No. 45235-9-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

LEWIS COUNTY SUPERIOR COURT NO. 11-3-00031-3

BRIAN MASSINGHAM

Appellant

v.

KAREN THIEL

Respondent

RESPONDENT'S BRIEF

Karen Thiel
Respondent
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I. INTRODUCTION

Appellant Brian Massingham ("Massingham") has filed seven appeals within the last 18 months in an anti-harassment and simple parenting-plan modification action, plus an eighth to the Washington Supreme Court, bankrupting Respondent Karen Thiel ("Thiel"), who is proceeding without counsel after spending over $100,000 in legal fees. Now Massingham asks for attorneys fees for his own intransigent actions that constitute blatant forum-shopping, as has been recognized by Superior Court judges in both Lewis and Thurston Counties. This appeal is primarily about Massingham's desperation to remove the judge that has made rulings against him. All of his requests should be denied for the reasons explained below.

II. ARGUMENT

A. The Trial Judge Was Not Required To Recuse Himself On the Contempt Motion.

Massingham asserts that the trial judge was *required*, as a matter of law, to recuse himself on a contempt motion regarding enforcement of an order signed by that judge previously. He makes this assertion based on cases that are all distinguishable from the facts in this case.

Massingham believes that a 1914 case, *Russell*,[1] is "dispositive." In *Russell*, the Supreme Court ruled that a contempt proceeding is a new proceeding subject to the (former) statute permitting a change of judge. But all *Russell* really holds, upon careful reading, is that the "transfer" — or change-of-judge — statute does apply to a contempt motion — that it can be treated as a "proceeding."[2] The court found that the motion was filed before any rulings had been made, and that actual prejudice of the judge had been shown.[3] In this case, it is not the first time the same issues have come before the Court. The Court made other rulings in this case, and there has been no showing of any type of actual prejudice. All *Russell* is saying is that contempt proceedings are proceedings where a change-of-judge request can apply, but you still have to fit within the requirements of the statute. In this case, Massingham did not satisfy the requirements of RCW 4.12.050(1).

Massingham also cites *Cooper v. Cooper*[4] to support his position on contempt, arguing that any proceeding "commenced by new and

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1 *State ex rel. Russell v. Superior Court of King County*, 77 Wash. 631, 138 P. 291 (1914).

2 *Id.* at 634.

3 *Id.*

4 83 Wash. 85, 143 P. 66 (1914).

independent process" gives a right to change judges under RCW 4.12.050. This case was also decided in 1914. It was an action to vacate a decree of dissolution. Under the statutes at that time, a proceeding to vacate a decree was commenced by filing a summons and petition.[5] So the court ruled that a new proceeding had been started, and it was subject to the transfer statute, and since there had been no prior rulings made, the motion was timely and should be granted.[6] This is totally different from the instant case. A contempt proceeding is not commenced by the filing of a summons and petition — it is commenced by filing a motion in a pre-existing case and getting an Order To Show Cause. Plus, this Court made prior rulings that invalidate the RCW 4.12.050 request.

B. The Trial Judge Was Not Required To Recuse Himself On the Second Parenting Plan Modification Petition.

Similarly, Massingham's arguments that the trial court was required to recuse as matter of law on Massingham's second parenting plan modification petition is not well taken.

A modification action under case law is a new proceeding entitling the parties to an affidavit of prejudice if it's timely filed before the judge

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5 *Id.* at 86,88.

6 *Id.* at 90.

makes any discretionary rulings whatsoever in the case. RCW 4.12.050(1). In July 2012, Massingham objected to a relocation notice, and filed a Petition To Modify the parenting plan.[7] Cross-motions were filed and three discretionary rulings were made that Fall: about a re-appointment of the GAL, about counseling for the kids, and about temporary relocation.[8]

Massingham then withdrew his objection to relocation, dismissed his modification and re-filed it, on the same basis/grounds, in Thurston County. The facts in the "new" Thurston County Petition were exactly the same as the basis and facts in the previous modification petition he filed in connection with the relocation — that Thiel's relocation 33 miles north provided a basis for modification.[9] No new facts were presented, and no new relief was requested in the second petition versus the first.[10] This was not a new proceeding entitling Massingham to an affidavit of prejudice as a matter of right. It does not make sense that if a party repeatedly files a petition to modify based on the same facts, requesting the same relief, that

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7 RP (June 14, 2013) 12:25-13:2.
8 RP (June 14, 2013) 13:11-15.
9 RP (June 14, 2013) 13:2-5.
10 RP (June 14, 2013) 13:6-8.

each time they file the petition they are entitled to a new affidavit of prejudice.

Massingham relies on *State ex rel. Mauerman v. Superior Court for Thurston County*[11] for the proposition that a new, post-decree proceeding to modify custody provisions of a dissolution decree is a new proceeding that entitles a party to file an affidavit of prejudice against the judge who presided over the dissolution. But *Mauerman* does not control the present facts. The court found that because the modification "present[ed] *new issues arising out of new facts* occurring since the entry of the decree," it was a new "proceeding" within the meaning of RCW 4.12.050.[12]

The problem for Massingham is that the facts of this case are entirely different from *Mauerman*. As described above, Massingham had already requested a modification of the parenting plan in Lewis County in connection with his objection to Thiel's notice of relocation. His basis was the detriment to the children arising from Thiel's move. He filed motions, and Judge Hunt made discretionary rulings.[13] He then tried to

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11 44 Wn.2d 828, 271 P.2d 435 (1954).

12 *Id.* at 830 (emphasis added).

13 RP (June 14, 2013) 13:11-17.

abandon the litigation and re-file *the same petition* (parenting plan modification) based on *the same allegations* in Thurston County, and it was transferred right back to Lewis County. This is the *same* proceeding, obviously.

Mauerman, therefore, does not apply on these facts. This not a new "proceeding" — unlike *Mauerman*, it involves the *same* issues arising out of the *same* facts as the recent litigation in Lewis County. Courts have not hesitated to limit the scope of *Mauerman*'s holding where the subsequent litigation arises from the same facts and involves the same issues.[14] Put another way, *Mauerman*'s holding concerns the relationship between a dissolution and a subsequent modification arising from new facts. It does not concern the relationship between, as in this case, a petition to modify in connection with a request for relocation, then a dismissal and immediate re-filing of a petition to modify, based on the same facts as the dismissed petition. Thereafter, the trial judge made

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[14] *See, e.g., In re: Marriage of True*, 104 Wn. App. 291, 297-98, 16 P.3d 646 (Div. I 2000) (court's retaining jurisdiction for later review of parenting plan provisions not a new "proceeding" permitting change of judge, explicitly distinguishing *Mauerman*); *see also, State v. Belgarde*, 119 Wn.2d 711, 717, 837 P.2d 539 (1992) (distinguishing *Mauerman* because retrial did not present new issues or new facts); *State v. Clemons*, 56 Wn. App. 57, 59-61, 782 P.2d 219 (Div. I 1989) (summary of case law re: "proceeding").

further discretionary rulings in the case. By no stretch of the imagination does *Mauerman* permit Massingham to file an affidavit of prejudice against the trial judge on these facts.

Massingham also relies on a 1917 case, *State ex rel. Foster v. Superior Court*,[15] but that case does not help Massingham for the same reason that *Mauerman* does not. The *Foster* court defined a "new proceeding" as one that is based upon a new and different set of facts arising after the rendering of the final decree.[16] That is not the case here. Massingham's second petition rested on the same facts as his July 2012 petition for modification, and thus cannot be viewed as a new proceeding under the case law.

Massingham's insistence that the bifurcated nature of a relocation case makes a parenting plan modification somehow distinct from a "regular" parenting plan modification is a distinction without a difference, an attempt to elevate form over substance. There is no authority supporting this position. Because the two identical petitions allege identical facts and issues, the second petition is not a new proceeding. Because the trial judge made discretionary rulings on the earlier

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15 95 Wash. 647, 164 P. 198 (1917).

16 *Id.* at 650-51.

modification petition, the change-of judge request was untimely.

C. The Trial Court Did Not Improperly Modify the Parenting Plan By Allowing Thiel To Select a Counselor For the Children.

Massingham believes that the trial judge could not order that Thiel could select the child's new counselor after finding that Massingham had improperly intimidated the earlier-ordered counselor.[17] But the order was in the midst of an active parenting plan modification case, and is properly characterized as a temporary order. Nothing about the "choosing-a-counselor" ruling had anything permanent about it. The litigation regarding the children's best interests was (and is) ongoing. The trial judge issued the narrowly-tailored temporary order to handle the "contemptuous"[18] interference with a previously-ordered counselor by the father. As Massingham concedes, a permanent parenting plan may be changed by temporary order. Massingham simply asserts, without support, that the trial court's order regarding counseling "is properly characterized as a permanent order," but there is no basis for such a characterization. As such, his argument should be rejected.

Moreover, there was ample basis for the trial court's temporary

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17 *See, e.g.*, RP (May 22, 2013) 22:17-21.

18 RP (June 14, 2013) 4:15-17.

order allowing Thiel to choose a counselor. Massingham has a history of threatening and intimidating the counselors of the children until they withdraw from seeing them.[19] Thiel has been unable to get the children the help and support they needed until the trial judge acted in the children's best interest and awarded Thiel the temporary power to choose a counselor and get counseling going for the children.

D. The Trial Judge Was Not Required To Recuse Himself For Cause.

Massingham's forum-shopping tactics led the trial court to question his credibility. This is something a trier of fact does in every litigation. The judge's statements that he "did not believe" Massingham, or his counsel's descriptions of his motives, does not create a mandatory recusal. Nearly every single case that comes before a judge involves resolution of conflicting facts that cannot possibly all be true. In many decisions, a judge must decide who is more credible — who he does and does not believe. Each of these rulings implicitly calls one party or another a "liar," if you choose to so characterize it. By Massingham's standard, we would have no judges left to make decisions in legal cases.

The trial judge was appropriate in not recusing himself for cause.

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[19] *See, e.g.*, RP (May 22, 2013) 22:1-20.

The trial judge had knowledge and understanding of the long-standing court battles, and had fairly and without bias presided over several decisions in the past. As the trial judge noted, the record was replete with evidence that Masssingham had simply been engaging in forum shopping because he did not like the trial court's rulings against him. He should not be rewarded for such tactics.

Likewise, the trial judge's frustration with Massingham was based on his own intransigent actions, not any unfairness by Judge Hunt. Prior to receiving this unfavorable ruling, Judge Hunt had made several discretionary rulings, including ordering that the children receive counseling and agreeing with Commissioner Mitchell's previous order that Deb Darnell be that counselor. Massingham and his attorney attempted to "torpedo" the trial judge's order by threatening Ms. Darnell in a letter that was not sent to either Thiel or her attorney. Ms. Darnell was not willing to continually be harassed and threatened by Massingham, and she withdrew as the children's counselor. Judge Hunt had knowledge of the history of this contemptuous behavior and was the appropriate judge to hear it. Judge Hunt did not even find Massingham in contempt, so it seems unclear where the bias and prejudice is since the contempt motion

was ruled in his favor.

There is no actual or apparent bias on the part of the trial judge — he was merely forced to make rulings in response to repeated intransigence by Massingham. For similar reasons, the Thurston County trial judge found Massingham intransigent and awarded attorneys' fees to Thiel.[20] Appellant has been engaging in abusive use of the legal system for years and the judges are, not surprisingly, ruling against him. This is not judicial bias, this is simple exercise of proper judicial discretion.

The trial judge did not show prejudice or bias toward Massingham. Massingham and his attorney presented, in court, information as fact that was well-known to be false. The trial judge fairly commented that he knew their position to be false. For example, Massingham's attorney represented in court that it was a two-hour commute between Olympia and Adna (33 miles), and this would be too extreme of a commute for the children to relocate to Olympia with Thiel. Judge Hunt reasonably pointed out that the commute is approximately thirty minutes. This seems less a position of bias as a position of asking the attorneys to be factually accurate.

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[20] CP 75-77.

E. Massingham Should Not Be Granted Attorneys Fees.

Massingham has filed ***seven*** appeals to the Court of Appeals, plus one to the Supreme Court in the last year and a half. This is a ludicrous number of appeals for a simple run-of-the-mill dissolution case. The excessive number of appeals filed in this case should constitute abusive use of litigation on its own.

After spending more than $100,000.00 in legal fees, I am unable to retain the services of an attorney and am forced to represent myself. I am shocked that Massingham is requesting attorney fees for this appeal. I am unable to do anything other than respond to Massingham's motions and appeals. As stated in Massingham's Opening Brief, "Judge Hunt engaged in a bitter exchange with Appellant's third attorney as well." If Massingham can afford three attorneys and to file all of these motions and appeals, he can clearly afford to pay for this appeal.

III. CONCLUSION

I respectfully request that the Court deny Massingham's appeal and help put an end to this abusive use of litigation that Massingham and his attorney have engaged in for over three years. I believe that Judge Hunt

acted appropriately, using appropriate judicial discretion, and was attempting to get Massingham and his attorney to be truthful and honest, to put an end to the abuse of litigation, and encourage him to only bring appropriate motions before the court. I have no doubt that Judge Hunt can preside over this case fairly and without bias or prejudice. As I will be forced to continue to represent myself, I plead with the court to not allow Massingham and his attorney to bully and intimidate via the court system in order to get his way.

DATED this 27th day of March, 2014.

Respectfully submitted,

Karen Thiel

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years.

On the below written date, I caused delivery of a true copy of Karen Thiel's Brief of Respondent to the following individuals on March 28, 2014:

Office of the Clerk State of Washington Court of Appeals, Div. II 950 Broadway Suite 300 Tacoma, WA 98402-4427	[✓] Personal Service
Dennis J. McGlothin Robert J. Cadranell Western Washington Law Group, PLLP 7500 212th St SW, Ssuite 207 Edmonds, WA 98026	[✓] Electronic Service/Email

Signed this 28th day of March, 2014 Olympia, Washington.

Karen Thiel

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