

APPELLANT'S BRIEF  
NO. 45135-2-II  
11/17/03  
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO

NO. 45135-2-II

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Andrew Westley Bertrand,

Respondent,

v.

Rhiannon Djnase Smith,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Lisa Sutton, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion by awarding attorney fees to the respondent without legal or factual basis.

1. Issue Pertaining to the Assignment of Error

The trial judge awarded the respondent four thousand dollars (\$4,000) in attorney fees based on the following statement: “The father had little current info on Costa Rica at trial + was frustrated by new information rec’d during trial re Costa Rica. The court finds the mother’s actions in nt (sic) cooperating to frustrate + length (even require) trial + awards the father \$4,000 in atty fees.” CP 69-74. Did the court abuse its discretion in awarding attorney fees to the respondent without legal or factual basis?

B. STATEMENT OF THE CASE

The final presentation as a result of a relocation trial took place before the Honorable Lisa Sutton of Thurston County Superior Court at 9:00 a.m. on June 21, 2013.

The original date for presentation of the final relocation documents was scheduled for May 14, 2013. However, the Respondent’s attorney contacted the Appellant’s attorney indicating she had an emergency and she needed to continue the presentation hearing. Having no objection, the appellant’s attorney notified Judge Sutton’s scheduler.

The purpose of the presentation was for the Appellant, Rhiannon Smith, to present her final proposed documents as a result of prevailing in a relocation trial that took place on April 23 and May 2, 2013. After the relocation trial, Appellant was the prevailing party and the court allowed her move to Costa Rica with her 5 year-old daughter.

The court's ruling took place in May, 2013. Prior to the original date of presentation, the appellant supplied the court and Respondent's attorney with Findings of Fact and Conclusions of Law, and the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule.

The court substantially followed the Appellant's Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule dated June 21, 2013, which contained the Appellant's attorney's originally submitted Findings of Fact and Conclusions of Law. RP 11-13.

On June 21, 2013, the Respondent's attorney began the presentation by providing the court with new documents which included a new Parenting Plan, and Order of Child Support. The Respondent's attorney also wanted to make some revisions to the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule and the Parenting Plan. Finally, the Respondent's attorney requested an award of attorney fees. RP 5-6. The Respondent's attorney

claimed that the mother did not give the respondent any information before trial. RP 5-6. The respondent's attorney also claimed the appellant's attorney did not communicate with her. RP 7. The appellant's attorney explained to the court that he did, in fact, makes numerous attempts to speak to the respondent's attorney, who never responded to him. Additionally, the appellant's attorney never missed any court hearings. RP 18-25.

Prior to the relocation trial, the court made no orders regarding pre-trial discovery or pre-trial discovery scheduling. No pre-trial court-ordered or required case schedule was issued to the parties indicating document or event "due by" dates. No pre-trial conference or status conference was required. Also, no pre-trial required exhibit exchange took place. Finally, the respondent's attorney conducted no formal pre-trial discovery, pursuant to Civil Rules 26 – 37, or pursuant to any other discovery rule. After the appellant's attorney inquired whether a case schedule would be issued, the Thurston County Family and Juvenile Court Clerk's Office informed him to simply "set a trial date." RP 20-21.

The court stated the mother's conduct or intransigence was the reason for her award of \$4,000 in attorney fees to the father. RP 28-29. However, the court then signed the *mother's* proposed Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule and the *mother's* proposed parenting plan. Based on the court's ruling, the appellant/mother and her attorney signed the two final

documents and gave them to the respondent's attorney to review and sign for the court. RP 29-30. However, neither the respondent nor her attorney signed the final documents signed by the court. However, the respondent's attorney was still not satisfied and continued to argue with the court about the final documents. RP 29-35. The court then allowed changes to be made by both the parties in a "separate document in writing." RP 36. The court was upset the parties were not ready to have her sign final documents. RP 38-40. The appellant's attorney asked whether the parenting plan was final yet, and the court stated it was not. RP 40. The appellant's attorney had expected to sign final documents at this presentation. RP 41.

Later in the day on June 21, 2013, Judge Sutton's assistant emailed the parties the final documents without the signatures of the attorneys or the parties. Before signing and sending the original documents, the judge deleted the original signatures of the appellant and the appellant's attorney, and then made changes to them. CP 60-68, 69-74. Judge Sutton's ruling regarding attorney fees was written in the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule. The judge indicated, "The father had little current info on Costa Rica at trial + was frustrated by new information rec'd during trial re Costa Rica. The court finds the mother's actions in nt (sic) cooperating to frustrate + length (even require) trial + awards the father \$4,000 in atty fees." CP 69-74.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING THE RESPONDENT ATTORNEY FEES IN THE AMOUNT OF FOUR THOUSAND DOLLARS (\$4,000) WITHOUT LEGAL OR FACTUAL BASIS.

1. STANDARD OF REVIEW

A court reviews the reasonableness of attorney fees awards under an abuse of discretion standard. Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). "A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* This court has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award. *Id.* (citing Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987)).

2. APPLICATION OF THE STANDARD OF REVIEW TO AWARD OF ATTORNEY FEES IN RELOCATION TRIAL

It is not clear upon which statute the trial judge relied in ordering attorney fees. On June 21, 2013, during the presentation of final orders, the trial judge alluded to RCW 26.09.550. RP 29. However, the trial judge's comment about RCW 26.09.550 can only lead one to believe she was not intending to "sanction" the appellant. However, the trial judge stated no other legally (different statute) or factually supported basis for awarding attorney fees to the respondent. The trial judge made an

unsupported, bare statement that the appellant's "conduct rises to the level of intransigence and by extending the trial needlessly by repeatedly failing to provide the father with information on her proposed relocation." RP 29. Other than the court's statement, there is no other evidence in the record or findings which substantiates her statement that the appellant needlessly extended the trial by failing to provide information to the father. The trial judge relies only on the statement made by the respondent's attorney at the time of the presentation. RP 5-6. However, the respondent's attorney seems to be asking for fees based on the following comment: "But the fees have fallen on my client. You know, he's losing his daughter. He's going to be paying long distance transportation expenses." RP 6. None of respondent's attorney's comments are evidence unless she points to specific evidence in the record supporting her comments.

Moreover, the record is absent that the trial court ordered any pre-trial discovery requirements or pre-trial discovery scheduling requirements. No pre-trial court-ordered or required case schedule was issued to the parties indicating document or event "due by" dates. No pre-trial conference or status conference was required. Also, no pre-trial required exhibit exchange took place. The parties simply exchanged exhibits at trial. Finally, the Respondent's attorney conducted no formal pre-trial discovery, pursuant to Civil Rules 26 – 37, or pursuant to any other discovery rule. After the Appellant's attorney inquired whether a case schedule would be issued, the Thurston County Family and Juvenile

Court Clerk's Office informed him to simply "set a trial date." RP 20-21. The Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule signed by the court on June 21, 2013, is replete with information that the father was wholly aware of the fact that the mother wanted to relocate to Costa Rica and her specific plans to do so since 2009, with his involvement. CP 69-74. The respondent/father had extensive knowledge that the appellant/mother's intent was to relocate to Costa Rica, and, at one time, the respondent even wanted to relocate to Costa Rica with the appellant and their daughter. CP 69-74, (paragraph 2.3.2). For the court to state the respondent/father was "surprised in trial by the evidence," is incredulous. RP 29.

RCW 26.09.550 allows the judge to use discretion in sanctioning parties for one or more violations of its terms. RCW 26.09.550. The term "may" in a statute generally confers discretion. Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (citing Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 381, 858 P.2d 245 (1993)). "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." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

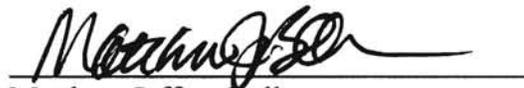
D. CONCLUSION

The trial judge clearly abused her discretion in awarding attorney fees to the father in the amount of four thousand dollars (\$4,000). RCW 26.09.140 may have applied to an award of attorney fees to the *appellant*, under these circumstances, as indicated by the appellant's attorney. RP 23-25. However, the court's bare, unsupported assertion that the appellant somehow violated RCW 26.09.550 was wholly based on the respondent's attorney's comments. It was not based on a legal or factual determination. Further, the trial court's basis or method to determine the father's attorney fees is not supported by the law, nor does the trial court record state a basis for supporting an award of fees.

The trial court's award of attorney fees should be reversed, and remanded to the trial court to enter an order vacating the respondent's attorney fee award.

Dated this 4<sup>th</sup> day of April, 2014.

Respectfully submitted by:



Matthew Jeffrey Bellmer  
WSBA, No. 19824  
Attorney for Appellant,  
Rhiannon Djnase Smith

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Court of Appeals  
State of Washington  
Division II

Andrew Bertrand	)	No. 45135-2-II
	)	
Petitioner,	)	Appellant's Declaration of
	)	Mailing
Rhiannon Smith,	)	
	)	
Respondent.	)	
_____	)	

- I am over the age of eighteen and competent to testify to the facts contained herein;
- I mailed a copy of the following documents to Andrew Bertrand, the Petitioner/Respondent, on April 4, 2014:  
"Appellant's Brief."

- I mailed the document to the following address:

Andrew Bertrand, Petitioner/Respondent in Appeal  
1024 Turner Avenue  
Shelton, Washington 98584

I swear under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct.

Dated this 4th day of ~~March~~ 2014 at Olympia, Washington.

*April*

*Matthew J. Bellmer*

Matthew J. Bellmer; WSBA#19824  
Attorney for Appellant  
Rhiannon Smith