Court of Appeal No. 31574-6

No. 87064-1

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Dan Barrett, Jr. *Respondent*

vs

Dan Barrett, Sr., *Appellant*

RESPONSE TO MOTION ON MERITS

Dan Barrett, Sr.

Petitioner, pro se

P.O. Box 361

South Prairie WA 98385

253-273-1110

Response in Opposition to Motion on the Merits

General opening statement.

This appeal is not suitable for summary affirmation pursuant to RAP 18.14 because the primary issue is one of superior court jurisdiction. If the rules permitted it, Petitioner/Appellant would have filed his Opening Brief and also a Motion on the Merits to Reverse.

Furthermore, Respondent should not be permitted to file a Response Brief because that would be inconsistent with his assertion that the case is suitable for RAP 18.14 determination. If the case can be affirmed without a brief, then submitting a brief later would be futile.

This Court should either refer the matter to the panel or else reverse based on the content of Petitioner/Appellant's Opening Brief.

Preliminary issues.

RAP 4.2(e) governs the consideration of this action in this Court. It appears from the wording of the rule that the Supreme Court must first accept the case for review before it reaches the merits. At this point in time, there is nothing in the record that indicates acceptance by this Court. Thus, the RAP 18.14 motion on the merits to affirm would seem to be premature at the least. Of course if this Court accepts review, that means that the appeal has merit and the RAP 18.14 motion must be denied in order to be consistent. In any event, the contents of Respondent's motion show a purpose of seeking to keep this Court from reaching the merits of the appeal.

Why the appeal has merit.

Petitioner/Appellant has argued two critical points in his Opening Brief: (a) that Respondent never had legal standing to petition Kittitas County Superior Court for relief; and (b) that the Kittitas County Superior Court's assumption of jurisdiction over this subject matter was in direct defiance of existing and valid precedent of this Court.

There is also another reason: the trial court did not make any jurisdictional findings to support its conclusion that it had jurisdiction.

Respondent has completely avoided rebutting (or even meeting) the arguments in the Opening Brief. There is only one reason to do this - he cannot overcome those arguments. By that reasoning, a Motion on the Merits to Affirm is an obvious mechanism to avoid that confrontation.

Petitioner/Appellant has no disagreement with Respondent's recitation of the procedural history of this dispute in Kittitas County. As is his custom, he omits the facts which are inconsistent with his message that Petitioner/Appellant is a stubborn re-litigator. Since those facts relating to the prior history of the case in Pierce County are found in the Opening Brief, they can be incorporated here. Respondent sought to intervene in Pierce County and prevailed. He filed a Non-Parental Petition for Custody. *He invoked the jurisdiction of Pierce County Superior Court upon himself.* This cannot be ignored by the Kittitas County Superior Court yet it was.

Respondent presents this case to this Court as one which meets the criteria of RAP 18.14(e)(1), which states:

> *Motion to Affirm.* A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly supported by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

The three specified factors are alternative. It is unclear whether the decision will be affirmed if only one of the criteria is met but that would seem to be within the authority of the rule.

In his motion, Respondent implicitly asks this Court to affirm because Petitioner/Appellant is "requesting a third bite at the apple" which is presumably not allowed. He proceeds to describe the results of prior appeals and again implies that it is not permitted to revisit (or visit for the first time) the issue of standing and jurisdiction.

Yet Respondent provides zero authority to this Court to support his implications, inferences, premises, assumptions, and presumptions. In short, he expects this Court to simply give him what he wants.

Factor (a)

This factor cannot be applied here because Respondent has provided no "settled law" by which this Court could determine that the trial court was correct. It is not the responsibility of this Court to figure out what the law is that Respondent could have cited. The closest he comes is his oblique use of the phrase "Law of the Case Doctrine" on page 3.

As for the jurisdictional argument in Petitioner/Appellant's opening brief, Respondent has provided no citations to authority to the contrary. Therefore, Factor (a) is not applicable to this motion.

Factor (b)

As mentioned earlier in this response, the trial court made no jurisdictional findings. Therefore, this Court must either make the findings itself or determine that the rulings on jurisdiction lack support.

As cited in the Opening Brief, settled law clearly holds that Pierce County Superior Court had exclusive jurisdiction over the subject matter of this litigation. Unless this Court is prepared to overrule its own precedent articulated in **Seattle Seahawks v King County**, the trial court committed clear error. Since the error allowed the trial court to affect a fundamental right of Petitioner/Appellant as articulated in **Troxel v Granville 530 U. S. 57 (2000)**, the presumption must be that the issue is controlled by those two cases and is thus unsuitable for affirmance using Factor (b).

Factor (c)

Having eliminated the first two factors, (c) is all that remains.[1] Discretion is usually defined in terms of what constitutes an abuse of discretion, leaving the remaining determinations to be within discretion.

There are three conditions which can show an abuse of discretion:

[1] The rule is not limited to three factors by its text but since Respondent did not articulate any other factors along with argument for their acceptance, this motion is limited to the three enumerated factors.

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. [cite omitted]. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. [cites omitted].
>
> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.
>
> **State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).**

Petitioner/Appellant agrees that this Court should begin from the position that the trial court decision is correct and that it is his burden to show error. Petitioner/Appellant has done so in his opening brief and Respondent's motion on the merits contains nothing to even resist the showing of error, let alone overcome it. This Court has before it a brief which clearly articulates the trial court errors, and the authorities which show that those claims of error are well-taken. Therefore, absent something to argue against in the Motion on the Merits, Petitioner/Appellant is forced to stand only on his opening brief. This Court should carefully consider the claims of errors (with supporting authorities) made by Petitioner/Appellant and shift the burden of proof & persuasion to Respondent to show if any authorities exist that support the trial court.

In short, he needs to defend the trial court decision. This motion on the merits to affirm is essentially a statement that the decision below can stand on its own and needs no help.

Conclusion.

Since Respondent has declined to defend the trial court decision, nor cite to any authority which supports it, this Court should refer this appeal to the panel for decision.

Respectfully submitted:

12/17/12 Dan Barrett

date Dan Barrett Sr., *Petitioner/Appellate pro se*

No. 87064-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Daniel Barrett Sr.	)	
Appellant	)	**DECLARATION**
vs	)	**OF SERVICE**
	)	
Daniel Barrett, Jr.	)	
Respondent	)	
	)	

Daniel Barrett Sr. declares as follows:

On the date shown below, I served a true copy of

RESPONSE TO MOTION ON MERITS

upon the Respondent by both USPS and email to his attorney at:

Richard Cole rick@colelaw.net
P.O. Box 638
Ellensburg WA 98926

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 12/17/12 at Tacoma WA

Dan Barrett

Dan Barrett Sr. declarant

ORIGINAL

OFFICE RECEPTIONIST, CLERK

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Susan L. Carlson
Supreme Court Deputy Clerk

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Attached are two pdf documents for filing, per Mr. Barrett's request.