

71344-2

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No. 713442

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CARLA D. BIERLINE,
Petitioner

v.

TODD J. BIERLINE,
Respondent

REPLY OF APPELLANT - **CORRECTED**

Presented by:
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~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~

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I. APPELLANT'S REPLY

A. The Appellant Did Not Waive Appellate Review, and This Court Has the Authority to Review a Claim of Error That Was Not Raised at the Trial Court Level.

RAP 2.5 (a) does give this Court the option to refuse review for any claim of error that was not raised in the trial court. And generally, a court will refuse to review such claim if it does not fall into one of the stated exceptions listed. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Though, such a decision by the court is permissive and not a requirement.

The stringency of RAP 2.5 (a) is mitigated by the overarching rules of interpretation under RAP 1.2 (a) and (c). Under RAP 1.2 (a), it is stated that the rules are to be “liberally interpreted to promote justice and facilitate the decision...on the merits.” Under RAP 1.2 (c), it is stated that “the appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice.” Petitioner contends that the present matter warrants such consideration by this court.

The purpose underlying the court’s insistence on issue preservation is to encourage “the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Preservation of issues serves this purpose by ensuring that a trial court has an opportunity to correct errors to avoid unnecessary appeals. *Id. see also McFarland*, 127 Wn.2d at 333.

The Respondent argues that Petitioner waived its right to appeal the issues on review for failure to respond to his motion to quash the order for examination and halt further enforcement proceedings. Respondent's Brief, p. 3. However, he fails to address the fact that this was due to his own actions. As is evidenced by the record, Respondent noted two separate motions on the same day. CP 31 and CP 33. In one note, he placed the matter on the docket of Judge Catherine Shaffer. CP 31. In another note, he placed the same matter on the docket for non-assigned cases as a non-dispositive motion without oral argument. CP 33. Petitioner only received the note for motion and materials as to the motion scheduled under non-assigned cases (CP 33). No note for motion for Judge Shaffer (CP 31) was ever served on Petitioner – as evidenced by the lack of any declaration of mailing in the record.

The motion scheduled under the non-assigned cases note (CP 33) was to be heard by Judge Jay White. However, Judge White's bailiff contacted Petitioner's counsel to inform him that the matter would not be heard because it was improperly noted. Based on the information provided by the court, Petitioner's counsel was waiting for the matter to be re-noted and/or re-served. This never occurred. Rather, Respondent obtained an order through the alternate motion that he scheduled, yet never served –

depriving the Petitioner of due process. This is the reason why the motion was unopposed at the trial level.

Petitioner did not file a CR 60(b) motion to vacate, and it will move to do so should this Court decide not to review the claims of error. However, after reviewing the arguments by Respondent in its motion and researching the legal precedent, it became clear to Petitioner that the issue of when the statute of limitations begins to run on an unvested award is one that has not been adjudicated. Accordingly, Petitioner elected to appeal. She did so because the inevitable result of vacating and rehearing the motion would result in an appeal, regardless of who is victorious - an outcome that requires considerably more time and money by the parties. Accordingly, Petitioner's decision to elect this option is in line with the court's stated interest of judicial efficiency.

Moreover, this court can either waive or liberally construe the rules to promote justice and facilitate a decision on the merits, as is allowed under RAP 1.2(a) and 1.2(c). This is warranted here. If this Court declines to review this matter, then the Petitioner will be damaged as she has not been afforded a reasonable opportunity to contest Respondent's position. Further, at its core, this matter deals with how the period of enforceability is defined with respect to a judgments. A further definition by the courts as

to how the statute of limitations operates with unvested awards is necessary for the Washington legal system as a whole.

For these reasons, Petitioner requests that this Court uses its discretion to allow the claims of error to be heard at this time.

B. Respondent Incorrectly Relies on Precedent in *Bank of America, N.A. v. Owens* and *Stokes v. Polley*.

The issue in this matter is not about a statute of limitation on an award in a decree where there is no sum certain, as the Respondent contends. Rather, it is about a statute of limitation on an award that has yet to vest in any of the parties that are subject to the decree.

Respondent relies on precedent that was established in *Bank of America, N.A. v. Owens* and *Stokes v. Polley*. 173 Wn.2d 40, 266 P.3d 211 (2011); 145 Wn.2d 341, 37 P.3d 1211 (2001). These cases dealt with splitting equity in owned real estate as part of dissolution proceedings. In doing so, he makes the argument that these should apply to the present matter because there was no sum certain and no money judgment summary. However, the equity and ownership in the real estate that was the subject of the awards had already been established. Accordingly, the amount to be awarded was contingent only on the sale, and rights to any moneys from said sale had already vested. This is distinct and different from the present matter where a settlement had not been reached. In other

words, it had not vested. For this reason, the precedent cited is not on point with the current matter and should not be considered by this Court.

C. The Judgment Renewal was a Proper Step in Order to Maintain Petitioner's Standing in This Matter.

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wn.App. 685, 692, 150 P.3d 610, review denied 160 Wn.2d 1025 (2007). It is a threshold issue that must be satisfied before this court can review any claims of error. *In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). The rule ensures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn.App. 215, 223, 232 P.3d 1147 (2010).

RCW 6.17.020(3) states that a person to whom a judgment is granted "may, within ninety days before the expiration of the original ten-year period, apply to the court that rendered the judgment...for an order granting an additional ten years." If a judgment is not renewed during this period, then any ability by the judgment creditor to enforce or otherwise bring action on a judgment is barred.

In the present matter, this appeal overlapped with the judgment expiration date posited by the Petitioner, March 26, 2014. Because

standing on the matter is contingent on there being a valid judgment, it was necessary to petition for the extension. This is a petition, not a motion. Accordingly, Respondent was not entitled any notice – RCW 6.17.020 does not require it. Moreover, taking this step does not violate the order that was entered by the court barring enforcement proceedings, CP 34, as this action does not seek to enforce the judgment. Rather, it merely secures Petitioner’s standing in the matter and her subsequent right to enforce should this Court find in her favor.

Because this action was taken maintain Petitioner’s standing, and because Respondent was not entitled to notice, Respondent’s demand for CR 11 sanctions should be denied.

D. The Respondent is Not Entitled to Attorney’s Fees Under Either RAP 18.1(a) or RAP 18.9(a).

The Respondent argues that he should be entitled to attorney’s fees under RAP 18.1(a), relying on RCW 26.09.140. However, under both, the decision to award attorney’s fees is permissive, not mandatory. Moreover, RCW 26.09.140 states a court “may order a party to pay a reasonable amount for the cost to the other party,” but only after “considering the financial resources of both parties.” In Respondent’s brief, no evidence of need or financial disparity between the parties was provided, and no

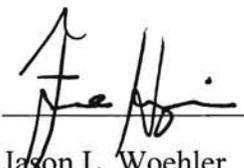
allegations to that effect were made. That is because none exists. For this reason, attorney's fees under this statute are not warranted.

The Respondent also argues that he should be entitled to attorney's fees under RAP 18.9(a) under the claim that Petitioner's appeal is frivolous. This too must fail. Frivolous actions have been defined as those that "cannot be supported by any rational argument on the law or facts." *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn.App. 690, 696-97, 723 P.2d 483 (1986). In the present matter, the Petitioner has put forth rational arguments requesting a further definition from this court as to how statutes of limitations should be interpreted for unvested awards. The absence of any precedent on the matter means that such an argument, even if not agreed to by this Court, has merit for consideration. Therefore, attorney's fees should not be awarded.

II. CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court (i) exercise its discretionary right under the Rules of Appellate Procedure to review the Petitioner's claims of error, (ii) find that the judgment renewal by Petitioner to maintain standing is not sanctionable under Rule 11, and (iii) find that Respondent is not entitled to attorney's fees. Petitioner's request for relief under this Reply is in addition to its requested relief under her Brief.

Respectfully submitted this 17th day of July, 2014


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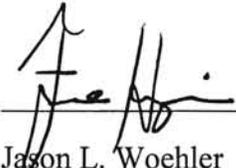
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II. CONCLUSION

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Respectfully submitted this 17th day of July, 2014

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