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**COMMONWEALTH OF KENTUCKY
SUPREME COURT
2006-SC-000506-DG**

STANLEY K. SPEES

APPELLANT

**ON DISCRETIONARY REVIEW FROM
VS. KENTUCKY COURT OF APPEALS,
NO. 2005-CA-000510-MR**

**KENTUCKY LEGAL AID and
ESMERALDA MARIE VASQUEZ-OROSCO**

APPELLEES


REPLY BRIEF FOR APPELLANT, STANLEY K. SPEES

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6)

The Undersigned hereby certifies that copies of this brief were served upon the following named individuals by mail on June 21, 2007: Hon. Cynthia E. Sanderson, *McCracken Family Court Judge*, Courthouse, 301 South 6th Street, Paducah, Kentucky 42003; Natalie Bash, Esq., Kentucky Legal Aid, 1122 Jefferson Street, Paducah, Kentucky 42001, *Attorney for Esmeralda Marie Vasquez-Orosco*; Allison Connelly, Esq., UK College of Law Legal Clinic, 630 Maxwellton Court, Lexington, Kentucky 40506, *Attorney for Kentucky Legal Aid*; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.



STANLEY K. SPEES

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The purpose of this reply brief is to point out that the appellees' arguments comply with neither law nor logic.

Appellant submits that the appellees are mistaken on four salient points. First, to require a party to make reimbursement *after* being permitted access to the courts in no way "forecloses" that party's rights. Second, the appellees' right to claim there was no constitutional "taking" in this case has been waived because they did not cross-appeal. Third, an individual who is *singled out* by the heavy hand of government does not have to prove membership in a "suspect class," since classification plays no role in that type of constitutional violation. Fourth, the courts – especially the Supreme Court – have the inherent power to order Kentucky Legal Aid or the Commonwealth to pay Warning Order attorneys who are involuntarily required to serve in *in forma pauperis* cases whether money has been appropriated or not, because the cost is a societal cost.

ARGUMENT

**To Require a Party to Make Reimbursement
After Being Permitted Access to the Courts
in No Way "Forecloses" That Party's Rights**

Boddie v. Connecticut, 401 U.S. 371 (1971), cited by the appellees, deals narrowly and specifically with a party's *obtaining access* to the courts. In fact, the opinion expressly states "we wish to re-emphasize that we go no further than

necessary to dispose of the case before us.” The Court also recognized that “other alternatives exist to fees and cost requirements.” Surely one of those alternatives would be to follow **KRS § 453.060(2)** and order the petitioner to pay the Warning Order attorney after she has gained the access she sought. After all, she cannot be jailed for not paying. She simply would have another creditor who would have a right to collect his debt like any other creditor.

But, the appellees say, the petitioner is entitled by law to “all needful services.” They say the petitioner could not have obtained a divorce without the services of a Warning Order attorney. What the appellees do not say – even though the point practically leaps from the page – is that neither could she have obtained a divorce without the services of her own attorney. If the sovereign can simply strong-arm an attorney with no connection to the case and make him serve as Warning Order attorney without compensation, why can it not also force an attorney to handle her divorce in the first place? Why is an organization like Legal Aid even needed?

The appellees’ argument contradicts itself in two ways. First, they assert that a private citizen can have a portion of his very livelihood extracted by force, while at the same time saying (by strong implication) that their own organization (of course) should be paid. Second, they are so strenuous in their argument that the appellant should bear the cost of providing Warning Order services that they found it necessary to associate not one, but two, outside attorneys to assist them in this appeal, but at the same time they admit the burden of paying the Warning Order fees “falls on the Commonwealth.” *Appellees’ brief, page 10*. The appellees seem to be firing their

shotgun in two opposite directions in hopes that one of the pellets will strike something useful to their cause.

The appellees' attempts to distinguish this case from *Cummins v. Cox*, 763 S.W.2d 135 (Ky. App. 1988), constitute distinctions without a difference. The *Cummins* court said, "The sole matter before us is whether the court erred in refusing to make the appellee, James E. Cox, responsible for the court costs incurred." The court then said, "The award of costs . . . is governed by KRS 453.040 and CR 54.04. . . . CR 54.04 defines costs as 'including . . . warning order attorney.'" It is immaterial for purposes of the court's holding that the case before it dealt with recovery of already-expended costs by the other party rather than recovery of already-expended costs by the Warning Order attorney. If "453.060" had been substituted for "453.040," the principle would have been the same. Despite what the appellees would have this Court believe, the *Cummins* case did not in any way hinge on who was entitled to the payment or on a so-called "defensive" use of the *in forma pauperis* statute. Instead, it simply held that CR 54.04 costs, including Warning Order fees, are not excused by that statute.

**The Appellees' Right to Claim There Was No
Constitutional "Taking" in this Case Has Been
Waived Because They Did Not Cross-Appeal**

The appellees used more space in their brief arguing that there was no constitutional "taking" of the appellant's property than they used on any other point.

Apparently they hope this Court will overlook the fact that the Court of Appeals unequivocally ruled otherwise. *Spees v. Kentucky Legal Aid*, No.2005-CA-000510-MR, slip op. at pp. 7-8. It is fundamental that a judgment may not be modified on appeal at the instance of the appellees unless they cross-appealed. *Lainhart v. Rural Doxol Gas Company*, 376 S.W.2d 681 (Ky. 1964), *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. App. 2001), *Fryar v. Stovall*, 504 S.W.2d 701 (Ky. App. 1973). The appellees cannot therefore be heard to argue that there was no "taking." That issue has already been decided against them.

Recognizing the danger of leaving an argument unanswered, however, the appellant submits that the appellees' position is illogical and contrary to law anyway. They first say that the "deprivation" (a word used by the appellees since they cannot bring themselves to use the word "taking") is constitutionally insignificant because it is not – in their minds – "substantial." The appellees analogize this situation to the government's requirement that citizens prepare their tax returns, license their vehicles, and maintain their property.

Once again, the appellees' arguments fall flat when exposed to logic. The examples they use pertain to a citizen's duty in regard to his own affairs, the mismanagement of which might harm his fellow citizens. There certainly is no requirement that a citizen prepare *someone else's* tax returns, license *someone else's* vehicles, and maintain *someone else's* property.

Moreover, if the appellant used "form-generated documents" (a fact found nowhere in the record), thereby rendering his work "insubstantial," what can be said

about Legal Aid's own work in the Orosco divorce? Did it not also use "form-generated documents"? Was its work also "insubstantial"? If so, why should tax dollars support its efforts but not those of the Warning Order attorney?

"Well," the appellees say, "the Warning Order attorney was not required to serve. He could have asked to be relieved of his appointment." Incredibly, the Court of Appeals bought this argument and the appellees obviously hope this Court will too. Anyone who thoroughly reads **SCR 3.130(6.2)**, however, should easily see that it *prohibits* an attorney from withdrawing from an appointment on the grounds the appellees and the Court of Appeals suggest. The appellees have set up a classic "straw man" by claiming representation was "repugnant" to the appellant in this case. That simply is not true. Neither was there any financial hardship or any potential rules violation. All there was was unfairness, and even that was not made known until after the services had already been performed. [In that regard, Kentucky Legal Aid claims the appellant *should have known* he would not be paid simply because Legal Aid was a participant and because the case was filed *in forma pauperis*. How can that be true, when Kentucky Legal Aid has paid this very attorney for Warning Order services in the past, such as in *In Re: The Marriage of Loria Lopez Rios and Marcos Andreas Rios* (McCracken Circuit Court, 02-CI-00599)?]

In an attempt to bolster their argument, the appellees say the appellant could not have been subjected to the "disciplinary process" if he had sought to be excused. Whether by design or by lack of understanding, the appellees miss the point that the "disciplinary process" is a proceeding initiated against an attorney by the Bar Association and not a contempt action by a trial judge. If the appellant had refused

the order of the McCracken Family Court – as the appellees say he should have done – it is the trial judge to whom he would have had to answer, not the Bar Association.

Perhaps if this Court fashions a new exception to **SCR 3.130(6.2)**, an attorney can then seek to be excused from an appointment on the grounds of unequal treatment or lack of payment. Under the current rule, however, the appellant simply could not have refused the appointment as the appellees claim.

An Individual Who Is Singled Out by the Heavy Hand of Government Does Not Have to Prove Membership in a "Suspect Class," Since Classification Plays No Role in That Type of Constitutional Violation

The appellees continue to press an argument that *any* objective person would reject out of hand, and that is that there has been no equal protection violation in this case. Clearly the appellant was treated differently than (a) every other participant in this case, and (b) other attorneys who have not been ordered to work for free. No serious argument could be made that government authorities can do that.

In an effort to avoid the issue, the appellees say that the appellant is not a member of a "suspect class." For that proposition they cite ***Pennell v. City of San Jose***, 485 U.S. 1 (1988) and ***Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet***, 133 S.W.3d 456, 466-67 (Ky. 2004). It is obvious that there is a fundamental difference between the ***Pennell*** and ***Alligator Dock*** cases and this one. Those cases involved actual classifications. If the issue in this case, for example, was whether all attorneys, or perhaps all Family Court attorneys, could be ordered to

take their turns as uncompensated Warning Order attorneys, there might be an issue as to whether that classification held up to **Fourteenth Amendment** scrutiny. But any argument as to a "suspect class" plainly does not apply when there is no classification of any kind, but a singling out of just one individual.

Surely the appellees do not suggest that a judge can pick one attorney from the entire local bar and make him take the free cases. If the judge picked all black attorneys, or all female attorneys, or all young attorneys, it is certain that the judge's choices would violate both the federal and state constitutions because of the indisputable unequal treatment. How then can a judge properly pick just one attorney? If the treatment is unequal for a small group, it is all the more unequal for a "group" of one.

As for the appellees' suggestion that the record does not support the appellant's claim of being singled out among attorneys, the procedure by which this case reached the appeal stage provided no opportunity to place that evidence of record. At oral argument, it might be instructive to ask appellees' counsel if she has evidence to the contrary, or if she has ever personally been required to donate time, "off the clock," for someone else's idea of the public good. Legal Aid attorneys well know not all attorneys are appointed as Warning Order attorneys, least of all themselves. They are paid for 100% of their work.

The Courts – Especially the Supreme Court – Have the Inherent Power to Order Kentucky Legal Aid or the Commonwealth to Pay Warning Order Attorneys Who Are Involuntarily Required to Serve in In Forma Pauperis Cases Whether Money Has Been Appropriated or Not, Because the Cost Is a Societal Cost

The appellant believes the appellees' suggestion for a different method of providing notice to indigent defendants is a good one. If the clerk were required to forward a form notification in those cases, the defendant would be at least as likely to receive the notice and to heed its warnings as he would if notified by a Warning Order attorney. The appellant parts company with the appellees, however, on who must be left "unsatisfied" in the case at bar.

Constitutional violations have already occurred in this case. They cannot be swept away as if they never happened. The question remains, "Who must bear the financial burden in this particular case?" The appellant believes that either of two alternatives would be entirely appropriate.

One alternative is to require either Esmeralda Marie Vasquez-Orosco or Kentucky Legal Aid to pay the Warning Order fee. The plain language of **KRS § 453.060(2)** supports assessing the fee to Ms. Vasquez-Orosco. Nevertheless, if this Court should determine that she should not be ordered to pay, it would be both appropriate and in accordance with law to order Kentucky Legal Aid to pay.

Like the former Cabinet for Human Resources in termination actions, Kentucky Legal Aid is the most frequent petitioner in divorces for indigent persons. Kentucky Legal Aid receives public money. See *Appellees' brief*, p. 11. With public money comes public responsibility. The money Legal Aid gets is not its own. It is money

received from society, and it must be used for society's benefit. This includes payment of fees necessary for helping Legal Aid's clientele. There simply is no law allowing Kentucky Legal Aid to use its position as the state's most frequent filer of indigent divorces to force private attorneys, by means of legal procedure, to add free lawyer work to the free money it already gets. Ordering Kentucky Legal Aid to pay a private attorney who was involuntarily drawn into the case is both the right thing to do and within this Court's power.


Similarly, this Court could also choose to make the Commonwealth of Kentucky bear the cost, since it too receives public money and the Warning Order fee is a public expense. *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984), quoted by appellees, says: "We reiterate our previously adopted language, ' . . . a court, once having obtained jurisdiction of a cause of action, has, as incidental to its general jurisdiction, inherent power to do all things reasonably necessary to the administration of justice in the case before it. . . .' The Court went on to say the legislature cannot prevent such inherent power. How, then, can the legislature's *inaction* (failure to appropriate money) subvert the Court's inherent power to obtain justice for all participants in this case?

Providing legal divorce services to poor persons is a cost all of society should bear, rather than just a small group, and especially rather than just one attorney. Kentucky's taxpayers have already given money to Kentucky Legal Aid. They have also already given money to the Commonwealth itself. This Court would therefore be squarely within its inherent power if it ordered one of those entities to pay the appellant's fee.

RELIEF SOUGHT

As stated in his original brief, the appellant therefore asks this Court:

- ★ To reverse the decision of the McCracken Family Court which denied the appellant's motion for a Warning Order attorney fee;
- ★ To award to the appellant a Warning Order attorney fee of \$150.00;
- ★ To award to the appellant his filing fee for the original appeal in the amount of \$150.00 and his filing fee for the motion for discretionary review in the amount of \$125.00 (pursuant to **Civil Rule 76.42**); and
- ★ To assess both the Warning Order fee and the reimbursement of the filing fee against Kentucky Legal Aid, or alternatively, against the Commonwealth of Kentucky.



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