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No. ~~1088189241~~

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY ARZABAL
Petitioner/Appellant,

v.

CHRISTOPHER ARZABAL
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#11-3-00522-4

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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INTRODUCTION:

Appellant Kimberly Arzabal is appealing the Honorable Judge Charles Snyder's denial of her CR 60 motion to vacate. Appeals of CR 60 motions are reviewed for abuse of discretion. In this case, not only was there no abuse of discretion, but there was no relief available to Ms. Arzabal via CR 60 as her motion consisted of raising errors of law and issues previously brought to the court's attention in her previous motions which is not the purpose of CR 60.

This appeal also relies on issues and alleged errors not preserved by the appellant at the time of the CR 60 motion and entry of orders. Generally, "failure to raise an issue before the trial court precludes a party from raising it on appeal." Oltman v. Holland America Line USA, Inc., 136 Wn. App. 110, 148 P.3d 1050 (Div. 1 2006) (*aff'd in part, rev'd in part on other grounds*, 163 Wn.2d 236, 178 P.3d 981 (2008)). Under RAP 2.5, this Court appropriately refuses to consider errors not brought to the trial court's attention.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (citations omitted).

This appeal also faults Whatcom County Superior Court Judge Charles Snyder when ruling that RCW 26.09.170 allows a party to move to modify maintenance based on a substantial change of circumstances at any time. Yet, the statute's plain language supports Judge Snyder's ruling, not listing any limitations on when a party can bring such a motion.

Further, this appeal also faults Whatcom County Superior Court Judge Charles Snyder for not considering all of the Appellant's arguments. Yet, the record shows Judge Snyder clearly articulating his consideration of her arguments.

Because the trial court did not abuse its discretion in this case, Respondent Christopher Arzabal respectfully requests this Court to dismiss this appeal and award him reasonable attorneys' fees on appeal.

ASSIGNMENTS OF ERROR:

1. The respondent assigns no error to the decision of the trial court.

STATEMENT OF THE ISSUES:

1. Whether Ms. Arzabal has a right to appeal, when she failed to preserve the error in any way that would give the trial court an opportunity to correct any alleged error.

2. Whether Ms. Arzabal had any grounds under CR 60 to be granted any relief as she was asserting error of law and the court had previously heard her arguments in that regard.
3. Whether, pursuant to CR 52(a)(5)(B), the trial court properly issued orders without findings on Ms. Arzabal's CR 60 motion, in a motion hearing on 10/30/15.
4. Whether the trial court properly considered Ms. Arzabal's previously raised issues of Res Judicata and Estoppel before denying Appellant's CR 60 motion, in a motion hearing on 10/30/15.
5. Whether the trial court properly ruled that a Motion to Modify Maintenance can be brought at any time when it denied Ms. Arzabal's CR 60 motion in a motion hearing on 10/30/15.
6. Whether the respondent, Mr. Arzabal, is entitled to an award of attorney fees and costs, pursuant to RAP 18.1.

COUNTER-STATEMENT OF THE CASE ¹

¹ The Appellant has filed their Verbatim Report of Proceedings in 4 parts. To clarify citations to the record the Respondent will cite to the hearings as follows: **April 7, 2015**: "*April Transcript*" 1-38; **May 21, 2015**: "*May Transcript*" 39-90; **June 26, 2015**: "*June Transcript*" 1-21; and **October 30, 2015**: "*October Transcript*" 1-22.

The facts and procedural history set forth below supplement and correct those presented by Appellant in her brief, and support the relief ordered by the trial court and contained in its Judgment and Order.

I. PROCEDURAL HISTORY

The Parties, Kimberly Arzabal and Christopher Arzabal, had a marriage that was dissolved on 3/28/13. (CP 32). As part of the Decree, maintenance was awarded to Ms. Arzabal in the amount of \$2,000.00 per month for a fixed time period. (CP 34). On 4/7/15, Mr. Arzabal, *pro se*, brought a motion to modify maintenance which was heard by Commissioner Heydrich. (CP 54). Commissioner Heydrich denied Mr. Arzabal's motion for not having brought evidence of a substantial change in circumstances and for not having brought it properly. (CP 68, ln 11-15; *April Transcript* 33-34; *October Transcript* 12-13). Mr. Arzabal immediately hired an attorney and filed a new motion to modify maintenance pursuant to RCW 26.09.090 and 26.09.170(1). (CP 61). A motion hearing was conducted by *pro-tem* Commissioner Henley on 5/21/15. (CP 106). On 6/2/15, Commissioner Henley issued a written decision finding that there had been a substantial change in circumstances in Mr. Arzabal's income and that he was not voluntarily unemployed. (CP 138-139). On 6/16/15 at a noted entry of orders, Orders were entered

modifying Mr. Arzabal's maintenance obligation. (CP 165).² Ms. Arzabal did not appear or object to entry of orders as proposed by Mr. Arzabal. (CP 164).

Ms. Arzabal moved for Revision before Judge Snyder, who set aside the order of 6/16/15 and remanded the matter back to Commissioner Henley to do further fact finding as to whether the change in circumstances was voluntary and whether the modification in maintenance was a temporary suspension or complete. (*June Transcript* 17, ln 12-20). Those orders were entered on 9/18/15 on Mr. Arzabal's motion. (CP 188).

Mr. Arzabal noted a hearing for fact-finding on remand, but agreed to delay it as Ms. Arzabal filed a CR 60 motion to vacate both the orders of Commissioner Henley of 6/16/15 and the Order of Judge Snyder of 9/18/15. (CP 196; CP 209). Judge Snyder heard that CR 60 motion on 10/30/16, and denied Ms. Arzabal's motion. (CP 237). Ms. Arzabal had not filed proposed orders with her motion, and through counsel requested the judge enter a blank order prepared by her attorney's office rather than an order with findings proposed by Mr. Arzabal. (*October Transcript* 21).

Commissioner Henley conducted the remanded fact-finding hearings on 11/13/15 and 2/2/16, and having reviewed the pleadings and

² The court record erroneously notes the clerk's minutes (CP 164) and the entry of the Order (CP 165) as occurring on 6/11/15, but both are noted on their face as occurring on 6/16/15.

filing of the parties, re-affirmed the court's findings of 6/2/15, further found that Mr. Arzabal had involuntarily lost his job, had unforeseen medical problems and set a modified maintenance amount of \$1,000.00 per month. (CP 239; CP 242). These orders are currently in place.

RESPONDENT'S ARGUMENT

I. STANDARD OF REVIEW -- ABUSE OF DISCRETION

This court reviews a trial court's rulings on CR 60 motions to vacate under an abuse of discretion standard. A trial court's decision to grant or deny a motion to vacate under CR 60(b) will not be overturned on appeal absent an abuse of discretion. Lindgren v. Lindgren, 58 Wn.App. 588, 594-95, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1991). Discretion is abused if it is exercised on untenable grounds for untenable reasons. In re Marriage of Tang, 57 Wn.App. 648, 653, 789 P.2d 118 (1990).

II. ERROR NOT PRESERVED

This appeal relies on issues and alleged errors not preserved by the appellant at the time of the CR 60 motion and entry of orders. Generally, "failure to raise an issue before the trial court precludes a party from raising it on appeal." Oltman v. Holland America Line USA, Inc., 136 Wn.App. 110, 148 P.3d 1050 (Div. 1 2006) (*aff'd in part, rev'd in part on other grounds*, 163 Wn.2d 236, 178 P.3d 981 (2008)). Under RAP 2.5,

this Court appropriately refuses to consider errors not brought to the trial court's attention.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (*citations omitted*).

At no time did counsel for Ms. Arzabal object to any aspect of the ruling or to the form of the order. (*October Transcript* 1-21). More specifically, Ms. Arzabal raises, as an alleged error, an issue she did not raise to the trial court, that Judge Snyder did not enter findings. (Appellant's Brief at 1-2). In fact, after counsel for Mr. Arzabal proposed an order with specific findings, counsel for Ms. Arzabal objected to that and stated "I prefer a blank order" and subsequently put forward a denial order without findings on her own pleading paper. (*October Transcript* 21, ln 3-19; CP 237).

Ms. Arzabal has further raised as alleged errors in this appeal of her CR 60 motion, that Judge Snyder failed to consider "the principles of Res Judicata and Estoppel by Judgement when it denied Ms. Arzabal's

CR60(b) motion to vacate.” (Appellant’s Brief at 1) These arguments appear nowhere in Ms. Arzabal’s underlying motion to vacate. (CP 209). At best, they appear non-responsively raised in reply briefing (CP 233-234), outside of the scope of Mr. Arzabal’s responsive briefing. (CP 229).

As Ms. Arzabal’s alleged errors were not raised to the trial court at the hearing or on reconsideration, and as Ms. Arzabal’s issues of Res Judicata and Estoppel by Judgment were not pled to the court as part of her motion to vacate, pursuant to RAP 2.5 this Court should appropriately refuse to consider errors not brought to the trial court’s attention and dismiss the appeal.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT’S MOTION TO VACATE PRIOR ORDERS

A. Ms. Arzabal had no grounds under CR 60 to be granted any relief as she was essentially asserting error of law and the court had already heard her arguments in that regard

1. Relief under CR 60 is not available where the issues have previously been raised to the court’s attention

A party is not entitled to relief under CR 60 when they raise issues to the trial court, which have already been raised to and considered by the trial court. Weems v. North Franklin School Dist., 109 Wn. App. 767, 778, 37 P.3d 354 (2002) (where special education director was not entitled to have the superior court vacate its decision affirming hearing examiner's

affirmance of school district's termination of director's employment, where director's motion to vacate raised issues already considered by the superior court.) (*abrogated on other grounds by, Federal Way School Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011)*).

Ms. Arzabal filed a motion for the revision hearing that took place on 6/26/15. (CP 144). That motion included extensive briefing raising and alleging procedural irregularities and errors of law in allowing Mr. Arzabal's motion to modify to proceed. (CP 144-160). In Ms. Arzabal's subsequent CR 60 motion to vacate that is the subject of this appeal, no new facts or issues that were not previously raised in her earlier revision motion were brought forward for Judge Snyder's attention and review. (CP 209). In fact, Ms. Arzabal specifically notes and references that earlier June revision hearing before Judge Snyder in her motion to vacate (CP 211-212).

In her motion to vacate Ms. Arzabal only raises issues previously brought to the court's attention in her motion for revision. She pled: of an irregularity in allowing Mr. Arzabal to file a second motion (CP 212, ln 23; *already raised*, CP 147-148; *raised to the court orally, June Transcript 4-6; addressed by the court June Transcript 11, 14*); of fraud or deception on the part of Mr. Arzabal in representing Commissioner Heydrich's directions (CP 213, ln 15; *already raised*, CP 173; *raised to*

the court orally, June Transcript 4-6; addressed by the court, June Transcript 8, ln 10-16); and, of procedural defects (CP 214, ln 7; already raised, CP 147-148; raised to the court orally, June Transcript 5, ln 16; addressed by the court June Transcript 14).

As all of the issues raised in Ms. Arzabal's motion to vacate were previously raised and argued to the trial court in her prior motion for revision, consequently Ms. Arzabal was not entitled to any relief under CR 60. As there was no basis for relief, there was no abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal's motion.

2. Relief from alleged errors of law is not available under CR 60

Unlike a motion for new trial, a motion to vacate a judgment pursuant to CR 60 is not a substitute for an appeal of intentional rulings of the court. The inherent power of the courts to vacate rulings is not a means by which the court should review or revise its own final judgments or correct errors of law. State v. Price, 59 Wn.2d 788, 790-791, 370 P.2d 979 (1962). The power to vacate judgments on motion is confined to cases where the ground alleged is something extraneous to action of court and goes only to question of regularity of proceedings; that judgment is erroneous as matter of law is not grounds for setting it aside on motion. Kern v. Kern, 28 Wn.2d 617, 619, 183 P.2d 811 (1947).

The courts have consistently rejected efforts to use a motion to vacate as a vehicle for asserting errors of law. See Port of Port Angeles v. CMC Real Estate Corp., 114 Wn.2d 670, 673, 790 P.2d 145 (1990) (*extended discussion of general principles*). Intentional rulings of the court, even if in error, cannot not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal. See In re Marriage of Tang, 57 Wn.App. at 654, 789 P.2d at 122 (*citing Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986)).

Through Ms. Arzabal's motion to vacate is framed in terms of irregularity of procedure or fraud, all of the issues she is seeking to have vacated are issues previously pled to the court and ruled on by the court. (CP 209) For example, specifically stating "the court erred when...", reveals the motion to vacate as standing in place of an appeal or reconsideration of the court's own rulings. (CP 212, ln 23). This is made abundantly clear in her reply briefing, in which she specifically outlines her reasoning for seeking vacation in terms of legal principles that the judicial officials ruled otherwise upon previously (CP 232). She also pleads in her appellate briefing that the motion to vacate should have been granted due to errors of law in the court's prior rulings. (Appellant's Brief at iii, 11-13).

Consequently, as it is the rulings of the judicial officers Ms. Arzabal seeks to have vacated, because she disagrees with their interpretation of the law and not a newly discovered irregularity or fraud, CR 60 is being used in lieu of appeal or reconsideration of the ruling itself. As all of the issues raised in Ms. Arzabal's motion to vacate were issues of law previously ruled upon and intentionally acted upon by the court she was not entitled to any relief under CR 60. Consequently, as there was no basis for relief, there was no abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal's motion to vacate.

B. Pursuant to CR 52(a)(5)(B), the trial court properly issued orders without findings, and was not required to do so

Ms. Arzabal has argued in her appeal brief that the trial court "erred when it failed to make findings when it denied [her] CR 60(b) motion to vacate." (Appellant's Brief at 2). CR 52(a)(5) governs when the entry of findings are necessary or unnecessary in a court order. Findings are unnecessary for orders on any motion, "except as provided in rules 41(b)(3) and 55(b)(2)." CR 52(a)(5)(B). Neither CR 41((b)(3) nor CR 55(b)(2) are applicable to Ms. Arzabal's CR 60 motion and the resultant denial order. CR 60 itself contains no requirement for written findings either.

Further, this argument by Ms. Arzabal on appeal is brought in bad faith. At the CR 60 hearing, counsel for Mr. Arzabal proposed an order with specific findings and counsel for Ms. Arzabal objected to that and stated “I prefer a blank order” and subsequently put forward a denial order without findings on counsel for Ms. Arzabal’s own pleading paper. (October Transcript 21, ln 3-19; CP 237). It is disingenuous to request a specific form of an order, fail to bring to the court’s attention any error in that form, and then claim error on appeal. Allowing such appeals would effectively make litigation at the trial court level require the non-prevailing party to adopt a bad faith strategy of deliberately drafting and inserting language into orders to cause self-made error. Mr. Arzabal would suggest this behavior is not desirable and requires less than good faith candor to the tribunal.

Consequently, as findings are not required for a CR 60 motion, and the order was entered in the form requested by Ms. Arzabal, there is no basis to find any abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal’s motion to vacate without written findings.

C. The trial court properly considered Ms. Arzabal’s previously raised issues of Res Judicata and Estoppel before denying Appellant’s CR 60 motion

Ms. Arzabal has argued in her appeal brief that the trial court “erred in failing to consider the principles of Res Judicata and Estoppel by

Judgment when it denied [her] CR 60(b) motion to vacate.” (Appellant’s Brief at 1). Setting aside the issue that Ms. Arzabal was requesting a vacation of decisions on alleged errors of law which is barred under CR 60,³ there are two reasons the grounds for alleged error do not manifest on appeal.

1. Ms. Arzabal had not argued or raised either Res Judicata or Estoppel in her Motion to Vacate.

First, and as a general matter, an argument neither pled nor argued to the trial court cannot be raised for the first time on appeal. Washington Federal Sav. v. Klein, 177 Wn.App. 22, 29, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019, 318 P.3d 280 (2014) (*citing* Sourakli v. Kyriakos, Inc., 144 Wn.App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009)).

Ms. Arzabal did not argue or raise either of these issues in her Motion to Vacate. (CP 209-214). As Ms. Arzabal’s arguments of law were not raised to the trial court in her Motion to Vacate they were neither properly before the trial court to consider, nor was Mr. Arzabal given notice to respond to such issues of law. At best, they appear non-responsively raised in reply briefing (CP 233-234) outside of the scope of Mr. Arzabal’s responsive briefing. (CP 229).

³ See discussion in this Brief in Argument at III(A)(2) [pg 10-12].

As Ms. Arzabal's issues of Res Judicata and Estoppel by Judgment were not pled to the court as part of her Motion to Vacate, there is no basis to find any abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal's motion to vacate for any alleged failure to consider those issues.

2. The court had in fact considered the issues of Res Judicata and Estoppel.

Second, in actuality Judge Snyder specifically addressed the issue of both Res Judicata and Estoppel at the hearing on the motion to vacate on 10/30/15, at two distinct times in response to Ms. Arzabal's Reply Brief and oral argument by her attorney:

"[The Commissioner] knew about it. So it wasn't as though he was somehow hoodwinked into doing what he did. Res adjudicata and bar and estoppel all apply usually when there's been a final determination, and the parties have litigated completely, and then you just don't do it all over again, but a denial of a request for a modification of maintenance because the judge says I don't think there's enough information here to show me a change in circumstance is not res adjudicata to a later request to modify maintenance if a change of circumstances can be shown."

(October Transcript at 14, ln 5-15).

"So I don't think res adjudicata applies here, and I don't think that bar applies here, because those are generally used when there's some sort of final decision made upon a full litigation of the facts, and that's not what he have here this. This is a preliminary determination, and Commissioner Heydrich said that I don't think there's enough here for you to go forward.

I think that there needs to be a more complete finding, and I think that will serve both parties best if there's an opportunity for everybody to present what they have, and a decision to be made on the true facts rather than just the affidavits, and recognizing that pro se parties and not pro se parties kind of upset that apple cart."

(October Transcript at 15, ln 24 to 16, ln 12).

In both instances Judge Snyder had considered the matters and discarded them appropriately. As noted earlier, Ms. Arzabal had previously raised the issue of procedural irregularities to the court and was not entitled to any relief under CR 60 as she was improperly trying to have the court reconsider its prior rulings of law through her CR 60 motion.⁴ These issues of law were raised previously to Judge Snyder's attention in Ms. Arzabal's prior motion for revision (CP 147) and, disagreeing with Judge Snyder's ruling, raised them again in her subsequent motion to vacate.

The record of the proceeding shows that Judge Snyder did consider the issues and gave thoughtful reasons for his rejection of those arguments as inapplicable to the case at hand. Consequently, as Ms. Arzabal's issues of Res Judicata and Collateral Estoppel were in fact considered by the court, there is no basis to find any abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal's motion to vacate. Even if Judge Snyder

⁴ See extensive discussion in this Brief in Argument at III(A)(1-2) [pg 8-12].

had not considered her re-raised issues, Ms. Arzabal was not entitled to any reconsideration of rulings of law in a CR 60 motion to vacate, and thus there is no basis to find any abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal's motion to vacate.

D. The trial court properly ruled that a Motion to Modify Maintenance can be brought at any time

Ms. Arzabal argues that the court should have made a ruling that a substantial change in circumstances must be examined not from the time of the setting of a maintenance order, but from the time of Mr. Arzabal's last motion to modify, which was denied for not having brought evidence of a substantial change in circumstances and for not having brought it properly. (Appellant's Brief at 3; CP 54-55; CP 68, ln 11-15; *April Transcript* 33-34; *October Transcript* 12-13).

Maintenance falls under Title 26 of the RCW, Domestic Relations. RCW 26.09.090, authorizes courts to establish and adjust maintenance orders for either spouse "in such amounts and for such periods of time as the court deems just, without regard to misconduct" and said jurisdiction and decision making power extends after the entry of a decree. RCW 26.09.090(1). RCW 26.09.170(1) allows for the provisions of any decree respecting maintenance to be modified. None of these statutes have time

limitations or other procedural bars to bringing motions to modify maintenance.

Modification of spousal maintenance can be granted upon the showing of proof of substantial, unanticipated change in parties' circumstances. *In re Marriage of Coyle*, 61 Wn.App. 653, 657, 811 P.2d 244, review denied 117 Wn.2d 1017, 818 P.2d 1099 (1991) (citing *In re Marriage of Ochsner*, 47 Wn.App. 520, 524, 736 P.2d 292, review denied, 108 Wn.2d 1027 (1987)). Indeed, the basis for the courts to retain jurisdiction over maintenance is such that modifications can provide for the changing needs of the recipient and the changing ability of the obligor to meet those needs. See *Bungay v. Bungay*, 179 Wn. 219, 223-224, 36 P.2d 1058 (1934). It has been a longstanding principle that where maintenance cannot be afforded it will not be ordered. *Worden v. Worden*, 84 Wn. 614, 615-616, 147 P. 403 (1915) (Change in financial circumstances of former husband, warranting modification of decree for monthly alimony, is shown where since divorce his income has not been sufficient to meet monthly payments).

In the case at hand, Judge Snyder ruled:

“Regardless of that, I think we have to go back, as I said, to core principles here, and those are these: Modifications for maintenance can be sought at any time, 26.09.170(5)(a), “a party to an order of child support may petition for modification based upon a showing of substantially

changed circumstances at any time.” The same thing applies to maintenance. There must be a showing of a change in circumstances, obviously. That’s one of the requirements, but it seems to me that had – if a party goes in and applies on June 1 and says I need to have a modification, and the Judge at that point says not enough, I don’t see a substantial change in circumstances, and five days later, the circumstances do change, a person gets laid off, a person gets seriously injured, is incapable of working for a period of time, there’s nothing to prevent them from coming back and filing again just because they got denied. If the changes of their circumstances are – they can allege sufficient change in circumstances, they can file as often as need be.

(October Hearing at 13, ln 3-21). The basis for Judge Snyder’s ruling is rational and in line with statutory guidance.

While Ms. Arzabal argues that the court should not look at the change in circumstances from the time of the decree to the time of motion but rather since the time of Mr. Arzabal’s prior motion to modify, she gives no authority or legal rationale for her position.

In arguendo, ignoring that CR 60 motions to vacate are not to be used for challenging alleged errors of law, the ruling was well considered and as there being no statutory bar to Mr. Arzabal bringing his motion to modify to show a change in circumstances since entry of the decree, there is no basis to find any abuse of discretion on the part of Judge Snyder in denying Ms. Arzabal’s motion to vacate.

IV. MOOTNESS ON THE MERITS

A basic premise of our legal system is that disputes should be decided on the legal and factual merits of the case and not on any preliminary, procedural, or technical pleas or objections when possible. The reason default judgments have a low bar for being set aside is that courts prefer to give parties their day in court and have controversies determined on their merits. Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

Though Ms. Arzabal was previously granted orders on a motion for revision (CP 165) setting aside Mr. Arzabal's previously granted order on modification (CP 188), what her motion truly seeks is a bar on Mr. Arzabal having his claims heard on their merits. Ms. Arzabal sought to have the portion of the revision order remanding issues of fact to a commissioner vacated, such that there would be no full examination of the facts and merits of the case as intended by the Court:

“Yes, right, whether there was enough of a change of circumstances to justify and support his decision which is why I remanded it back for a proper fact finding and decide what the circumstances were, because it struck me that if there wasn't a basis, that needed to be developed, so that if there then were a later request a month or two months or six months later that was based on the same information, there would be a possibility for somebody to say you litigated this. We had a final decision based on facts and based on evidence.

We don't have that. We didn't have that in either of these cases. We had a decision made on affidavits, which I think

is kind of an incomplete way of resolving issues, and from a purely practical standpoint, if I grant your motion, which I don't think I'm required to do for the – on the bases that were cited me, and I don't think that I have to any point in time, Mr. Majumdar is correct. He just files again, and nothing really changes except what happens in the interim, whether there was money owed in that period of time. That will be resolved once you go back on this case in the first place, anyway, because if it's determined on this remand that there wasn't a basis, then she gets payments over all that period of time. If it's determined that there was, then the decision is to be made, and the court can decide the effective date it should be.

(October Hearing at 14, ln 23 to 15, ln 23).

Pursuant to that Remand in the Order on Revision (CP 188), the parties have now made extensive submission of pleadings to the court and fact-finding hearings on the merits were conducted by the court on 11/13/15 and 2/2/16. (CP 239; CP 242). On the merits, the court having reviewed the pleadings and filing of the parties, re-affirmed the court's findings of 6/2/15, further found that Mr. Arzabal had involuntarily lost his job, had unforeseen medical problems and set a modified maintenance amount of \$1,000.00 per month. (CP 242). These orders are currently in place, and as they were conducted on the merits, a vacation of the remand order would have the effect of denying the parties a hearing on the merits, and would result in Mr. Arzabal having to file his motion again to be heard again on the same facts and arguments. Granting that motion would result in an inefficient use of our State's judicial resources and the

imposition of prejudice and hardship on Mr. Arzabal who has already been found to have had a substantial change in circumstances, which was not appealed for any error.

As the matter of the case on its merits has now been decided, and no error was appealed to the court of appeals from those holdings, the matter is moot and the appeal should be denied.

V. IT IS APPROPRIATE TO AWARD THE RESPONDENT ATTORNEY FEES AND COSTS ASSOCIATED WITH RESPONDING TO THIS APPEAL.

Pursuant to RAP 18.1(b), the Respondent's plea for attorney fees pursuant to all applicable statutory and common law as the court deems just is hereby made.

Generally, a party may recover fees on appeal if the party was entitled to recover fees in the trial court. Landberg v. Carlson, 108 Wn.App. 749, 758, 33 P.3d 406 (2001), *review denied*, 146 Wn.2d 1008 (2002). Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. Ur-Rahman v. Changchun Dev., Ltd., 84 Wn.App. 569, 576, 928 P.2d 1149 (1997); Sarvis v. Land Res., Inc., 62 Wn.App. 888, 894, 815 P.2d 840 (1991). As a Domestic Relations case, under RCW 26.09.140, "upon any appeal, the appellate court may, in its discretion,

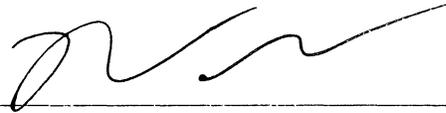
order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.”

An award is appropriate for four primary reasons. First, Ms. Arzabal's appeal raises issues of error not raised to the trial court to correct and raised issues not pled for in her original motion to vacate. The appeal does not provide compelling arguments that would overcome RAP 2.5(a). Second, Ms. Arzabal has misinterpreted the proper purposes and case law regarding a CR 60 motion to vacate, attempting to use CR 60 to have the trial court and court of appeals reconsider findings of law and to deny Mr. Arzabal a hearing on the merits of his claims. Third, Ms. Arzabal's claim of error with regard to the lack of findings was not an error and an issue created at her own direction, and thus is an appeal in bad faith. Fourth, the Appellant submitted a brief not keyed to the page numbers or designations assigned by the court, though they were marked with erroneous CP designations; and did not provide full transcripts to the Respondent with, or prior to, the filing of her brief, until demanded, resulting in numerous hours of unnecessary document review and hunting, as well as a trip to the Court of Appeals, Division I, from Whatcom County, to inspect the file to confirm what transcripts had and had not been provided to the Respondent. For these reasons, Mr. Arzabal deserves reimbursement of his attorneys' fees for defending against this appeal.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that the Court affirm the Superior Court's judgment, and award attorney fees and costs to the Respondent pursuant to RCW 26.09.140. and RAP 18.1.

Submitted this 14th day of July 2016.

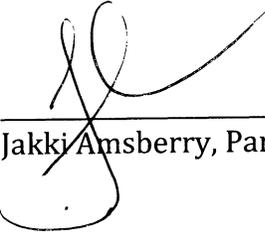


Rajeev D. Majumdar, WSBA 39753
Of Attorneys for the Respondent

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED this 20th day of July 2016



Jakki Amsberry, Paralegal