small Business*, the court quoted from an 8th Circuit case, *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir.1978):

A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to

the motion. This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed.

First Small Business Inv. Co., 108 Wn.2d at 337. In this case, if the second attorney for Mr. Herridge wanted to re-visit the issue of conflict of interest (although the court had already ruled on the matter in 2008), she could have done so at the hearing on the motion to vacate in 2010. This issue was not preserved for appeal and has also been waived.

E. The Appellant's request for attorneys fees should be denied.

The Appellant requests fees under the SCRA, citing 50 U.S.C. App. §597 (a). This is not appropriate because the Act was not violated. In addition, this statute addresses an aggrieved party bringing a civil action to recover such fees. Mr. Herridge has not brought such an action.

F. The Respondent hereby requests attorneys fees.

Ms. Herridge requests attorneys fees for responding to this appeal based on RCW 26.09.140. RAP 18.1. Determining whether a fee award is appropriate requires the court to consider the parties' relative ability to pay. *In re Marriage of Trichak*, 72 Wn.App. 21, 26, 863 P.2d 585 (1993). The court should also examine the arguable merit of the issues raised on

appeal. *See State ex rel. Stout v. Stout*, 89 Wn.App. 118, 127, 948 P.2d 851, 855 (1997).

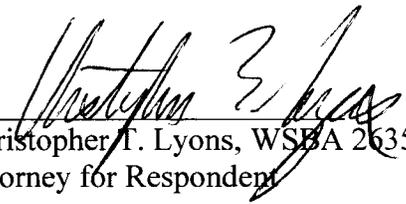
The record in this case indicates that Mr. Herridge has more of an ability to pay than does Ms. Herridge. According to the record in this case, Ms. Herridge's annual income was only \$20,976 in 2008. CP 62-64. Mr. Herridge submitted financial documents in 2010 indicating that his income alone (not including his spouse) ranged from \$5170 to \$5599 per month. CP 28-30.

The Appellant has not raised meritorious issues on appeal. The issue regarding whether or not Mr. Herridge's wife should have been allowed to argue his case in court is frivolous and has no bearing on the outcome of the case. The argument regarding conflict of interest had already been addressed by the court 2 ½ years prior to the issue being raised in an appellate brief. As for the trial court's decision not to issue the stay, the Appellant had clearly not satisfied the requirements under the SCRA and the Appellant has not discussed the standard of review or explained how the court abused its discretion.

G. Conclusion

The Respondent requests that the decisions of Judge Churchill and Judge Hancock be affirmed and that attorneys fees be awarded to the Respondent.

Dated January 16, 2012.



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