

FILED
COURT OF APPEALS
DIVISION II

ORIGINAL

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STATE COURT OF APPEALS, DIVISION II
BY *[Signature]* OF THE STATE OF WASHINGTON

BRENDA M. BRYANT

Appellant

vs.

ALEX LOPEZ

Respondent

APPELLANT'S RESPONSIVE BRIEF

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I. OBJECTIONS TO RESPONDENT'S BRIEF: MOTION
TO STRIKE AND FOR TERMS

Respondent's brief makes numerous statements of fact which are inaccurate, not referenced to the record as required by the rules or referenced so broadly as to make it difficult for counsel and the court to determine the accuracy of the reference.

A. BASIC RULES:

RAP 10.3 (5) Statement of the Case, requires in part that counsel make "... references to relevant parts of the record" in the brief.

RAP 10.4 (f) provides in part: "A reference to the record should designate the page and part of the record,"

The purpose of these rules has been stated by our court, "... to enable the court and opposing counsel efficiently and expeditiously review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority. *Litho Color, Inc. v. Pacific Employers Ins. Co.* 98 Wash.App. 286, 305-306, 991 P.2d 638, 648 (Wash.App. Div. 1,1999); *Hurlbert v. Gordon*, 64 Wash.App. 386, 400, 824 P.2d 1238, review denied, 119 Wash.2d 1015, 833 P.2d 1389 (1992).

The following cited portions of Respondent's brief violate these rules:

1. Brief of Respondent p2, —.

The order puts Mr Lopez into his home and **restores him possession of several items of personal property** that were taken from his care by virtue of the December 29, 2006 Order because **they happened to be in the home.**

These statements and conclusions are not supported by any reference to the record. They are also not supported by the evidence or the order of the court.

Respondent cites no reference to the record that personal property was taken from his care by virtue of the December 29, 2006 Order or that specific pieces of personal property were in the home at the time of the order.

2. Brief of Respondent p3, —.
Pictures . . . Showing that **Ms Bryant had caused extensive damage and removed items of personal property . . . or destroy.** CP 62-83.

This particular statement does contain a reference to twenty-one (21) pages of material. However, there is no proof in the record to support the Court's Order or Respondent's statement in his brief.

CP 66-68 does constitute evidence in the form of Mr Lopez's declaration. But no where in that declaration does he make a statement which supports either the statements in his brief or the Contempt Order of the court.

CP 69-83 are a number of photographs which were attached to Respondent's declaration. Again the photographs do not show that, "... *Ms Bryant had caused extensive damage* , . . ." or that she "... *removed items of personal property . . . or destroy* [sic] . . ."

3. Brief of Respondent p4, —.

. . . she failed to turn over personal property left in her care to Mr Lopez *as ordered by the court*. CP 59-83.

The statement does contain a reference to twenty-four (24) pages of material. The only evidence contained in that selection is the Declaration of Alex Lopez, CP 66-68. Nowhere does that Declaration state that Ms Bryant failed or refused to turn over personal property.

4. Brief of Respondent p4, —.

She elected to not respond on the merits to the Motion for Contempt which left the judge in a position to weigh *Mr Lopez's declaration* with Ms Bryant's trial testimony about the value of the various items or conditions of various items. CP 99-106.

The statement does contain a reference to seven pages of material, consisting of Petitioner's Motion to Dismiss. That document does not contain a statement of value for personal

property.

This fact does not change the fact that Respondent has not supported his statements with references to the record as required by the above rules.

II. RELIEF REQUESTED:

Portions of a brief which contain factual material not submitted to or considered by the trial court should be stricken. In re Dependency of K.S.C. 137 Wash.2d 918, 932, 976 P.2d 113, 120 (1999); *Nelson v. McGoldrick*, 127 Wash.2d 124, 896 P.2d 1258 (1995).

Failure of counsel to cite to record for factual statements was not formality. This tactic places unacceptable burden on opposing counsel and on court and warrants the imposition of sanction on counsel for Respondent. *Lawson v. Boeing Co.*, 58 Wn.App. 261, 792 P.2d 545 (1990): 3 WAPRAC RAP 10.3 .

In *Clancy v. Hawkins*, 53 Wn.2d 810, 337 P.2d 714 (1959), the court held, in a pre-RAP ruling:

Where the successful respondent's brief was, in the main, a restatement of the facts, and contained no reference to the pages of the record in support thereof as required by the rule on appeal, no costs were allowed for such brief.

III. REPLY

Respondent argues that Ms Bryant failed to respond to the motion for contempt and that the trial court was left with only Respondent's proof to weigh.

Ms Bryant did not have the burden of proof in this case. Mr Lopez did.

In a contempt motion, other than from the bench, the moving party must show by a preponderance of the evidence that Respondent has failed to perform an obligation ordered by the court. *Britannia Holdings Ltd. v. Greer*, 127 Wn.App. 926, 932, 113 P.3d 1041 (2005).

There was no such evidence shown in this case. The Order should be reversed with instructions to dismiss.

Petitioner should be awarded her attorney fees on appeal.

Respectfully submitted this 27th day of March, 2009.


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Attorney for the Petitioner

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STATE OF WASHINGTON)
) SS.
COUNTY OF PIERCE)

I certify that I know or have satisfactory evidence Pennie M. Faiivae who appeared before me and said person acknowledged that he/she signed this instrument and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.



[Handwritten Signature]

NOTARY PUBLIC in and for the State of Washington
Residing at *[Handwritten Address]*
My commission expires: *4-23-2010*