In the
Missouri Court of Appeals
Western District

REBECCA L. DUNN (NOW WALLINGFORD),	)	
	)	**WD80123**
Appellant,	)	
	)	**OPINION FILED:**
v.	)	**October 17, 2017**
	)	
TERRENCE P. DUNN, JR.,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Jennifer M. Phillips, Judge

Before Division Two: Anthony Rex Gabbert, Presiding Judge, Thomas H. Newton, Judge and Gary D. Witt, Judge

Rebecca Wallingford ("Wallingford") appeals the circuit court's entry of summary judgment in favor of Terrence Dunn ("Dunn") on his Motion to Enforce the Property Settlement Agreement and Reimbursement of Maintenance and Attorney Fees. Further, Wallingford appeals the court's grant of Dunn's Motion to Set Off Amounts Due Between Parties and denial of Wallingford's Motion to Determine Amounts Due following a trial on these issues. The order granting the motion for summary judgment awarded Dunn $16,062.75 in reimbursement for maintenance paid after Wallingford's remarriage and

attorney's fees. Wallingford argues that the court erred in not disclosing an alleged conflict of interest, granting summary judgment, setting-off Dunn's award against a future payment to Wallingford provided for in the property settlement, and denying Wallingford's Motion to Determine Amounts Due. We affirm.

Factual Background[1]

A Judgment and Decree of Dissolution of Marriage ("Underlying Judgment") between Wallingford and Dunn was entered on March 18, 2013, pursuant to a settlement agreement entered into between the parties as to all issues. The Underlying Judgment incorporated the parties' Joint Parenting Plan and Separation and Property Settlement Agreement. There were two children born of the parties' marriage. The parties were awarded joint legal custody and joint physical custody of the minor children. A Form 14 establishing a presumed child support amount of $850 per month, was determined to be unjust and inappropriate based on the request and agreement of both parties. Pursuant to the Underlying Judgment, Dunn was ordered to pay Wallingford child support in the sum of $2,000 per month, as well as, to pay other designated expenses relating to the children. Dunn was also ordered to pay Wallingford non-modifiable decretal maintenance in the sum of $2,000 per month for forty-eight consecutive months. Termination of maintenance would occur upon the death of either party, Wallingford's remarriage, Wallingford's co-habitation in a marriage-like relationship, or the expiration of forty-eight consecutive

[1] We review the facts in the light most favorable to the trial court's judgment. *In the Interest of B.J.H.*, 356 S.W.3d 816, 820 n. 1 (Mo. App. W.D. 2012) (citation omitted). For purposes of Point Two, we will review the facts under the summary judgment standard of review. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993) ("When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.").

months, whichever was first to occur. In order to equalize the division of property, Dunn was ordered to make equalization payments to Wallingford: $70,000 on January 30, 2013; $50,000 on January 30, 2014; $50,000 on January 30, 2015; and $30,000 on January 30, 2016.

Further, pursuant to the Underlying Judgment and the settlement agreement of the parties, the parties were to complete two joint tax returns for 2012. The first tax return was to be the actual tax return to be filed with the IRS, and contain Dunn's S-Corporation pass-through income and the corporation's cash distribution to pay for the taxes on the pass-through income. Dunn was to pay any deficiency or retain any refund from the first tax return. The second tax return, which was referred to in the settlement agreement as the "Pro Forma Tax Return," was not to be filed with the IRS and was not to include Dunn's pass-through income from the S-Corporation or the cash distribution from the same. Based on the Pro Forma Tax Return, Dunn was to pay Wallingford fifty percent of any potential refund reflected in the Pro Forma Tax Return. The Pro Forma Tax Return which was prepared showed a $0 refund.[2]

Dunn was notified in 2013 that Wallingford was planning to remarry. The parties orally agreed that upon her remarriage the maintenance obligation would cease and the child support payment would be modified to the amount of $3000 per month. Dunn sent multiple drafts of a Joint Motion and Stipulation to Modify Judgment and Decree of Dissolution of Marriage to Wallingford. On October 2, 2013, Dunn sent a revised draft,

[2] The record does not establish at what point in time the Pro Forma Tax Return was provided to Wallingford.

which contained a provision that Dunn's obligation to pay spousal maintenance would terminate on October 31, 2013, and that child support would be modified to $3,000 per month commencing November 1, 2013. Wallingford signed none of these drafts. Wallingford remarried on November 23, 2013 but concealed the date of her remarriage from Dunn and did not record her marriage license until April 2014. Wallingford denied being married until Dunn presented her with a copy of the recorded marriage license in April 2014, which showed that a wedding ceremony occurred on November 23, 2013. Dunn had paid spousal maintenance through April 2014 in the amount ordered by the Underlying Judgment even though his maintenance obligation terminated by operation of law on Wallingford's remarriage on November 23, 2013.

On May 13, 2014, Dunn filed a Motion to Enforce Separation and Property Settlement Agreement and for Reimbursement of Maintenance and Attorney's Fees, which was denied.[3] Dunn then filed a Motion to Reconsider Order Denying Respondent's Motion to Enforce Separation Agreement and Property Settlement Agreement and For Reimbursement of Maintenance and Attorney's Fees, which was also denied.

On September 29, 2014, Wallingford filed a counter Motion to Modify Child Support, which was ultimately denied by the trial court.[4] On January 15, 2015, Dunn filed a Motion to Terminate Maintenance and For Restitution Or, in the Alternative, To Modify Judgment and Decree of Dissolution of Marriage. Dunn then filed a Motion for Summary

[3] Dunn claims this motion is denied without prejudice because the court told the parties specifically that it was. This motion is not at issue before this Court, therefore we do not address it or the effect of its dismissal.

[4] The trial court found that there had not been a change in circumstances so substantial and continuing as to make the terms of the existing judgment of child support unreasonable. Section 452.370.1

Judgment on that motion. The court granted summary judgment and Dunn was awarded $10,000 in reimbursement for the overpayment in maintenance and $6,062.75 in attorney's fees. Dunn's Motion to Terminate Maintenance and For Restitution Or, in the Alternative to Modify Judgment and Decree of Dissolution of Marriage was then dismissed, as it was no longer at issue.

Dunn then filed a Motion for Set-Off of Amounts Due Between Parties. The court granted the motion, which allowed the $16,062.75 Dunn was awarded in the summary judgment for reimbursement and attorney's fees to be set-off against the last $30,000 Dunn still owed Wallingford under the property division.

Wallingford also filed a Motion to Determine Amounts Due regarding the Pro Forma Tax Return. At trial, Wallingford asked the court to interpret the settlement agreement and determine what amount Dunn owes pursuant to the Pro Forma Tax Return. The court denied Wallingford's motion finding that the Pro Forma Tax Return reflected a $0 refund due. Wallingford appeals from the above judgments and rulings.

Analysis

Wallingford raises four points on appeal. In Point One, Wallingford argues that the court denied her due process of law because the trial judge did not disclose an alleged conflict of interest prior to the presentation of evidence. Wallingford claims in Point Two that the court erred in granting summary judgment against Wallingford. In Point Three, Wallingford contends that the court erred in granting Dunn's Motion for Set-Off Amounts Due Between Parties. In Point Four, Wallingford argues the court erred in denying her Motion to Determine Amount Due.

Point One

Wallingford argues in Point One that the court denied her due process of law because the trial judge had a conflict of interest and did not disclose that she had "within the last three or four months, award [sic] a contract worth Three Hundred Eleven Million Dollars ($311,000,000,000.00) to J.E. Dunn Construction Group from which Pat Dunn received the overwhelming majority of his income." Wallingford claims this alleged award creates an appearance of impropriety, and if she had been made aware of this prior award, she would have requested a change of judge.

Missouri Supreme Court Rule 2-2.11(A)[5] "sets the standard for when a judge should recuse in a proceeding." *Anderson v. State*, 402 S.W.3d 86, 91 (Mo. banc 2013). "Rule 2-2.11(A) provides that '[a] judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.'" *Id.* It is presumed that a judge acts with honesty and integrity and will not preside over a trial if he or she cannot be impartial. *Smulls v. State*, 10 S.W.3d 497, 499 (Mo. banc 2000). This presumption is overcome and disqualification is required if a "reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Anderson*, 402 S.W.3d at 91. Recusal is not limited to actual prejudice. *Id.*

Wallingford provides absolutely no factual support whatsoever for this argument; no citation to the alleged prior case or indication as to what judgment the alleged award she is referencing was derived. She conceded at oral argument that the record was devoid

[5] All rule references are to Missouri Supreme Court Rules (2017).

of any factual support for her assertion. As such, it is appropriate for this court to deny this point on that basis alone. We further note that Wallingford's allegations regarding the grounds for the judge's recusal raise serious allegations about the trial judge that are not in any manner supported by affidavit or evidence. Bare and conclusory accusations "against a court or for that matter, such an accusation against any member of the Bar [are] extremely serious as [they] relate[ ] to the integrity of our legal system. Groundless and flagrant accusations by disgruntled litigants should be carefully investigated by counsel for the alleged aggrieved party to determine their validity before being asserted." *Barth v. Barth*, 372 S.W.3d 496, 520 n.13 (Mo. App. W.D. 2012)(internal quotation marks, citation, and emphasis omitted). We caution counsel against making such unsubstantiated allegations in the future.

Dunn speculates in his brief that the judgment Wallingford is referencing is one in which the corporation in which Dunn is a minority shareholder and in which neither Dunn nor the corporation were even a party to the action but there was a possibility that the corporation may have received a contract from one of the parties as a result of the judgment. At oral argument Wallingford, for the first time, identified that the case suggested by Dunn in his brief was in fact the case that she was referring to in her criticism of the trial judge. The case identified by Dunn was a petition for a writ of mandamus addressing whether an initiative petition required the City Council of the City of Kansas City to place before the voters of the City for approval or disapproval the construction of a downtown hotel. *State ex. rel. Coffee v. City of Kansas City*, Case No. 1516-CV26565. In that case, the trial court denied the writ. A review of the case confirms that J.E. Dunn (the corporation in which

Dunn is a minority shareholder) was not a party to the action and in fact this Court cannot even find a single reference to J.E. Dunn anywhere in that court file. The judgment in that case provides no direct or even indirect benefit to J.E. Dunn of any kind whatsoever but merely denied a writ to place the issue of the construction of the hotel on the ballot before the voters. There was certainly no "award" of a contract of any amount let alone for hundreds of millions of dollars to anyone or any entity as a result of that judgment and there is no indication that the trial court would have had any knowledge that J.E. Dunn was in any way even peripherally involved in or even interested in the outcome of that case.

No reasonable person would find there to be an appearance of impropriety where a judge presiding over a modification of a dissolution also presided over an earlier, completely unrelated case dealing with a ballot measure where one of the parties to the current action was a minority shareholder in a company who was not even a party to the earlier action. Wallingford fails to present any argument which would support there being an appearance of impropriety by the trial court. It appears that Wallingford believes this Court will be so overwhelmed by her use of the figure of $311,000,000.00 that we would blindly agree with her assertion of a conflict. We are not so inclined and find Wallingford's argument to be completely baseless, disingenuous and offensive to the proper administration of justice. Point One is denied.

Point Two

In Point Two, Wallingford claims that the court erred in granting summary judgment because: the court misapplied the law in that she was not provided an evidentiary hearing, there were multiple material facts still in dispute, she pled three affirmative defenses that

she was not allowed to present evidence on, and any overpayment by Dunn was voluntary and cannot be recovered.

Rule 84.04(d) requires a point relied on to: (1) identify the challenged ruling, (2) "concisely state the legal reasons" for the challenge, and (3) "explain in summary fashion why, in the context of the case, those legal reasons support" the challenge. *See Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978). A point relied on violates Rule 84.04(d) when it groups together multiple, independent claims rather than a single claim of error. *Mo. Bankers Ass'n, Inc. v. St. Louis Cnty.*, 448 S.W.3d 267, 271 (Mo. banc 2014).

Wallingford's Point Two is multifarious in that it presents four distinct claims of error that are required to be asserted in separate points relied on. Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for appeal. *Doe v. Ratigan*, 481 S.W.3d 36, 53 (Mo. App. W.D. 2015).

However, we choose to gratuitously address Wallingford's first argument as we prefer to decide cases on the merits. Wallingford argues that the court erred in not holding an evidentiary hearing on Dunn's motion for summary judgment as required under "Missouri Law." However, courts are not required to hold an evidentiary hearing on a motion for summary judgment. *See* Rule 74.04(d) ("[B]y conducting a hearing, *if necessary*, …") (emphasis added)[6]. Further the language in Rule 74.04(d) regarding a

[6] Wallingford cites to *Lawson v. St. Louis-San Francisco Ry. Co.*, 629 S.W.2d 648 (Mo. App. E.D. 1982). Appellate courts were conflicted as to whether a hearing on a motion for summary judgment was required. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 499 (Mo. banc 1991). However, in 1993 the Missouri Supreme Court revised 74.04(d) to remove all references to a hearing, except the above cited portion. "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002). It is clear from the language used in Rule 74.04(d) that the Missouri Supreme Court did not intend for an evidentiary hearing to be required.

hearing is limited to cases where the case is not fully adjudicated on the motion for summary judgment. *Id.*

As her sole support for her argument that an evidentiary hearing is required, Wallingford cites the case of *Lawson v. St Louis-San Francisco Ry. Co.*, 629 S.W.2d 648 (Mo. App. E.D. 1982). First, *Lawson* does not stand for the proposition that an evidentiary hearing is required before summary judgment can be granted. *Lawson* held that it was reversible error for the trial court to convert a motion for judgment on the pleadings into a motion for summary judgment and grant the motion for summary judgment on the same day the affidavits on which the movant relied were filed with the court without giving the adverse party a chance to respond with its own affidavits to controvert the movants material facts. Nothing in *Lawson* stands for the proposition that an evidentiary hearing is required before summary judgment can be granted. In the case at bar, Wallingford was given every opportunity to file her responsive pleading and any supporting affidavits necessary to properly respond to Dunn's motion for summary judgment. Second, the Missouri Supreme Court has recognized that no evidentiary hearing is required under Rule 74.04 prior to the grant of summary judgment. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints,* 821 S.W.2d 495, 499-500 (Mo. banc 1991); *see also Weems v. Montgomery*, 126 S.W.3d 479, 483 (Mo. App. W.D. 2004). Third, the purpose of summary judgment is to expedite the disposition of a case and to conserve judicial resources and the financial resources of the parties. *Pub. Sch. Ret. Sys. of Mo. v. Taveau,* 316 S.W.3d 338, 345 (Mo. App. W.D. 2010). A requirement of an evidentiary hearing in every summary judgment motion would be counter-productive to the purpose of the rule

and this Court has cautioned that it should be rare, if ever, that a trial court would take oral testimony on a motion for summary judgment. *Id.*

Dunn is not entitled to an evidentiary hearing under the rule or as a matter of right. Point Two is denied.

Point Three

In Point Three, Wallingford argues that the court erred in offsetting the amount Dunn was awarded in his action for overpayment of maintenance and attorney fees against the amount he still owed Wallingford under the property division from the original dissolution because Missouri law prohibits a modification of a final division of property. Wallingford argues that allowing the set-off of the $16,062.75 that she owes Dunn against the $30,000 installment payment he owes her as part of the property division is a modification to the final property division, which cannot be modified.

"A trial court has the inherent power to compel a set-off." *Janes v. Janes*, 242 S.W.3d 744, 750 (Mo. App. W.D. 2007). "Where mutuality of debts and parties exists, the trial court may order a set-off." *Id.* "Both maintenance and the division of property are meant to provide for the financial needs of the spouses." *Id.* at 751. Attorney's fees owed after a proceeding to enforce a part of a divorce decree may be included in a set-off. *See id.*; *see also Labarca v. Labarca*, WD79944, 2017 WL 4125682, at *5 n.7 (Mo. App. W.D. Sept. 19, 2017).

The set-off does not modify the underlying amount Wallingford receives from the property settlement. The set-off in this case clearly involves obligations that are "mutual and subsisting between the same parties, and due in the same capacity of right." *Labarca*,

2017 WL 425682 at *5. Accordingly, we find no abuse of discretion by the court in offsetting the award. Point Three is denied.

Point Four

Wallingford argues in Point Four that the court erred in denying her Motion to Determine Amounts Due because she presented clear evidence that established that Dunn omitted from the Pro Forma Tax Return significant income consisting of a tax refund for the prior year, stock sales, interest, and dividends.

At trial Wallingford asked the court to interpret the settlement agreement and determine what amount Dunn owes under the Pro Forma Tax Return because she alleges that Dunn omitted significant income from the return. The settlement agreement was incorporated into the Underlying Judgment. Requesting the court to interpret the Underlying Judgment to determine the appropriate amount Wallingford is owed under the Pro Forma Tax Return in essence asks for an advisory opinion. "A court may not issue advisory opinions." *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 488 (Mo. App. W.D. 2010).

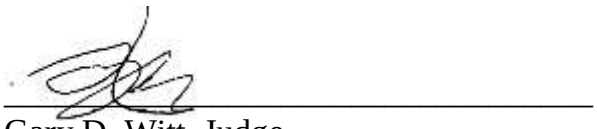
Further, Wallingford fails to explain how Dunn's alleged omission of substantial *income* would result in an increase in any tax *refund*. The addition of substantial income to a tax return would result in an increase in tax *liability*, not an increase in tax *refund*. Rule 84.13(b) provides: "No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Absent a showing of prejudice an appellate court will not find reversible error. *Barron v. Abbott Labs., Inc.*, No. SC 96151, 2017 WL 4001487, at *2 (Mo. banc

Sept. 12, 2017). Wallingford fails to establish that she was prejudiced by any errors in the preparation of the Pro Forma Tax Return.

Point Four is denied.

Conclusion

Finding no error, we affirm the trial court's judgment.[7]



Gary D. Witt, Judge

All concur

[7] Dunn filed a motion, which was taken with the case, to exclude and/or strike Wallingford's exhibits. The motion is denied as moot.

Wallingford also filed a motion, which was taken with the case, for attorney's fees. The motion is denied.