

NOT FOR PUBLICATION

NO. 25928

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

DONNA EDWARDS MIZUKAMI, nka DONNA EDWARDS,
Plaintiff-Appellee, v. GLENN KIYOHICO MIZUKAMI,
Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 90-4214)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Glenn Kiyohiko Mizukami (Glenn) appeals from the following orders entered in the Family Court of the First Circuit by Judge Bode A. Uale: (1) the May 2, 2003 order denying Glenn's April 9, 2003 Hawai'i Family Court Rules (HFCR) Rule 62(b) motion seeking a stay of, and Rule 60(b) motion seeking relief from (a) the September 20, 2000 order as amended by the May 14, 2001 order, (b) the May 15, 2001 order, and (c) the May 16, 2001 order; and (2) the May 29, 2003 order denying Glenn's May 7, 2003 motion for reconsideration. We affirm.

BACKGROUND

The son (Son) of Glenn and Plaintiff-Appellee Donna Edwards Mizukami (Donna) was born on June 30, 1986. The "Decree Granting Divorce and Awarding Child Custody", entered by Judge Victoria S. Marks on August 2, 1991 (Divorce Decree), awarded legal and physical custody of Son to Donna and ordered Glenn to

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pay child support of \$350 per month commencing August 5, 1991. The Divorce Decree noted that Glenn was \$1,350 in arrears in the payment of child support at that time, entered judgment for that amount, and ordered Glenn to pay \$50 per month on that judgment. The Divorce Decree also ordered, in relevant part, as follows:

"[Glenn] shall provide medical and dental insurance for the benefit of [Son]. Ordinary medical and dental expenses not covered by insurance shall be paid by [Donna]. Any extraordinary medical and dental expenses not covered by insurance shall be paid 50% - 50% by the parties."

On February 10, 2000, after a contested hearing, the Office of Child Support Hearings entered its "Administrative Findings and Order" deciding that Glenn owed child support of \$19,800 as of January 1, 2000, and ordering him to pay it at the rate of \$50 per month commencing February 1, 2000.

On August 9, 2000, using the family court's "Revised 12/16/96" pre-printed "Motion and Affidavit for Post-Decree Relief" form, Donna moved for enforcement of the previous orders and for orders requiring Glenn to pay "50% of Orthodontic treatment (\$2,007.10)," "to reimburse [Donna] for all of the legal expenses [she has] incurred," to pay statutory interest, and requiring the auction sale of Glenn's "entire sword collection for security for future support." Attached to the motion as an exhibit was an offer from Dr. Kimi S. Caswell, DDS, MS, that stated, in relevant part, as follows:

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Patient Name [Son]

Date 06-20-00

Orthodontic treatment is an excellent investment in the overall dental and psychological well being of children and adults. We understand that different people have different needs in fulfilling their financial obligations, therefore we are able to provide several payment options for the necessary orthodontic care.

upper & lower

Treatment Fee	<u>\$ 3480.00</u>
State Tax	<u>\$ 139.20</u>
Total Fee	<u>\$ 3619.20</u>
Retention and Supervision Fee	<u>\$ 395.00</u>
TOTAL FEE (valid for one year)	<u>\$ 4014.20</u>

* optional add \$150 per arch for clear, gold or neon braces.

PAYMENT OPTIONS

Option A: Payment in Full

*A bookkeeping credit of **10%** is given for payment in full at the start of treatment by cash, Visa, MasterCard or check resulting in a one-time payment of **\$3612.78**. A savings to you of **\$401.42**.

Option B: Orthodontist[']s Fee Plan

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Option C: Interest Free Office Payment Plan

*An initial payment of **\$1214.20** is due when treatment begins, with the balance paid in **16** monthly payments of **\$175.00**.

(Emphases in original.)

On September 12, 2000, after a hearing on August 30, 2000, Judge Allene R. Suemori entered an order continuing the hearing on the August 9, 2000 motion to September 20, 2000 and requiring Donna "to provide ortho bill and letter showing need[.]"

Dr. Caswell wrote a letter dated September 11, 2000, that stated, in relevant part as follows:

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To Whom It May Concern,

I saw [Son] for an initial orthodontic exam on June 20, 2000. Upon clinical orthodontic exam, the following problems were found:

- ! Improper bite relationship of the back teeth on the right and left sides.
- ! Lower midline shifted to the left. (Also indicates poor fit of the bite.)
- ! Mild crowding in the upper and lower arches.

My recommendations are as follows:

- ! Comprehensive orthodontic treatment for 18 months.
- ! No extractions or headgear.
- ! Continue visiting the general dentist every 6 months for cleanings and check-ups,

[Son] would benefit from orthodontic treatment most if corrected at this time. The improper bite is resulting in excessive wear on his teeth.

The total fee for his treatment is \$4164.20. This fee includes the orthodontic appliances [sic], as well as, all visits to Dr. Caswell's office during braces and visits after the braces are removed during retention.

On September 18, 2000, Glenn filed his response to Donna's August 9, 2000 motion. Glenn alleged that he paid the \$50 per month he owed on the arrearage, questioned the necessity and cost of Son's orthodontic treatment, and questioned the necessity of the August 9, 2000 motion. He was silent on the question whether he had been paying child support of \$350 per month commencing February 1, 2000.

After the hearing on September 20, 2000, Judge Paul T. Murakami entered an order: (1) refusing to amend the February 10, 2000 order, (2) entering judgment against Glenn for child support unpaid for the period from February 1, 2000 to August 30, 2000 in the amount of \$2,450, (3) awarding Donna the right to statutory interest from January to September 2000,

(4) denying Donna's request for 25% attorney fees and ordering Donna to submit an affidavit of reasonable attorney fees for the court's consideration, (5) ordering Glenn to pay "50% of orthodontic estimate," (6) denying, without prejudice, Glenn's request for change of custody, (7) reserving for further hearing the issues of foreclosure and sequestration of Glenn's property and transfer of title to Donna, and (8) ordering Glenn to pay reduced child support of \$250 per month commencing October 1, 2000.

On September 22, 2000, Glenn sought reconsideration of the September 20, 2000 order. He supported his request with an addendum memorandum filed on October 5, 2000.

At some point in time, Donna submitted a proposed judgment for entry by the court. On January 22, 2001, Glenn filed his objection to the proposed judgment. On May 14, 2001, Judge Murakami entered an "Order Granting in Part and Denying in Part Defendant's Objections and Request for Reconsideration of Plaintiff's Proposed Judgment and Order Regarding Attorney Fees" stating, in relevant part, as follows:

[T]he court having concluded that the instant pleadings fail to show good cause to warrant further hearing under Rule 59(j) Hawaii Family Court Rules;¹

IT IS HEREBY ORDERED that Defendant's Objections and Request for Reconsideration of Plaintiff's Proposed Judgment and Order Regarding Attorney Fees filed January 22, 2001 is granted in part and denied in part without hearing. Court amended it's [sic]

^{1/} The order cited Hawai'i Family Court Rules (HFCR) Rule 59(j), notwithstanding the deletion of HFCR Rule 59(j) effective January 1, 2000.

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order to delete the 10% interest on prior judgment and deleted the second paragraph of proposed judgment. Court sustained the request for attorney fees.

(Footnote added.)

Although the May 14, 2001 order "deleted the second paragraph of proposed judgment[,]" Judge Murakami did not enter any judgment or amended judgment. Therefore, the effective order is the September 20, 2000 order as amended by the May 14, 2001 order.

On May 15, 2001, Judge Murakami entered an Order Regarding Attorney Fees which "decreed that [Donna] is awarded attorney fees against [Glenn] in the amount of \$3,497.25." Of that amount, \$2,160 was for attorney time at \$180 per hour and \$1,337.25 was for paralegal time at \$75 per hour.

On May 16, 2001, after a hearing, Judge Suemori entered an order continuing the hearing on an April 30, 2001 motion to June 6, 2001, and requiring, in relevant part, that Glenn "shall pay \$2007.00 for half of orthodontic expenses and shall be reimbursed [sic] if this is more than 1/2 of final bill or be increased if it is less than 1/2 of final bill"; "[Donna] shall take [S]on to Dr. Richard Kappenberg"; and "[i]nterest shall be calculated on both judgments against [Glenn]." On May 29, 2001, Glenn timely moved for reconsideration of the part of the order pertaining to orthodontic expenses. In an accompanying affidavit, Glenn stated, in relevant part, as follows:

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4. Customarily, General Dentistry initiates treatments of improper-bite conditions and refers gross cosmetic misalignment conditions for orthodontic treatment if desired and affordable by parents.

a) The General Dentistry Doctors of the King Kalakaua Dental Center have successfully treated three generations of Mizukamis with timely minimal molar shaping for adjustment of the hereditary improper-bite condition.

b) My father and I, and my adult son have been satisfactorily so treated at nominal cost covered by ordinary dental insurance.

c) My son . . . could also benefit from such treatment without incurring extraordinary expense.

d) My son . . . would most importantly not then be subjected to the unnecessary prolonged embarrassment and emotional distress unavoidable with orthodontic braces.

. . . .

b) If elective orthodontic treatment cost is ordered by the Court to be shared by the parents, where are the limits on reshaping a child's ears, nose, eyes, etc.?

c) The orthodontic treatment of the subject child is not medical nor dental, it is entirely elective; and does not consider the undue stress upon the child.

. . . .

5. The Orthodontist's letter . . . referenced herein is misleading and obviously self-serving:

a) While referring twice to "improper bite", and "back teeth", the letter carefully avoids mention of molars, which have the greater affecting of proper bite; and which also are customarily treated by General Dentistry rather than Orthodontists.

(Emphasis in original.)

On June 1, 2001, Glenn filed a notice of appeal from the May 14, 2001 order (appeal No. 24327). He thereby challenged (a) the September 20, 2000 order as amended by the May 14, 2001 order and (b) the May 15, 2001 order.

On June 14, 2001, Glenn filed Defendant's Motion for Leave to Appeal in Forma Pauperis. In an accompanying affidavit, he reported that: he works as "Glenn K. Mizukami dba TS&D

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Co./Technical Services Consultants"; his "Income Statement for year 2000 shows a business and personal loss of (\$3,380.90)"; his "monthly EXPENSES EXCEED INCOME by {\$3,042.00}"; and his "DEBTS EXCEED ASSETS by more than \$100,000.00[.]" His motion was "granted as to filing fees only."

On June 19, 2001, Judge Suemori entered an order summarily denying Glenn's May 29, 2001 motion for reconsideration of the May 16, 2001 order pertaining to Son's orthodontic expenses. On July 16, 2001, Glenn filed a notice of appeal from the June 19, 2001 order (appeal No. 24442).

On July 19, 2001, Glenn filed Defendant's Motion for Leave to Appeal in Forma Pauperis. His motion was "granted as to filing fees only."

On October 5, 2001, appeals Nos. 24327 and 24442 were consolidated under appeal No. 24327. This court's January 29, 2003 Memorandum Opinion affirmed the family court's September 20, 2000 order as amended by its May 14, 2001 order, in appeal No. 24327; the May 15, 2001 order requiring Glenn to pay Donna's attorney fees in the sum of \$3,497.25, in appeal No. 24327; and the May 16, 2001 order requiring that Glenn "shall pay \$2007.00 for half of orthodontic expenses and shall be re-imbursed [sic] if this is more than 1/2 of final bill or be increased if it is less than 1/2 of final bill," in appeal No. 24442.

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On April 9, 2003, Glenn filed an HFCR Rule 62(b) motion seeking a stay of, and a Rule 60(b) motion seeking relief from: (1) the September 20, 2000 order as amended by the May 14, 2001 order; (2) the May 15, 2001 order; and (3) the May 16, 2001 order. In this motion, Glenn stated, in relevant part, as follows:

[Donna's] Motion August 9, 2000 alleged that in addition to arrearages, [Glenn] had failed to pay orthodontic costs for [Son], due and owing from Glenn to Donna on June 20, 2000 and accruing interest thereafter. Said Motion also attached exhibits 1 and 4 itemizing said claim and accruing interest, and presenting the purported receipt for the bill of costs paid by Donna on June 20, 2000.

Donna's answering brief December 5, 2001 page 1 para 5 and page 5 para 1 contrarily state that said exhibit 4 purported receipt is now in fact instead a proposed fee for future services. Said statements are in effect admissions of a false claim and fraud upon the Court.

Donna's counsel had repeatedly argued reimbursement of Donna's attorney fees "to make her whole" citing the legislated intent of HRS [§] 571-52.7 award of attorney fees incurred by Child Support Enforcement actions.

Donna's answering brief October 16, 2001 page 5, B.1 para 2 contrarily states "Yes, she was not billed prior to award of attorney fees". Therefore, absent award she would not ever be billed, thereby verifying that counsel is in fact a "no fee" counsel, and Donna would not in any event "be made whole", award or no award. Therefore, Donna's claim for reimbursement and her counsel's supporting arguments, in essence suborned perjury and were deceptive misconduct by counsel.

On May 2, 2003, Judge Uale entered an order denying Glenn's motion. On May 29, 2003, Judge Uale entered an order denying Glenn's May 7, 2003 motion for reconsideration. On June 27, 2003, Glenn filed a notice of appeal from the May 2, 2003 and May 29, 2003 orders.

On June 27, 2003, in the family court, Glenn filed a motion to supplement the record on appeal with (1) a copy of his

June 13, 2003 letter to orthodontist Dr. Kimi Caswell², and (2) a copy of Dr. Caswell's June 14, 2003 letter to Glenn³. Judge Uale denied this motion on August 7, 2003.

On July 8, 2003, Judge Uale entered Findings of Fact and Conclusions of Law (FsOF and CsOL).

This appeal was assigned to this court on February 18, 2004.

DISCUSSION

Glenn contends, in relevant part, as follows:

- B. . . . The [April 9, 2003, and May 7, 2003] Motions' points and references, and exhibits clearly present evidences verifying the misconduct of Donna and counsel by false reimbursement claim for orthodontic costs for treatments never required, never provided, never billed, and never paid for. Donna & counsel had failed to recall the premise & pretense of their original reimbursement claim August 9, 2000 and consequently stated in Answering Brief to S.C. No. 24442 that said claim's Exhibit 4 was NOT the "paid-bill" originally purported. Thereby, Donna inadvertently but clearly admitted that said original reimbursement claim was false and intended fraud upon the Court.

- C. The Court's Final Amending Orders May 14 & 15, 2001 had in effect denied ALL of Donna's claims moved August 9, 2000, but inexplicably awarded Donna reimbursement of \$3,497.25 attorney fees for her unsuccessful & frivolous motion. Donna's counsel had persistently argued for such award "to make her whole" and that counsel was a "1/3 (one-third) contingency" attorney. On appeal, Glenn presented that such

^{2/} This letter states, in relevant part, as follows:

My son . . . was treated by Dr. Caswell in June 2000. His bill for treatments was \$4,014.

I would like to promptly pay 50% or one-half of his bill. I can pay by cash or money order on Saturday 6/14/03 during your business hours of 8:00 AM -11:00 AM. The portion of bill I will be paying is \$2,007.

^{3/} This letter states, in relevant part, as follows:

According to our records, [Son] has only been seen for a complimentary consultation by Dr. Kimi Caswell prior to March 2002. No fees have ever been billed on [Son's] account, therefore the status of his account is zero.

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award was contrary to the Principle & Practice of Law of awarding legal expenses to the prevailing party; Donna was not the prevailing party; Donna could not in any event be "made whole" because counsel was a "NO FEE" attorney and not a "1/3 contingency attorney". Further, Donna's Motion had shown at its Exhibit 1 that "25% attorney fees" had been added to the requested award amount, and all of counsel's fee Affidavits had shown all fees as "Unbillable to Client". In direct contradiction to all prior pleadings, Donna's Answering Brief to S.C. No. 24327 stated "Yes, she was not billed prior to the award of attorney fees." To wit, absent such award, Donna would never be billed for attorney fees; Donna could not be "made whole" in any event; Donna had not paid nor incurred any attorney fees; counsel would not receive 1/3 of any award as a contingency fee, and is not a contingency attorney; the 25% attorney fees originally requested did not apply because 174% fees were being requested (\$3,497.25 fees & \$2007 award). Therefore said counsel misrepresented to the Court that his fees were 25% added to the award, 1/3 contingency of award, 174% added to award, required to "make Donna whole" OR said counsel misrepresented his fees to the Appellate Court. Any sane mind would not find that all the above could simultaneously be true. Therefore, on plain review, said Answering Brief's statements verify misconduct by Donna & counsel by perjury and false claim for reimbursement of "paid attorney fees" OR perjury in the Appellate Court.

(Emphases in original.)

Glenn contends (1) that the only victory Donna won by the September 20, 2000 order was the order requiring Glenn to pay "50% of orthodontic estimate" and (2) that victory was based on Donna's false reimbursement claim for orthodontic costs for treatments never required, never provided, never billed, and never paid for. The record shows that both contentions are wrong. Regarding contention (1), the order requiring Glenn to pay "50% of orthodontic estimate" was not the only victory Donna won by the September 20, 2000 order. Although she was not successful on every request, Donna was the prevailing party. Regarding contention (2), the record is clear that the orthodontic treatment had not yet been performed and was to be performed in the future.

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On August 9, 2000, using the family court's "Revised 12/16/96" pre-printed "Motion and Affidavit for Post-Decree Relief" form, Donna moved for, among other things, an order requiring Glenn "to reimburse [Donna] for all of the legal expenses [she has] incurred". As noted by Glenn, the pre-printed word "reimburse" is inaccurate. What Glenn fails to understand is the simple fact that the court was authorized to order him to pay a reasonable attorney fee to Donna's attorney and it did so. The words used by Donna and/or her attorney in describing the request for the attorney fees do not change that fact.

CONCLUSION

Accordingly, we affirm: (1) the May 2, 2003 Order Denying Motion for Stay and Relief from Orders Filed April 9, 2003, and (2) the May 29, 2003 Order Denying Defendant's Motion for Reconsideration and Findings by the Court for Denial of Defendant's Motion for Stay and Relief from Orders Filed 9/20/00, amended 5/14/01, 5/15/01 and 5/16/01 Filed May 7, 2003.

DATED: Honolulu, Hawai'i, January 4, 2005.

On the briefs:

Glenn Kiyohiko Mizukami
Pro Se Defendant-Appellant.

Chief Judge

Thomas D. Collins, III,
for Plaintiff-Appellee.

Associate Judge

Associate Judge