No. 07-0174
IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN RE THE MARRIAGE OF

MARK STONEMAN,
Petitioner and Appellant.

vs.

RUTH L. DROLLINGER,
Respondent and Cross Appellant.

CROSS-APPELLANT'S REPLY BRIEF

On Appeal from the District Court of the
Eighteenth Judicial District of the State of Montana,
In and For the County of Gallatin

Appearances:

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INTRODUCTION

Cross-appellant Ruth L. Drollinger ("Drollinger") filed her appeal arguing the district court erred in failing to enforce the divorce decree, which provided that if Cross-respondent and Petitioner, Mark Stoneman, ("Stoneman"), defaulted on "any" payment, he "shall forfeit" his interest in the marital home. It is undisputed that, in fact, he defaulted on every single mortgage payment due from July, 2000, through December, 2004, when Drollinger ultimately satisfied the debt from resources borrowed from her family. Stoneman therefore should be deemed to have forfeited all interest he had in the marital home, and the entire property should have been awarded to Drollinger.

Drollinger also appealed the district court's refusal to take jurisdiction over Drollinger's motion to modify child support, sought for Stoneman's having taken control of the family home after serving the criminal sentence imposed upon him for spousal battery. With respect to the latter issue, Stoneman has apparently conceded.[1]

As regards the former issue, Stoneman claims two defenses. First, he argues Drollinger is ineligible for forfeiture relief based on her own lack of "clean

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[1] Stoneman's Resp. Br., p. 23: "Mark Stoneman submits on the issue of child support...."

hands." Second, he invokes *res judicata*, arguing that a final judgment has already been entered by a bankruptcy court after full litigation of the forfeiture issue. For the reasons discussed below, both arguments are no defense to the forfeiture argument.

ARGUMENT

1. The "unclean hands" defense does not apply, where, as here, it is overcome by the public policy against domestic violence.

A. Stoneman's financial circumstances did not force him to stop making mortgage payments – he did so by choice.

No where in his brief does Stoneman attempt to defend his own indefensible behavior.[2] Rather, he seeks to portray Drollinger as equally culpable in an effort to persuade the Court that his own bad behavior equates with Drollinger's and, therefore, neither should expect any equitable relief.[3] In support of this notion, he argues that because it was Drollinger who first missed mortgage payments in this

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[2] For example, he argues the horse that was killed did not have a bullet in it, and that it belonged to his mother Geraldine Stoneman. It is telling and conclusive, however, that he cannot muster the temerity to deny that he, in fact, killed the animal. See Stoneman Response Br., 17-18.

[3] Stoneman Response Br., 22 citing *Marriage of Bruner* (1991), 246 Mont. 394, 397, 803 P.2d 1099, 1100.

case, so it was she who "***first*** jeopardized the equity."[4] Of course, he does not deny the fact that he had the funds to pay the mortgage payments, and simply refused. He did so unilaterally, he admits, because Drollinger, who was broke, could not pay her lawyer, and her lawyer therefore placed a lien on Drollinger's one-half interest in the home.[5]

This is a condemning admission – especially in light of the fact that Stoneman, the party asserting the affirmative defense in equity, bears the burden of proof.[6] Stoneman declares he simply took it upon himself, unilaterally and without any leave of court to refuse to comply with the dissolution decree because of an attorney lien – which did not even effect his half of the equity. It is inherently unfair to equate Stoneman's cavalier attitude, when he was fully endowed with the financial wherewithal to meet his obligations under a court decree, with Drollinger's desperation in the face of severe economic distress. Drollinger was honest but unfortunate in her dealings, while Stoneman was calculated and defiant in the face of a valid court decree. The only reasonable

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[4] Stoneman Response Br., 21 (emphasis Stoneman's).

[5] *Id.*

[6] *Anderson v. Stokes*, 2007 MT 166, ¶ 19, 338 Mont. 118, ¶ 19, 163 P.3d 1273, ¶ 19.

inference that can be drawn from his behavior is that he had a conscious object of either forcing a sale to his brother for less than fair market value, or forcing the property into foreclosure so he could buy it at the trustee's sale and thereby ensure neither he nor his own children benefitted from the sale. But all this entire dispute is overshadowed by what Stoneman did to Drollinger to force the matter into such a deplorable set of circumstances.

B. Stoneman's own violent behavior, as a matter of public policy, bars his defense of "unclean hands."

(i) *Stoneman does not attempt to deny his own violent ungovernable behavior.*

The Court has instructed that risk factors and "identified indicators of homicidal potential" are the batterer's access to or ownership of guns; use of weapons in prior abusive incidents; threats with weapons; serious injury in prior abusive incidents; threats of suicide; drug or alcohol abuse; forced sex with the female partner; obsessiveness; extreme jealousy; and extreme dominance.[7] In this particular relationship, the marriage of Stoneman and Drollinger was marked by repeated incidents of domestic violence. Stoneman was arrested and convicted on not less than four charges of partner and family member assault on numerous

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[7] *Stoneman v. Drollinger*, 2003 MT 25, ¶ 24, 314 Mont. 139, ¶ 24, 64 P.3d 997, ¶ 24 ("*Stoneman II*").

occasions between 1989 and 1996. According to the Court, this boldly recidivist pattern of conduct demonstrates a "propensity for violence" toward Drollinger, including a willingness to employ firearms.[8] It also found that "in light of his history of violence toward their mother," and "the overwhelming evidence in this case" that there is both "an emotional and physical risk to the children if they are left alone with their father."[9] It is Stoneman's own coldly remorseless decade-long war against Drollinger – which he decided to continue to prosecute by non-violent means in his steadfast refusal to obey the district court's orders – that has landed him where he is today.

(ii) ***The defense of unclean hands in this case cannot overcome the public policy against domestic violence.***

Meanwhile, the "unclean hands" defense which Stoneman invokes so smugly is subject to a number of limitations. Equity of course will generally not relieve parties *in pari delicto*. "Between those who are ... ***equally*** in the wrong, the law does not interpose."[10] The term "*pari delicto*" refers to fraud or

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[8] *Id.,* ¶¶ 26-27.

[9] *Stoneman v. Drollinger*, 2000 MT 274, ¶ 59, 302 Mont. 107, ¶ 59, 14 P.3d 12, ¶ 59 ("*Stoneman I*").

[10] *Patten v. Raddatz* (1995), 271 Mont. 276, 279, 895 P.2d 633, 635 (quoting Mont. Code Ann. § 1-3-215, emphasis added).

inequitable conduct on the part of each of the parties to the transaction.[11] As to parties *in pari delicto*, equity will not generally relieve one party against another where both are equally in the wrong defendant holds the stronger ground. In other words, where the fault is roughly mutual the law will leave the case as it finds it.[12] But the clean hands doctrine does not apply to parties, even if they are *in pari delicto,* if there is an inequality of position between the wrongdoers, or elements of public policy are more outraged by the conduct of one than of the other.[13] "The maxim being one founded on public policy, public policy may require its relaxation."[14] Thus, even when the parties have been found to be *in pari delicto*, "relief has at times been awarded on the ground that in the particular case public policy has been found to be best conserved by that course."[15]

As regards public policy, in determining the applicability of the clean hands doctrine, the relative extent of each party's wrong upon the other and upon public

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[11] *Bushner v. Bushner*, 307 P.2d 204, 207-08 (Colo. 1957).

[12] *Morrissey v. Bologna*, 123 So. 2d 537, ___ (Miss. 1960).

[13] *Waller v. Engelke* (1987), 227 Mont. 470, 476, 741 P.2d 385, 389; *Choquette v. Isacoff*, 836 N.E.2d 329, 332-33 (Mass. 2005).

[14] *Waller*, 227 Mont. at 477-78, 741 P.2d at 390.

[15] *Id.*

policy should be taken into account, and an equitable balance struck.[16] Equity may on grounds of public policy, and to prevent a greater wrong, extend relief to one even with unclean hands if she is comparatively innocent.[17] This situation can be presented in cases in which the wrongful conduct of the party seeking relief has come about through fear, oppression, or like circumstances which measurably excuse the wrongful conduct involved.[18] Thus, even when the parties have been found to be *in pari delicto*, relief is sometimes awarded if in the particular case public policy is found to be best conserved by that course.[19] As a result, even in cases where forfeiture is sought, "courts of equity are not bound by cast-iron rules."[20] Forfeiture "will be granted when, in view of all the circumstances, to

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[16] *Republic Molding Corp. v. B. W. Photo Utilities*, 319 F.2d 347, 349-50 (9th Cir. 1963).

[17] *Dawson v. McNaney*, 223 P.2d 907, 911-12 (Ariz. 1950).

[18] *CrossTalk Productions, Inc. v. Jacobson*, 76 Cal. Rptr. 2d 615, 623-24 (Cal. 2d Dist. 1998); *Hasselschwert v. Hasselschwert,* 106 N.E.2d 786, 789 (Ohio App. 1951).

[19] *Waller*, 227 Mont. at 477-78, 741 P.2d at 390. See also, *Lloyd v. Gutgsell*, 124 N.W.2d 198, 203 (Neb. 1963); *Morrissey v. Bologna*, 123 So. 2d 537, 543 (Miss. 1960); *Suburban Home Mortg. Co. v. Hopwood*, 73 N.E.2d 519, 521 (Ct. App. 2d Dist. 1947).

[20] *Fey v. A. A. Oil Corp.* (1955), 129 Mont. 300, 318, 285 P.2d 578, 587.

deny it would permit one of the parties to suffer a gross wrong at the hands of the other party who brought about the condition."

In Montana, there is a strong, well-recognized public policy in favor of defeating domestic violence and refusing to allow a batterer to benefit in any way from his or her dangerous, manipulative and anti-social conduct. "It is the policy of this state to ensure the safety and security of a victim of partner or family member assault, sexual assault, or stalking."[21] Likewise, the "purpose" of the domestic partner and family member assault statutes is "to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking."[22] Thus, Montana law "focuses a court's attention on the safety and well-being of the victims of domestic violence when determining appropriate jurisdiction."[23] This should includes the Court's equity jurisdiction in considering a defense such as unclean hands.

In this case, the record is undisputed. When Drollinger was forced in fear to flee the state upon Stoneman's release from incarceration, her financial troubles

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[21] Mont. Code Ann. § 40-15-115.

[22] Mont. Code Ann. § 40-15-101.

[23] *Stoneman II*, ¶ 18 (citing Mont. Code Ann. § 40-4-108(2)(a)).

began in earnest.[24] Stoneman sought to capitalize on the financial distress he caused by refusing to pay his half of the mortgage on a pretext that there was an attorney lien against Drollinger's half of the equity. Now he claims her inability to pay, and the desperate measures she took to defend her economic rights with the scanty resources at her disposal, should excuse him of the consequences of his undisputed violent temper and unrepentant defiance of the trial court's decree. He seeks to do so by blaming his victim for not only her troubles – but his own. This may be typical of a violent domestic abuser such as Stoneman, but it should not be given credence under any theory of law or equity.

Stoneman argues the person who jeopardized the parties' equity in the home "first" should not be heard to call upon equity for relief. Drollinger agrees. It was Stoneman, however, who took the first steps in what has become a travesty for all concerned. He should not therefore be eligible to benefit from the equitable defense of "unclean hands."

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[24] The circumstances of Drollinger's flight are detailed in *Stoneman II*, ¶¶ 29-32.

2. *Res judicata* does not apply because there has never been a "final" judgment or appealable order entered on the issue of Stoneman's forfeiture.

A. *Res judicata* does not apply because the bankruptcy court's order upon which Stoneman relies was not a final judgment or order.

Stoneman also relies on the purely legal defense of *res judicata*. He accurately recites the four elements of *res judicata* thus:

> (1) The parties are the same;
>
> (2) The subject matter is the same;
>
> (3) The issues are the same and relate to the same subject matter; and
>
> (4) The capacities of the parties are the same in reference to the same subject matter and issues.[25]

He argues that an order entered in March 18, 2004, by the U.S. Bankruptcy Court, District of Montana, Cause No. 0362113-13, consists of a previous adjudication of the issue of Stoneman's forfeiture for his failure to make mortgage payments, and therefore acts as a bar to Drollinger's claim in this case. Stoneman's analysis, however, leaves out any discussion whether the bankruptcy court's order upon which he relies is final. As he fails to acknowledge, *res judicata* will bar

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[25] Stoneman Response Br., 23 (citing case law). *See Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 16, 331 Mont. 281, ¶ 16, 130 P.3d 1267, ¶ 16.

subsequent litigation of the same issues if – but only if – a "final" judgment has been entered.[26]

The bankruptcy court's order of March 18, 2004, upon which Stoneman relies was not "final."[27] A final judgment as "one which constitutes a final determination of the rights of the parties; any judgment, order or decree leaving matters undetermined is interlocutory in nature and not a final judgment for purposes of appeal."[28] It was interlocutory in nature because it did not dispose of the pending matters between the parties. In acknowledgment of the non-appeal-ability of the order, Drollinger even filed on March 26, 2004, a motion for special

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[26] *Baltrusch*, ¶ 16. *See* also, *Holtman v. 4-G's Plumbing and Heating* (1994), 264 Mont. 432, 436, 872 P.2d 318, 320; *Olson v. Daughenbaugh*, 2001 MT 284, ¶ 22, 307 Mont. 371, ¶ 22, 38 P.3d 154, ¶ 22; *see* also *State Med. Oxygen v. American Med. Oxygen* (1992), 256 Mont. 38, 43, 844 P.2d 100, 103 (indicating that "a final judgment on the merits" is a prerequisite to application of res judicata).

[27] Stoneman entered a copy of the order, entered in *Drollinger v. Stoneman*, Adv. No. 03/00224, (*In re Drollinger*, Case No. 03-62113-13), on March 18, 2004, in into evidence as Stoneman's Exhibit J at the district court's April 1, 2005, hearing. A copy is also attached hereto for the convenience of the Court.

[28] *E.g.*, *In re B.P.*, 2000 MT 39, ¶ 15, 298 Mont. 287, ¶ 15, 995 P.2d 982, ¶ 15.

leave to appeal it.[29] The Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals, however, denied the motion for appeal of the interlocutory order on May 5, 2004.[30] Meanwhile, the bankruptcy court entered an order on April 26, 2004 – which according to the bankruptcy court Stoneman did not resist – dismissing both the adversary proceeding in which the non-final March 18, 2004, order had been entered, and the entire Drollinger bankruptcy case was dismissed "without prejudice."[31] The court ruled succinctly: "The parties are free to proceed under applicable non-bankruptcy law in another forum."[32]

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[29] Stoneman entered a copy of the motion into evidence as Stoneman's Exhibit K at the district court's April 1, 2005, hearing. A copy is also attached hereto for the convenience of the Court.

[30] Stoneman entered a copy of the BAP order into evidence as Stoneman's Exhibit L at the district court's April 1, 2005, hearing. A copy is also attached hereto for the convenience of the Court.

[31] Stoneman entered a copy of the BAP order into evidence as Stoneman's Exhibit Q at the district court's April 1, 2005, hearing. A copy is also attached hereto for the convenience of the Court.

[32] *Id.,* 2.

A dismissal "without prejudice," such as this, leaves the parties free to re-file an action at any time, even if the bankuptcy court had not so ruled.[33] Such a dismissal "does not act as a bar to a further suit on the same action."[34]

> On the contrary, normal use of the phrase would lead us to believe that a dismissal "without prejudice," means that no right or remedy of the parties is affected, the use of the phrase simply shows that there has been no decision in the case upon the merits ***and prevents the defendant from setting up the defense of res judicata.***[35]

As a result, the March 18, 2004, order in which the bankruptcy court considered and ruled upon the forfeiture issue at issue here does not bar Drollinger's request for relief. Rather, as the bankruptcy court held in its order dismissing, its order of dismissal left Drollinger free to proceed under applicable non-bankruptcy law in another forum, which is just what she did. Thus, *res judicata* is no defense to Stoneman's forfeiture of interest.

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[33] *Schmitz v. Engstrom*, 2000 MT 275, ¶ 11, 302 Mont. 121, ¶ 11, 13 P.3d 38, ¶ 11.

[34] *Id.*

[35] *Id.* (emphasis added, citing *Sellie v. North Dakota Ins. Guar. Ass'n.* (N.D.1992), 494 N.W.2d 151, 159).

B. *Res judicata* does not apply to subsequent events – including each of Stoneman's separate monthly defaults.

Res judicata, moreover, is apt only on issues one has litigated or has had an opportunity to litigate, whether they were raised or not.[36] Neither applies to events subsequent to entry of judgment. Here, moreover, the divorce decree is clear: each an every event of default by Stoneman is separate and independent grounds for forfeiture.

> 21. Petitioner ***shall*** make his share of the mortgage payment of $330.00 beginning on December 1, 1998, and on the first day of ***each*** month thereafter. The payment shall be made to the Clerk of District Court, 615 S. 16th Avenue, Bozeman, Montana 59715. If Petitioner is in default of any mortgage payment, ***he shall forfeit*** all of his interest in the Quinn Creek Road property.[37]

Meanwhile, although Stoneman sought to have this clause made reciprocal, he never sought to modify or have it overruled with respect to his defaults. It is undisputed, moreover, that Stoneman made no payments after entry of the bankruptcy court's order of March 18, 2004 – until Drollinger rescued the property from foreclosure with her own resources (in the form of a loan from her

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[36] *Olympic Coast Investment, Inc. v. Wright,* 2005 MT 4, ¶ 26, 325 Mont. 307, ¶ 26, 105 P.3d 743, ¶ 26; *O'Neal, Booth and Wilkes, P.A., v. Andrews* (1986), 219 Mont. 496, 499, 712 P.2d 1327, 1329.

[37] *Decree of Dissolution* ("*Decree*") entered October 23, 1998 (emphasis added), see AR6-AR7.

elderly parents). Each and every one of these missed payments are a separate basis for the forfeiture of Stoneman's interest. There is no reason to excuse these subsequent defaults based on any order of the bankruptcy court entered previous to their occurrence, even if the bankruptcy court's order had been final, and even if *res judicata* otherwise might apply.

CONCLUSION

Stoneman cannot sustain his "unclean hands" defense under these circumstances, especially in the face of the clear public policy against domestic violence. Stoneman's financial circumstances did not force him to stop making mortgage payments – he did so by choice regardless of the district court's specific order. This defiance, together with his own premeditated violent behavior, as a matter of public policy, bars him from any equitable defense such as "unclean hands." Indeed, Stoneman never even denies his own craven behavior – he simply seeks to paint Drollinger with his own tainted brush. Such efforts cannot excuse him from the consequences of his domestic violence.

Moreover, Stoneman cannot prove his *res judicata* defense to forfeiture, either, because it does not apply where, as here, there has never been a "final" judgment or appealable order entered on the issue. *Res judicata* would govern only if the bankruptcy court's order upon which Stoneman relies had been a final,

appealable order. In this case, the bankruptcy court's order was not final, and subsequently, the bankruptcy court dismissed the entire case – without objection from Stoneman – without prejudice. Thus, *res judicata* is no defense. Because Stoneman failed to comply with the court order requiring him to make monthly payments, he "shall forfeit" his interest in the marital home.

WHEREFORE, PREMISES CONSIDERED, as regards to the Cross-Appeal, the Court is respectfully requested to reverse the district court's denial of Drollinger's motion to enforce the dissolution decree by declaring forfeit all Stoneman's interest in the martial residence, and to remand this aspect of the case with instructions to enter a judgment divesting Stoneman of his interest in the property; and to grant all other relief as it may deem apt in the circumstances.

RESPECTFULLY SUBMITTED this ____ day of September, 2007.

SULLIVAN, TABARACCI & RHOADES, P.C.

By:_____
Quentin M. Rhoades
Attorneys for Respondent and Cross-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 12 for Windows is approximately _____ words and does not average more than _____ words per page, excluding the Certificate of Service and Certificate of Compliance.

RESPECTFULLY SUBMITTED this ____ day of September, 2007.

SULLIVAN, TABARACCI & RHOADES, P.C.

_____By:_____

Quentin M. Rhoades
State Bar No. 3969
Attorneys for Respondent and Cross-Appellant

CERTIFICATE OF MAILING

I hereby certify that on the ____ of September, 2007, I mailed a true and correct copy of the foregoing by placing a copy of the document in the United States Mail with first class postage prepaid, addressed to the following:

Mark M. Stoneman
124 South 7th Street
Livingston, MT 59047

Legal Assistant to Quentin M. Rhoades