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**NO. A09-1492**

State of Minnesota

# In Court of Appeals

In re the Marriage of:

Patricia L. Rooney,

*Respondent,*

v.

Michael T. Rooney,

*Respondent,*

and

Christ's Household of Faith, Inc.,

*Third-Party Defendant, Appellant,*

and

Ramsey County,

*Intervenor, Respondent.*

## APPELLANT'S REPLY BRIEF

Steven P. Aggergaard (#336270)
Mark R. Bradford (#335940)
BASSFORD REMELE,
*A Professional Association*
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612) 333-3000

*Attorneys for Christ's Household of Faith, Inc.*

Michael T. Rooney
825 Marshall Avenue
St. Paul, MN 55104
(651) 602-3200

*Respondent, Pro se*

Joseph F. Schmidt (#96994)
THE LAW OFFICES OF
JOSEPH F. SCHMIDT
The Kenosha – Suite 4
1204 Harmon Place
Minneapolis, MN 55403
(612) 333-5040

*Attorney for Respondent Patricia L. Rooney*

Amy Anderson (#120445)
Assistant Ramsey County Attorney
Ramsey County Government Center-West
50 West Kellogg Boulevard, Suite 415
St. Paul, MN 55102
(651) 266-3187

*Attorney for Ramsey County*

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## REVISED STATEMENT OF THE CASE

As of this Reply Brief's filing date, Appellant Christ's Household of Faith, Inc. ("CHOF") was taking steps to satisfy the judgment that was the subject of its appeal related to contempt-sanction enforcement of the judgment. Accordingly, CHOF expects to request dismissal of its appeal and offers no reply as to those issues. Because dismissal could not be obtained by the time CHOF's Reply Brief became due, CHOF has submitted this reply consistent with the Minn. R. Civ. App. P. 131.01, subd. 3 time limitations.

The remaining issue, before the Court on Respondent Patricia Rooney's ("Ms. Rooney") Notice of Review, is whether CHOF can be liable for $52,753.00 in prejudgment, pre-enforcement attorney's fees. As explained *infra*, the Court would have no jurisdiction to consider this issue raised only in a Notice of Review if the underlying appeal is dismissed. If the Court determines that it has jurisdiction, it should affirm the district court's denial of $52,753.00 in attorney's fees.

## ARGUMENT

### I. THE COURT HAS NO JURISDICTION TO CONSIDER THE NOTICE OF REVIEW IF THE UNDERLYING APPEAL IS DISMISSED

Ms. Rooney filed a Notice of Review pursuant to Minn. R. Civ. App. 106 for review of the district court's denial of an award of $52,753.00 in attorney's fees. As stated in the Revised Statement of the Case, CHOF anticipates seeking dismissal of its appeal. If and when the underlying appeal is dismissed, the Court would not have jurisdiction to consider Ms. Rooney's issue on appeal. The purpose of Rule 106 "is to allow a matter that the appellate court will be hearing anyway to be heard in its entirety." *Kostelnik v. Kostelnik,* 367 N.W.2d 665, 669 (Minn. Ct. App. 1985). As of this Reply Brief's filing date, CHOF expects there will not be another issue the Court will be "hearing anyway." On that basis, dismissal of the entire appeal would be warranted.

### II. STANDARD OF REVIEW

If the Court determines it has jurisdiction to consider Ms. Rooney's Notice of Review, it would review the district court's denial of the award of attorney's fees for an abuse of discretion. *Swenson v. Bender*, 764 N.W.2d 596, 604 (Minn. Ct. App. 2009).

### III. MINNESOTA LAW DOES NOT AUTHORIZE THE AWARD OF ATTORNEY'S FEES THAT MS. ROONEY SEEKS

Ms. Rooney seeks an award of $52,753.00 in attorney's fees dating to July 10, 2001. (AA 51-105.) July 2001 was toward the end of an eleven-year gap between the date this Court ordered an evidentiary hearing in favor of CHOF and the date the hearing was held. *Rooney v. Rooney,* 669 N.W.2d 362, 367 (Minn. Ct. App. 2003) ("The evidentiary hearing ordered by this court in 1991 was held in June 2002."), *rev. denied*

(Minn. Nov. 25, 2009), *cert. denied,* 124 S.Ct. 2075 (2004). As Ms. Rooney states, the request for fees "was made to the trial court after the judgment was entered." (Resp. Br. at 11.) The issue is whether Minnesota law permits a child-support obligee to recover fees in district court that were incurred before judgment was entered, including fees incurred as part of appeals.

As demonstrated below, the recovery is not authorized because the Minnesota Rules of Civil Appellate Procedure govern fees and costs incurred on appeal. As for the district court fees, the statute at issue plainly distinguishes between liability and enforcement and therefore cannot be applied in the way Ms. Rooney suggests. To the degree Ms. Rooney's cited doctrines of "merger by judgment' and/or res judicata are relevant, the doctrines would compel the Court to affirm the district court's denial of $52,753.00 in pre-judgment, pre-enforcement attorney's fees. Accordingly, the district court's ruling with respect to fees should be affirmed.

### A. The relevant statute does not authorize fees dating to 1990 or fees incurred with respect to appeals

"An award of attorney's fees must be authorized by statute or contract." *Swenson*, 764 N.W.2d at 604. The only statutory basis cited is Minn. Stat. § 518A.53, subd. 5(c), which states in relevant part: "A payor of funds is liable for reasonable attorney's fees of the obligee or public authority incurred in enforcing the liability under this paragraph." Ms. Rooney claims that pursuant to this statute "CHOF's liability for withholding commenced when it was served with an order for income withholding in 1990." (Resp. Br. at 10.) This would be impossible given that the payor-of-funds attorney's fees

provision took effect in 1997. Act of June 2, 1997, ch. 203, art. 6, § 48, 1997 Minn. Laws 1587, 1784 (codified at Minn. Stat. § 518.6111, subd. 5(c) (1997)). Ms. Rooney has provided no authority indicating that the legislature intended or even could have imposed a retroactive application.

However, Ms. Rooney seeks $52,753.00 in fees dating to 2001. A portion of the fees are for matters involving appeals. (*See, e.g.,* AA 71-81, 92-92.) The procedure for moving for fees for appeals is in Minn. R. Civ. App. P. 127 and 139.06. Ms. Rooney has cited no authority indicating that a district court has authority to award fees for appeals irrespective of the Minnesota Rules of Civil Appellate Procedure. Accordingly, the Court should hold that § 518A.53, subd. 5(c) applies neither retroactively nor in a way permitting Ms. Rooney to recover fees for appeals outside what the Minnesota Rules of Civil Appellate Procedure allow.

### B. The relevant statute does not authorize fees incurred before judgment was entered

In seeking an award of pre-judgment, pre-enforcement fees, Ms. Rooney has ignored § 518A.53, subd. 5(c)'s plain language that distinguishes between "liability" and "enforcement." CHOF argued this in the district court. (AA 107, 161-163.) Pursuant to the statute, a payor of funds is liable for reasonable attorney's fees "incurred in *enforcing the liability* under this paragraph." (Emphasis added.) The words "are clear and free from all ambiguity"; accordingly, the "letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16.

Here, liability for attorney's fees arose no earlier than December 3, 2008. This is the date of the Notice of Entry of Judgment. (Appellant's Reply Appendix.) Before this date, CHOF could not have been "legally obligated or accountable" for any attorney's fees amount because there was no underlying liability to enforce. *See Torgelson v. Real Property Known as 17138 880th Ave., Renville County*, 749 N.W.2d 24, 27 (Minn. 2008) (defining "liability" as "[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, *enforceable by* civil remedy or criminal punishment") (quoting Black's Law Dictionary 932 (8th ed. 2004)) (emphasis added).

This plain-language interpretation of § 518A.53, subd. 5(c) is bolstered by the even plainer language of Chapter 518A's attorney's fees statute applicable to child-support obligors liable for arrearages. That statute could not be clearer. It unambiguously directs that attorney-fee liability attaches only with respect to attempts to "enforce" a "docketed judgment":

> A child support obligee is entitled to recover from the obligor reasonable attorney fees and other collection costs *incurred to enforce a child support judgment*, as provided in this section. In order to recover collection costs under this section, the arrearages must be at least $500 and must be at least 90 days past due. In addition, the arrearages *must be a docketed judgment* under sections 548.09 and 548.091. If the obligor pays in full the judgment rendered under section 548.091 within 20 days of receipt of notice of entry of judgment, the obligee is not entitled to recover attorney fees or collection costs under this section.

Minn. Stat. § 518A.735(a) (emphasis added). The statute goes on to require that notice of the obligor's intent to recover attorney's fees be served by certified or registered mail, that there be an "itemization" of fees and costs being sought, and that notice of the obligor's right to a hearing be provided. *Id.* subd. (c).

This statute evinces not only a clear legislative intent to distinguish between liability and enforcement in the child-support arrearages context, but also the legislature's intent that obligors' rights be protected. Payors of funds deserve no less. But interpreting Minn. Stat. § 518A.53, subd. 5(c) as Ms. Rooney suggests would trample the rights of payors of funds. It would create different rules for obligors and payors of funds and would encourage obligees to pursue persons other than the obligors who ultimately are and should be responsible for arrearages.

This is not what the legislature intended by enacting the child-support attorney's fees provisions in Chapter 518A. A decision from this Court interpreting the statute in the way Ms. Rooney suggests would have grievous consequences detrimental to public policy. Obligees and their counsel would be encouraged to seek arrearages not from obligors, but from the oftentimes *nonparty* payors of funds that apparently would be on the hook for attorney's fees "upon receipt of an order for or notice of withholding." Minn. Stat. § 518A.53, subd. 3. The nonparties at risk of paying obligees' attorney's fees would include obligors' relatives, nonprofit organizations that provide de minimis reimbursements to obligors who volunteer, and innumerable others besides the obligor himself or herself. Liability would attach even without the basic § 518A.735(a) due process protections afforded to the obligors—precisely the sort of protections to which this Court held CHOF was entitled. *Rooney v. Rooney,* 478 N.W.2d 545, 547 (Minn. Ct. App. 1991) ("Ordinary rules of due process mandate a hearing.").

For these numerous reasons, the Court should hold that attorney's fees liability pursuant to Minn. Stat. § 518A.53, subd. 5(c) arises only with respect to enforcement of docketed judgments and should affirm the district court's denial of $52,753.00 in fees.

### C. Ms. Rooney's request for fees was procedurally insufficient

As CHOF explained to the district court, the most for which it could be liable to Ms. Rooney for post-judgment, enforcement-related attorney's fees would be $2,600. (AA 107.) However, even that amount should not be awarded in this instance. In her request to the district court, Ms. Rooney ignored the Minn. Gen. R. Prac. 119.01-.02 requirement that a motion for fees "shall be accompanied by an affidavit of an attorney of record which establishes" each item of work performed and the normal hourly rate, among other things. (AA 7-8.) Ms. Rooney ultimately provided an affidavit, but only after CHOF filed a memorandum explaining the deficiency. (AA 17.) In the memorandum, CHOF also explained that an attorney's fees motion "should be accompanied by a memorandum of law that discusses the basis for recovery of attorneys' fees and explains the calculation of the award of fees sought." (*Id.* (quoting Minn. Gen. R. Prac. 119.04).) In response, Ms. Rooney provided a single conclusory sentence stating that $52,753.00 was "clearly reasonable." (AA 50.)

This comes nowhere close to what Minn. Gen. R. Prac. 119.04 envisions, particularly with respect to a demand for tens of thousands of dollars in fees and a request that the district court interpret a statute in a way it has never been interpreted. *See also In re Christ's Household of Faith, Inc.,* No. A09-1387 (Minn. Ct. App. Aug. 11, 2009) (order op.) at 2-3 (denying Ms. Rooney's attorney's fees motion to this Court for failure

to "submit documentation required by Minn. R. Civ. App. P. 139.06, subd. 1") (AA 185-186).

On this record, there is little question that the district court acted within its discretion by denying Ms. Rooney's request for attorney's fees in its entirety.

### D. "Merger by judgment" and res judicata are irrelevant

CHOF interprets the district court's denial of fees as a reasonable, correct application of Minn. Stat. § 518A.53, subd. 5(c) that was within the district court's discretion. Before issuing its order, the district court stated with respect to Ms. Rooney's request for fees:

> [E]ach of you is free to submit what you believe the law to be, but I remember the law is that if the main action is over and done with and there was not a request for attorneys fees, I am not at liberty nor do I have the power or authority to award attorneys fees in connection with that main action. I believe that my only authority is to award attorney fees in connection with this particular proceeding. Now, if you think I am wrong, Mr. Schmidt, bring me the case law that states otherwise.

(Tr. 51.) After considering written submissions from Ms. Rooney and CHOF, the district court awarded Ms. Rooney $1,160.00 in connection with the particular proceeding—an amount CHOF is taking steps to satisfy. In light of § 518A.53, subd. 5(c), the district court's ruling was entirely correct and squarely within its discretion.

Ms. Rooney interprets the ruling as an erroneous application of the doctrines of "merger by judgment" and/or res judicata. Ms. Rooney makes this issue on appeal much more complicated than it is. It appears that all that remains of this unfortunate case is a simple question of statutory interpretation. As demonstrated above, CHOF prevails under the plain language of Chapter 518A attorney's fees statutes.

Even if the cited doctrines were relevant, Ms. Rooney's authority demonstrates how and why the district court acted within its discretion. Ms. Rooney cites *Ly v. Nystrom,* 615 N.W.2d 302 (Minn. 2000), but in that case the district court's *denial* of attorney's fees was *affirmed* as not authorized by statute. *Id.* at 307, 314 & n.25. The exact same outcome is required here.

In *Obraske v. Woody,* 294 Minn. 105, 199 N.W.2d 429 (1972), the "only question" concerned whether the *amount* of fees in a mechanic's lien *foreclosure action* was excessive. *Id.* at 106, 108, 199 N.W.2d at 430-31. Because a real property foreclosure is akin to a money judgment, this bolsters the conclusion that Minn. Stat. § 518A.53, subd. 5(c) applies only to post-judgment enforcement fees. Additionally, in *Obraske* the award was affirmed but on the supreme court's directive that it was not "unduly burdensome" to require attorneys seeking fees "to present probative evidence to the trial court to assist it in setting the amount of fees," such as "testimony regarding the time consumed ... or such other probative evidence as may assist the trial court at arriving at a fair and reasonable fee." *Id.* at 109-10, 199 N.W.2d at 432. No such probative evidence or testimony was provided here, in a matter where the party is seeking ten times the fees awarded in *Obraske.*

As for the res judicata cases, they are easily distinguishable because this matter has involved a single proceeding whereas the cases cited involved *two* lawsuits and/or proceedings. *Hauschildt v. Beckinham,* 686 N.W.2d 829, 831-32 (Minn. 2004) (class action and regular action); *State v. Joseph,* 636 N.W.2d 322, 327 (Minn. 2001) (Washington County declaratory judgment proceeding and Chisago County garnishment

proceeding); *Hauser v. Mealey*, 263 N.W.2d 803, 807-09 (Minn. 1978) ("county court" divorce action and "district court" deed-reformation action); *Paulos v. Johnson,* 597 N.W.2d 316, 318 (Minn. Ct. App. 1999) (medical malpractice action and misrepresentation action); *Myers v. Price,* 463 N.W.2d 773 (Minn. Ct. App. 1990) (federal civil rights action and state professional-malpractice action).

Additionally, in *Joseph, Paulos,* and *Myers*, the courts applied res judicata to *bar* parties from what they sought. These holdings generally support a conclusion that in this instance the district court acted within its discretion. In *Hauschildt,* the bar was not applied because "entirely different evidence" was necessary to sustain the claims in the two actions. 686 N.W.2d at 841. Not so here. The decision in *Hauser*, which predates the unification of Minnesota courts, was rooted more in subject-matter jurisdiction than res judicata given the holding that a county court had no jurisdiction to consider a deed-reformation matter. 263 N.W.2d at 808-09. Here there is no question that the district court had jurisdiction to enter the judgment and determine an attorney's fees award.

As Ms. Rooney demonstrated by citing *Joseph*, a res judicata bar applies when "the estopped party had a full and fair opportunity to litigate the matter." 636 N.W.2d at 327. Ms. Rooney is the estopped party, and during the contempt proceedings CHOF put her on notice that her attorney's fees submission was deficient. Still, she failed to provide any rational basis for the district court to conclude that an award of $52,753.00 was either authorized or reasonable. For these numerous reasons, the district court acted within its discretion by denying the request and its decision should be affirmed.

## CONCLUSION

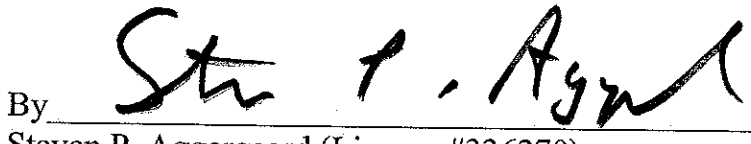
As of this writing, CHOF is taking steps to satisfy the judgment that has pained so many for so long. Now it is Ms. Rooney who seeks a remand in an attempt to collect $52,753.00 in fees. It appears that this troubling matter finally will be over, and that the Court lacks jurisdiction to consider the remaining attorney's fees issue that was raised only in a Notice of Review.

Alternatively, the plain statutory language of Minn. Stat. § 518A.53, subd. 5(c) strongly favors CHOF's position that the district court did not abuse its discretion in denying Ms. Rooney's request for fees. A holding in Ms. Rooney's favor would create different attorney's fees rules for obligors and payors of funds and encourage obligees to pursue the latter and not the former. This cannot be what the legislature intended by enacting § 518A.53, subd. 5(c). The Court should affirm the district court's denial of fees in all respects and put this unfortunate matter to rest once and for all and for the good of all.

Respectfully submitted,

**BASSFORD REMELE**
***A Professional Association***

Dated: October 27, 2009

By 

Steven P. Aggergaard (License #336270)
Mark R. Bradford (License #335940)
Attorneys for Christ's Household of Faith, Inc.
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-3000

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

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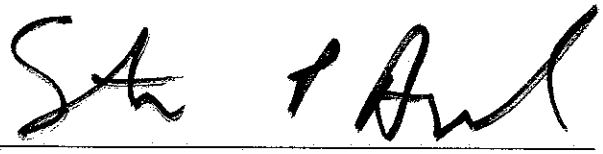

Steven P. Aggergaard
33 South Sixth Street
Suite 3800
Minneapolis, Minnesota 55402
(612) 376-1635