

NO. A06-0736

State of Minnesota
In Court of Appeals

Elizabeth Soll Brodsky,

Respondent,

v.

Joseph Alan Brodsky,

Appellant,

and

Nancy L. Ponto,

Intervenor.

**BRIEF AND APPENDIX OF APPELLANT
JOSEPH ALAN BRODSKY**

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STATEMENT OF LEGAL ISSUES

- I. Minn. Stat. § 518.14 authorizes an award of “conduct-based” attorney’s fees when a party “unreasonably contributes” to the length or expense of the dissolution proceeding. Eight years after the final judgment and decree, the trial court ordered Brodsky to pay all of Soll’s attorney’s fees incurred in Brodsky’s bankruptcy and in her unsuccessful dispute with her own attorney over an alleged “fee cap.” Were the fees incurred due to Brodsky’s conduct lengthening the dissolution proceeding?**

The trial court ruled in the affirmative.

Apposite authority: Morrison v. Swenson, 142 N.W.2d 640 (Minn. 1966); Minn. Stat. § 518.14.

- II. In the J&D, Soll was awarded Brodsky’s interest in a real estate partnership. The trial court later held Brodsky responsible for the attorney’s fees she incurred dissolving the partnership. Were those fees incurred due to “Brodsky’s failure to fulfill his obligations under the J&D”?**

The trial court ruled in the affirmative.

Apposite authority: Morrison v. Swenson, 142 N.W.2d 640 (Minn. 1966); Minn. Stat. § 518.14.

- III. The doctrine of laches applies when a party suffers prejudice in defending a stale claim due to loss of evidence or unavailability of witnesses. Brodsky transferred the balances of 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. Does the doctrine of laches preclude Soll’s claim for a deficiency in the bank account balances she received in 1997?**

The trial court ruled in the negative.

Apposite authority: Goodman v. McDonnell Douglas Corp., 606 F.2d 800 (8th Cir. 1979); M.A.D. v. P.R., 277 N.W.2d 27, 29 (Minn. 1979).

- IV. A family court is without authority to change a division of real and personal property after the original decree has been entered and time for appealing therefrom has expired. The trial court ordered Brodsky to pay the second mortgage debt in the J&D, but did not award interest, and Soll did not appeal from the judgment. Does the prejudgment interest statute support the retroactive interest award?**

The trial court ruled in the affirmative.

Apposite authority: Blattner v. Blattner, 411 N.W.2d 24 (Minn. Ct. App. 1987); McKey v. McKey, 36 N.W.2d 17 (Minn. 1949); Ernst v. Ernst, 408 N.W.2d 679 (Minn. Ct. App. 1987); Kiesow v. Kiesow, 133 N.W.2d 652 (Minn. 1965); Minn. Stat. § 549.09.

- V. When findings of fact are made after a court trial without a jury, a party may move for amended findings and/or a new trial. Soll's "Motion to Determine Non-Dischargeability" was, in reality, a court trial in which no inferences were granted in favor of the nonmoving party, and three entirely new judgments were entered based on credibility determinations. Was Brodsky entitled to amended findings or a new trial?**

The trial court ruled in the negative.

Apposite authority: Green v. City of Coon Rapids, 485 N.W.2d 712 (Minn. Ct. App. 1992); ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn. Ct. App. 1992).

STATEMENT OF THE CASE

Appellant Joseph Brodsky (“Brodsky”) appeals from three judgments entered March 6, 2006, in a marital dissolution proceeding which was resolved by final Judgment and Decree (“J&D”) on May 2, 1997. After the J&D divested him of all marital property, including what is now more than \$1 million in real estate, Brodsky went bankrupt. Respondent Elizabeth Soll (“Soll”), meanwhile, pursued separate litigation against her divorce attorney, Nancy Ponto. During the pendency of that dispute – in which the trial court twice ruled for Soll, and this Court twice reversed – Brodsky hired an attorney for the sole purpose of settling his obligations under the J&D, but Soll would not discuss it.

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). In August 2005, Soll moved the trial court for a determination of “non-dischargeability.” Brodsky agreed the two subject debts (\$25,000 in “Northeast State Bank” debt; \$62,822.64 sanction) were not dischargeable.

Also in her “Motion to Determine Non-dischargeability,” Soll made the three new claims for money which are the subject of this appeal. She argued certain expenses would not have been incurred but for Brodsky. Brodsky opposed Soll’s attempt to reopen the J&D, disputed Soll’s claims as a matter of law, and submitted evidence to refute her allegations of causality (to the extent which appeared necessary on a “Motion to

Determine Non-dischargeability.”) The trial court flatly rejected Brodsky’s evidence in favor of Soll’s – the moving party’s – and issued findings of fact, conclusions of law, and an order awarding Soll virtually everything she requested, including:

- “Prejudgment interest” of about **\$7,100.00** accruing from May 2, 1999, on the \$25,000 “Northeast State Bank debt”;
- The August 1996 balance of bank accounts Soll received from Brodsky in June 1997 (\$23,134.00 plus interest accruing from May 9, 1997, for a total of **\$31,912.24**);
- “Post-dissolution” attorney’s fees of **\$94,651.69**, representing (1) \$72,265.50 incurred intervening in Brodsky’s bankruptcy and in Soll’s dispute with her divorce lawyer over a their retainer agreement¹ ; and (2) \$22,386.19 she incurred dissolving a real estate partnership in which Brodsky had no interest.

These new awards, totaling about \$134,000, were based on the trial court’s eight-year old credibility determination. In practical effect, Brodsky was once again sanctioned for conduct which occurred during his acrimonious divorce in 1996. Following the court’s December 12, 2005, Order, Brodsky retained new counsel – the undersigned – and made post-trial motions, including a motion for a new trial, which the trial court erroneously declined to consider. This appeal followed.

STATEMENT OF FACTS

The trial court entered a final Judgment and Decree dissolving the Elizabeth Soll-

¹ In this “fee cap” dispute, this Court twice reversed the trial court’s findings for Soll; Brodsky did not even participate. A.68-69 (Order I). The Court ruled these to be in the nature of “support,” and therefore not dischargeable in bankruptcy. A.68, ¶ 6 (Order I). Brodsky paid Soll those amounts.

Joseph Brodsky marriage in May 1997. Soll was awarded the “great majority” of marital assets,² including what is now over \$1 million in real estate.³ Brodsky was ordered to pay \$62,822.64 towards attorney’s fees for his conduct during the pendency of the divorce proceeding. He could not meet his obligations went bankrupt on April 27, 1999.⁴ His attorney wrote the trial court:

[T]he bankruptcy schedules which my client executed indicate that he does not have substantial assets with which to pay the obligations that are the subject of your court proceeding. Further more [sic] my client has agreed to submit all of his disposable income to repay those obligations through his chapter 13 plan. If you have any problems or questions please do not hesitate to contact me.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. Brodsky received a discharge in bankruptcy on July 26, 1999. On November 27, 2002, the U.S. District Court, the Honorable Nancy C. Dreher presiding, issued an order stating the federal court would abstain from ruling on whether two of Brodsky’s debts were dischargeable due to the presence of state law questions. It was that abstention alone that provided any

² Brodsky v. Brodsky, 639 N.W.2d 386, 393 (Minn. Ct. App. 2002) (“Brodsky II” hereinafter).

³ Transcript of August 30, 2005, hearing at p. 26.

⁴ Brodsky has never missed a child support payment. Transcript of August 30, 2005, hearing at 26:11-18; 28:13-25.

⁵ Affidavit of Ralph V. Mitchell, dated August 1, 2005, Ex. B) (letter from Brodsky bankruptcy counsel to trial court).

legal basis for Soll's returning to the trial court to bring her "Motion to Determine Non-Dischargeability." The trial court, in turn, ordered the three new money judgments from which Brodsky currently appeals.

Soll's Litigation

While Brodsky was going through bankruptcy, Soll hired new attorneys to intervene in that proceeding and also to litigate with her divorce attorney, Nancy Ponto, over the \$94,000 Soll still owed.⁶ Soll admitted incurring \$130,000 in attorney's fees during the dissolution in order to obtain the \$63,000 sanction against Brodsky.⁷ However, Soll later claimed that Ponto had orally agreed to "cap" her fees at \$50,000. Soll based this argument exclusively on Ponto's estimate that her fees "could go as high as \$50,000."⁸ Soll moved to have Ponto's liens removed from her properties.

The trial court refused to permit Ponto to present testimony or other evidence tending to refute Soll's claim.⁹ (Ponto's retainer agreement specifically provided that

⁶ See Brodsky v. Brodsky, No. C9-99-1693, 2000 WL 890416 (Minn. Ct. App. July 3, 2000) (hereinafter, "Brodsky I"); Brodsky II, 639 N.W.2d 386.

⁷ Brodsky I, 2000 WL 890416 *1 ("Following that hearing, wife renewed her motion, claiming that she had incurred \$127,927.27 in attorney fees and costs . . .").

⁸ Brodsky II, 639 N.W.2d at 389.

⁹ Brodsky I, 2000 WL 890416 *2, *3 ("[Soll] was allowed to testify at length about the facts and circumstances that she believed supported [a fee cap] . . . [Ponto tried to offer] testimony tending to refute the claimed \$50,000 maximum. On repeated occasions, the trial court refused to allow testimony from [Ponto] that would support her position that neither party agreed that the fees and costs would be limited to \$50,000 during any portion of the representation, even though [Soll] had already been given

fees would be billed at an hourly rate, Soll received monthly bills and did not dispute them, and, during the dissolution proceeding, Soll *admitted* “incurring” \$130,000 in attorney’s fees in order to claim half of them from Brodsky.)¹⁰ Refusing to hear any evidence tending to contradict Soll, the trial court ruled in her favor.

Ponto appealed to the Minnesota Court of Appeals, which reversed the trial court and remanded with instructions to, at minimum, permit Ponto to present evidence in opposition to Soll’s claim. The court of appeals also instructed that, if a \$50,000 “fee cap” indeed existed, the sanction against Brodsky would have to be “reexamined.”¹¹ Brodsky did not participate in this appeal, which was resolved on July 3, 2000.

On remand, the trial court again found for Soll; Ponto again appealed; Brodsky again did not participate.¹² This Court again reversed the trial court, and Ponto’s liens were reinstated on Soll’s properties.¹³ During this contentious and protracted dispute, Brodsky hired an attorney for the specific goal of settling and paying his due.¹⁴ He

ample opportunity to present evidence on the matter.”).

¹⁰ See Brodsky I, 2000 WL 890416, *2-3.

¹¹ Id. at*5 (“If wife has incurred fees of only \$50,000 by reason of her oral contract with appellant, the issue of the amount of bad-faith fees against husband will need to be reexamined.”).

¹² Brodsky II, 639 N.W.2d at 387 fn. 1 (“Although listed as a respondent in this appeal, Brodsky has taken no part in it.”).

¹³ Id. at 393.

¹⁴ Transcript of August 30, 2005, hearing at 14:16-18; A.45-46 (letters from Brodsky’s former attorney attempting to settle case).

attended a “Soll-Ponto” mediation with borrowed funds ready to pay his sanction, but was told there was “really no reason” for him to be there.¹⁵ Ponto would not settle for Brodsky’s share, and Soll refused to pay anything more:

Several times during the [Soll-Ponto] litigation I [counsel for Ponto] was advised by the attorney for Brodsky that he (Brodsky) would partake in any global settlement of the fee dispute and pay his share. We were not able to reach an agreement because Soll would not agree to pay an amount which approximated what she owed Ponto over and above the amount owed by Brodsky.¹⁶

In the end, Soll apparently incurred about \$70,000 in additional attorney’s fees asserting her “fee cap” argument.¹⁷

Casa Del Sol Partnership Dissolution Proceeding

Soll was awarded Brodsky’s interest in the “Casa Del Sol” real estate partnership in the J&D.¹⁸ Brodsky turned over his interest as ordered. Brodsky’s parents were the other shareholders, so, unsurprisingly, the new partnership arrangement was not satisfactory.¹⁹ While she certainly could have, Soll did not request that Brodsky fund a partnership dissolution, and no such award was issued in the J&D. When a dissolution

¹⁵ Transcript of August 30, 2005, hearing at 17:3-14.

¹⁶ A.92-93 (Affidavit of John Warchol); see also A.41 (Brodsky Aff., ¶ 10).

¹⁷ A.66 (Trial Court’s December 12, 2005, Order, p. 5); A.34-38 (Affidavit of Ralph Mitchell regarding Attorney’s Fees).

¹⁸ J&D, p. 23-29.

¹⁹ A.94-95 (Affidavit of Marcia Rack-Brodsky).

was negotiated and the properties partitioned, Brodsky did not participate:

I was the attorney retained by Norton and Marcia Brodsky to represent them in the Casa Del Sol Properties Partnership litigation against Elizabeth Soll . . . Joseph Brodsky was not a party to this litigation, and during all times of my representation Joseph Brodsky did not have a direct ownership interest in any of the property . . . Joseph Brodsky had no involvement in the negotiations . . . At no point during this partition action did Joseph Brodsky . . . act as co-counsel or in any other representation capacity concerning the Casa Del Sol Partnership.²⁰

Brodsky had nothing to do with this process, and did not even learn that the partition action was resolved until weeks after the fact.²¹ Soll later claimed that Brodsky “was running his parents [sic] interest” in the partnership and, thus, necessitated a partition action.²²

Soll’s Motion to Determine Non-Dischargeability

In 2002, the federal bankruptcy court abstained from ruling on two narrow state law issues: (1) dischargeability of the \$62,822.64 attorney’s fee sanction; and (2) dischargeability of the Northeast State Bank debt.²³ Once it was resolved that the trial court would decide these issues, Brodsky stipulated that the obligations were not

²⁰ A.96-97 (Affidavit of Steve Siltan, Esq.).

²¹ A.41 (Brodsky Aff., ¶ 18).

²² A.60 (Soll Aff., ¶ 8-9).

²³ After remand, Brodsky no longer contested those amounts or their dischargeability. As for the debt on the second mortgage, “property settlements” are dischargeable in bankruptcy; “support” obligations are not. See 11 U.S.C. § 523 (a)(5)(B).

dischargeable.²⁴ However, Soll sought to drastically expand the scope of the proceeding and moved the trial court to order Brodsky to fund all of her various interim, tangential legal disputes.²⁵

Specifically, Soll made new claims for “post-dissolution” attorney’s fees as follows:

- (1) expenses and fees incurred in the Soll-Ponto fee dispute;
- (2) expenses and fees incurred intervening in Brodsky’s bankruptcy proceeding; and
- (3) attorney’s fees incurred to dissolve her real estate partnership with Brodsky’s parents.

Soll also claimed interest – which was not awarded in the J&D – on the “Northeast State Bank debt.” Finally, she requested an award of \$23,134.00 plus interest accruing from May 9, 1997, representing the August 1996 balance of bank accounts she received from Brodsky more than eight years earlier.²⁶ Other than her naked allegations, Soll presented no evidence that Brodsky wrongfully depleted the accounts before transferring them to her in June 1997.²⁷

While Soll couched these requests as a “Motion to Determine

²⁴ A.40-41 (Brodsky Aff., ¶ 9).

²⁵ A.1-3 (Soll’s Notice of Motion and Motion to Determine Non-Dischargeability).

²⁶ A.1-3.

²⁷ A.30-33 (Soll Affidavit); A.58-61 (Soll Affidavit).

Nondischargeability,” no dischargeability issues were before the trial court.²⁸ She cited no procedural rule or law authorizing the re-opening of the J&D eight years later or ordering the three new judgments against Brodsky.²⁹ Brodsky filed an affidavit disputing a number of facts, which the trial court refused to consider based on its credibility determination made eight years earlier during the parties’ acrimonious divorce.³⁰ The trial court made fact findings consistent with Soll’s submissions, and awarded Soll essentially everything she asked.³¹

Brodsky’s Post-Trial Motions

Brodsky brought a motion for amended findings and for a new trial. In the alternative, he requested permission to move for reconsideration. On Soll’s “Motion to Determine Nondischargeability,” Brodsky had no notice that awards would be issued in favor of the moving party without any inferences granted in his favor, that his testimony would be rejected based on an eight-year-old credibility determination, and a second sanction issued for his conduct during his contentious divorce in 1996. In essence, a massive, \$134,000 award against him was issued after a de-facto court trial, and he was

²⁸ A.40-41 (Brodsky Aff., ¶ 9).

²⁹ A.1-3 (Notice of Motion and Motion).

³⁰ A.39-46 (Brodsky Aff. and Exhibits A-B); A.67 (Order, p. 6, ¶ 2) (“Given Brodsky’s pattern of obfuscation in this matter . . . the Court gives little credence to his [sworn testimony].”).

³¹ A.62-69 (Findings of Fact, Conclusions of Law, and Order).

given no opportunity to present evidence refuting Soll's affidavits. However, the trial court determined that Brodsky's Motions were "improper," and, even if proper, they were denied.

SUMMARY OF ARGUMENT

The divorce proceedings bankrupted Brodsky. He lost his law practice. Five years after his discharge in bankruptcy and eight years after entry of the final J&D, Brodsky was suddenly haled before the trial court and ordered to pay Soll an additional \$134,000. In effect, he was sanctioned a second time for conduct which occurred during his 1996 divorce. This was patently unfair, especially in light of the fact that the only question properly before the trial court was the dischargeability of two debts, both of which Brodsky has paid.

Each of the trial court's new awards are erroneous as a matter of law. Almost \$100,000 in post-dissolution attorney's fees were awarded. Complete lack of causality aside, there is no statute in Minnesota so generous to support the trial court's award of all costs incurred "to enforce" Brodsky's obligations under the J&D. Minn. Stat. § 518.14 is inapplicable; it permits an award of "conduct-based" fees only when a party unreasonably contributes to the expense of the marital dissolution proceeding, which, here, was resolved in 1997. Moreover, Minnesota law prohibits such an award where *both parties* unreasonably contribute to the delay. Here, Soll made all the decisions regarding her post-dissolution litigation; Brodsky was not even involved.

The trial court ordered Brodsky to pay a second mortgage to Northeast State Bank in the J&D, but chose not to award interest. Soll did not appeal. The trial court's December 2005 award of interest is an impermissible modification of a property settlement resolved in the May 1, 1997, J&D. Contrary to Soll's assertion, Brodsky having "notice of the obligation" does not somehow mean he is *per se* liable for interest.

The doctrine of laches precludes Soll's claim for the August 1996 balance of certain bank accounts awarded her in the J&D. Brodsky was ordered to turn over the account balances and an accounting of expenditures in the J&D. He did that in early June 1997, with Soll's attorney and a court reporter present. Soll made no mention of any deficiency in the balances or records until August of 2005: after all of the records were destroyed by the bank and the court reporter. The trial court's award of the full, August 1996 balances to Soll is erroneous as a matter of law.

To the extent the above awards are not reversed as a matter of law, Brodsky respectfully requests this matter be remanded to permit him to present evidence which was rejected by the trial court.³²

ARGUMENT

I. Standard of Review.

A reviewing court is not bound by and need not give deference to a district court's

³² A.122, ¶ 4 (Order, dated May 1, 2006).

decision on a purely legal issue.³³ The application of law to undisputed facts is a question of law, which this court reviews de novo.³⁴ When reviewing the determination of a mixed question of fact and law, the court will affirm if the findings of fact are supported by the evidence and if the conclusion based on those facts is consistent with the statutory mandate.³⁵ If the underlying findings of fact made by the district court are undisputed or sustainable (because not clearly erroneous), the district court's "ultimate" findings must be affirmed in the absence of a demonstrated abuse of the district court's discretion.³⁶

Generally, the district court's failure to make findings on statutory factors requires a remand.³⁷ "Conclusory findings on the statutory factors do not adequately support a fee award."³⁸

³³ Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003) (citation omitted).

³⁴ Morton Bldgs., Inc. v. Comm'r of Revenue, 488 N.W.2d 254, 257 (Minn. 1992).

³⁵ Colburn v. Pine Portage Madden Bros., Inc., 346 N.W.2d 159, 161 (Minn. 1984).

³⁶ Maxfield v. Maxfield, 452 N.W.2d 219, 221 (Minn. 1990).

³⁷ Stich v. Stich, 435 N.W.2d 52, 53 (Minn. 1989).

³⁸ Geske v. Marcolina, 624 N.W.2d 813, 817 (Minn. Ct. App. 2001).

II. Minn. Stat. § 518.14 authorizes an award of “conduct-based” attorney’s fees when a party “unreasonably contributes” to the length or expense of the dissolution proceeding. Eight years after the final judgment and decree, the trial court ordered Brodsky to pay all of Soll’s attorney’s fees incurred in Brodsky’s bankruptcy and in her unsuccessful dispute with her own attorney over an alleged “fee cap.” The trial court erred in concluding the statute applied to those fees and the fees were somehow incurred due to Brodsky’s conduct.

The American rule is that each party must pay her own attorneys fees absent some contractual or statutory basis.³⁹ Here, the trial court cited Minn. Stat. § 518.14, subd. 1, in support of its award of approximately \$95,000 in attorney’s fees Soll incurred intervening in Brodsky’s bankruptcy and in her dispute with Nancy Ponto over her retainer agreement. The statute, permits an award of fees incurred *in a marital dissolution proceeding*:

Except as provided in subdivision 2, in a [marriage dissolution] 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 . . .* 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*.⁴⁰

The trial court’s awards of “Brodsky bankruptcy” fees and “Ponto-Soll” fees are erroneous as a matter of law. Each will be discussed in turn.

³⁹ Morrison v. Swenson, 142 N.W.2d 640, 647 (Minn. 1966) (absent statutory authority, legal fees ordinarily are not recoverable).

⁴⁰ Minn. Stat. § 518.14, subd. 1 (emphasis supplied).

A. Legal fees incurred by Soll intervening in Brodsky's bankruptcy are not awardable by a family court.

For obvious reasons, bankruptcy is not the option of choice for those who can pay their debts. To his detriment, Brodsky had a need – and a legal right – to file for federal bankruptcy protection after the J&D divested him of all marital property and the means to satisfy his many debts.⁴¹ Soll was made his creditor in the J&D. There is no provision in the bankruptcy code providing for payment of a creditor's counsel fees by a debtor.⁴² Accordingly, the trial court cited Minn. Stat. § 518.14 – the only statute authorizing it to award attorney's fees. The statute is *per se* inapplicable to fees incurred in Brodsky's bankruptcy: it unequivocally applies only to fees incurred in “a proceeding under this chapter [Minn. Stat. Ch. 518, ‘Marital Dissolution’].”⁴³

Moreover, the trial court – a family court – had no jurisdiction to award fees incurred in an action in another court.⁴⁴ Its award of fees incurred in Brodsky's

⁴¹ See, e.g., J&D p. 60-61 (holding Brodsky responsible for \$121,617.20 in various debts); Transcript of August 30, 2005, hearing at 16:5-8.

⁴² See, e.g., Cox v. Elliot, 122 F.2d 851, 852 (8th Cir. 1941).

⁴³ Minn. Stat. § 518.14. Even if the statute applied, which it does not, it requires that Brodsky “unreasonably contribute to the length and expense of *the [marital dissolution] proceeding*.” Going bankrupt after the dissolution was over did not contribute to the length and expense of the marital dissolution.

⁴⁴ See, e.g., Burns v. Burns, 448 S.E.2d 571, 573 (S.C. Ct. App. 1994) (reversing family court's award of attorney's fees incurred in bankruptcy proceeding; stating “While the family court clearly has jurisdiction to award a party attorney's fees in a domestic action, there is no provision for the award of attorney's fees by the family court based on an action brought in another court. The award of attorney's fees by the family court is

bankruptcy is erroneous as a matter of law and must be reversed.

B. The “Ponto-Soll” attorney’s fees were not caused by Brodsky.

The trial court based its award of fees on a conclusion that they were incurred “as a result of Brodsky’s failure to fulfill his obligations under the J&D.”⁴⁵ There is no Minnesota statute so generous to support this award.⁴⁶ The statute cited – again, Minn. Stat. § 518.14, the only one permitting the trial court to award attorney’s fees – does not permit awards of fees incurred outside the marital dissolution proceeding itself:

Except as provided in subdivision 2, in a [marriage dissolution] 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* . . . 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*.⁴⁷

As a matter of law, the Soll-Ponto fees were not necessary to “carry on or contest” the marital dissolution proceeding, which was resolved by final J&D on May 1, 1997. Unlike the fees awarded in the case cited by the trial court, Farrar v. Farrar,⁴⁸ the fees here were not incurred because *the dissolution proceeding* was somehow unreasonably

limited to those fees incurred in actions brought in the family court.”)

⁴⁵ A.67 (Order, ¶ 4).

⁴⁶ Morrison, 142 N.W.2d at 647 (absent statutory authority, legal fees ordinarily are not recoverable).

⁴⁷ Minn. Stat. § 518.14, subd. 1 (emphasis supplied).

⁴⁸ Farrar v. Farrar, 383 N.W.2d 436 (Minn. Ct. App. 1986).

protracted. To the contrary, Soll chose to litigate on other fronts.⁴⁹

Soll will undoubtedly argue that Minn. Stat. § 518.14 applies. Even assuming, *arguendo*, that it did, there is absolutely no basis for the trial court's conclusion that the fees were incurred "because of" Brodsky. Soll submitted an affidavit claiming that she would not have litigated with Ponto if Brodsky had paid Ponto \$63,000 immediately. Stated differently, Soll explains her decision to incur \$70,000 in *additional* legal fees as follows: "I could not afford the \$63,000 in legal fees I *already incurred*." Obviously, pursuing the expensive and protracted "fee cap" argument – the cause of two appeals – was a poor decision. Indeed, as observed by this Court, Soll's argument was entirely unreasonable:

Soll could not reasonably have believed that her obligation to pay was transferable. She testified that she read Ponto's representation agreement and had it reviewed by a retired attorney. It provides:

[T]he court may order your spouse to pay part or all of your fees and out-of-pocket expenses. Court orders requiring payment on your behalf of fees and expenses will not affect our Agreement and do not in any way limit the amount of fees. You are primarily liable for payment of your total bill with us and will be expected to pay according to the terms of this

⁴⁹ Even in cases where fees are incurred to carry on or contest the marital dissolution proceeding, *conduct-based attorney's fees are inappropriate where both parties contribute to the expense of the proceeding*. See Kitchar v. Kitchar, 553 N.W.2d 97, 104 (Minn. Ct. App. 1996) (affirming denial of conduct-based attorney fees where, among other things, both parties contributed to expense of case), review denied (Minn. Oct. 29, 1996). Here, Soll made all of the decisions with regard to her litigation with Ponto. She directed her attorneys and monitored the bills. Brodsky had no such power.

Agreement.

Soll also testified that Ponto had told her that she was responsible for the total bill.⁵⁰

If anyone should be sanctioned for litigating with Ponto, it is Soll. While she pursued her frivolous arguments, Brodsky was in the midst of bankruptcy and powerless to prevent her from incurring the tens of thousands in additional legal fees he has now been ordered to pay.⁵¹ Soll, on the other hand, could have – and should have – *simply chosen to pay Ponto instead of paying new attorneys to litigate against Ponto*. Also, she could have borrowed money from her father, or obtained credit. Brodsky was a debtor in federal bankruptcy court and did not have that option. Soll also had dozens of valuable real estate properties at her disposal.⁵²

⁵⁰ Brodsky II, 639 N.W.2d 393.

⁵¹ Also, as this court has noted, Soll's retainer agreement made her responsible for all of Ponto's legal fees, regardless of any sanction against Brodsky. Brodsky II, 639 N.W.2d at 393 ("Soll could not reasonably have believed that her obligation to pay was transferable.").

⁵² Adding insult to injury, Soll was expending more than \$5,000 per month on living expenses, including a maid, gardener, and health club membership. See <http://www.mndaily.com/daily/1996/01/25/news/welfar/> ("Senators Consider Revamping Medical Assistance." "State senators . . . considered adding a requirement to Minnesota law that would prevent people with significant assets from receiving public medical assistance. The lawmakers were reacting to the story of Elizabeth Soll Brodsky, a Twin Cities woman who gets state medical assistance but lives in a \$165,000 home and owns a stake in 23 rental properties in Minnesota and Texas . . ."). She was also planning a 900-square-foot addition to her home. See <http://www.ci.shoreview.mn.us/ZoningAndInspections/planning%20zoning%20info/planning%20commission/pdf%20minutes/04-26-2005.PDF>.

Soll simply claimed that she would not have litigated with Ponto but for Brodsky, and the trial court accepted her word at face value. Soll introduced no evidence that she could not pay Ponto, and no evidence that she ever offered Ponto a cent to settle the case. Soll's claim that *Brodsky forced her* to litigate the "fee cap" issue is nothing short of ludicrous.⁵³ How can Soll's decision to accrue more debt in favor of paying off debt be attributed to Brodsky?

Brodsky was sanctioned for his conduct in his 1996 divorce. He paid that sanction to the tune of almost \$100,000. Almost a decade later, the trial court sanctioned him *again* for the exact same conduct. The trial court's order that Brodsky fund Soll's imprudent decision to litigate with her former attorney over a fee arrangement *Soll* herself negotiated and bills *Soll* herself received should be reversed as unsupported by either fact or law.

III. Soll was awarded Brodsky's interest in a real estate partnership in the J&D. The trial court later held Brodsky responsible for the attorney's fees she incurred dissolving the partnership. Those fees were a business expense and are not attributable to Brodsky's conduct.

The trial court ordered Brodsky to reimburse Soll for \$22,386.19 in "post-dissolution" attorney's fees of Nancy Ponto, most of which were "expended on a

⁵³ Notably, Soll produced nothing to show: (1) she offered to pay Ponto one cent to settle the dispute; (2) she made any effort to set up a payment plan with Ponto; or (3) she so much as considered setting up a payment plan with Ponto in lieu of paying monthly bills to new attorneys.

settlement agreement regarding the Casa Del Sol partnership.”⁵⁴ Again, the trial court’s reasoning is the fees were incurred “as a result of Brodsky’s failure to fulfill his obligations under the J&D.”⁵⁵

Brodsky was ordered to surrender his interest in the Casa Del Sol partnership in the J&D, and he did that. The remaining partners then hired counsel to partition the assets. Brodsky did not participate:

I was the attorney retained by Norton and Marcia Brodsky to represent them in the Casa Del Sol Properties Partnership litigation against Elizabeth Soll . . . Joseph Brodsky was not a party to this litigation, and during all times of my representation Joseph Brodsky did not have a direct ownership interest in any of the property . . . Joseph Brodsky had no involvement in the negotiations . . . At no point during this partition action did Joseph Brodsky . . . act as co-counsel or in any other representation capacity concerning the Casa Del Sol Partnership.⁵⁶

Soll certainly could have requested an award of money to fund the partnership dissolution, but did not do so. Therefore, Brodsky’s “obligations under the J&D” were satisfied when he turned over his share to Soll. Soll’s business costs related to dissolving the partnership were her own responsibility.

The only legal “support” cited for this attorney’s fee award is, again, Minn. Stat. § 518.14, the only statute permitting a family court to award attorney’s fees. The statute permits an award of “need based” or “conduct based” attorney’s fees. The trial court

⁵⁴ A.66 (Order, ¶ 21); A.67 (Order, ¶ 4).

⁵⁵ A.67 (Order, ¶ 4).

⁵⁶ A.96-97 (Affidavit of Steve Siltan, Esq.).

made no findings regarding Soll's need or Brodsky's conduct. Such findings are required to sustain the award.⁵⁷ Finally, like the Soll-Ponto "fee cap" fees, the Casa Del Sol partnership dissolution fees were not incurred "in the proceeding" as required by § 518.14. The award is patently erroneous and should be reversed.

IV. The doctrine of laches applies when a party suffers prejudice in defending a stale claim due to loss of evidence or unavailability of witnesses. Brodsky transferred the balances of 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. The doctrine of laches precludes Soll's claim.

In the J&D, the trial court awarded Soll various bank accounts. The J&D lists outdated balances from August 1996, most likely the date when the parties first submitted account records. In light of the fact that the J&D was entered a full nine months later, the trial court also ordered an accounting of interim expenditures:

Within 10 days of the entry of this Judgment and Decree, Respondent shall turn over to Petitioner all books, records and bank accounts for the properties awarded to her. *Respondent shall account for all income and disbursements made subsequent to the date and amount for the respective bank account balances* set forth in the Findings of Fact above (the bank account balances agreed to by the parties for the respective properties and partnerships).⁵⁸

In other words, Brodsky was ordered to either turn over the funds or account for

⁵⁷ See *Geske*, 624 N.W.2d at 819 ("The district court did not, however, identify what conduct by father justified the award of conduct-based attorney fees or whether that conduct occurred during the litigation process.").

⁵⁸ J&D at 68 (emphasis supplied).

all expenditures since August 1996.⁵⁹ Brodsky transferred the balances in early June 1997, in the presence of Soll's attorney and a court reporter who transcribed every word.⁶⁰ Eight years later, Soll suddenly claimed the balances received were insufficient. By that time, both the court reporter and the bank had destroyed the records documenting the amounts she received.⁶¹

Brodsky raised a laches defense, which the trial court did not address; instead, it simply awarded the full, August 1996 balances.⁶² However, laches clearly bars Soll's claim as a matter of law. The defense of laches applies when a party fails to raise a claim to enforce a known right after an unreasonable delay which prejudices the other party.⁶³ The doctrine is based on a public policy to discourage stale claims,⁶⁴ and depends on the circumstances of each case, the nature of the claim, and whether the delay has been

⁵⁹ J&D at 63-65; Transcript of August 30, 2005, hearing at 18:24-19:9 ("That issue has to do with the fact that the Court ordered [Brodsky] to turn over either an accounting or turn over the funds.").

⁶⁰ A.91 (email from Katie Thornhill to Patricia Brodsky, dated February 7, 2006); A.41-42 (Brodsky Aff., ¶ 16); Transcript of August 30, 2005, hearing at 18-19.

⁶¹ A.91 (email from Katie Thornhill to Patricia Brodsky, dated February 7, 2006).

⁶² See Transcript of August 30, 2005, hearing at 19:10-21 ("So, we've sat on this for over eight years now, and now she's decided she doesn't have [the bank account balances]. That's . . . laches.").

⁶³ M.A.D. v. P.R., 277 N.W.2d 27, 29 (Minn. 1979). The standard of review of the district court's decision regarding laches is whether the court abused its discretion. In Re Marriage of Opp, 516 N.W.2d 193, 196 (Minn. App. 1994), review denied (Aug. 24, 1994).

⁶⁴ St. Paul, M. & M. Ry. Co. v. Eckel, 84 N.W. 1008, 1009 (Minn. 1901).

unnecessary and unreasonable.⁶⁵ Determining whether a delay is inexcusable is closely related to determining whether a party suffered prejudice from the delay:

If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice required before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.⁶⁶

Generally, prejudice in a laches case “stems from such factors as loss of evidence and unavailability of witnesses, which diminish a defendant’s chances of success.”⁶⁷

Here, to be sure, Brodsky suffered manifest prejudice. Soll’s unreasonable delay and the unavailability of records and the meeting transcript are sufficient to establish prejudice as a matter of law.⁶⁸ It was incumbent on Soll to raise any “claim” pertaining to the bank accounts within a reasonable period of time. (Practically speaking, if she had a legitimate claim, she undoubtedly would have raised it, especially in light of her sworn testimony about her dire financial circumstances.) However, rather than holding Soll to that most minimal of burdens, the trial court held Brodsky to the burden of proving a

⁶⁵ Id.

⁶⁶ Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979).

⁶⁷ Id. at 808 n.17.

⁶⁸ Goodman, 606 F.2d at 808 n.17. All records which would permit Brodsky to prove the negative that the trial court held him to were destroyed by August 2005. A.41-42 (Brodsky Aff., ¶ 16); Transcript of August 30, 2005, hearing at p. 18-19. See, e.g., Minn. Stat. § 336.4-406(b) (requiring banks to keep legible copies of checks for seven years).

negative: that he did not wrongfully deplete bank accounts eight years earlier.⁶⁹ This was patently unfair and erroneous as a matter of law. Laches precludes Soll's claim, and the trial court should be reversed.

V. A family court is without authority to change a division of real and personal property after the original decree has been entered and time for appealing therefrom has expired. The trial court ordered Brodsky to pay the second mortgage debt in the J&D, but did not award interest, and Soll did not appeal from the judgment. The trial court erred when it awarded statutory pre-judgment interest and retroactively modified the J&D.

The Court found Brodsky responsible for prejudgment interest on the Northeast State Bank debt, accruing from May 2, 1999, to the present, "because Soll did not have the use of [her \$25,000 payment] during the intervening years."⁷⁰ The Court based this award of prejudgment interest on Minn. Stat. § 549.09, subd. 1, which provides:

Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed . . . from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first⁷¹

Here, Soll did not commence action or otherwise give notice of her "claim" on May 2, 1999.⁷² The prejudgment interest statute does not support the Court's award of

⁶⁹ A.65 (Order, p. 4, ¶ 16) ("Brodsky claims that he used the money in the accounts to pay for property taxes and to refund security deposits . . . he has not submitted any documentation to support that claim.").

⁷⁰ A.66 (Order, p. 5, ¶ 1).

⁷¹ Minn. Stat. § 549.09, subd. 1.

⁷² A.41 (Brodsky Aff., ¶ 15).

interest on the Northeast State Bank debt.

Additionally, the Northeast State Bank debt was part of the property distribution in the J&D.⁷³ Therefore, the retroactive award of interest is an impermissible modification of the J&D— which was never appealed by Soll — more than eight years after its entry.⁷⁴ Soll did not even attempt to establish a basis for modification of the J&D.⁷⁵ Indeed, even the trial court recognized such a modification would be improper.⁷⁶

Finally, the award of interest and inappropriate modification of the J&D retroactively circumvents the automatic stay of 11 U.S.C. § 362. Ultimately, there is no legal basis for the award of interest on the Northeast State Bank debt, and the trial court should be reversed.

⁷³ J&D at 35 (“The property division set forth above is just and equitable, and is made without consideration of marital misconduct . . .”); J&D at 11-12.

⁷⁴ See, e.g., Blattner v. Blattner, 411 N.W.2d 24 (Minn. Ct. App. 1987) (trial courts may set aside or modify divorce decree if court determines such judgment amounts to fraud upon the court); McKey v. McKey, 36 N.W.2d 17 (Minn. 1949) (party seeking modification of divorce decree has the burden of furnishing court with clear proof of the facts establishing a substantial change in the circumstances of the parties); Ernst v. Ernst, 408 N.W.2d 679 (Minn. Ct. App. 1987) (principles of res judicata bar relitigation of issues finally disposed of in a prior, appealable order and apply to dissolution cases, subject to the limitation that either party may petition for modification of support or maintenance based on substantially increased or decreased needs or resources).

⁷⁵ Minn. R. Civ. P. 60.02; Kiesow v. Kiesow, 133 N.W.2d 652 (Minn. 1965) (the court is without authority to change a division of real and personal property after the original decree has been entered and time for appealing therefrom has expired); Maranda v. Maranda, 449 N.W.2d 158 (Minn. 1989).

⁷⁶ A.67 (Order, p. 6, ¶ 3) (“Increasing the sanction imposed on Brodsky more than eight years after the J&D was issued would be improper . . .”).

VI. When findings of fact are made after a court trial without a jury, a party may move for amended findings and/or a new trial. Soll's "Motion to Determine Non-Dischargeability" was, in reality, a court trial in which no inferences were granted in favor of the nonmoving party, and three entirely new judgments were entered based on credibility determinations. Brodsky was entitled to amended findings or a new trial.

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. 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. As set forth above, the trial court should be reversed as a matter of law. However, in the less desired alternative, Brodsky requests this matter be remanded for a new trial and the record re-opened to permit him to introduce evidence refuting Soll's new claims.⁷⁷

⁷⁷ ZumBerge v. Northern States Power Co., 481 N.W.2d 103, 110 (Minn. Ct. App. 1992) (citation omitted), review denied (Minn. Apr. 29, 1992) (This Court will order a new trial when the verdict "is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict."); Green v. City of Coon Rapids, 485 N.W.2d 712, 716 (Minn. Ct. App. 1992) (internal quotation omitted), review denied (Minn. June 30, 1992) (a new trial should be ordered where "the conflict between the verdict and the preponderance of the evidence suggests that the [factfinder] failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice.").

CONCLUSION

On a "Motion to Determine Non-dischargeability," Brodsky was essentially "re-sanctioned" for conduct from a decade ago. The new judgments have absolutely no basis in fact or law, as set forth above. In short, the trial court has been consistent in ruling for Soll, and this Court has consistently reversed. For the foregoing reasons, Appellant Joseph Brodsky respectfully requests that the trial court be, once again, reversed.

Respectfully submitted,

Dated: July 24, 2006 . JOHNSON & CONDON, P.A.

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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).