

NO. A06-0736

State of Minnesota
In Court of Appeals

Elizabeth Soll Brodsky,

Respondent,

v.

Joseph Alan Brodsky,

Appellant,

and

Nancy L. Ponto,

Intervenor.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

1. Whether, after reviewing detailed time records of Soll's attorneys to which Brodsky made no objection, and having presided over this case for over ten years, the district court committed a clear abuse of discretion in awarding Soll 86% of her post-dissolution attorneys' fees and costs under Minn Stat. § 518.14.

The trial court found such fees were reasonably and necessarily incurred as a result of Brodsky's failure to fulfill his obligations under the J&D.

Apposite authority: Minn. Stat. § 518.14, *Farrar v. Farrar*, 383 N.W.2d 436, 441 (Minn.Ct.App. 1986) (affirming award of post-dissolution attorney fees where the party "unnecessarily created much of the cost of attorney's fees by his failure to comply with the original judgment and decree")

2. Whether the doctrine of laches precludes collection of money awarded to Soll in a final judgment.

In the J&D, the trial court awarded Soll the balances of three bank accounts totaling in the aggregate \$23,134.00. Brodsky admits that he spent the balances and did not turn them over to Soll as ordered in the J&D. In the December 12, 2006 Order, the district court entered judgment against Brodsky for the account balances plus accrued interest. The district court did not discuss laches in its decision.

Apposite authority: *Dent v. Casaga*, 296 Minn. 292, 297, 208 N.W.2d 734, 737 (1973). (Final judgments are enforceable for the entire ten year statutory period); *Ryan v. Ryan*, 300 Minn. 244, 251 n. 2, 219 N.W.2d 912, 916 n. 2 (1974) *citing Richter v. Richter*, 126 N.W.2d 634 (N.D.1964)) (Equitable defenses are not available in an action for support arrearages brought within the statutory limitation period); *see also, Froats v. Froats*, 415 N.W.2d 445, 447 (Minn.Ct.App.1987) (Even if the doctrine of laches would be considered by this court, respondent correctly points out appellant's lack of cooperation as revealed in the procedural history of this matter. Appellant's lack of cooperation over the years would fall within the equitable "unclean hands" doctrine for "he who seeks equity must do equity.").

3. Whether Soll is entitled to statutory interest on Brodsky's obligations under the J&D even though the J&D is silent about interest.

The district court awarded post-judgment interest on the attorneys' fees awarded to Soll as a sanction under the J&D; on the bank account balances awarded to Soll under the J&D and on the Northeast State Bank judgment paid by Soll after Brodsky refused to pay. (Brodsky does not dispute the interest on the attorneys'

fees awarded as a sanction but disputed the interest on the Northeast State Bank judgment).

Apposite authority: Minn. Stat. § 549.09, subd. 2; *Mon-Ray, Inc. v. Granite Re, Inc.* 677 N.W.2d 434, 441 (Minn.Ct.App. 2004).

STATEMENT OF THE CASE

The original 71-page Judgment and Decree (“J&D”) in this marital dissolution matter was entered by the district court on May 2, 1997 after a three day trial. Joseph Brodsky (“Appellant” or “Brodsky”) was a Minnesota-licensed attorney engaged in the private practice of law. Elizabeth Soll Brodsky was a homemaker with three children all aged 5 and under. The J&D awarded Soll a number of marital rental properties and partnership interests, not as a property settlement, *but as support*. In the J&D, Joseph Brodsky (“Appellant or Brodsky”) was also ordered to pay certain debts and to indemnify Soll for liability for such debts. Primary among those debts were attorney’s fees in the amount of \$62,822.64 assessed against Brodsky as a sanction for his bad faith behavior during the dissolution, and a non-marital second mortgage debt to Northeast State Bank in the original principal amount of \$50,000 drawn and spent entirely by Brodsky without Soll’s knowledge or consent. Brodsky was also ordered in the J&D to turn over bank account balances for several properties awarded to Soll in the J&D with stated balances totaling \$23,134.00.

Despite the district court’s clear order, Brodsky flatly refused to pay the sanction for Soll’s attorneys’ fees to Soll’s attorney Nancy Ponto (“Ponto”) or the Northeast State Bank debt for nearly nine years. He refused to turn over the bank account balances and instead spent the money. As a result of his refusal to pay the attorneys’ fees he was ordered to pay to Ponto as sanctions, Ponto filed attorneys’ liens against all of Soll’s rental properties awarded to her as support. Soll discharged Ponto. In her ongoing effort to collect from Soll, Ponto commenced two separate lien foreclosure proceedings. Soll litigated with Ponto over these liens and her claimed fees for over five years at great expense, in order to protect Soll’s source of support from

the rental properties all of which could have been avoided had Brodsky paid what he was ordered to pay when he was ordered to pay it.

Similarly, Brodsky refused to pay the Northeast State Bank debt. The bank sued Soll and Brodsky and obtained a judgment which also became a lien on Soll's rental properties. To force Brodsky to pay Ponto and the Northeast State Bank judgment, whose liens were threatening Soll and her children's means of support, Soll returned to court after May 2, 1997 to collect. Finally, on February 19, 1999, the Court issued an order to show cause why Brodsky ought not to be held in contempt for failure to pay these debts. In the order, the court found:

Respondent's failure to pay the above two debts [to Ponto and Northeast State Bank] has deprived Petitioner of her court ordered spousal maintenance and endangers her and the children's welfare.

The hearing date on the contempt motion was set for March 9, 1999. Brodsky filed a Chapter 13 bankruptcy reorganization petition on February 25, 1999. As a result of Brodsky's bankruptcy, the district court issued an order striking the scheduled contempt hearing and staying further proceedings pending resolution of the bankruptcy case.

Brodsky's Chapter 13 was converted to a Chapter 7 liquidation on April 27, 1999. On May 28, 1999, to prevent Brodsky's obligations to her under the J&D from being discharged, Soll commenced an adversary proceeding in the bankruptcy case (the "Adversary Proceeding") seeking a determination that *all* of the obligations Brodsky owed to Soll under the J&D as well as post-dissolution attorneys' fees and costs incurred by Soll in attempting to enforce the J&D both before and during the bankruptcy case were non-dischargeable in Brodsky's bankruptcy under section 523 of the Bankruptcy Code (11 U.S.C. § 101 *et seq*).

Upon Soll's motion, the bankruptcy court determined that the district court had concurrent jurisdiction over the issue of what obligations remained under the J&D and whether such obligations were nondischargeable as being in the nature of support. On November 27, 2002, the bankruptcy court issued an order abstaining from hearing the dischargeability case in deference to the expertise and experience of the district court in light of its long history in this matter and remanded the case to the district court for a determination of what debts remained outstanding under the J&D and whether they were dischargeable. Specifically, the bankruptcy court held:

This court abstains from hearing the issue of what obligations Plaintiff and Defendant owe each other pursuant to state court dissolution proceedings. This is solely a matter for resolution in state court.

2. This court also abstains from hearing the issue of whatever obligations Defendant owes Plaintiff pursuant to state court dissolution proceedings are excepted from Debtor's discharge under 11 U.S.C. § 523(a)(5).

Order of November 27, 2002. RA 228.¹

The matter returned to the district court for resolution. On October 31, 2002, Soll filed her Motion for Order Determining Nondischargeability of Debts of Respondent and accompanying memorandum and affidavits (together the "Original Dischargeability Motion"). In that motion Soll sought a determination that: (1) Brodsky had a continuing obligation to pay the \$62,822.64 in attorney's fees awarded as sanctions; (2), Brodsky had a continuing obligation to pay the Northeast State Bank judgment; (3) Brodsky had an unsatisfied obligation to turn over the bank account balances, all as ordered in the J&D; (4) based on Brodsky's conduct, she was

¹ Appellant's repeated statements that the bankruptcy court's abstention was limited to two debts, the attorneys' fees and the Northeast State Bank judgment are false.

entitled to an award of post-dissolution attorneys' fees and costs of enforcement of the J&D; and (5) all of these items were not dischargeable in Brodsky's bankruptcy.

Concurrent with the Original Dischargeability Motion, Soll filed an ultimately successful motion seeking an order that the eight percent interest Ponto had been charging was usurious. Ponto countered with an ultimately unsuccessful motion to remove Judge Anderson. While the issues with Ponto were being resolved, Soll withdrew the Original Dischargeability Motion. The motion was revised to include a request for interest and a correction of an erroneous \$12,000 credit allowed in favor of Brodsky on the amount of his sanctions and refiled and served on August 1, 2005, after Soll had settled with and paid Ponto \$120,000.

The Dischargeability Motion was scheduled for hearing on August 30, 2005. Despite the fact that Brodsky had nearly three *years* from the original service of the Original Dischargeability Motion to retain counsel and prepare a comprehensive response, Brodsky submitted no legal memorandum in opposition to the Dischargeability Motion and instead submitted merely a five page affidavit replete with numerous false statements. Brodsky did not appear at the hearing on August 30, 2005 but he was represented by his then counsel, Barbara May. At the hearing, Ms. May made no request for an evidentiary hearing or an opportunity to present additional evidence beyond Brodsky's five-page affidavit. During the hearing, the district court requested additional back up for Soll's post-dissolution attorneys' fees and twice invited Brodsky to submit a response to the billings. Soll provided the billings but Brodsky submitted nothing further in response.

Three months after the hearing, having received no further materials from Brodsky, on December 12, 2005, the district court issued its order (the "December 12 Order"). Judgment was entered on the December 12 Order on March 6, 2006. Brodsky retained new counsel.

On March 14, 2006, Brodsky, through his new counsel, filed a Motion for Amended Findings of Fact, Conclusions of Law, Motion for New Trial and Motion to Dismiss (the "Motion to Reconsider"). With the Motion to Reconsider, Brodsky attempted to supplement the record by submitting four new affidavits. Soll moved to strike the new affidavits. The Motion to Reconsider was heard on April 11, 2006 and was denied in all respects by order of May 1, 2006 (the "May 1 Order"). In the May 1 Order, the district court ordered all of the new affidavits stricken from the record. This appeal followed.

Despite the May 1 Order that the four new affidavits were not part of the record, Brodsky has treated them in this appeal as if they were and did not even mention in his brief that the affidavits had been ordered stricken. Soll has filed a separate motion in this appeal case to strike the affidavits.

STATEMENT OF FACTS

Brodsky left his wife and young family on April 9, 1995. RA 3. At that time Brodsky had three children, twins (son and daughter) aged three, and a daughter aged one. RA 3. On October 16, 1996, the district court issued an order for protection which contained a finding of domestic abuse by Brodsky. RA 4. Brodsky repeatedly violated the order. RA 4.

Prior to their separation, Brodsky and Soll had obtained, but had not drawn on, a home equity line of credit for \$50,000 on their home in December, 1994 from Northeast State Bank.

RA 11-12. Shortly thereafter, Brodsky withdrew the full balance of \$50,000 without Soll's knowledge or consent, flew to Las Vegas by himself and spent it all. *Id.*

Brodsky's conduct during the dissolution was reprehensible. Despite three separate court orders, Brodsky "systematically and flagrantly" destroyed his charge account statements. RA 12. Brodsky refused to provide income to Soll sufficient for her to maintain health insurance for the children. RA 14. Brodsky refused to produce charge account and financial records in defiance of the court's orders. RA 15. The limited records he did produce revealed "an astounding number of misappropriations." RA 16. While Brodsky went on gambling junkets to Grand Casino in Hinckley in August 1995, Grand Casino in Onamia in September and October 1995, Mystic Lake Casino in October 1995, Las Vegas in December 1995, the two mortgages on the home occupied by Soll and the three children which Brodsky had been ordered to pay went into default. RA 17-19. The first mortgage was foreclosed and Soll and the minor children were forcibly evicted. RA 18. Despite the fact that Brodsky and Soll jointly owned a second home occupied by Brodsky and his girl friend, and over 20 rental properties, Brodsky refused to assist Soll in securing housing even among these many rental properties. RA 18 - 19.

Despite court orders, Brodsky refused to pay both child and spousal support. RA 23, 29. Brodsky's failure to comply with court orders and his manipulation of his income from his law practice made it impossible for the court to determine the amount of his outstanding arrearages as of the time of trial. RA 42. If Brodsky had paid child support and spousal maintenance, he would have paid Soll \$74,616.00 between the separation and the time of the J&D. RA 43.

Brodsky's behavior was summarized by the court in the J&D:

The evidence of Respondent's misconduct throughout these proceedings constitutes bad faith. Respondent's uncooperative attitude and lack of candor seriously impaired Petitioner's ability to adequately prepare for trial, delayed these proceedings and added considerably to the cost she incurred in doing so. The records Respondent did produce showed a course of extravagant spending and misappropriation of marital funds by Respondent throughout this proceeding. In addition, Respondent has violated nearly every interim order entered by this Court, not once, but in most cases, repeatedly. He has breached his fiduciary duty to Petitioner and the minor children. He very purposely and intentionally created a financial crisis for Petitioner, causing Petitioner and the children to be ejected from the family homestead and left without suitable living quarters from August 1995 to the present. During the pendency of these proceedings, Respondent threatened to leave Petitioner without a place to live and penniless. His actions during the pendency of this case appear to be consistent with his expressed goal.

RA 53-54.

As of the date of the J&D, Soll owed Ponto \$90,961.74 in unpaid fees. RA 54. Of that amount, the court held that at least \$74,822.64 was incurred by Soll in attempting to obtain financial information and in dealing with violations of court orders by Brodsky. RA 54. The district court sanctioned Brodsky \$74,822.64 for his bad faith conduct which resulted in considerable unnecessary delay and expense. RA 70. Brodsky received credit of \$12,000 (erroneously) and judgment for \$62,822.84 was entered against him in the J&D. RA 70-71.

The district court also required Brodsky to indemnify and hold Soll harmless for the second mortgage on the by then foreclosed homestead to Northeast State Bank (RA 60) and to turn over the balances in three bank accounts aggregating \$23,134.00. RA 63 (\$3,734.00), RA 64 (\$12,559.00), RA 65 (\$6,841.00). Brodsky did none of these. Following the foreclosure of the first mortgage on the homestead, Northeast State Bank sued Brodsky and Soll and obtained a judgment for the \$50,000 plus interests and costs. RA 342.

In the J&D, the court awarded Soll a 50% interest in the Casa Del Sol Properties, a partnership with Marcia Rack-Brodsky, Brodsky's mother (RA 29) and managed by Brodsky. RA 28.

The district court repeatedly made clear that the properties awarded were in the nature of support and were not property settlements because based on the history of Brodsky's behavior, the court had no confidence that Brodsky would pay traditional support. RA 22, 29, 31, 36, 43, 44. Brodsky kept fighting after the entry of the J&D. Just three weeks after the J&D was entered, on May 20, 1997, Brodsky filed a motion seeking to reduce his child support obligations under the J&D. Soll was forced to respond. RA 73. Brodsky's post-dissolution motion resulted in an amendment to the J&D entered August 28, 1997 and additional expense for Soll but no reduction in child support because the court found that Brodsky had been intentionally self-limiting his income. RA 74-75.

Following the J&D, Ponto assisted Soll in dissolving the Casa Del Sol partnership and in selling two of Soll's properties to raise funds to pay Ponto part of what Brodsky had been ordered to pay. RA 84-85. Brodsky and his mother insisted on Brodsky managing the Casa Del Sol properties. Brodsky claimed to be acting as his mother's attorney, forcing Soll to deal directly with Brodsky if she wanted to complete the dissolution. Soll found him impossible to deal with and needed Ponto to negotiate and facilitate the dissolution. RA 84. As the Court of Appeals found:

Appellant [Ponto] continued to work on the dissolution matter, including overseeing transfer of rental properties to respondent, the partition of properties, docketing the attorney-fee judgment, and responding to husband's motion to amend the decree.

Marriage of Brodsky, 2000 WL 890416 (Minn.Ct.App. 2000). RA 187.

In March 1997, even before the entry of the J&D, to secure her unpaid fees, Ponto filed attorneys' liens against the rental properties owned by the parties. RA 81. Ponto filed additional liens on these properties post-dissolution on February 10, 1998. RA 81. The J&D recited that that Ponto had billed Soll for fees through May 2, 1997 of \$126,131.23. Soll discharged Ponto in June 1998. RA 82-83. In its Amended Order of September 13, 1999, the court found that Ponto had charged Soll an additional \$23,363.97 for work performed after May 2, 1997 through the date she was discharged. RA 154. The total amount billed to Soll by Ponto therefore, without interest, was \$149,495.20. RA 83. Soll paid Ponto \$22,386.19 in compliance with the district court's Amended Order of September 13, 1999. By then Soll had paid Ponto a total of \$77,557.71, \$55,171.52 toward billings in the dissolution proceedings and additional \$22,386.19 as required by the court's order toward post-dissolution fees. RA 83.

Without counting interest, the principal balance due to Ponto after the payments Soll made (without interest) should have been \$71,937.49. RA 83. If Brodsky had paid Ponto what he was ordered to pay (\$62,822.64) at the time he was ordered to pay it (May 2, 1997), there would have been only \$9,114.85 remaining. RA 83. Soll could have pulled together the remaining \$9,000 and Soll would not have been forced to spend any additional money on attorneys to litigate with Ponto. RA 83. Had Brodsky turned over the \$23,134.00 in bank account balances, he was ordered to turn over; Soll would have had sufficient funds to pay Ponto in full.

But Brodsky did not pay. Nor did he turn over the account balances. He spent them.

After Soll discharged Ponto in June of 1998 and with Soll and Northeast State Bank pressing to foreclose on their liens which would destroy Soll's source of needed spousal support,

Soll retained attorney Dan Nelson. Brodsky continued to refuse to pay. RA 82-149. The defense against Ponto's liens resulted in two trips to the Court of Appeals. Brodsky filed his Chapter 13 bankruptcy on February 25, 1999 (RA 164) only days before a hearing on Soll's motion for contempt for Brodsky's failing to pay Ponto and Northeast State Bank. RA 175. Believing that he was protected by the automatic stay from further enforcement action by Soll (See RA 174-175), Brodsky went on the offensive, again seeking to reduce his child support obligations. RA 178. This time, in an effort to avoid Judge Anderson, Brodsky brought his child support modification motion before the administrative law judge for hearing on April 28, 1999. RA 178.² The ALJ refused to hear the matter because Judge Anderson was still assigned to the case and sent it back to Judge Anderson. RA 178. Foiled in his effort to sidestep Judge Anderson, Brodsky filed a motion accusing Judge Anderson of prejudice, falsely attributing to her a number of statements she had never made, and demanding that she remove or recuse herself. RA 176-185. Judge Anderson refused and denied Brodsky's motion recounting the history of Brodsky's delaying conduct and "correcting" various misstatements Brodsky had made in support of his motion. RA 176-185.³ Judge Anderson then denied Brodsky's second motion to reduce his child support filed July 14, 1999 following Brodsky's discharge in his bankruptcy case. RA 85. Nelson represented Soll in these matters. In all, Nelson billed Soll \$35,723.59 and the district court allowed \$20,051.00 of those fees in the December 12, Order. RA 174.

³ Although Soll was represented by attorney Nelson at these unnecessary and spurious proceedings brought by Brodsky, Nelson was unable to produce detailed billing records for this time period so the district court did not include these fees in the award of additional fees made on December 13, 2005. See RA 115, RA 165.

Soll retained bankruptcy litigation counsel at Lapp, Libra, Thomson, Stoebner & Pusch, Chartered (“Lapp Libra”) to represent her in Brodsky’s bankruptcy proceedings. Lapp Libra continued the adversary proceeding Soll commenced in Brodsky’s bankruptcy (by Dan Nelson) to determine the dischargeability of Brodsky’s obligations under the J&D. Soll successfully sought an order from the bankruptcy court abstaining from hearing the dischargeability issues in the adversary proceeding arising under 11 U.S.C. § 523 and remanding the matter to district court. RA 309-324. When the case finally returned to the district court on December 20, 2002, after Brodsky’s bankruptcy, for a determination of the amount of remaining obligations due under the J&D and the dischargeability of such obligations, it was then Ponto who sought to remove Judge Anderson. The matter went to Chief Judge Burke for resolution and Ponto’s motion was ultimately denied. RA 312.

Thereafter Brodsky, Soll and Ponto unsuccessfully attempted a mediated three-way settlement. At the mediation, Brodsky claimed to have deposited into his attorneys’ trust account \$90,000 to be used to “settle” with Soll. Brodsky knew that the judgment against him for the \$62,822.84 plus interest and the judgment for the Northeast State Bank remained unsatisfied. Brodsky claims that he sat in the mediation all day with \$90,000 to “settle” his debt, yet he refused in bad faith to *pay* the \$90,000 or any part of it against the judgment in an attempt to force concessions from Soll. RA 197-198. The result of his refusal to pay the \$90,000 resulted in further unnecessary proceedings, delay and additional expense to Soll.

Brodsky has been represented in this case and his related bankruptcy by no fewer than seven attorneys: William A. Blonigan, Edward Kautzer, William E. Haugh, Jr., Geraldine Steen, John Hedback, Barbara May, and now Robert Kuderer. His two most recent attorneys have each

been so unfamiliar with the history of the case that they have made numerous misstatements of fact that Soll has been obligated to correct, further adding to the delay and cost of these proceedings. *See* Tr. August 30, 2005, RA 293-294. (Former Brodsky attorney Barbara May incorrectly accused Soll in open court of attempting to remove the district court judge.) *See also*, Statement of Erroneous Facts, *infra* (Listing 15 factual “errors” in Brodsky’s Brief made by present counsel).

In fact, Brodsky made so many “mistakes” *under oath* in his Responsive Affidavit dated August 22, 2005 (RA 191-199) that much of Soll’s Reply dated August 26, 2005 was devoted to correcting these misstatements. RA 345-356.

**STATEMENT OF ERRONEOUS FACTS MADE BY BRODSKY
IN HIS BRIEF WITH CITES THERETO⁴**

False Statement No. 1: “Brodsky transferred the balances of the three bank accounts and all related documents to Soll in June 1997; Soll first alleged Brodsky did not transfer the balances in 2005, after all account records were destroyed by the bank.” Table of Contents ¶ IV, p. i.; *see also*, Statement of Legal Issues ¶ III; Statement of the Case p. 3, Statement of Facts p. 10 (“balance of bank account she received from Brodsky more than eight years earlier”); Summary of Argument, p. 13 (“Brodsky was ordered to turn over the account

⁴ The Minnesota Rules of Civil Appellate Practice do not require (or anticipate) a “Statement of Erroneous Facts” but since there are so many erroneous statements of fact by Brodsky in his brief that to avoid confusion they must be identified. Although he is an attorney, Brodsky apparently believes he is not subject to the Rules of Professional Conduct. In the J&D, the district court found that Brodsky lied about his gambling trips, was not credible (RA 16) and demonstrated a lack of candor (RA 53). In its order two year later denying Brodsky’s motion for removal/recusal, the district court “corrected” a number of false statements Brodsky had attributed to the court. RA 176-185. In the order denying Brodsky’s motion for reconsideration, new trial, etc. the district court found that Brodsky had demonstrated a pattern of obfuscation bolstered by the fact that he had made at least one false statement in his affidavit, that Soll had sought to remove Judge Anderson. RA 205. There is no change in the spots on this leopard.

balances and an accounting of expenditures in the J&D. He did that in early June 1997, with Soll's attorney and court reporter present").

True Fact: Brodsky admitted in his affidavit that the funds were used "dollar for dollar to pay property taxes on Petitioner's properties or to return security deposits." RA 194. In other words, Brodsky admits that he *spent* the funds. He did not turn them over as he claims and he was unable to produce any records to support his claim at the hearing on August 30, 2005. RA 166.

Soll first raised the bank deposit issue in her Memorandum in Support of Motion for Determination of Nondischargeability served on Brodsky's counsel on October 31, 2002, not in August 2005 as Brodsky claims. There is no evidence that any records had been destroyed by October 31, 2002.

False Statement No. 2: "In 2002, the federal bankruptcy court abstained from ruling on whether two of Brodsky's debts under the J&D were 'in the nature of support,' and therefore, non-dischargeable under 11 U.S.C. § 523(a)(5)." Statement of the Case. p. 3, Statement of Facts p. 9 ("court abstained from ruling on two narrow state law issues"); Summary of Argument, p. 12 ("the only question properly before the district court was the dischargeability of two debts, both of which Brodsky has paid")

True Fact: The bankruptcy court held:

2. This court abstains from hearing the issue of what obligations Plaintiff and Defendant owe each other pursuant to state court dissolution proceedings. This is solely a matter for resolution in state court.
3. This court also abstains from hearing the issue of whatever obligations Defendant owes Plaintiff pursuant to state court dissolution proceeding are excepted from Debtor's discharge under 11 U.S.C. § 523(a)(5). RA 228-229.

Soll first notified Brodsky that she was seeking more than just these two debts in her Original Dischargeability Motion served October 31, 2002 wherein she made a claim for the bank account balances and attorneys' fees incurred in enforcing the J&D.

False Statement No. 3: "These new awards totalling about \$134,000 were based on the trial court's eight-year old credibility determination." Statement of Case p. 4, *See also*, Statement of Facts, p.11

True Fact: The district court found Brodsky less than credible as recently as May 1, 2006 in his sworn Responsive Affidavit. RA 205; *see also* fn. 5, *supra* for other post-dissolution occasions when Brodsky's lack of credibility was demonstrated.

False Statement No. 4: "He could not meet his obligations went [sic] bankrupt on April 27, 1999." Statement of Facts, p. 5.

Actual Fact: Brodsky filed Chapter 13 bankruptcy on February 25, 1999. RA 164, RA 174.

False Statement No. 5: "Nancy Ponto, Soll's attorney, commenced an adversary proceeding in Brodsky's bankruptcy action under 11 U.S.C. § 523 on October 22, 1999." Statement of Facts p.5.

True Fact: Soll discharged Ponto in June 1998. RA 82. (The adversary proceeding was filed May 28, 1999 by Dan Nelson although that fact is not found in the record).

False Statement No. 6: "It was that abstention alone that provided any legal basis for Soll's returning to the trial court to bring her "Motion to Determine Non-Dischargeability." Statement of Facts p. 6.

Actual Fact: The bankruptcy court and the district court have *concurrent* jurisdiction over matters under 11 U.S.C. § 523(a)(5) and the bankruptcy court so held. RA 229.

False Statement No. 7: “Soll admitted incurring \$130,000 in attorney’s fees during the dissolution in order to obtain the \$63,000 sanction against Brodsky.” Statement of Facts, p. 6 *citing* Brodsky I, 200 WL 890416 * 1.

True Fact: Soll made no such admission and the Court of Appeals made no such finding in the cited opinion.

False Statement No. 8: “Soll *admitted* ‘incurring’ \$130,000 in attorney’s fees in order to claim half of them from Brodsky.” Statement of Facts, p. 7.

True Fact: Soll made no such admission. No attorneys’ fees were to be split in half under the J&D except the fees associated with the transfer of the properties and interests awarded to Soll under the J&D. RA 70 (Each party to pay their own attorneys’ fees except for sanctions against Brodsky), RA 69 (Each party shall pay one half of attorneys’ fees incurred in transferring the properties and interests awarded to Soll).

False Statement No. 9: In the end, Soll apparently incurred about \$70,000 in additional attorney’s fees asserting her “fee cap” argument.” Statement of Facts, p. 8, citing A 66 and A 34-38.

Actual Fact: The dispute over the so-called “fee cap” was resolved by the decision of the Court of Appeals issued February 12, 2002. RA 230. Dan Nelson, not Ralph Mitchell, represented Soll on the two appeals. RA 85. Nelson billed a total of \$35,723.59 of which the district court awarded only \$20,051.00 (56%) (RA 67, RA 82-149) some of which fees were

incurred in defending Soll against Brodsky's attempt to remove Judge Anderson and to reduce his child support obligations. RA 85.

False Statement No. 10: "Brodsky had nothing to do with this process . . ." [the Casa Del Sol dissolution]. Statement of Facts p. 8-9 *citing affidavits of Marcia Rack-Brodsky, Steve Stilton, and Second Affidavit of Joseph Brodsky.* (all of which were stricken from the record below and are not part of the record on appeal).

Actual Fact: The fees Soll incurred were necessitated by Brodsky's continuing involvement and by the need to dissolve the partnership in order to enforce the maintenance order. RA 84-85, RA 203-204. Whether or not he was involved, Brodsky was ordered to pay half of the attorneys' fees incurred in transferring the properties and interests ordered transferred in the J&D. RA 69.

False Statement No. 11: "[P]roperty settlements are dischargeable in bankruptcy; 'support' obligations are not. See 11 U.S.C. § 523(a)(5)(B)." Statement of Facts p. 9, fn 23.

Actual Fact: Prior to the enactment of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 ("BAPCPA"), property settlements could also be non-dischargeable as well under the balancing test in 11 U.S.C. § 523(a)(15) (West 2005). The bankruptcy court had exclusive jurisdiction over that section and the bankruptcy court in Brodsky's case noted that it was reserving all other jurisdiction (including that under section 523(a)(15) in its order). RA 229. Subsequent to the enactment of BAPCPA, section 523(a)(15) (West 2006) was amended to make property settlements non-dischargeable.

False Statement No. 12: “The trial court made fact findings consistent with Soll’s submissions, and awarded Soll essentially everything she asked for.” Statement of Facts, p. 11.

Actual Fact: Soll requested an additional \$12,000 for a credit the court gave to Brodsky for a payment he did not make. The district court denied the request. Soll also requested post-judgment attorneys’ fees of \$109,844.67 but was awarded only \$94,651.69. RA 237, RA 163-170.

False Statement No. 13: “In essence, a massive, \$134,000 award against him was issued after a de-facto court trial, and he was given no opportunity to present evidence refuting Soll’s affidavits.” Statement of Facts p. 12.

Actual Fact: Soll originally served her motion and supporting documents regarding dischargeability on Brodsky’s then counsel John Hedback on October 31, 2002, more than two and a half *years* before the hearing date of August 30, 2005. RA 227. Soll’s original motion was withdrawn, amended and re-served on Brodsky’s new counsel Barbara May on August 1, 2005, 29 days before the hearing date of August 30, 2005. Although he had every opportunity to submit a memorandum and whatever affidavits he deemed appropriate, Brodsky filed a only terse Responsive Affidavit (RA 228) and nothing else. Brodsky did not even appear at the hearing on August 30, 2005. At the hearing Ms. May made no request for an evidentiary hearing or for leave to submit additional affidavits or evidence. RA 202. She failed to explain why Brodsky had failed to submit a legal memorandum or additional evidence. The district court requested detail on the claimed attorneys’ fees from Soll’s counsel and during the course of the hearing *twice* invited Brodsky’s counsel to respond in writing after the hearing. RA 297, 300.

Brodsky made no response, however and after waiting three months, the district court entered the December 12 Order disposing of the matter.

False Statement No. 14: “Brodsky was suddenly haled before the trial court and ordered to pay Soll an additional \$134,000.”

Actual Fact: Brodsky had notice of Soll’s intent to seek these additional amounts since at least October 31, 2002. See Actual Fact 13 *supra*.

False Statement No. 15: “Soll’s ‘Motion to Determine Non-Dischargeability’ presented two narrow issues: whether the Northeast State Bank debt and attorney’s fee sanction were dischargeable in Brodsky’s bankruptcy.”

Actual Fact: Soll’s motion included the bank account balances, interest on the Northeast State Bank debt, attorneys’ fees incurred in enforcing the J&D and a claim for a correction of the amount of the sanctions. RA 237-266.

ARGUMENT

I. POST-DISSOLUTION ATTORNEYS’ FEES

A. Applicable Standard of Review -- “Clear Abuse of Discretion”

The award of attorney fees in a dissolution proceeding rests “almost entirely” within the discretion of the district court and will not be disturbed absent a clear abuse of discretion. *Solon v. Solon*, 255 N.W.2d 395, 397 (Minn.1977). A dissolution proceeding under Chapter 518 is not limited to merely proceedings prior to the entry of the J&D. It includes modification proceeding, and efforts to enforce the J&D.

B. Brodsky Has Waived Any Objection to the Attorneys' Fees

At the hearing on August 30, 2005, the District Court requested that Soll provide additional backup detail for her claimed attorneys' fees. The court also repeatedly invited Brodsky to submit whatever response Brodsky thought appropriate:

But I'm going to look at the fees and the statements when Mr. Mitchell submits them to me. And he's going to have to give a copy to you as well, *and I would invite you to respond to it*. I think it's going to have to be real candid in terms of what was reasonable and necessary in the post-decree litigation in order to enforce the obligations under the decree. (Emphasis added).

August 30, 2005 Tr. p. 26.

All right, thank you. Ahmm, would you also, Mr. Mitchell, make sure that you give Miss May a copy of anything that's provided to the Court? *And, Miss May, I will of course give you an opportunity as well to weigh in on the submission*. (Emphasis added).

August 30, 2005 Tr. p. 29.

The additional detail was provided by Soll and copied to Brodsky but Brodsky submitted *nothing* in response. Now, on appeal, Brodsky objects to the award of attorneys' fees. But arguments not raised below may not be raised for the first time on appeal, particularly when Brodsky was repeatedly invited to submit a response and was not even given a deadline in which to do so. *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599 (Minn. 1982); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63 (Minn. 1979).

It was clear from the district court's remarks at the hearing on August 30, 2005 that the court was prepared to award post-dissolution attorneys' fees provided such fees were shown to have been reasonably and necessarily incurred in the enforcement of the J&D. Brodsky was offered and declined an opportunity to review the detailed billings submitted and to object to the fees on whatever grounds Brodsky deemed appropriate. Brodsky submitted nothing and has

therefore waived any argument he may have had that the fees submitted by Soll were not reasonably or necessarily incurred in the enforcement of the J&D or that such fees could not be allowed as a matter of law whether they were reasonable and necessary or not.

Brodsky ignored his opportunity to contest the attorneys' fees ultimately awarded and instead attacks the decision after the fact and through this appeal. This is yet one more example of Brodsky ignoring the rules and causing unnecessary delay and expense.

C. Attorneys' Fees Incurred in Enforcement of the J&D Were Appropriate.

Soll sought the award of an additional \$110,324.28 in attorneys' fees. The district court awarded \$94,651.69 (86% of those requested). In support of her request, Soll submitted detailed billing records of Lapp Libra, Ponto, and incomplete billing records of Nelson. (Nelson handled the two prior appeals dealing with Ponto's fees and Brodsky's motion to recuse Judge Anderson and to reduce child support).. The District Court carefully reviewed the billing records and awarded Soll an additional \$94,651.69 in post-dissolution conduct based fees.

In awarding the additional attorneys' fees, the district court noted that Judge Anderson had presided over this case since September 19, 1995. It held further:

4. Brodsky shall reimburse Soll for the attorney fees she incurred post-dissolution because those fees were incurred as a result of Brodsky's failure to fulfill his obligations under the J&D. See Minn. Stat. § 518.14, subd 1; Farrar v. Farrar, 383 N.W.2d 436, 441 (Minn.App. 1986)(affirming award of attorney fees where the party "unnecessarily created much of the cost of attorney's fees by his failure to comply with the original judgment and decree").

December 12 Order, pp 6-7.

Minn. Stat. § 518.14, subd. 1 provides:

518.14 Costs and disbursements; attorney fees; collection costs.

Subdivision 1. General. Except as provided in subdivision 2, in a proceeding under this chapter, the court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

(1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Nothing in this section precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding. Fees, costs, and disbursements provided for in this section may be awarded at any point in the proceeding, including a modification proceeding under sections 518.18 and 518.64. The court may adjudge costs and disbursements against either party. The court may authorize the collection of money awarded by execution, or out of property sequestered, or in any other manner within the power of the court. An award of attorney's fees made by the court during the pendency of the proceeding or in the final judgment survives the proceeding and if not paid by the party directed to pay the same may be enforced as above provided or by a separate civil action brought in the attorney's own name. If the proceeding is dismissed or abandoned prior to determination and award of attorney's fees, the court may nevertheless award attorney's fees upon the attorney's motion. The award shall also survive the proceeding and may be enforced in the same manner as last above provided. (Emphasis added).

In *Farrar v. Farrar*, 383 N.W.2d 436, 441 (Minn.Ct.App.1986), the court affirmed an award of attorneys' fees incurred in attempting to enforce the provisions of the J&D:

Appellant has unnecessarily created much of the cost of attorney's fees by his failure to comply with the original judgment and decree, causing respondent to seek contempt orders and make various motions to force him to meet his obligations.

Farrar v. Farrar 383 N.W.2d 436, 441 (Minn.Ct.App.1986).

As was the case in *Farrar*, Brodsky unnecessarily created much of the cost of attorney's fees by his failure to comply with the original judgment and decree causing Soll to

seek contempt orders and various motions both in district court and in bankruptcy court to force Brodsky to meet his obligations. The district court had before it both detailed documentary proof of the attorney's fees and the opportunity to observe first hand the various proceedings. The court had before it a voluminous record, replete with numerous motions. There was ample evidence to support the district court's award.

1. Conduct-Based Attorneys' Fees -- Minn. Stat. § 518.14, subd 1.

Under Minn.Stat. § 518.14, subd. 1, a court, "in its discretion," may award "additional fees, costs and disbursements against a party who unreasonably contributes to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 -819 (Minn.Ct.App. 2001). The district court must identify the offending conduct, the conduct must have occurred during litigation, and it must be found to have unreasonably contributed to the length or expense of the proceeding. Minn. § Stat. 518.14, subd. 1 (2004); *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn.App.2001).

The identification of the offending conduct need not be lengthy or detailed:

Here, the district court found that Colten delayed the resolution of the matter and contributed to its expense by changing her attorneys three times. The court also mentioned an award of attorney fees as a deterrent to "such another factually unsupported claim to the Court." In separate findings, the district court found that appellant was untruthful in her testimony, and had disobeyed the court's temporary orders. Given the discretion vested in the district court, this is sufficient to sustain an award of attorney fees to respondent.

Biagi v. Biagi 2003 WL 22015841, 4 (Minn.App.2003) RA 304.

Finally, we reject appellant's argument that the court granted respondent's second motion for attorney fees without identifying the authority for the award. It is evident that the fee award rested on the district court's observation, stated in a memorandum attached to its order, that appellant's motion to amend "lacks any merit and caused [respondent] to incur additional expense in relitigating

[appellant's] claims.” We infer from this statement that the fees were awarded as conduct-based fees under Minn.Stat. § 518.14, subd. 1. *Cf. Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn.App. 2001) (analyzing fee award for which no authority was given under Minn.Stat. § 518.14, subd. 1, because case was a family-law matter and family-law attorney fees awards are “[g]enerally” governed by that statute).

Reed v. Reed, 2005 WL 3111950, 3 (Minn.Ct.App. 2005) RA 308.

As was a decisive factor in *Biagi*, Brodsky has had seven different attorneys, has refused to comply with his obligations ordered in the J&D, and has made numerous false statements, including statements made under oath in these post-decree proceedings.

It is evident from the December 12 Order that the award of attorneys’ fees was conduct based and arose from the district court’s observation and involvement in the proceedings. *See Reed, supra*. First, Brodsky filed a bankruptcy on February 25, 1999. RA 164 Soll commenced an adversary proceeding to determine that Brodsky’s obligations under the J&D were non-dischargeable. RA 164. Brodsky filed an answer denying that the obligations were non-dischargeable. Soll filed a motion in the bankruptcy court to determine that the District Court had concurrent jurisdiction and seeking abstention by the bankruptcy court (a motion Brodsky opposed). RA 164. Soll brought a motion in District Court seeking to have the obligations under the J&D determined to be non-dischargeable. RA 164.

Brodsky filed an affidavit in opposition to the Dischargeability Motion in which he conceded for the first time that his debts under the J&D were non-dischargeable, an admission obtained only after years of litigation in the bankruptcy court and the district court. Had Brodsky admitted the obligations were not dischargeable at the start, thousands of dollars of attorneys’

fees incurred by Soll could have been avoided. Again causing unnecessary cost and delay is one of Brodsky's hallmarks.

In the December 12 Order, the district court cited Brodsky's "pattern of obfuscation" and gave "little credence" to his claim that the bank accounts had been used in the properties. RA 168. It noted that the post-dissolution attorneys' fees were incurred as a result of Brodsky's failure to fulfill his obligations under the J&D. RA 168. IN addition the district court noted that Brodsky produced no records to support his position. RA 166.

Significantly, the district court also noted that it has presided over this case since September 19, 1995. RA 163. The court had extensive historical as well as recent knowledge Brodsky's conduct. In the Memorandum incorporated in its Order of May 1, 2006, the court elaborated on its December 12 Order. *See* RA 200-205. Specifically, the court explained that the fees incurred by Soll in dealing with the Casa Del Sol properties were necessary to the enforcement of the maintenance order and by Brodsky's continuing involvement in the partnership. RA 203. The court explained further that the fees Soll incurred in litigating with Nancy Ponto were necessitated by Brodsky's failure to pay the attorneys' fees to Ponto that he was ordered to pay in the J&D. RA 204. Finally, the court noted that Brodsky's pattern of obfuscation was bolstered by the fact that Brodsky's affidavit submitted under oath contained at least one undeniable misstatement of fact that Soll had sought to have the judge removed in the case. RA 205.

Brodsky asserts that an award of attorneys' fees within the authority of Minn. Stat. § 518.14 is limited to fees incurred in the dissolution proceeding. Brodsky misconstrues the statute. Fees may be awarded in the dissolution proceeding but need not be incurred in the

dissolution case. They only need be incurred in litigation. The acts for which the fees may be awarded are for anything that unreasonably contributes to the expense or length of the proceeding. Soll was litigating in district court to enforce her rights under the J&D. In fact, she had a hearing for contempt scheduled when Brodsky filed bankruptcy. It was Brodsky, not Soll, that forced Soll to continue the proceedings to enforce the J&D in the bankruptcy court.

The conduct-based award of additional attorneys' fees was well supported, reasonable and appropriate.

2. Attorney's Fees Incurred in Brodsky's Bankruptcy Were Appropriately Awarded.

Brodsky misreads the statute in arguing that Minn. Stat. § 518.14 applies only to fees actually incurred in a proceeding under Chapter 518. The proper reading of the statute is that statute gives the court authority to award fees in a proceeding under Chapter 518, whether incurred in the specific proceeding or not. The award *was* made in a proceeding under Chapter 518, the dissolution proceeding between Brodsky and Soll. The statute does not limit the attorneys' fees to those incurred in the dissolution proceeding itself. The case law only requires that the fees be incurred in litigation. *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn.App. 2001). In fact, this court very recently affirmed the award of conduct-based attorney's fees where the offending conduct occurred in part in a "companion case:"

The district court identified the offending conduct. That conduct occurred during the course of the litigation. And the 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] proceedings." We conclude that the district court did not abuse its discretion by awarding respondent \$5,000 in conduct-based attorney fees.

Evenson v. Evenson, 2006 WL 771229, *1 -2 (Minn.Ct.App. 2006).

Conduct-based attorneys' fees have also been awarded on appeal. *Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn.Ct.App. 1999) and Soll intends to seek additional fees she incurred as a result of this spurious appeal.

Moreover, because Brodsky sought to discharge his obligations to Soll under the J&D through bankruptcy, Soll was unwillingly thrust into litigation in bankruptcy court if she was to preserve the support obligations under the J&D. She was forced by Brodsky's own actions to retain bankruptcy counsel in order to preserve her rights under the J&D.⁵ Brodsky filed for bankruptcy protection on February 25, 1999, twelve days before the hearing on Soll's motion for order to show cause why Brodsky should not be held in contempt for failing to comply with his court-ordered obligations to pay Northeast State Bank and Ponto under the J&D. In the Order to Show Cause issued February 19, 1999, the court found:

Respondent's failure to pay the above two debts has deprived Petitioner of her court ordered spousal maintenance and endangers her and the children's welfare.

The bankruptcy filing enabled Brodsky to avoid paying these debts for another six *years*. Brodsky would never have paid a cent had not Soll forced him into compliance first by suing Brodsky in the bankruptcy proceeding and then by further proceeding in district court following abstention by the bankruptcy court. Brodsky opposed Soll every step of the way and it was only after Soll had incurred tens of thousands of dollars in attorneys' fees and years of lost time that Brodsky first conceded at the hearing on August 30, 2005 that his obligations under the J&D were nondischargeable. If, as Brodsky now claims, he *never* contested the issue of

⁵ Contrary to Appellant's claim, Respondent did not "intervene" in Appellant's bankruptcy. Respondent sued Appellant in an adversary proceeding to prevent Appellant's debts to her from being discharged. *See*, 11 U.S.C. § 523(c)(1) (West 2005) and Fed R. Bankr. P. 7001(6) (West 2005).

dischargeability, but simply did not know who to pay, why did he contend in the bankruptcy adversary proceeding that all the obligations in the J&D *were* dischargeable? Why did he *oppose* Soll's abstention motion in the bankruptcy adversary proceeding? Why did he simply not *pay* the obligations years ago? Why did Brodsky sit by while Soll prepared and submitted comprehensive and expensive legal memoranda and supporting affidavits regarding concurrent jurisdiction, abstention and dischargeability? Why did he fail to submit anything in substance in opposition to Soll's motion for determination of dischargeability? Why, after failing to take advantage of the district court's invitation to make submissions before the decision was rendered did Brodsky bring a flurry of legally baseless motions attacking the decision ultimately rendered? Why if Brodsky had at least \$90,000 at his disposal did he not pay that to Ponto? There is only one logical answer to these questions and the district court nailed it in the J&D when it wrote:

He [Brodsky] very purposely and intentionally created a financial crisis for Petitioner [Respondent], causing Petitioner and the children to be ejected from the family homestead and left without suitable living quarters from August 1995 to the present. During the pendency of these proceedings, Respondent threatened to leave Petitioner without a place to live and penniless. His actions during the pendency of this case appear to be consistent with his expressed goal.

J&D, pp 53-54, RA 54.

Brodsky has persisted in his goal of leaving Soll penniless post-dissolution, steadfastly refusing to pay his debt to Ponto and Northeast State Bank despite his admitted ability to do so at least in part from at least November 5, 2004. RA 192, RA 197. His continued resistance to the relief sought by Soll followed ultimately by his capitulation was patently unreasonable.

Attorney's fees incurred in attempting to enforce support and maintenance orders are not dischargeable in bankruptcy. *Foster v. Childres*, 416 N.W.2d 781 (Minn.Ct.App. 1987) *citing* *Coakley v. Coakley*, 400 N.W.2d 436 (Minn.Ct.App 1987). By his bankruptcy filing, Brodsky unnecessarily delayed the inevitable result from February 26, 1999 until December 12, 2005, a period of nearly seven years. The fees incurred by Soll in litigating with Brodsky in the bankruptcy case and later in this case were directly caused by Brodsky's tactics and the district court, after careful review, did not abuse its discretion in awarding them.

This court has held that the filing of a Chapter 7 bankruptcy can unreasonably contribute to the delay for purposes of affirming an award of attorneys' fees under Minn. Stat. § 481.13:

The trial court found that Walbridge's action in filing for Chapter 7 bankruptcy unreasonably contributed to the substantial delay in resolving this matter. In its order denying Walbridge's motion to amend the judgment, the court further concluded:

This matter has been delayed substantially by [Walbridge's] dilatory tactics, specifically removing all the money from his 401k account contrary to the restraining order, purchasing a home during the pendency of the litigation without [Simmons's] consent; and, attempting to discharge the property settlement in bankruptcy. All of these actions caused substantial delay and undoubtedly increased [Simmons's] legal costs[.]

In light of Walbridge's actions, the trial court did not abuse its discretion in ordering him to pay attorney fees.

Walbridge v. Simmons, 2000 WL 1577097, 1 (Minn.Ct.App. 2000) RA 331.

There is no clear abuse of discretion by the district court in awarding Soll her attorneys' fees and costs in enforcing the J&D through bankruptcy proceedings caused by Brodsky.

3. The Ponto Litigation Fees

The J&D entered on May 2, 1997, nine years ago, ordered Brodsky to pay \$62,822.64 to Soll's then attorney Nancy Ponto. Brodsky refused. Ponto sought to collect and Brodsky filed

bankruptcy. Ponto then sought to collect from Soll by filing liens on all of Soll's property awarded to her as support. Ponto's liens threatened to deprive Soll of her means of support. Soll was forced to litigate at length with Ponto to prevent this loss. At the hearing on August 30, 2005, the district court explained in advance some of the rationale that supported her later ruling on the fees incurred in the enforcement of the J&D:

And at least from my point of view, it appeared that when Mr. Brodsky did not pay the attorney's fees that he was ordered to pay to Miss Ponto, that she had no choice but to file liens; and too, a lot of the fees were generated trying to sell some of the properties and get rid of some of the properties to come up with some money. And that had Mr. Brodsky paid Ms. Ponto's fees and what was due under the J&D, I don't -- I'm not sure we'd be here today.

August 30, 2005 Tr. p. 25, RA 295.

The record supports the court's rationale that had Brodsky paid what he was ordered to pay, the protracted litigation with Ponto would not have occurred. If Brodsky had paid the \$62,822.94 and the bank account balances of \$23,134.00, Soll could have paid Ponto in full. Ultimately, because of the accrual of interest on Ponto's debt, Soll was forced to pay Ponto \$120,000 to obtain releases of her liens.

Brodsky argues that the Ponto-Soll attorney's fees were not *caused* by Brodsky. But cause of the fees is not the test for whether they can be properly awarded.

Appellant argues that the district court improperly assessed him attorney fees because the court never found that either the multiple changes in legal representation or the Hertogs matter were appellant's fault. But a finding of bad faith is not necessary for the award of conduct-based attorney fees. *Geske*, 624 N.W.2d at 818-19.

Evenson v. Evenson 2006 WL 771229, *1 -2 (Minn.Ct.App. 2006). RA 334

The test is whether Brodsky's conduct unreasonably delayed the proceedings and the district court held that they did. The post-dissolution contempt proceedings brought by Soll to collect the attorneys' fees Brodsky was ordered to pay to Ponto and to collect the Northeast State Bank debt were interrupted and delayed for years by Brodsky's intervening bankruptcy. Certainly Brodsky has a legal right to choose to file bankruptcy. But his choice also has its consequences. His non-dischargeable support obligations under the J&D, for example, continued to accrue interest. His choice resulted in additional litigation costs to Soll. His choice caused Ponto to turn to Soll to collect rather than trying to collect from Brodsky. Through his bad faith conduct, Brodsky increased the cost of the dissolution proceeding to Soll by at least \$74,822.64 for which conduct he was sanctioned \$62,822.64. Post-dissolution, his refusal to pay his non-dischargeable debts and his unsuccessful attempts to discharge these obligations through bankruptcy caused delay and additional cost to Soll in excess of \$100,000. If Brodsky really did not contest the nondischargeability of his obligations under the J&D and had the ability to borrow \$90,000 from his parents as he claims, one wonders why he did not pay Ponto long ago. The only answer is that Brodsky has from the beginning and continues to this day to act in bad faith.

The award of attorneys' fees incurred by Soll in litigating with Ponto was not a clear abuse of discretion and should be affirmed.

4. The Casa Del Sol Partnership Fees to Ponto

Despite the fact that Soll was awarded Brodsky's interest in the Casa Del Sol Partnership, a partnership owning at the time eleven rental properties *See* RA 23- 29, RA 63-64, and despite the facts that Brodsky had no further interest therein subsequent to the J&D, Brodsky continued

to manage the eleven properties in the Casa Del Sol Partnership at the urging of his parents, the other 50% partner. RA 84. Soll found it impossible to deal with Brodsky, who was claiming to be acting as the attorney for his parents, and was therefore forced to have her attorney, Nancy Ponto, deal with the partition of the Casa Del Sol properties and incurred additional expense and delay. RA 84. The district court found that Ponto charged Soll \$22,386.19 for time spent on post-decree matters, most of which was dealing with the Casa Del Sol Partnership. Ponto's records reflect that she also spent time attending to the transfers of the other properties awarded to Soll under the J&D.

In his responsive affidavit (RA 191), Brodsky says nothing to refute Soll's statements. He argues that the incurrence of fees in the Casa Del Sol dissolution was not his fault. But again fault is not the test for conduct-based fees:

Appellant argues that the district court improperly assessed him attorney fees because the court never found that either the multiple changes in legal representation or the Hertogs matter were appellant's fault. But a finding of bad faith is not necessary for the award of conduct-based attorney fees. *Geske*, 624 N.W.2d at 818-19.

Evenson v. Evenson 2006 WL 771229, *1 -2 (Minn.Ct.App. 2006). RA 334

More importantly, Brodsky fails to acknowledge that he was required under the terms of the J&D to pay for half the attorneys' fees incurred in accomplishing the transfers of the properties and interests awarded to Soll under the J&D:

Each party shall pay one-half the costs of transfer, including, but not limited to, attorney's title opinion or title insurance, preparation of transfer documents, recording fees and reasonable attorney's fees.

RA 69.

With Brodsky already liable under the J&D for half of Ponto's post-decree fees incurred in handling the transfers, the court did not abuse its discretion in awarding Soll additional fees under Minn. Stat. § 518.14 as a result of Brodsky's continuing interference in the Casa Del Sol partition. *See* RA 82. Moreover, Ponto also handled an unsuccessful motion by Brodsky for a reduction in child support, an event which obviously delayed and increased the cost of the proceedings. RA 84.

II. THE BANK ACCOUNT BALANCES

Brodsky *admits* that he did not turn over the bank account balances he was ordered to turn over in the J&D. RA 193-194. But he says his failure to do so should be excused because he spent all the funds in the accounts on the properties. The court held that Brodsky had offered no proof that he had spent the balances on the properties other than his unsupported statement, *albeit* sworn, that he had done so. But the court held that Brodsky was not credible and that his word was simply not good enough. RA 165-166. Moreover the J&D did not give Brodsky the option of spending the money on the properties.

Brodsky claims that he raised an equitable defense, laches that the district court refused to consider. But Brodsky submitted no legal memorandum of any kind (despite having nearly three years to do so) mentioning laches. There is also no mention of laches in Brodsky's responsive affidavit. Ms. May, Brodsky's then attorney, mentioned laches briefly in her oral presentations on August 30, 2005 but did not elaborate on its elements or application to this case. August 30 Tr. p. 19. RA 289.

This court reviews a district court's decision on an issue of laches for an abuse of discretion. *Opp v. LaBine*, 516 N.W.2d 193, 196 (Minn.App. 1994), *review denied* (Minn. Aug. 24, 1994). There was no abuse of discretion here.

It is undisputed that the properties and the accompanying bank accounts were awarded to Soll in the J&D as *support*. The court has concurrent jurisdiction with the bankruptcy court *only* to determine which obligations under the J&D are in the nature of support. RA 164. Brodsky does not dispute and has conceded that his obligations under the J&D are nondischargeable as being in the nature of support. RA 164.

A judgment for support, like any other judgment, is enforceable for ten years and is not subject to equitable defenses:

Minnesota Supreme Court has stated that judgments for support are considered final judgments, enforceable for the entire ten-year statute of limitations period. *See Dent v. Casaga*, 296 Minn. 292, 297, 208 N.W.2d 734, 737 (1973). Equitable defenses are not available in an action for support arrearages brought within the statutory limitation period. *Id.* at 432 (citations omitted).

S.G.K. v. K.S.K. 374 N.W.2d 525, 528 (Minn.Ct.App. 1985).

Even if the doctrine of laches would be considered by this court, Brodsky's lack of cooperation as revealed in the procedural history of this matter would fall within the equitable "unclean hands" doctrine for "he who seeks equity must do equity." *Froats v. Froats*, 415 N.W.2d 445, 447 (Minn.Ct.App. 1987).

Moreover, Brodsky's argument that he had no knowledge of Soll's intent to raise this claim and therefore either destroyed the records by August 2005 (or failed to insure their preservation) is false. Soll gave Brodsky notice of the claim in her Original

Dischargeability Motion served October 31, 2002. If Brodsky destroyed records after October 31, 2002, as he apparently concedes, he did so at his own peril.⁶

On the facts of this case, the district court did not abuse its discretion in refusing to consider Brodsky's laches defense because as a matter of law the defense is inapplicable.

III. INTEREST ON THE NORTHEAST STATE BANK DEBT

Brodsky has conceded that his obligation to indemnify Soll on the Northeast State Bank debt was not dischargeable as being in the nature of support and Brodsky has paid Soll the \$25,000 she paid to Northeast State Bank. Brodsky objects to the interest of \$7,093.83 awarded at the statutory rate on the \$25,000 from May 2, 1999 through the judgment date. Brodsky claims that the court is without authority to change a division of real and personal property after the J&D has been entered and the time for appeal has passed. While that statement certainly is correct for property settlements, the responsibility for paying this obligation was not a property settlement. It was ordered in the *nature of support*. The proceedings before the district court following abstention by the bankruptcy court were limited to determinations of what obligations under the J&D were *in the nature of support*. See 11 U.S.C. § 523(a)(5). The district court did not have jurisdiction to determine whether obligations in the nature of property settlements were nondischargeable. See 11 U.S.C. § 523(a)(15) (West 2005).⁷ Obligations to indemnify for joint debts deemed to be in the nature of support are not dischargeable.

⁶ It would also be consistent with his past behavior. Brodsky has a history of destroying records in this case. See J&D RA 17.

⁷ This section was amended in 2005 but Brodsky's bankruptcy was not affected by the subsequent amendments.

1. The Court Was Within its Discretion in Allowing Interest

Unlike property settlements and awards under a J&D, the district court has broad discretion in modifying support or maintenance awards. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *General v. General*, 409 N.W.2d 511, 513 (Minn.App.1987). Pursuant to a pre-dissolution order, Brodsky was ordered to pay the first mortgage and a second mortgage on the family home to Northeast State Bank. He paid neither and the home was foreclosed. Brodsky's obligations to make these payments were in the nature of both child support and spousal maintenance.

Moreover, the state court's original order noted that appellant's obligation to pay the homestead costs was "as and for additional child support and spousal maintenance." That the payments are properly viewed as support and are therefore nondischargeable in bankruptcy is shown by numerous cases holding that the maintenance and support of a family "includes the obligation to keep a roof over their heads." *Jones*, 300 Minn. at 187, 220 N.W.2d at 290 (quoting *Poolman v. Poolman*, 289 F.2d 332, 335 (8th Cir. 1961)).

Coakley v. Coakley 400 N.W.2d 436, 442 (Minn.App.1987).

The court was well within its discretion to add prejudgment interest to this support obligation.

2. Section 549.09 Requires Interest and Brodsky Had Ample Notice

The district court cited Minn. Stat. § 549.09 as the basis for its support of prejudgment interest. Brodsky complains that he had no notice of Soll's claim and therefore the statute does not apply. Brodsky's argument is disingenuous. Brodsky had notice of his obligation for the Northeast State Bank debt since he was ordered to keep the mortgages current on the family home way back at the beginning of the dissolution proceeding. He was "reminded" of the obligation in the J&D. He was "reminded" again

when Northeast State Bank sued him and Soll for the unpaid balance of \$50,000 and obtained a judgment against them. He was “reminded” of the obligation when Soll sought to have him held in contempt for failing to pay it and when the district court issued its order to show cause on February 19, 1999. He was “reminded” of the debt when Northeast State Bank obtained judgment against Brodsky and Soll. He was “reminded” of the obligation when he listed it on his bankruptcy schedules.

Because Brodsky filed bankruptcy on February 25, 1999, the automatic stay prevented Soll from making additional demands for payment. The bankruptcy court order of November 27, 2002, permitted Soll to return to the district court for resolution of the remaining issues.

3. Soll is Also Entitled to Interest under the Doctrine of Equitable

Subrogation

But even if this court agrees that Brodsky is not entitled to prejudgment interest under the J&D and Minn. Stat. § 549.09, she is nonetheless entitled to interest under the doctrine of equitable subrogation. RA 315 fn. 7. When Soll paid the \$25,000 to settle the Northeast State Bank debt and obtained a release, she became equitably subrogated to the bank’s judgment rights against Brodsky, including the right to collect interest on the bank’s judgment:

Under the doctrine of equitable subrogation, “one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.” *Am. Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa.*, 314 U.S. 314, 317, 62 S.Ct. 226, 228, 86 L.Ed. 241 (1941) (citations omitted).

Mon-Ray, Inc. v. Granite Re, Inc. 677 N.W.2d 434, 441 (Minn.Ct.App. 2004).

4. The Automatic Stay of 11 U.S.C. § 362(a) Has No Application

Brodsky claims that the award of interest “retroactively circumvents the automatic stay,” whatever that means. Brodsky’s Brief p. 26. But Brodsky is mistaken as a matter of law. The automatic stay is imposed automatically upon filing of a bankruptcy petition. 11 U.S.C. § 362(a). But the automatic stay terminates upon the granting of the debtor’s discharge. 11 U.S.C. § 362(c)(2)(C). Brodsky received his discharge on July 26, 1999 and the automatic stay terminated on that date. RA 229.

While Soll may be precluded from collecting post-petition interest from Brodsky’s bankruptcy *estate* on an unsecured debt, she is not precluded from collecting it from Brodsky. The rationale for the rule was explained in a bankruptcy decision from the Eastern District of New York:

Lastly, the statutory interest that has been accruing from the time of the money judgment to the present, including the post-petition period, is also nondischargeable. As a general rule, creditors are barred from claiming post-petition interest from the bankruptcy estate. 11 U.S.C. § 502(b)(2). However, the Supreme Court has distinguished between the denial of post-petition interest against the bankruptcy *estate* on a non-dischargeable debt and the accrual of interest on a non-dischargeable debt to be collected from the *debtor* after the bankruptcy proceeding is complete. *Bruning v. United States*, 376 U.S. 358, 362-63, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964). This reasoning has been applied to other types of non-dischargeable debts. *See, e.g., In re Fullmer*, 962 F.2d 1463, 1468 (10th Cir.1992) (applying *Bruning* to post-petition interest on a non-dischargeable tax penalty); *In re Brace*, 131 B.R. 612, 613-14 (Bankr.W.D.Mich. 1991) (holding that post-petition interest accrues on debt that is non-dischargeable for fraudulent misrepresentation). Therefore, under the decision in *Bruning*, the Debtor is responsible for paying post-petition statutory interest on those debts declared non-dischargeable pursuant to § 523(a)(5). *See In re Foross*, 242 B.R. 692, 694 (9th Cir. BAP 1999) (holding that accrued post-petition interest on non-dischargeable debt for a child support obligation survives discharge).

In re Boccio, 281 B.R. 171, 175 (Bankr.E.D.N.Y. 2002).

The rule is the same in the Eighth Circuit for non-dischargeable debts. *In re Hanna*, 872 F.2d 829 (8th Cir. 1989) (Postpetition interest on unpaid federal and state taxes could be enforced as continuing nondischargeable obligation against Chapter 7 debtors subsequent to liquidation). Brodsky is not protected from the accrual of interest on non-dischargeable debts by any provision of the Bankruptcy Code.

IV. BRODSKY'S POST-JUDGMENT MOTIONS

As discussed above, Brodsky did not appeal from the denial of his post-judgment motions so his arguments with respect thereto should be disregarded. Brodsky asserts:

Brodsky had no notice the Motion would ultimately be a court trial in which no inferences were granted in his favor, and all of his evidence would be rejected based on an eight-year-old credibility determination. He was not even called in to give live testimony. Instead, the trial court simply disregarded his submissions and his attorney's oral argument, and made findings absolutely consistent with Soll's submissions.

Brodsky's Brief, p.27.

To the extent that Brodsky argues that he was somehow denied due process, Brodsky is mistaken, again, as a matter of law:

Appellant claims he was denied due process of law because the district court denied his request for an evidentiary hearing. Where, as here, a party can submit written arguments and affidavits, lack of an evidentiary hearing does not offend due process. *Sieber v. Sieber*, 258 N.W.2d 754, 756 (Minn.1977); see Minn. R. Gen. Prac. 303.03(d) (absent "good cause," family court motions decided without evidentiary hearings).

In re Marriage of Erickson, 1996 WL 330540, 2 (Minn.Ct.App. 1996) RA 337.

In family cases, non-contempt motions are decided without an evidentiary hearing, "unless otherwise ordered by the court for good cause shown." Minn. R. Gen. Prac. 303.03(d).

Doering v. Doering, 629 N.W.2d 124, 130 (Minn.Ct.App. 2001).

The parties may request oral testimony under rule 303.03, however neither party timely did so in this case. Appellant requested oral testimony only after the district court issued its order granting respondent's petition. The district court made note of this fact in its denial of appellant's motion for amended findings. Additionally, appellant did not make an offer of proof with his motion for an evidentiary hearing. Had his request been timely, an offer of proof would have aided the district court when deciding whether an evidentiary hearing was necessary. It is clear that the district court did not abuse its discretion by denying appellant's untimely request for an evidentiary hearing.

Psyck v. Psyck 2003 WL 1489757, 2 (Minn.Ct.App. 2003) RA 339.

Despite receiving written notice of the subject matter of the hearing years before (RA 263 – 266), Brodsky declined to appear at the hearing on August 30, 2005. He declined to submit a legal memorandum in opposition to Soll's motion. He declined to make a written demand for an evidentiary hearing as required by Minn.Gen.R.Prac. 303.03(d). At the hearing, Brodsky's counsel made no offers of proof and declined to request an evidentiary hearing. She declined to request an opportunity to submit additional evidence by affidavit or otherwise. Even though Brodsky had failed to request an opportunity to submit additional evidence, the court nonetheless invited him to do so on two occasions during the course of the August 30 hearing. Although Brodsky's counsel was served with Soll's post-hearing submissions on September 8, 2005, Brodsky still declined to submit any additional materials of his own. The court waited in vain for three months for Brodsky to submit something before it finally entered its order on December 12, 2005.

Brodsky had every opportunity to submit whatever evidence he believed relevant and every legal argument he deemed appropriate. He submitted nothing.

Brodsky did not obtain advance permission from the court to file a motion for reconsideration as required by Minn.Gen.R.Prac. 115.11. RA 203. To the extent that his post-

judgment motion was a motion for reconsideration, it was properly denied. There was no trial or evidentiary hearing held on August 30, 2005 and Brodsky did not request one. Family courts can decide motions, even motions involving disputed facts, on affidavits. Few post-decree proceedings will constitute trial. *Erickson v. Erickson*, 430 N.W.2d 499, 500 n.1. (Minn.Ct.App. 1988). Brodsky's motion for a new trial therefore was properly denied. RA 203. Finally, Brodsky's transparent attempt to expand the record for this appeal made it clear that his motion was not a motion for amended findings nor was it filed in good faith. *Lewis v. Lewis*, 572 N.W.2d 313, 315-316 (Minn.Ct.App. 1997) (motion for amended finding must point out why the particular finding was not supported by the *existing* record). New evidence may not be received on a motion for amended findings. *Rathburn v. W.T. Grant Co.*, 300 Minn. 223, 219 N.W.2d 641 (1974). The motion must be based on the existing record, not on newly discovered evidence which is not part of the record. *Otte v. Otte*, 368 N.W.2d 293 (Minn.App. 1985). Brodsky's post-hearing motions were contrary to well-established law and failed to comply with applicable rules. As a result, Soll was once again forced to incur delay, costs and attorneys' fees in dealing with Brodsky's bad faith motions.

Even if the denial of Brodsky's post-judgment motions were properly before this court, his motions were properly denied by the district court.

CONCLUSION

The district court did not abuse its discretion in awarding Soll post-decree attorneys' fees of \$94,651.69 (86% of those incurred) after carefully parsing the billing records and being well advised in the history of the protracted and acrimonious proceedings in this case.

Brodsky admitted under oath that he spent the bank account balances he was ordered to turn over in the J&D, the district court therefore did not abuse its discretion in refusing to consider Brodsky's baseless laches argument and in awarding Soll judgment for the bank balances plus interest.

Soll is entitled to interest on the \$25,000 of Northeast State Bank debt she paid when Brodsky refused to do so either under Minn. Stat. § 549.09 or the doctrine of equitable subrogation.

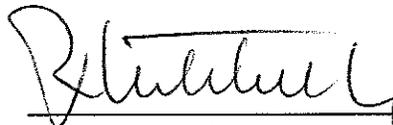
Brodsky's assertions that he was entitled to an evidentiary hearing that he failed to demand and that he was denied an opportunity to submit evidence he declined to submit is so spurious as to be sanctionable.

The decision of the district court should be affirmed in all respects.

Respectfully submitted,

Dated: August 25, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).