

FILED
Court of Appeals
Division II
State of Washington
3/8/2018 2:27 PM

No. 51273-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DANIEL J. BARRETT

Appellant,

v.

CARMELITA ESCARCEGA
(fka CARMELITA BARRETT),

Respondent.

BRIEF OF APPELLANT

DANIEL J. BARRETT
Appellant, Pro Se

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii - iii

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENT OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

 1. Court MUST find "need and ability to pay" before awarding attorney fees -- no such argument or demonstration of evidence was even attempted by the party who bore this burnde to prove these elements..... 6

 2. Judge was "all over the map" in her reasoning and findings there was no rhyme or reason and especially no legall authority..... 8

F. CONCLUSION.....11

TABLE OF AUTHORITIES

Washington Supreme Court Cases

<u>In re Marriage of Konzen</u> 103 Wn.2d 470 693 P.2d 97 (1985)	7
<u>Bering v. Share</u> 106 Wn.2d 212, 721 P.2d 918 (1986)	9
<u>Yousoufian v. Office of Ron Sims</u> 168 Wn. 2d 444, 229 P.3d 73 (2010)	9
<u>State v. Rohrich</u> 149 Wn. 2d 647, 71 P.2d 638 (1990).	9

Washington Court of Appeals Cases

<u>In re Marriage of Leslie</u> 90 Wn. Ap. 796, 954 P.2d 330 (1998)	6
<u>In re Marriage of Hoseth</u> 115 Wn. App. 563, 63 P.3d 164 (2003).....	6
<u>In re Marriage of Coyle</u> 61 Wn. App. 653, 811 P.2d 244 (1991)	7
<u>Kirshenbaum v. Kirshenbaum</u> 84 Wn.App. 798, 929 P.2d 1204 (1997).....	7
<u>In re Marriage of Pennamen</u> 135 Wn. App. 790, 146 P.3d 466 (2006).....	8
<u>In re Marriage of Rockwell</u> 141 Wn. App. 235, 170 P.3d 572 (2007).....	9

Washington Statutes

RCW 26.09.140.....7
RCW 26.19.071.....8

Washington State Court Rules

Superior Court Civil Rule 11.....6

A. SUMMARY OF ARGUMENT

Appellant Barrett appeals the award of attorney fees by the Honorable Karena Kirkendoll in Pierce County Superior Court on November 3, 2017. CP 109. The award should be reversed and vacated by this court.

This order is surrounded by procedures of continuances and motions for reconsideration.

In short, Appellant argues that Judge Kirkendoll premediated her award of attorney fees before hearing any evidence. When it came time for entry of the award, she still never considered the requisite public policy of “need and ability to pay”, nor is there any evidence in the record of the Appellant’s ability to pay or the Respondent’s need for help to pay. It was Respondent Escarcega’s burden to prove both elements in Superior Court before the judge considered the issue of attorney fees. Respondent did not even attempt to demonstrate the elements, nor did she submit any evidence thereof. The judge admitted on record that she had her mind made up before even hearing any evidence. See 9/29/2017 RP 8 (lines 19 -24). The first June 30, 2017 hearing resulted in an order stated that attorney fees were “Reserved”. CP 5. So, there was never even a consideration or hearing on the

mertis of the attorney fee issue on that date of June 30. But, again, the judge later said that she premeditated a determination that she was planning on awarding attorney fees, but for no reason other than she had her mind made up to do so.

B. ASSIGNMENT OF ERROR

1. The trial court erred in awarding attorney fees on November 3, 2017. CP 109
2. The trial court abused its discretion in awarding attorney fees while not even considering the requisite public policy of the Respondent's need and the Appellant's ability to pay.
3. The trial court erred by denying and failing to consider subsequent Motions for Reconsideration and denying them without fixing the error on attorney fee award and ignoring public policy, causing all parties the cost and time of dealing with this reversible error on appeal. Denials at CP 198 and CP 126.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should this court vacate and/or reverse the trial court's order awarding Respondent attorney fees against Appellant? [pertains to Assignments of Error 1 through 3]

D. STATEMENT OF THE CASE

Appellant Dan Barrett filed a Motion to Lift Permanent Restraining Order, which was the result of a parenting plan modification case. CP 1.

On June 30, 2017, Judge Kirkendoll entered an order on the motion. CP 5. This order was essentially a continuance, as it said that the matter would be heard later, after Barrett brought and presented more evidence for the court to consider. And the issue of attorney fees was specifically "Reserved". CP 5.

On September 29, 2017, the matter set to be heard. Barrett's attorney was a no-show and sent Barrett on his own to get a continuance (with no preparation to argue the merits of the case on his own). The judge was angered and granted no continuance. See 9/29/17 RP 3-4, 8.

The judge granted attorney fees in the amount of \$3,972.71 solely on the basis that Respondent's attorney Dan Smith verbally stated at September 29 hearing that there was attorney fees billed at that amount. See 9/29/17 RP 6, line 25 – RP 8.

In this section of the transcript, the judge said that she was awarding attorney fees based upon "ongoing....continuances". There were two that were granted for good cause. She says at RP

8 , line 20-25 that she had “put the attorney fees issue on hold...I thought we’d all come back and go through this. I would have awarded fees whether you were successful or not.”

The attorney fee award was made up “on the spot”, after the judge was frustrated and angered at Barrett’s attorney being a no show and seeking a third continuance. The judge then said she was essentially planning on awarding attorney fees no matter what, indicating a premeditation. But, she also said that she was awarding them “because of waste time from these continuances” at line 14 of RP 8. She made up this reasoning on the spot because she had just found out that Barrett’s attorney was a no-show without good cause. But, again, at the same time, she contradicts herself and said that the award is not because of something new, but that she planned on awarding fees no matter what.

So, attorney fees were reserved, then they were awarded out of judge’s frustration of “delays”, but then she said that she had her mind made up to award them from the beginning.

During these entire proceedings there was never any presentation by Respondent Escarcega of any evidence showing

(1) Escarcega’s need for help in paying her attorney fees.

(2) Dan Barrett’s ability to pay Escarcega’s fees.

It was Escarcega's burden to prove both elements (as shown in case law below).

An order awarding \$3,972.71 in attorney fees was entered on that same September 29, 2017. CP 56.

Barrett filed a Motion for Reconsideration (CP 61) and claimed that the Sept. 29 order:

- (1) was a fraud upon the court because Attorney Smith wrote "denied with prejudice" when judge clearly denied without prejudice; and,
- (2) attorney fee award was reversible error

On November 3, 2017 the reconsideration motion was heard. Judge Kirkendoll entered an order denying the reconsideration. CP 198. But, the judge granted the relief to fix the fraudulent, misconstrued finding of "with prejudice" and entered a "Corrected" order with the attorney fee judgment. CP 109.

On November 13, 2017, Barrett motioned to reconsider the attorney fee award again, citing that it was reversible error, since "need and ability to pay" was never considered. CP 114.

Judge Kirkendoll denied the second reconsideration by way of "Letter from Department 17". CP 126.

Judge Kirkendoll never found the matter to be frivolous. In fact, again, she denied the original motion “without prejudice” with the expectation that the same original matter would be brought to court again. So, there is no basis for attorney fees pursuant to any authority to punish or sanction for frivolousness or CR 11 violations. Therefore, there is no legal basis for the award.

E. ARGUMENT

1. Court MUST find “need and ability to pay” before awarding attorney fees – no such argument or demonstration of evidence was even attempted by the party who bore this burden to prove these elements

Neither party is entitled to attorney fees as a matter of right. In re Marriage of Leslie, 90 Wn. App. 796, 805, 954 P.2d 330 (1998), review denied, 137 Wn.2d 1003 (1999).

Requesting attorney fees without authority is reversible error. Our higher courts always, automatically deny attorney fees when **no** authority is cited—even though everyone knows the maxim regarding attorney fees (“need vs. ability to pay”). For example, In re Marriage of Hoseth, 115 Wn. App. 563, 63 P.3d 164 (2003) reads in part:

“But he cites no applicable authority justifying such an award...Accordingly, James is not entitled to

fees. See In re Marriage of Coyle, 61 Wn. App. 653 665, 811 P.2d 244 (1991).”

A party relying on RCW 26.09.140 "must make a showing of need and of the other's ability to pay fees in order to prevail." Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 808, 929 P.2d 1204 (1997) (citing In re Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97 (1985)).

More specifically, the party requesting the attorney's fees under RCW 26.09.140 must make a **present** showing of need to support the award. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, CERT. DENIED, 473 U.S. 906 (1985).

But, the Respondent never made **any mention** of what statute she relies upon, if any. Moreover, she made **no attempt whatsoever** to “make a showing of need and other the other’s ability to pay”.

RCW 26.09.140 reads in part:

“Payment of costs, attorney’s fees, etc.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining **or defending** any proceeding under this chapter and for reasonable attorney's fees **or other professional fees** in connection therewith, including sums for legal services rendered **and costs** incurred prior to the commencement of

the proceeding or enforcement or modification proceedings after entry of judgment.”

Given Dan Smith’s 16 years of representing Escarcega, it is obvious that she has paid the attorney up front. He would not represent her consistently for 16 years without any payment. This deductive-reasoning conclusion shows that she HAS the ability to pay. It is HER BURDEN to show that she cannot and the other factor that I can. She didn’t even attempt to do that and attorney fees CANNOT be awarded.

There is no current Financial Declaration on file and RCW 26.19.071 was not complied with, as she did not serve me with two (2) years tax returns and pay stubs per the statute.

On point is In re the Marriage of Pennamen 135 Wn. App. 790, 808, 146 P.3d 466 (2006). Therein, the court awarded *neither* party fees, as the parties demonstrated *in their financial affidavits* that they had no ability to pay. Financial Declarations are the *bare minimum* method of demonstrating the element of ability to pay.

2. Judge was “all over the map” in her reasoning and findings there was no rhyme or reason and especially no legal authority

Courts must make findings of facts and conclusions of law in entering orders. Its findings and rulings must be based upon

clearly construed evidence.

The court's findings of fact must be supported by substantial evidence. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007).

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

The court's findings of fact must, in turn, support its conclusions of law and decree. Rockwell at 242.

Even if the court applied the correct legal standard to any supported facts, it's still untenable and reversible if the court adopts a view that no reasonable person would take. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.2d 638 (1990)).

But, Judge Kirkendoll was “all over the map” in her reasoning for awarding attorney fees. There was no consistency, rhyme or reason or even logic behind her award of attorney fees, notwithstanding the failure to follow requisite “need and ability to pay” policy.

Firstly, she said that she was “reserving” attorney fees until a

later hearing. CP 5. But, then later she said she was planning on awarding attorney fees regardless of prevailing party. See 9/29/2017 RP 8 (lines 19 -24).

The judge said that she re-set or continued the matter to September 29, 2017 in order that “the motion shall be heard” and attorney fees were “reserved” as arguments would be heard out. CP . But, then no “need and ability to pay” argument was put forth. And also on November 3 she said that the matter was never heard on the merits (and therefore she was not going to deny with prejudice as Attorney Dan Smith kept intransigently pushing for). 11/3/17 RP 7 lines 12, 19. Smith had fraudulently drafted an order reading “with prejudice” after being clearly admonished on the issue and being denied this relief. CP 56.

The judge said she granted attorney fees because of repeated delays. 9/29/2017 RP 8 (lines 23 -24). But, she had granted the previous two continuances for good cause. CP 5 is one continuance order. And yet again, she said she had her mind made up BEFORE the “delays” and was planning on granting fees regardless. See 9/29/2017 RP 8 (lines 23 -24).

F. CONCLUSION

The trial court abused its discretion by ignoring mandatory public policy in considering attorney fees.

There was no finding of frivolousness, so the only policy to follow is “need and ability to pay”. That was never demonstrated. The Respondent never even attempted to demonstrate it. There’s no substantial or any evidence at all supporting her need for help and Barrett’s ability to pay. It was her burden to prove both.

The award of attorney fees should be reversed and vacated.

Respectfully submitted this 8th day of March, 2018.

A handwritten signature in black ink, appearing to read "Dan Barrett". The signature is written in a cursive, flowing style.

Daniel J. Barrett, Appellant, pro se

DANIEL BARRETT - FILING PRO SE

March 08, 2018 - 2:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51273-4
Appellate Court Case Title: Carmelita Barrett, Respondent v. Daniel J. Barrett, Appellant
Superior Court Case Number: 97-3-02158-7

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