Appellate Court No. W.D. 79710

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JARRETT A. ARCHDEKIN,
Appellant,

vs.

SYBIL A. ARCHDEKIN,
Respondent.

APPEAL FROM THE CIRCUIT COURT
OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION NO. 4
HONORABLE DANIEL F. KELLOGG, CIRCUIT JUDGE

APPELLANT'S REPLY BRIEF

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Cases **Page(s)**

Missouri Supreme Court Rules

Abbreviations

L.F. ..... Legal File
Tr. ..... Transcript
¶ ..... Paragraph
App. Br. ..... Appellant's Brief
Resp. Br. ..... Respondent's Response Brief

REPLY TO STATEMENT OF FACTS

Pursuant to Rule 84.04(c), the Statement of Facts should be a fair and concise statement of facts without argument. Respondent's Statement of Facts is replete with facts favorable to only Respondent and omits relevant facts that are less favorable to her. For instance, Respondent's Statement of Facts includes the financial summaries of only two of the three relevant businesses owned by Appellant and does not include his principal operating business, Archdekin Investments, Inc. (Resp. Br. 10, ¶ 3). If Respondent were to have included the financial summary of Archdekin Investments, Inc., it would show that the collective debts of the three companies exceeded their overall income and assets. (Tr. 239-51, Feb. 13, 2013).

Respondent's Statement of Facts also references a telephone conversation between Appellant and the parties' eldest son that includes only facts favorable to Respondent. (Id. at 11). Respondent's incomplete recitation of the facts is misleading. Respondent's Statement of Facts state that during the telephone conversation, Appellant "admitted to having in his possession a $47,000 check which could be used to pay off this then accrued alimony indebtedness." Id. Respondent fails to mention that during her testimony, she testified that some of the tape recordings that she did *not* put into evidence show that the $47,000.00 check was funds belonging to a Mr. Bill Mann (Tr. 65-66, Mar. 30, 2016), which Appellant also testified to (Id. 90:24-92:7). Further, Respondent states that the transcription of this telephone conversation was placed into evidence as Exhibit 16 and the telephone conversations were placed into evidence as Exhibit 14 by a business affidavit from the Buchanan County Sheriff's Department. Respondent's Statement of

Facts omitted that the transcriptions were completed by Respondent herself. (Id. at 68:21-23). This omission is misleading, as it appears to suggest that the transcriptions were completed by the Buchanan County Sheriff's Department.

REPLY ARGUMENT

REPLY TO RESPONDENT'S SECTION I

RESPONDENT INCORRECTLY ASSERTS THAT APPELLANT WAIVED ANY ERROR IN THE SECOND AMENDED INTERLOCUTORY JUDGMENT BY NOT PURSUING APPELLATE RELIEF FROM THAT JUDGMENT.

Respondent asserts that pursuant to the doctrine of "the law of the case," Appellant waived any error in the Second Amended Interlocutory Judgment by not raising them in his appeal from that judgment which was dismissed by this Court as untimely. On April 4, 2014 Appellant filed his Notice of Appeal (L.F. 241) and this Court dismissed his appeal on May 9, 2014 for being untimely (L.F. 255). This Court did not review the merits of Respondent's appeal. Even if this Court found that the appeal was timely filed and had the opportunity to review the merits of the appeal, this Court would have found that the matter was not ripe for review because the trial court did not exhaust its jurisdiction and its decree was not a final judgment from which an appeal could be taken for the reasons stated in Points Relied On I of Appellant's Brief. (App. Br. 18-24).

Further, the doctrine of the law of the case does not apply to the present case because the doctrine applies to subsequent appeals following a remand from the appellate court. As reiterated in Walton v. City of Berkeley, the doctrine of the law of the case "precludes relitigation of the issue *on remand and subsequent appeal*." 223 S.W.3d 126, 128-29 (Mo. 2007) (en banc) (citation omitted) (emphasis added). Although Appellant's previous appeal was dismissed as untimely, it was not ripe for appeal at that time and the trial court subsequently heard the matter on a final hearing, not on remand from the Court of Appeals. Thus, the doctrine of the law of the case does not apply to the present case.

Further, the doctrine of law of the case is not absolute. Id. at 130 (citation omitted). The doctrine is a rule of policy and convenience where this Court has discretion to refuse to apply it "where the first decision was based on a mistaken fact or resulted in manifest injustice or where a change in the law intervened between appeals." Id. (citations omitted). Additionally, if there are substantially different issues or evidence on remand, the rule may not apply. Id. (citations omitted). Therefore, even if the law of the case doctrine would apply, this Court should exercise its discretion and refuse to apply the doctrine.

REPLY TO RESPONDENT'S SECTION II

RESPONDENT INCORRECTLY ASSERTS THAT THE TRIAL COURT DID NOT ERR IN ADOPTING THE MODIFICATION STANDARD OF REVIEW.

Respondent asserts that even if the trial court committed error in adopting the modification standard of review, it was "harmless error." Respondent does not cite any legal authority to support this assertion. This assertion is clearly contradictory to this Court's previous holding that "[a]pplying the wrong standard…is *reversible* error." Stirling v. Maxwell, 45 S.W.3d 914, 916 (Mo. Ct. App. 2001).

REPLY TO RESPONDENT'S SECTION III

RESPONDENT INCORRECTLY ASSERTS THAT THE MAINTENANCE AWARD WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND DID NOT INCLUDE IMPROPER EXPENSES AND ANY ERROR WAS WAIVED.

Appellant argues that an imputation of income requires evidence that a spouse is deliberately evading his support obligations to his family and that no such evidence existed in the present case. Respondent asserts that this argument must fail because of

Appellant's financial troubles with his personal creditors. Respondent mistakenly draws the conclusion that evading one's creditors is analogous to evading his or her family support obligations. The two are clearly distinct and Respondent cites to no legal authority to support this contention.

Further, in responding to Appellant's argument that the trial court included improper expenses in its calculation of maintenance, Respondent maintains that because there were no findings of fact and Appellant did not raise this issue in a motion to amend, he failed to preserve the issue for appellate review pursuant to Rule 78.07(c). Respondent implies that the trial court was statutorily required to make findings of fact regarding what expenses were included in its determination of maintenance. Again, Respondent cites to no legal authority to support this assertion.

REPLY TO RESPONDENT'S SECTION IV

RESPONDENT INCORRECTLY ASSERTS THAT THE TRIAL COURT DID NOT ERR IN AWARDING MAINTENANCE WITHOUT FIRST DIVIDING AND AWARDING PROPERTY.

Respondent argues that Missouri has long recognized the concept of "divisible divorce" and cites to cases which purportedly support Respondent's argument. In all of the cases cited by Respondent, the trial court lacked personal jurisdiction over one of the parties. Respondent contends that these cases support the proposition that the status of the marriage, custody, support, maintenance and property division are divisible concepts. Respondent misconstrues the holdings of these cases. Instead, these cases stand for the proposition that when the trial court lacks personal jurisdiction over a party, the court has jurisdiction only over the status of the marriage and does not have jurisdiction to enter (or

modify) orders of child support, child custody, maintenance, or property division. Gould v. Crow, 57 Mo. 200 (Mo. 1874) (holding that the Indiana divorce decree obtained by husband on service of publication on wife severed the parties' marriage status but if a decree of alimony was entered, it would have no effect); State ex rel. Miller v. Jones, 349 S.W.2d 534 (Mo. Ct. App. 1961) (holding that without personal service, and thus, personal jurisdiction, both Colorado and Missouri could grant the petition for divorce as to the marital status of the parties but Missouri could not enter, or enforce, any judgment for alimony, child support, or child custody); Thompson v. Thompson, 657 S.W.25 629 (Mo. 183) (en banc) (holding that where petitioner failed to obtain personal service on respondent, the trial court was without personal jurisdiction and could not modify another state's dissolution judgment).

CONCLUSION

For the reasons discussed in Appellant's Brief and Reply Brief, Appellant respectfully prays for an order of this Court vacating the trial court's award of maintenance and child support, remanding the case with instructions to the Circuit Court, and for such other and further order as the Court deems just and reasonable.

Respectfully submitted,

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	)	
Appellant,	)	
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vs.	)	Case No. WD79710
	)	
SYBIL A. ARCHDEKIN,	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the limitations contained in Supreme Court Rule 84.06 and Local Rule XLI, containing 1,479 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), and signature block, as determined by Microsoft Word software.

Respectfully submitted,

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of Appellant's Reply Brief was served upon James D. Boggs, Attorney for Respondent, via the electronic filing system on this 8th day of May, 2017.

Respectfully submitted,

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