

NO. A06-0736

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State of Minnesota  
In Court of Appeals

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Elizabeth Soll Brodsky,

*Respondent,*

v.

Joseph Alan Brodsky,

*Appellant,*

and

Nancy L. Ponto,

*Intervenor.*

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REPLY BRIEF OF APPELLANT  
JOSEPH ALAN BRODSKY

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## FACTS

### 1. 1996 Revisited.

At the trial level, Soll successfully obtained enormous windfall awards by resurrecting 1996 arguments concerning Brodsky's conduct long since past. She again takes that timeworn approach on appeal, relying on a single paragraph from a ten-year-old order<sup>1</sup> and a list of "fifteen" supposed misstatements in Brodsky's brief.<sup>2</sup>

Unfortunately (and ironically), Soll makes numerous misstatements in the process. For example, to provide context, Brodsky provided the date that Ponto filed her adversary proceeding in Brodsky's bankruptcy.<sup>3</sup> Soll confuses this with the date that she herself, through Attorney Dan Nelson, filed a separate adversary proceeding.<sup>4</sup> While this immaterial fact is labeled "False Statement No. 5," it is completely accurate.<sup>5</sup>

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<sup>1</sup> Respondent's Brief at 9; A.15 (Soll's Memorandum in Support of Motion for Determination of Nondischargeability) (also available at RA.217); A.47 (Soll's Reply to Responsive Affidavit of Joseph Brodsky) (also available at RA.345).

<sup>2</sup> Actually, Brodsky should say "five full pages and two partial pages for a total of 126 lines of text" to avoid being later accused of a material misrepresentation. Respondent's Brief at 14-20.

<sup>3</sup> Appellant's Brief at 5.

<sup>4</sup> Respondent's Brief at 16.

<sup>5</sup> Another example is Brodsky's allegedly "False Statement No. 7" (and "False Statement No. 8," which is identical to "No. 7"). Citing this Court's opinion, Brodsky argued: "Soll admitted incurring \$130,000 in attorney's fees in order to claim half of them from Brodsky." Soll responds that "she made no such admission and the Court of Appeals made no such finding in the cited opinion." The opinion reads: "Following that hearing, [Soll] renewed her motion, *claiming that she had incurred \$127,927.27 in*

As for the remainder of Brodsky's allegedly "false" statements, the only even arguable inaccuracy relates to the procedural dates of Brodsky's bankruptcy. Brodsky cited the date of his voluntary Chapter 7 filing; Soll cites the date (two months earlier) of his Chapter 13 petition.<sup>6</sup> Neither date, obviously, is remotely central to the legal issues before the Court.<sup>7</sup> Brodsky stands by the remainder of the statements.<sup>8</sup>

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*attorney fees and costs* - and of this amount, \$74,822.64 had been incurred as a direct result of husband's discovery and court-order violations." RA.186 (Brodsky v. Brodsky, 2000 WL 890416 \*1 (Minn. Ct. App. July 3, 2000)) (emphasis supplied). Brodsky truly has no idea what Soll believes he "misrepresented" and stands by his "Statements No. 7 and 8."

<sup>6</sup> Respondent's Brief at 16 ("False Statement No. 4").

<sup>7</sup> Brodsky actually went bankrupt in February 1999, not April 1999, and Soll's adversary proceeding in Brodsky's bankruptcy was commenced in May 1999. Respondent's Brief at 16.

<sup>8</sup> With all due respect, some of them are quibbling at its worst. For example, Soll disagrees with Brodsky's statement that the trial court awarded "essentially everything" she asked, even though she received every penny requested with the exception of: (1) \$12,000 Brodsky already paid; and (2) attorney's fees which were not itemized. Respondent's Brief at 19 ("False Statement No. 12").

Notably, most of the "false" statements have *absolutely nothing* to do with the issues on appeal. For example, Brodsky explained that the bankruptcy court abstained from ruling on whether his obligations were dischargeable, which, in turn, depends on whether they were in the nature of "support" or were part of a property settlement. Brodsky explained that property settlements are (sometimes) dischargeable and support obligations are not dischargeable. In her "True Fact [No. 11]," Soll points out that property settlements are sometimes non-dischargeable, depending upon the outcome of a balancing test. Respondent's Brief at 18. Obviously, there was and is no need for extensive treatment of the intricacies surrounding bankruptcy law. The argument merely distracts from the real issues.

## 2. Necessary Factual Corrections.

Leaving aside the various immaterial issues raised by Soll, the following *material* misstatements must be corrected:

### Casa Del Sol Fees

- The J&D did *not* require Brodsky to pay half of the attorney's fees relating to dissolving the Casa Del Sol partnership. Rather, it required him to pay half of recording fees and title opinions and attorney's fees related to transferring the properties from himself to Soll, which was complete by the time the partnership dissolution began and the fees at issue were incurred.<sup>9</sup>

### Bank Accounts

- Brodsky *did* have the option to use funds in the three bank accounts at issue on the parties' rental properties. The account balances were disclosed in August 1996, and on May 2, 1997, the trial court ordered:

[Brodsky] shall account for all income and disbursements made subsequent to the date and amount for the respective bank account balances . . . .<sup>10</sup>

Therefore, Soll's statement that "the J&D did not give Brodsky the option of spending the money on the properties" is patently false.

- Brodsky did not destroy any bank account records: he turned all of them over to Soll with a court reporter and her attorney present in June 1997.<sup>11</sup> Soll's statement that "If Brodsky destroyed records after October 3, 1 2002, as he apparently concedes, he did so at his own peril," is disingenuous at

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<sup>9</sup> See Respondent's Brief at 33-34; but see Appellant's Brief at 8-9 and citations therein.

<sup>10</sup> RA.68; Appellant's Brief at 22-23.

<sup>11</sup> A.91; Transcript of August 30, 2005, hearing at 18-19; Appellant's Brief at 22-23.

best.<sup>12</sup>

### Northeast State Bank Debt

- The Northeast State Bank debt was part of the *property distribution* in the J&D.<sup>13</sup> As such, Soll misstates that it “was ordered in the nature of support,” and also concedes the trial court had no jurisdiction to award interest after the time to appeal from the J&D has passed.<sup>14</sup>

### SUMMARY OF ARGUMENT

All of Soll’s arguments, once distilled, are grounded on a basic premise, as stated in her own words: “Brodsky *IS* and should be the ‘fall guy.’ He deserves nothing less.”<sup>15</sup> In every legal pleading, Soll refers to a single, ten-year-old paragraph describing 1996 conduct for which Brodsky has already been penalized through a bankruptcy and a sanction of almost **\$100,000**. Based on that ten-year-old paragraph, Soll ceaselessly seeks reimbursement from Brodsky for superfluous expenditures.<sup>16</sup> However, Brodsky

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<sup>12</sup> Respondent’s Brief at 36.

<sup>13</sup> RA.11-12 (awarding Northeast State Bank debt to Soll); RA.35 (stating “the property division set forth above [including distribution of Northeast State Bank debt] is just and equitable.”).

<sup>14</sup> Respondent’s Brief at 36 (conceding trial court is without authority to change a division of real and personal property after the J&D has been entered and time to appeal has expired). Soll argues that Brodsky somehow conceded this debt was in the nature of support. Brodsky did no such thing. He simply agreed to immediately pay Soll rather than face the trial court, which had a history of methodically ruling for Soll.

<sup>15</sup> A.50; RA.348.

<sup>16</sup> The most recent example is Soll’s 356-page “Respondent’s Appendix,” which blatantly violates basic procedural rules, not to mention incurs utterly wasteful printing expense. There is almost nothing in Brodsky’s Appendix that was not duplicated by

should not be “re-sanctioned” for conduct already addressed in his acrimonious divorce a decade ago. As set forth in Brodsky’s principal brief, neither the law or the facts support the \$130,000 award to Soll.

### ARGUMENT

**I. Whether Minn. Stat. § 518.14 somehow supports the trial court’s award of attorney’s fees is a question of law which this Court reviews de novo.**

The application of a statute to undisputed facts involves a question of law, and the trial court’s decision is not binding on this Court.<sup>17</sup> The trial court cites Minn. Stat. § 518.14 as authority for its award of approximately \$95,000 in attorney’s fees Soll incurred in: (1) a fee dispute with her former attorney; (2) dissolution of her real estate partnership; and (3) Brodsky’s bankruptcy proceeding. Whether the statute supports the fee awards presents a question of law, which this court reviews de novo. Soll’s argument that this court’s function is to review for an “abuse of discretion” is erroneous.<sup>18</sup> The

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Soll. But see Minn. R. Civ. App. P. 130.02 (“If the respondent determines that the appendix filed by appellant omits any items specified in Rule 130.01, *only those omitted items may be included in an appendix to the respondent’s brief.*”) (emphasis supplied). To the extent Soll’s Appendix is not duplicative of Brodsky’s, it represents already-available items such as published case law and the transcript of proceedings before the trial court, which was previously filed with this Court by the trial court reporter. But see Minn. R. Civ. App. 130.01, subd. 1 (“The parties . . . shall not engage in unnecessary reproduction.”).

<sup>17</sup> O’Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).

<sup>18</sup> See Respondent’s Brief at 20.

trial court does not have “discretion” to award fees absent statutory authority.<sup>19</sup>

Moreover, Soll argued to the trial court that its sole function on her “Motion to Determine Nondischargeability” – which resulted in the judgments on appeal – was to “determine only legal issues.”<sup>20</sup> It is axiomatic that a reviewing court is not bound by and need not give deference to a district court’s decision on a purely legal issue.<sup>21</sup>

**II. There is no legal authority for the trial court’s award of attorney’s fees incurred in the “Ponto-Soll” dispute and in Brodsky’s bankruptcy.**

As the Court knows, absent a contractual agreement or statutory authority, attorney’s fees are not recoverable.<sup>22</sup> The only statute cited by Soll and the trial court is Minn. Stat. § 518.14, which explicitly requires a finding that *the marital dissolution proceeding* was delayed due to the offensive conduct. Here, the Brodsky v. Brodsky marital dissolution was over, resolved by the final judgment entered May 2, 1997.<sup>23</sup> The fees at issue were all incurred *after* the dissolution proceeding was closed, unlike the case

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<sup>19</sup> Morrison v. Swenson, 141 N.W.2d 640, 647 (Minn. 1966) (absent statutory authority, legal fees ordinarily are not recoverable).

<sup>20</sup> A.55; RA 353 (“The Court need determine only legal issues, issues easily resolved by reference to the J&D and applicable law as identified in Soll’s memorandum.”).

<sup>21</sup> See, e.g., Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003) (citing Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n, 358 N.W.2d 639, 642 (Minn. 1984)).

<sup>22</sup> Morrison, 141 N.W.2d at 647.

<sup>23</sup> RA.71.

law relied upon by Soll.<sup>24</sup>

Moreover, there has never been any suggestion, let alone a finding, that Brodsky's bankruptcy was frivolous. To the contrary, it is undisputed that Brodsky simply did not have the ability to pay Soll in 1999:

[T]he bankruptcy schedules which my client executed indicate that he does not have substantial assets with which to pay the obligations that are the subject of your court proceeding. Further more [sic] my client has agreed to submit all of his disposable income to repay those obligations through his chapter 13 plan.<sup>25</sup>

There is not one scintilla of evidence suggesting that Brodsky's bankruptcy was in bad faith. Indeed, had Brodsky taken any frivolous positions, the bankruptcy court could have unilaterally imposed a sanction, and/or Soll could have moved for sanctions.<sup>26</sup> Instead, she waited to do so until she was before the trial court.

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<sup>24</sup> See, e.g., Evenson v. Evenson, 2006 WL 771229 \*2 (Minn. Ct. App. March 28, 2006) (“[T]he court made findings supporting its conclusion that a two-year delay *in marital dissolution proceedings* due to appellant’s repeated change in counsel and insistence upon protracted litigation in a companion case ‘unreasonably contributed to the length and expense of [the marital dissolution] proceedings.’”) (emphasis supplied); Walbridge v. Simmons, 2000 WL 1577097 \*1 (Minn. Ct. App. October 24, 2000) (citing Redmond v. Redmond, 594 N.W.2d 272, 276 (Minn. Ct. App. 1999)) (noting the trial court found husband’s bankruptcy filing “unreasonably contributed to the substantial delay in resolving [the marital dissolution]”; stating “where a party contributes to the length and cost of a proceeding through ‘duplicitous and disingenuous’ positions, an award of reasonable attorney fees is appropriate.”).

As the Court knows, it cannot rely on unpublished cases cited by the parties. Vlahos v. R & I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004).

<sup>25</sup> RA.174.

<sup>26</sup> See 11 U.S.C. § 105; Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399 (1990).

In short, Brodsky's bankruptcy cannot be seriously cited as the reason Soll "had to" hire new attorneys and incur tens of thousands in new attorney's fees *fighting* her own former lawyer, Ponto, instead of making payments she already owed *to* Ponto. Brodsky's bankruptcy is also cited as some sort of wrongful "cause" of Soll's adversary proceeding, yet Soll did not request fees from the bankruptcy court (because she had no basis to do so). Soll, a regular creditor like any other in Brodsky's bankruptcy, is not entitled to attorney's fees incurred in her adversary proceeding.<sup>27</sup> She has no special status entitling her to those fees, and the trial court had no jurisdiction to award them.<sup>28</sup> Minn. Stat. § 518.14 does not support the award of Soll's attorney's fees incurred in the "Soll-Ponto" feud or in Brodsky's bankruptcy.

**III. Soll is not entitled to recover her business expense of partitioning assets in a partnership she was awarded in the J&D.**

As established in Brodsky's principal brief, Soll requested and was awarded Brodsky's interest in the Casa Del Sol real estate partnership in the J&D. Brodsky's obligations under the J&D were satisfied once he transferred the properties to Soll, including executing warranty deeds and paying for title opinions, etc. After all of that

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<sup>27</sup> Cox v. Elliot, 122 F.2d 851, 852 (8th Cir. 1941) (recognizing there is no provision in bankruptcy code requiring debtors to pay creditors' attorney's fees).

<sup>28</sup> See, e.g., Burns v. Burns, 448 S.E.2d 571, 573 (S.C. Ct. App. 1994) (reversing family court's award of attorney's fees incurred in bankruptcy proceeding; stating "While the family court clearly has jurisdiction to award a party attorney's fees in a domestic action, there is no provision for the award of attorney's fees by the family court based on an action brought in another court. The award of attorney's fees by the family court is limited to those fees incurred in actions brought in the family court.").

was complete, Soll and her partners, Brodsky's parents, agreed to partition the assets and dissolve the partnership. Contrary to Soll's argument, Brodsky had no obligation to fund that partnership dissolution.<sup>29</sup> Soll did not request that he do so, and the trial court did not even consider any such award in the J&D.<sup>30</sup> After Brodsky transferred the properties – i.e., satisfied his obligations under the J&D – the new Casa Del Sol partners chose to dissolve the partnership, although they certainly could have chosen to proceed forward with partnership business. As explained by the attorney for Marcia Rack-Brodsky in a sworn affidavit, Brodsky had nothing to do with those negotiations and had no interest in any of the properties at issue.<sup>31</sup> Brodsky was, nonetheless, ordered to pay for all of Soll's partnership dissolution costs on her "Motion to Determine Nondischargeability" eight years after the J&D was entered. Minn. Stat. § 518.14 does not support the fee award as a matter of law, and the trial court should be reversed.

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<sup>29</sup> Soll confuses attorney's fees (if any) related to *transferring the properties themselves* as opposed to later partitioning of the partnership assets. See Respondent's Brief at 33-34 ("With Brodsky already liable under the J&D for half of Ponto's post-decree fees incurred in handling the transfers . . .") (citing provision of J&D requiring Brodsky to provide warranty deeds and pay half of title opinion and recording costs on transferring his property interest to Soll).

<sup>30</sup> RA.63-64 (awarding Casa Del Sol partnership to Soll); RA.67-69 (requiring Brodsky to execute warranty deeds and pay half of title insurance, recording costs, etc.); see also Appellant's Brief at 20-22.

<sup>31</sup> A.96-97.

**IV. If Soll had any claim for bank account balances, it was ripe on May 12, 1997. Laches bars her from raising it either five or eight years later.**

Because she served and then immediately withdrew a motion in 2002, Soll claims she actually only waited five years, as opposed to eight, to make her “bank account depletion” claim. She claims Brodsky had notice in 2002, and should have sought out evidence to *disprove* her claim at that time, just in case she ever decided to bring a motion at some unknown future date. As an initial matter, it was *never* Brodsky’s burden to *disprove* Soll’s claim. Rather, it was *Soll’s* burden to *prove* her claim. She produced absolutely nothing beyond a self-serving affidavit stating: “[Brodsky] turned over the books and records but he failed to turn over the account balances.”<sup>32</sup> This sworn statement begs some obvious questions. Since Soll *admitted* she received the account documents from Brodsky, why did she not submit them in support of her claim? Why did the trial court not require at least that much? Moreover, *all Soll was entitled to from Brodsky was documentation of expenditures:*

Within 10 days of the entry of this Judgment and Decree, Respondent shall turn over to Petitioner all books, records and bank accounts for the properties awarded to her. ***Respondent shall account for all income and disbursements made subsequent to the date and amount for the respective bank account balances*** set forth in the Findings of Fact above (the bank account balances agreed to by the parties for the respective properties and partnerships).<sup>33</sup>

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<sup>32</sup> A.32 (also available at RA.343).

<sup>33</sup> RA.68 (“Within 10 days of entry of this Judgment and Decree, Respondent shall turn over to Petitioner all books, records and bank accounts for the properties awarded to her. ***Respondent shall account for all income and disbursements made subsequent to the date and amount for the respective bank account balances*** set forth

It is undisputed that Soll received the account documents.<sup>34</sup> It is undisputed that all of the expenditures from the accounts between August 1996 and June 1997 went towards Soll's rental properties.<sup>35</sup> Reversal is warranted on that basis alone.

Soll claims, inexplicably, that she had "ten years" to collect on her "judgment" for the bank account balances.<sup>36</sup> This is truly inscrutable. Soll sought an entirely new judgment for the balances, from which Brodsky now appeals. Moreover, if Soll ever had any claim for wrongful depletion of account balances, it was (1) not part of any judgment, and (2) ripe in early June 1997. Not until eight years later did she move for a (duplicate) award of the bank account balances.<sup>37</sup> Although it was not his burden, Brodsky did try to obtain account documentation once faced with that motion. By that time, however, the bank had destroyed all records, and Brodsky had long ago transferred his paper copies to Soll.<sup>38</sup> Therefore, as a matter of law, doctrine of laches bars Soll from

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in the Findings of Fact above (the bank account balances agreed to by the parties for the respective properties and partnerships.)").

<sup>34</sup> A.32 (also available at RA.343).

<sup>35</sup> A.41-42 (also available at RA.193-94).

<sup>36</sup> Respondent's Brief at 35.

<sup>37</sup> The relevant date is the date Soll actually pursued "recovery."

<sup>38</sup> This begs the question: since Soll *admitted* she received the account documents from Brodsky, why did she not submit them in support of her claim? Why did the trial court not require at least that much?

pursuing her frivolous “claim.”<sup>39</sup>

**V. Neither Minn. Stat. § 549.09 or the doctrine of “equitable subrogation” permits a retroactive award of interest on the Northeast State Bank debt.**

As established in Brodsky’s principal brief, Minn. Stat. § 549.09 does not support the trial court’s award of interest on the Northeast State Bank debt.<sup>40</sup> Soll now argues, for the first time on appeal, that the doctrine of “equitable subrogation” supports the award. This legal argument was not advanced before the trial court, and cannot be considered on appeal.<sup>41</sup>

**CONCLUSION**

The trial court “re-sanctioned” Brodsky in the amount of \$130,000 for conduct from a decade ago. Brodsky has paid what he owes, and those new judgments have absolutely no basis in fact or law. For the foregoing reasons, and those stated in his

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<sup>39</sup> See, e.g., M.A.D. v. P.R., 277 N.W.2d 27, 29 (Minn. 1979); St. Paul, M. & M. Ry. Co. v. Eckel, 84 N.W. 1008, 1009 (Minn. 1901); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979) (“If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice required before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.”). Soll throws in an “unclean hands” argument that (1) was not raised before the trial court; and (2) is patently inapplicable. Respondent’s Brief at 35. There is not one scintilla of evidence that Brodsky did anything inequitable pertaining to the bank account balances.

<sup>40</sup> Appellant’s Brief at 25-26.

<sup>41</sup> See, e.g., Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988) (citations omitted) (“The function of the court of appeals is limited to identifying errors [on the record] and then correcting them.”); Matter of Welfare of child of L.F., 638 N.W.2d 793 (Minn. Ct. App. 2002) (generally, the failure to raise an issue before the district court is a waiver of the issue on appeal).

principal Brief, Appellant Joseph Brodsky respectfully requests the trial court's findings for Soll be, for the third time, reversed.

Respectfully submitted,

Dated: Sept 7, 2006. JOHNSON & CONDON, P.A.

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