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Case No. 69566-5

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

KAREN V. AGARS,

Petitioner/Appellant,

and

ROLLAND M. WATERS,

Respondent/Respondent,

And

CRAY, INC.,

Garnishee,

~~2013 JUN 19 PM 4:30
COURT OF APPEALS DIV 1
STATE OF WASHINGTON~~

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

The central question in this case is whether, when the parties executed their CR2A Agreement, they contracted to satisfy a Judgment previously entered against Mr. Waters and in favor of Ms. Agars. This is a simple matter of contract law: interpreting the parties' CR2A Agreement.

Accordingly, Mr. Waters' arguments to the trial court in support of his motion to quash the Writ of Garnishment were focused exclusively on the text of the CR2A Agreement. CP at 45-47. Mr. Waters also moved the court to enter CR 11 sanctions against Ms. Agars "to deter future bad faith frivolous filings." CP at 48. In support of that motion, he presented documents and information wholly unrelated his motion to quash the Writ. CP at 60-95, 107-109.

In his responsive brief, Mr. Waters continued to argue that the language in the CR2A Agreement is "unambiguous." RB at 26-27. On that matter, the parties agree, despite the fact that they disagree about how the Agreement should be interpreted.

B. MR. WATERS' ATTEMPTS TO DISCREDIT MS. AGARS ARE IRRELEVANT AND UNFOUNDED

Given that the parties agree that the terms of the CR2A Agreement are clear, one might not expect significant evidentiary disputes to arise regarding the interpretation of the Agreement. However, in his responsive brief, Mr. Waters attempted to make Ms. Agars' credibility the crux of his case. RB at 32. Therefore, it is necessary to address Mr. Waters' attack on Mr. Agars' credibility before addressing the core issues in this case.

As established above, Mr. Waters attacked Ms. Agars' credibility at the hearing on Mr. Water's motions. However, he did so in support of his motion for CR 11 sanctions, not in support of his motion to quash the Writ. CP at 48 and 49. To support his motion to quash the Writ, he relied solely on the text of the CR2A Agreement (and the Decree of Dissolution). CP at 45 – 47.

In his responsive brief, Mr. Waters argued that the fact that Ms. Agars did not attempt to collect the Judgment until some years after it was entered is evidence that Ms. Agars "intended" for the Judgment to be extinguished, somehow. However, the fact that the Judgment was not addressed in the CR2A Agreement suggests that both parties, and their respective attorneys, had in fact, forgotten about it when the CR2A

agreement was executed, or had decided that it need not be addressed, among other possibilities not here at issue.

Notably, Mr. Waters took no action to have a Satisfaction of Judgment entered until he was reminded that the Judgment remained unsatisfied. CP at 53, 344.

Despite Mr. Waters' contention that forgetting about the judgment is "unimaginable," it is consistent with Ms. Agars' subsequent behavior. As soon as she was reminded of it, she acted to collect it. Mr. Waters' behavior appeared to be consistent with his having forgotten about the Judgment: he took no action with respect to it, such as requesting entry of a Satisfaction of Judgment, until he was reminded of its existence by his lender. CP at 164, 344. Of course, his failure to take any such action was not inconsistent with the possibility that he was aware of the Judgment and hoped that the applicable statute of limitations would run before any collection activity commenced.

Mr. Waters argued that Ms. Agars' decision to decline addressing Mr. Waters' attacks on her creditability is "conspicuous," implying that, for her to address these attacks, she would be faced with perjuring herself or admitting that she acted in bad faith.¹ In fact, the explanation was

¹ Ms. Agars did respond to Mr. Waters' allegations after the court imposed CR 11 sanctions, but before the court specified the basis and amount of those sanctions.

simpler and was explicit in Ms. Agars' response to Mr. Waters' motion to quash the Writ: his attack on her credibility was irrelevant to deciding the matter. CP at 107-109, 126, and 208.

At the hearing below, Ms. Agars objected to Mr. Waters' motion for CR 11 sanctions, and the evidence presented in support of it, as baseless and irrelevant. CP at 126. In response to Ms. Agars' objections, Mr. Waters contended that Ms. Agars' credibility was an issue. CP at 159-161. However, at the hearings on his motions and on appeal, Mr. Waters failed to present any credible argument and/or authority as to how or why Ms. Agars' credibility is relevant with respect to the interpretation or construction of the CR2A Agreement.

For the first time, in his responsive brief, Mr. Waters argued Ms. Agars' post-dissolution activities serve as a basis for finding that the Judgment was satisfied and, therefore, that she obtained the Writ in bad faith.

Ms. Agars [sic] misrepresentations...were highly probative as to whether she had a good faith belief that the judgment was actually intended to survive the Decree of Dissolution.

RB at 35.

It is notable that Mr. Waters, for the first time on appeal, asked the court to consider the evidence he presented regarding Ms. Agars' credibility as evidence pertaining to the validity of the Writ, yet at the

same time, asked this court not to consider her response to those allegations and not to review the record *de novo*. RB at 38-39.

In response to Mr. Waters' Motion for Order Approving Attorney Fees, Ms. Agars filed a declaration in which she responded to Mr. Waters' various allegations against her. CP at 207-327. Mr. Waters repeatedly complained that it was inappropriate for Ms. Agars to respond to his allegations after the court imposed CR 11 sanctions on her. RB at 37; CP at 339, 344. His complaint is groundless. The order in which the CR11 sanctions were imposed did not include any of the necessary findings on which such an order could be based and reserved the amount of sanctions to be entered. For these reasons, alone, it was appropriate for Ms. Agars to state her objections to the various legal and evidentiary bases upon which the court might enter sanctions and findings to support them.

In his Motion for Order Approving Attorney Fees, Mr. Waters moved the court to "consider incorporating additional sanctions against Petitioner..." (CP at 183-184). In that Motion, Mr. Waters' Motion briefed the court on authority for entering 'additional' CR 11 sanctions against Ms. Agars, as well as the evidentiary basis for doing so. He should not be heard to object to Ms. Agars' response to his motion on the basis that she addressed the same issues.

Mr. Waters stated that “on the question of credibility, [Ms. Agars’] motive and behavior subsequent to the Decree is crucial.” RB at 32.

Mr. Waters misapprehends the crux of this case to be a matter of speculation regarding Ms. Agars’ subjectivity: what was her belief regarding whether the Judgment was “intended” to survive the Decree of Dissolution. “We do not interpret what was intended to be written but what was written.” Hearst Communications, Inc. v. Seattle Times Co., 154 Wash.2d 493, 504, 115 P.3d 262, 33 Media L. Rep. 1993 (2005) quoting J.W. Seavey Hop Corp. of Portland v. Pollock, 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944).

The actual issue is whether the parties contracted to satisfy the Judgment.

Extrinsic evidence cannot be considered: (a) to show a party's unilateral or subjective intent as to the meaning of a contract word or term; (b) to show an intention independent of the instrument; or (c) to vary, contradict, or modify the written word. Hollis v. Garwall, Inc., 137 Wash.2d 683, 695, 974 P.2d 836 (1999). “Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.” Hollis, 137 Wash.2d at 697, 974 P.2d 836. “Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions.” Lynott v. Nat'l Union Fire Ins. Co., 123 Wash.2d 678, 684, 871 P.2d 146 (1994).

Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 129 Wash. App. 303, 311, 119 P.3d 854, 858 (Div. 1; 2005).

Notably, Mr. Waters did not present any evidence establishing that he

“intended” or did not “intend” for the Judgment to survive the CR2A Agreement. Mr. Waters presented declarations signed in August 2012 by himself and David Owen, his former attorney, in which they both claimed that the parties intended the Judgment to be satisfied. CP at 51, 52, and 97. However, these declarations are unreliable and self-serving. They only establish what Mr. Waters wants now, not what he agreed to in the CR2A Agreement.

Mr. Waters stated that the “context rule” is “illuminating.” RB at 32. He cited Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 129 Wash. App. at 311, as follows (emphasis supplied, and internal citations omitted, by Mr. Waters; RB at 33):

The court may consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) *the subsequent conduct of the parties to the contract*, (4) *the reasonableness of the parties' respective interpretations*, (5) *statements made by the parties in preliminary negotiations*, (6) usages of trade, and (7) *the course of dealing between the parties*. Such evidence is admissible regardless of whether the contract language is deemed ambiguous.

In short, Mr. Waters argued, for the first time on appeal, that the CR2A Agreement should be construed in light of the subsequent activities of the parties. In fact, he urges this court that it is “crucial” to do so.

Mr. Waters’ theory of this case on appeal may be summarized as follows: after the parties’ divorce, Ms. Agars acted in bad faith to get, or

attempt to get, money from Mr. Waters. Therefore, Ms. Agars' attempt to collect the Judgment entered against Mr. Waters was in bad faith. Therefore, the Judgment must have been satisfied and the Writ should be quashed.

The record does not support Mr. Waters' contentions that Ms. Agars acted in bad faith at any point in this case. More to the point, his allegations are irrelevant. Mr. Waters presented no authority establishing that the court may use extrinsic evidence to impugn a party's credibility and, on the basis of that, interpret prior facts unrelated to the basis on which the court found the party's credibility to be impugned.

Surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of *specific words and terms used*" and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word."

Hearst Communications, Inc. v. Seattle Times Co., 154 Wash.2d at 503 (emphasis in the original) quoting Hollis v. Garwall, Inc., 137 Wash.2d 683, 693, 974 P.2d 836 (1999).

In the instant case, the parties agree that the language of the contract is "clear" and "unambiguous." RB at 26 and 27. In other words, the parties agree that the meaning of the specific words or terms in the CR2A Agreement are clear. This being the case, extrinsic evidence serves no purpose. Neither at the hearing on his motion, nor on appeal, did Mr.

Waters argue that the extrinsic evidence he presented was, or should be, used to support his interpretation of the meaning of any particular word or phrase in the Agreement. His failure to do so stems logically from the fact that the terms are clear in and of themselves. In the instant case, the only evidence presented regarding the meaning of the terms to which the parties agreed was the CR 2A Agreement, itself.

C. THE STANDARD OF REVIEW

Absent disputed facts, the construction of the separation agreement becomes a matter of law.

McGill v. Hill, 31 Wash. App. 542, 545, 644 P.2d 680, 682 (Div.1; 1982) citing Yeats v. Estate of Yeats, 90 Wash.2d 201, 580 P.2d 617 (1978).

The general rule is that the interpretation of a contract is a question of law. Kelly v. Aetna Cas. & Sur. Co., 100 Wash.2d 401, 407, 670 P.2d 267 (1983). Contracts should be construed to reflect the intent of the parties. Corbray v. Stevenson, 98 Wash.2d 410, 415, 656 P.2d 473 (1982)... Absent disputed evidence concerning the intent of the parties, the construction or legal effect of a contract is determined by the court as a matter of law. Yeats v. Estate of Yeats, 90 Wash.2d 201, 204, 580 P.2d 617 (1978).

Noble v. Ogborn, 43 Wash. App. 387, 390, 717 P.2d 285, 287 (Div. 1; 1986). Mr. Waters argued that, because the CR2A Agreement was entered into within the context of the case involving domestic relations, the abuse of discretion standard applies. His argument is

mistaken.

Interpretation of a decree is a question of law. In re Marriage of Gimlett, 95 Wash.2d 699, 705, 629 P.2d 450 (1981). If a decree is clear and unambiguous, there is nothing for the court to interpret. Byrne v. Ackerlund, 108 Wash.2d 445, 453, 739 P.2d 1138 (1987).

In re Marriage of Bocanegra, 58 Wash. App. 271, 275, 792 P.2d 1263, 1265 (Div. 3; 1990).

In the instant case, the only evidence of the parties' intent is their CR 2A Agreement.

In support of his argument that the court should use an abuse of discretion or substantial evidence standard, Mr. Waters cited to In re the Marriage of Rideout, 150 Wash.2d 339, 77 P.3d 1174 (2003), which he contends stands for the proposition that appellate courts are reluctant to make determinations of credibility "in the context of domestic relations." RB at 20.

Mr. Waters misconstrued the rule. Rideout stands for the proposition that appellate courts will defer to the trial court's assessment of witness credibility in proportion to the degree the outcome of the case depends on it.

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no

determination of witness credibility. *See Smith*, 75 Wash.2d at 719, 453 P.2d 832. However, substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings. *See Rideout*, 150 Wash.2d at 352, 77 P.3d 1174; *Anderson v. City of Bessemer City*, 470 U.S. 564, 574–75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (deference rationale not limited to credibility determinations but also grounded in fact-finding expertise and conservation of judicial resources).

Dolan v. King Cnty., 172 Wash. 2d 299, 311, 258 P.3d 20, 27 (2011), as corrected (Jan. 5, 2012), reconsideration denied (Jan. 10, 2012).

In the instant case, the parties do not dispute the pertinent facts. The evidence consists of primarily of documents which speak for themselves: (1) a Judgment was entered; (2) The parties subsequently executed a CR2A agreement which did not reference the Judgment; (3) a Decree was later entered which incorporated the CR2A Agreement by reference; and (4) several years later, Ms. Agars obtained a Writ of Garnishment to collect the Judgment. CP at 40, 51, and 56.

D. THE JUDGMENT WAS NOT ADDRESSED IN, NOR OTHERWISE “INCORPORATED” INTO, THE PARTIES’ CR2A AGREEMENT

Mr. Waters did not dispute Ms. Agars’ contention that the Judgment was her separate property. Mr. Waters did not attempt to refute Ms. Agars’ argument that, being her separate property, it was not subject

to the parties' CR2A Agreement. Mr. Waters did not directly address Ms. Agars' argument that the Judgment, being her separate property, survived the entry of the Decree of Dissolution.

In support of her argument, Ms. Agars cited as authority Miller v. Miller, 198 Wash. 32, 86 P.2d 758 (1939). In that case, the parties were divorced in an action instituted by the husband and in which the wife did not appear. While the case was pending, the parties entered into a written settlement agreement. The trial court's findings referred to this agreement, and found that 'there is no community property subject to disposition in this case.'

At the time, the wife was carrying a deferred annuity policy. (It is unclear when the husband became aware of this asset.) Apparently, after the parties were divorced, the wife moved the court to declare her annuity to be her separate property and enjoin the husband from asserting any claim or right to it. The trial court entered a judgment in her favor.

On appeal, the husband argued that the trial court erred in its determination that the annuity policy was the separate property of the wife. The policy was not referred to in the written property settlement agreement entered into by the parties prior to the entry of the interlocutory order, nor was it mentioned in the findings or decree entered by the court.

The Court of Appeals found as follows:

As the wife did not appear in the action, it is to be presumed that this finding reflects the testimony of the husband himself. If the policy was not community property, the husband cannot now be heard to assert any claim to it, because, as was said in Ambrose v. Moore, 46 Wash. 463, 90 P. 588, 590, 11 L.R.A.,N.S., 103: ‘* * * when a person prosecutes a suit for divorce, and fails to bring the property rights of the parties before the court for adjudication, he or she waives any right in or to the property of the other spouse.

Miller v. Miller, 198 Wash. at 34.

In the instant case, Ms. Agars was awarded a Judgment, which was her separate property. As in Miller, the parties did not reference that asset in their CR2A Agreement and Decree of Dissolution. CP at 123. They did not have to reference it, after all. As in Miller, that property remains the separate property of the one to whom it belonged: Ms. Agars.

E. THE DECREE DID NOT ‘SATISFY’ THE JUDGMENT

Mr. Waters asserted that, after a property settlement agreement has been incorporated into a Decree, a party may only bring suit on the Decree and not on the settlement agreement itself. His assertion, which apparently was aimed at persuading the court not to review this case *de novo*, is incorrect and irrelevant. The irrelevance of his argument is highlighted by the fact that he briefed the trial court regarding the terms CR2A Agreement.

Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the

enforcement of a judgment, including contempt, and are enforceable as contract terms.

RCW 26.09.070 (6).

Citing Wagner v. Wagner, 1 Wash. App. 328, 332-33, 461 P.2d 577, 580 (Div. 1; 1969) and Furgason v. Furgason, 1 Wash. App. 859, 465 P.2d 187, 188-89 (Div. 1; 1970), Mr. Waters argued that every preceding order in the suit is terminated upon entry of the final Decree of Dissolution. Mr. Waters apparently contends that these cases stand for the proposition that any prior Judgment entered by the court is, in essence, somehow dissolved when a Decree of Dissolution is entered. His contention is incorrect.

Mr. Waters' reliance on Wagner is misplaced. In Wagner, the trial court refused to enter a finding offered by the wife which would have set forth that any temporary support owing at the time of the entry of the decree was collectible, in addition to the alimony awarded. On review, the Court of Appeals found that it was questionable whether any such support was owed and that the trial court's refusal to accept the proposed finding indicates the trial court considered the wife's contention and rejected it.

Unlike in Wagner, in the instant case, the court entered a Judgment prior to the entry of the Decree of Dissolution. Unlike in Wagner, in the instant case, there is no controversy as to whether any amount was owing

by Mr. Waters to Ms. Agars. Unlike in Wagner, in the instant case, there is no evidence that the parties considered the existence of the Judgment when they drafted the CR2A Agreement.

In Wagner, the issue was whether the trial court acted within its discretion when it declined to order the husband to pay the wife temporary support when the existence of the debt itself was questionable. In the instant case, there is no dispute that the Judgment was entered. Also, the parties contracted to assign to each party any property in their possession at the time the CR2A Agreement was executed. CP at 459. In so doing, in essence, they contracted to reaffirm the Judgment owed by Mr. Waters.

In Furgason, after the parties' Decree of Dissolution was entered, the wife moved the court for entry of a judgment for support due pursuant to a previously entered temporary order. The trial court entered the Judgment and the Court of Appeals reversed. Thus, in Furgason, the issue before the court was whether delinquent support payments, which accrued under an order for temporary support, are enforceable after entry of the final decree of divorce when that decree makes no reference to the delinquent payments. Furgason v. Furgason, 1 Wash. App. at 860.

Furgason stands for the proposition that one must reduce any debt owed pursuant to a temporary support order to a judgment prior to, or at the same time as, the Decree of Dissolution is entered. Unlike in

Furgason, in the instant case, the Judgment was entered prior to entry of the Decree of Dissolution. CP at 1-6 and 7-9.

In explaining its decision, the Furgason court stated as follows:

Allowances for temporary support are made *pendente lite*. The order granting them necessarily becomes ineffective upon the termination of the action and the statutory remedies provided for the enforcement of those orders are no longer available.

The plaintiff could have preserved her right to recover the... delinquent payment by bringing the matter to the attention of the trial court prior to the entry of the divorce decree. The court could have then taken the question into consideration in distributing the property of the parties and fixing the future obligation for support.

Furgason, 1 Wash. App. at 860, 861.

The Judgment in dispute in the instant case is a Judgment, not an order. As such, it was not entered “*pendente lite*.” Unlike in Furgason, Ms. Agars obtained the Judgment prior to entry of the Decree of Dissolution. The CR2A Agreement, which is incorporated into the Decree, operates to preserve the Judgment, not release Mr. Waters from it.

With respect to the treatment of the Judgment after entry of the Decree, the facts in Lindsey v. Lindsey, 54 Wash. App. 834, 835-37, 776 P.2d 172, 173-74 (Div. 1; 1989) are somewhat applicable to the ones in this case.

In Lindsey, the wife moved at trial for entry of a judgment for temporary support arrearages. The court found there were arrearages but

declined to enter a Judgment pursuant to them.

In Lindsey, the Court of Appeals held that, upon request before entry of final decree, an obligee parent is entitled to a judgment for temporary child support arrearages unless the trial court makes a specific finding of fact that the support arrearage were properly considered in the property division or that establishes a recognized basis for equitable relief.

Upon request before entry of the final decree, an obligee parent is entitled to a judgment for temporary support arrearages unless the trial court makes a specific finding of fact stating that the support arrearage was properly considered in the property division, or that establishes a recognized basis for equitable relief.

Lindsey v. Lindsey, 54 Wash. App. 834, 836-37, 776 P.2d 172, 173-74 (Div. 1; 1989).

In the instant case, the court actually entered a Judgment prior to entry of the final decree. Following Lindsey, as well as the basic principles of law regarding Judgments and contracts as set forth in Ms. Agars' Opening Brief, this court should find that neither the CR2A Agreement, nor the Decree of Dissolution, specifically provided for Mr. Waters to be released from his obligation to pay the Judgment. Therefore, it stands.

In Lindsey, the record before the Court of Appeals contained no finding to justify denying the request for support arrearages, nor was any tenable reason expressed in the judge's oral remarks supporting such a

denial. Hence, the Court of Appeals reversed the trial court and remanded for calculating the amount of accrued support delinquent on the date of trial and for entry of a judgment in that amount.

F. THERE IS NO BASIS ON WHICH TO UPHOLD THE ORDER QUASHING THE WRIT

In his responsive brief, Mr. Waters maintained the posture that the CR2A Agreement was “all inclusive.” CP at 27. Ms. Agars disagreed that it was “all inclusive” insofar as Mr. Waters meant, by that phrase, that it included terms not specified in the CR2A Agreement.

The CR2A Agreement included a provision (paragraph 18) for the allocation of assets not listed in the table of the parties’ assets and debts: they were awarded to the party in possession of that property. CP at 121-122, and 459. In that paragraph 18 served as a kind of catch-all, the CR2A agreement was “all inclusive.” Ms. Agars contended that, if the Judgment is addressed in any way by the CR2A Agreement, paragraph 18 reaffirms that the Judgment is awarded to her. CP at 121-122. Mr. Waters failed to address this contention.

In fact, Mr. Waters did not, at any point in this case, specify which paragraph of the CR2A Agreement allegedly operated to satisfy the Judgment. Nor did Mr. Waters address how the parties’ other separate property and community property not listed in the CR2A Agreement

would be treated under the agreement, if not pursuant to paragraph 18.

Mr. Waters' declined to rebut any of Ms. Agars' arguments regarding the finality of Judgments and their distinguishability from 'claims,' 'reimbursements,' and 'attorney fees.' Mr. Waters declined to rebut Ms. Agars' contention that the trial court's decision was based on speculation and the erroneous application of law. The court may conclude that Mr. Waters was unable to rebut the above referenced arguments and that he effectively conceded that they are correct.

G. MR. WATERS FAILED TO PRESENT ANY VIABLE BASIS ON WHICH THIS COURT MIGHT UPHOLD THE TRIAL COURT'S ENTRY OF CR 11 SANCTIONS

Mr. Waters made numerous allegations against Ms. Agars in support of his motion for entry of CR 11 sanctions against her. CP at 39-44. Notwithstanding Mr. Water's statements to the contrary, Ms. Agars objected to these allegations, and the evidence presented in support of them, as irrelevant to the issue of whether the Writ should be quashed. CP at 108, 109, 125, and 126.

Ms. Agars moved the court for entry of CR 11 sanctions against Mr. Waters for presenting such evidence as it was neither relevant to the matter of the whether the Judgment remained unsatisfied, nor competent to support CR 11 sanctions. CP at 107-110,

Notably, the trial court struck proposed findings regarding these allegations from its Order dated October 17, 2012 (CP at 176) and declined to enter any finding regarding Mr. Waters' allegations in its order dated November 6, 2012 (CP at 396-397). It is also notable that Mr. Waters' allegations of Ms. Agars' bad faith occurred years after the CR2A Agreement was executed. CP at 39-44.

After the court found that Ms. Agars violated CR 11, but before the court entered sanctions, and findings as to the basis of these sanctions, Ms. Agars presented a point by point rebuttal of the allegations made by Mr. Waters. CP at 207-328. Those points were reiterated in Ms. Agars' Opening Brief and will not be delved into here in detail. OB at 33-44.

Mr. Waters did not attempt to refute Ms. Agars' rebuttal of his accusations. Instead, he complained that she presented it and asked this court to ignore it. RB at 37-39; CP at 339-342. As established above, Ms. Agars' rebuttal was properly before the court. Mr. Waters did not move the court to strike the declaration in which Ms. Agars presented her rebuttal and the propriety of the trial court's consideration of it is not an issue in this appeal. OB at 2-3.

In his responsive brief, Mr. Waters failed to identify any document which could serve as the basis for the sanctions entered against Ms. Agars. Likewise, he failed to state the manner in which any such document in the

record violated CR 11. The court may conclude that Mr. Waters conceded he is unable to do so. Therefore, this court should not remand this issue to the trial court for entry of additional findings of fact as doing so will serve no purpose.

Mr. Waters did not contest Ms. Agars' argument that, for his motion for CR 11 sanctions to prevail, he had the burden of showing that it was "patently clear" that Ms. Agars' claim had "absolutely no chance of success."

H. MR. WATERS APPARENTLY CONCEDED THAT THE COURT ERRED WHEN IT ORDERED THAT HIS LEGAL FEES AND COSTS "SHALL CONTINUE TO ACCRUE AFTER JUDGMENT, THROUGH COLLECTION, APPEAL, OR BANKRUPTCY."

Mr. Waters was silent as to Ms. Agars' contention that the court erred when it ordered that his legal fees and costs "shall continue to accrue after judgment, through collection, appeal, or bankruptcy." This court may, and should, conclude that he concedes that claim.

I. THIS CASE SHOULD NOT BE REMANDED TO AN ARBITRATOR

In the conclusion of his responsive brief, Mr. Waters requested that this court affirm the trial court's orders. RB at 44. Yet, in the body of the brief, he argued that "any dispute arising Post-Decree [sic]... shall be

submitted to binding arbitration.” CP at 30-31.

Mr. Waters moved the trial court to resolve the dispute in this case and it did so. CP at 38, 175, and 395. He should not be heard, now, to suggest that the trial court lacked jurisdiction to hear the matter. Mr. Waters did not appeal the trial court’s decision and Ms. Agars did not allege any error regarding the trial court’s jurisdiction. CP at 398; OB at 2-3.

The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

RAP 2.4 (a)

Mr. Waters’ argument that this matter should be remanded to an arbitrator is unfounded. As Ms. Agars argued at the hearing on the Motion to Quash, the provision of the CR2A Agreement to which Mr. Waters refers concerns disputes as to drafting final orders, only. CP at 123. No such disputes arose and, therefore, that provision has no application to the issues on appeal.

J. MR. WATERS' REQUEST FOR ENTRY OF SANCTIONS BY THE COURT OF APPEALS PURSUANT TO RAP 18.9 AND CR 11 IS UNFOUNDED

This appeal is well founded and far from frivolous, a fact indicated by Mr. Waters' failure to address many of the arguments raised by Ms. Agars in her Opening Brief. There is absolutely no basis for awarding sanctions against Ms. Agars, or her attorney, for bringing this case.

K. CONCLUSION

The trial court erred in finding that the Judgment in this case had been satisfied and that Ms. Agars acted in bad faith in attempting to collect it.

Among other relief, the court entered an order that Mr. Waters' legal fees and costs "shall continue to accrue after judgment, through collection, appeal, or bankruptcy" even though Mr. Waters had not moved the court for such relief. In fact, relief of this nature is clearly unlawful.

Ms. Agars asks this court to reverse the trial court's orders and remand this case to the trial court for the sole purpose of enabling the process of collecting the Judgment to go forward. This court should also enter a Judgment against Mr. Waters for Ms. Agars' attorney fees on appeal.

DATED June 13, 2013



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