

NO. 49868-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CHERYL LARRIVA, RESPONDENT

v.

DIEGO LARRIVA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-2-03695-9

REPLY BRIEF OF APPELLANT

BENJAMIN & HEALY, P.L.L.C.

By
SOPHIA M. PALMER
Attorney at Law
WSBA No. 37799

1201 Pacific Ave Suite C7
Tacoma, WA 98402
PH: (253) 512-1196

TABLE OF CONTENTS

A. APPELLANT'S ISSUES IN REPLY..... 1

1. THERE IS INSUFFICIENT EVIDENCE A ONE-YEAR PROTECTION ORDER WAS
WARRANTED. 1

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED FOR PROPER
APPELLATE REVIEW..... 1

3. ATTORNEY FEES ARE NOT WARRANTED WHEN CHERYL COULD HAVE OBTAINED A
PROTECTION ORDER IN HER DISSOLUTION MATTER AND FAILED TO DO SO. 1

B. ARGUMENT..... 1

1. THERE IS INSUFFICIENT EVIDENCE TO GRANT A ONE YEAR
PROTECTION ORDER..... 1

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED..... 3

3. CHERYL’S REQUEST FOR FEES SHOULD BE DENIED. 3

C. CONCLUSION..... 3

CASES

Freeman v. Freeman, 169 Wash.2d 664, 676, 239 P.3d 557 (2010)..... 1

STATUTES

RCW 26.50.060 2

A. APPELLANT'S ISSUES IN REPLY.

1. There is insufficient evidence a one-year protection order was warranted.
2. Findings of fact and conclusions of law are required for proper appellate review.
3. Attorney fees are not warranted when Cheryl could have obtained a protection order in her dissolution matter and failed to do so.

B. ARGUMENT.

1. THERE IS INSUFFICIENT EVIDENCE TO GRANT A ONE YEAR PROTECTION ORDER.

There is no evidence in the record that Cheryl was in fear of *imminent* physical harm, which is required by statute. Additionally, Cheryl must demonstrate that her fear is reasonable, something she failed to do. See Freeman v. Freeman, 169 Wash.2d 664, 676, 239 P.3d 557 (2010) (“the facts do not suggest Robin's fear of Rob is based on a reasonable threat of imminent harm.”). Given the record before the Court, there was no evidence that Diego presented a *reasonable* and *imminent* threat as required by the statute.

Diego painstakingly disputed each and every one of Cheryl’s claims in his declaration, and left no statement unchallenged as Cheryl suggests in her responsive brief.

Specifically, he denied her assertion that that he threatened to kill her, and that he did so in Spanish. CP 21. He struggles with Spanish. Id. He stated he did not lay a hand on her, or physically hurt her in any way. Id.

He provided Google printouts showing his locations on November 15, 2016 and November 16, 2016. CP 22. This evidence demonstrates he could not have possibly made it to Cheryl's home on the dates in question.

Diego never told her he would make her life miserable, and never gave her an ultimatum. Id. The conversation Cheryl referred to in her Petition was over 45 minutes long. Id. Had she felt threatened, she certainly could have terminated the call. Further, it defies all logic that she would remain on the phone with Diego for longer than five minutes, if he was engaging in the behavior she alleges.

Diego clarifies the conversation he had with Cheryl on November 15, where he *agrees* to leave her alone *and she continues the conversation*. CP 22, CP 37.

He also denies asking someone to call her on his behalf. CP 22.

Cheryl is the one who *confronted Diego* about the license plates on November 16, 2016. CP 23. This does not evidence that Cheryl feared Diego, but in fact was *not* fearful of him. She then *called him* after he left dance classes. Id.

There is insufficient evidence a one year protection order was warranted.

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED.

Cheryl argues that because RCW 26.50.060 (7) directs the court to enter findings in the event of a denial, the court is not obligated to make findings, or conclusions of law. This argument is without merit. It defies all logic that the trial court is not required to make findings, or conclusions of law, when it is required for this Court to make a determination on appeal.

3. CHERYL'S REQUEST FOR FEES SHOULD BE DENIED.

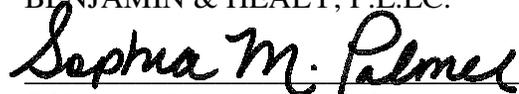
Cheryl failed to request attorney fees before the trial court pursuant to RCW 26.50.060 (g), and her request for fees should be denied here. Cheryl had the opportunity to obtain a restraining order, or protection order in the dissolution matter, but failed to do so. She then brought this Petition as a separate action causing Diego to incur his own attorney fees.

C. CONCLUSION.

For the foregoing reasons, the Diego respectfully requests this Court reverse Commissioner Kiesel's Order granting a one year protection order.

DATED: August 2, 2017.

BENJAMIN & HEALY, P.L.L.C.



SOPHIA M. PALMER, WSBA No. 37799

Certificate of Service:

The undersigned certifies that on this day she delivered by email and electronic service delivery to the attorney of record for the respondent and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-2-2017

 Saphia M. Palmer

Date Signature

BENJAMIN & HEALY, PLLC

August 02, 2017 - 9:53 AM

Transmittal Information

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