

FILED
Court of Appeals
Division II
State of Washington
10/1/2018 2:56 PM

No. 51305-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

MICHAEL C. CODEKAS
Appellant

and

CAMERON CORNELL
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

PATRICIA NOVOTNY
NANCY ZARAGOZA
ZARAGOZA NOVOTNY PLLC
Attorneys for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

I. STATEMENT OF ISSUES IN REPLY 1

II. ARGUMENT IN REPLY 1

 A. THE COURT’S DOMESTIC VIOLENCE FINDINGS ARE NOT
 SUPPORTED BY THE EVIDENCE ADMITTED AT TRIAL 1

 B. THE COURT’S ADDITIONAL FINDINGS ARE NOT
 SUPPORTED BY THE EVIDENCE 7

 C. THE TRIAL COURT ERRED BY IMPUTING THE FATHER’S
 INCOME FOR PURPOSES OF CHILD SUPPORT WHEN HIS
 INCOME WAS KNOWN..... 9

 D. ATTORNEY FEES AWARD..... 12

 E. MOTION FOR ATTORNEY FEES..... 14

III. CONCLUSION..... 15

TABLE OF AUTHORITIES

Washington Cases

Aiken v. Aiken, 187 Wn.2d 491, 387 P.3d 680 (2017)..... 1, 6

Case v. Olwell, 1 Wn. App. 766, 463 P.2d 664 (1970)..... 5

Christensen v. Gensman, 53 Wn.2d 313, 333 P.2d 658 (1958)..... 6

Mahoney v. Shinpoch, 107 Wn.2d 679, 732 P.2d 510 (1987) 14

Margoles v. Hubbart, 111 Wn.2d 195, 760 P.2d 324 (1988) 13

Matter of Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996) 14

Pimentel v. Roundup Co., 100 Wn.2d 39, 666 P.2d 888 (1983)..... 5

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182 (2005)..... 4

State v. Slerf, 181 Wn.2d 598, 334 P.3d 1088 (2014)..... 1

Cases From Other Jurisdictions

Augustine v. First Federal Sav. And Loan Ass’n of Gary, 270 Ind. 238,
384 N.E.2d 1018 (1979)..... 4, 5, 6

Statutes

RCW 26.09.140 14

RCW 26.19.071 11

Regulations & Rules

ER 612 4

ER 804 4

I. STATEMENT OF ISSUES IN REPLY

1. The domestic violence findings are not based on evidence.
2. The income findings are not based on evidence.
3. The fees award is not based on evidence.
4. The fees request should be denied.

II. ARGUMENT IN REPLY

A. THE COURT'S DOMESTIC VIOLENCE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE ADMITTED AT TRIAL

In her reply, Cornell ignores the glaring problems in this case, most prominently the trial court's reliance on the deposition as evidence, problems undermining foundational principles of our legal system. For example, Codekas had no notice the court would use the deposition as substantive evidence; it was not offered or admitted as substantive evidence and our evidence rules prohibit its use as such. Additionally, the improper, behind-the-scenes use of the deposition denied Codekas a right to cross-examination, fundamental to our fact-finding process as "a powerful instrument in eliciting truth or discovering error in statements." *Aiken v. Aiken*, 187 Wn.2d 491, 505, 387 P.3d 680, 688 (2017). There is little to distinguish what the judge here did from the secret machinations of a star chamber. *See State v. Sliert*, 181 Wn.2d 598, 603, 334 P.3d 1088, 1090 (2014) ("Our constitution flatly prohibits secret tribunals and Star Chamber justice").

Instead, Cornell cites as “fact” (in her Restatement of the Case) the very material Codekas identifies as not being evidence before the court. That is, when Cornell contends there is substantial evidence of “numerous instances of domestic violence by Codekas against Cornell” (Br. Respondent at 9), she necessarily and entirely relies on hearsay allegations. See Br. Respondent at 9 (citing the parties’ petitions for a domestic violence protection order and sexual assault protections order, the court’s order regarding the scope of the GAL/parenting evaluation, the GAL report and the parenting evaluation). There were never any findings of domestic violence made by the professionals engaged to investigate such claims, nor did Cornell ever seek such findings or allege domestic violence as a basis for modification or request a domestic violence assessment. As importantly, none of these allegations were presented in Cornell’s case in chief or subject to cross-examination. See Br. Appellant at 17-19. Rather, as detailed in the opening brief, the court’s findings of domestic violence were based on deposition testimony that was never admitted at trial. See Br. Appellant at 19-20.

In fact, even Cornell points to Dr. Poppleton’s testimony that the domestic violence allegations were “not fleshed out.” Br. Respondent at

10.¹ That is Codekas's point: there was no trial on domestic violence. For example, the court sustained an objection when Cornell questioned Codekas about an alleged incident in 2009 as beyond the scope of direct examination. RP 445-446; see, also, RP 447-448 (again sustaining objections to such questions). (Cornell did not testify to the incident.)

Cornell also points to a police report (Exhibit 37) admitted after the conclusion of trial testimony. RP 575. The report contains allegations about a single incident eight years ago (2010) and notes Codekas was not questioned about the incident. Ex. 37. Cornell never testified about the incident at trial, consistent with her not raising domestic violence as an issue in her modification petition, etc. The only testimony about this police report was Codekas's denial of the allegations when asked about them on cross-examination and on redirect. RP 476-477.² In short, domestic violence was never part of Cornell's case.

¹ Cornell claims "domestic violence" appeared more than 50 times in the report of proceedings, but does not mention that most of those references are to the DVPO Cornell sought after the car chase, which she later dismissed. The other references are those discussed above; Dr. Poppleton's testimony that domestic violence allegations were not fleshed out (RP 228); and Codekas's allegations that there was domestic violence between Cornell and her partner (RP 281).

² The court overruled an objection to inquiries about the 2010 incident when Cornell argued Dr. Poppleton's testimony "opened the door." RP 446-447. Dr. Poppleton testified about the lack of investigation into either the domestic violence allegations or concerns that Cornell has a personality disorder. RP 228-229. Neither side undertook to substantiate or adjudicate either of these alleged problems.

Overwhelmingly, the court's domestic violence lengthy findings were based almost verbatim on the deposition testimony that was never admitted at trial. See Br. Appellant at 19-20. Contrary to Cornell's assertion, "publishing" a deposition does not automatically admit it as evidence at trial; it simply refers to the act of making the deposition available to the court. See Br. Appellant at 20-21. Cornell fails to address the case law and rules establishing this principle. See Br. Appellant at 21 (citing case law recognizing a distinction between "published" depositions and those admitted as evidence, and rules that limit the use of depositions at trial, e.g., ER 804, ER 612). Instead Cornell simply quotes from an Indiana case cited in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005) that "publication of a deposition is still required in order to place the deposition before the court." Br. Respondent at 14 (citing *Augustine v. First Federal Sav. And Loan Ass'n of Gary*, 270 Ind. 238, 384 N.E.2d 1018 (1979)). This says nothing about the purpose to which the deposition is put. First, *Rufer* is a public records case, addressing when and whether documents generated in discovery (e.g., depositions) and later "published" (i.e., filed in the court record) are subject to the usual analysis applicable to sealing public records. 154 Wn.2d at 540. As noted there, "Washington court rules do not appear to use the term

‘publication’...” *Id.* n.3. Apart from this observation, *Rufer* offers no guidance here.

However, the Washington cases *Rufer* cites merely buttress Codekas’s argument. In one, the court acknowledged depositions are inadmissible as evidence absent a stipulation or an exception provided in the rules. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 50-51, 666 P.2d 888 (1983). Similarly, in another, the court notes limits on how a deposition may be used (e.g., when the deponent is dead, but not even then if an opposing party was not present at the deposition). *Case v. Olwell*, 1 Wn. App. 766, 768, 463 P.2d 664 (1970). Here, the trial court complied with none of Washington’s court rules.

Finally, in the Indiana case Cornell cites, the court there also affirmed the necessity of limits on how depositions be used at trial, with publication being a preliminary step (i.e., motion to publish, granted, breaking the seal). *Augustine v. First Fed. Sav. & Loan Ass'n of Gary*, 270 Ind. at 242. In *Augustine*, in the absence of a motion to publish or stipulation to publication of depositions, the trial court did not consider them in ruling on a summary judgment motion. An intermediate appellate court opened and read the depositions and decided they raised issues of fact, thereby justifying reversal of summary judgment. The Indiana Supreme Court said, “not so fast.” The court said publication is essential,

as are various procedures that follow publication, including the ability to object to content in the depositions. Otherwise, “[t]rial judges could examine depositions at will without regard to the possibility that they might contain objectionable matter.” *Augustine*, 270 Ind. at 242. Exactly the problem here. Cornell simply never engages with the pertinent law on this topic.

Nor does Cornell address any of Codekas’s arguments that by relying on evidence not admitted at trial the court deprived him of the right to a fair trial. See Br. Appellant at 21-26. As discussed in the opening brief, it is reversible error for a court to search out and rely on extrinsic evidence to be applied in corroborating or discrediting a witness. Br. Appellant at 21 (citing *Christensen v. Gensman*, 53 Wn.2d 313, 318, 333 P.2d 658 (1958)). Here, Codekas has important interests in stake – primarily his child, but also his reputation. He is entitled to a fair process in this proceeding, including the rights to notice, to adherence to the rules of evidence, and to cross-examination. Even in the streamlined process permitted for Domestic Violence Protection Orders, respondents may only be held to account where fundamental procedural protections exist, including the necessity of evidence. See *Aiken v. Aiken*, 187 Wn.2d at 503–04 (substitutes for child’s live testimony permitted where other procedures deemed adequate dependent on constitutional analysis). Here,

there was no notice that domestic violence was at issue, no live testimony on domestic violence, no opportunity for Codekas to defend against allegations contained in materials offered and used for other purposes. What the court did here violates the rules of evidence and due process.

B. THE COURT’S ADDITIONAL FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

Cornell likewise fails to show what evidence supported the court’s additional findings to which Codekas assigned error. For example, as to the court’s finding that Codekas persisted with claims of sexual abuse, in fact the evidence shows quite the opposite: he dismissed the sexual assault protection order petition once CPS determined the allegations were unfounded, RP 377; CP 462-463, and did not base his petition to modify on the sexual abuse allegations, see Ex. 9 at 2-3 (Codekas’s petition was based on allegations that C.C. reported witnessing domestic violence between his mother and Conlen, that Conlen had verbally abused C.C. and put him down, that Cornell failed to notify him of an injury C.C. suffered requiring stitches, that Cornell had lost C.C. at a baseball game at Safeco Field, and that Cornell neglects C.C.’s basic hygiene while in her care). Codekas’s petition referred to the molestation allegations only by mentioning how Cornell, immediately upon learning of the allegations and without further investigation of them, petitioned for modification seeking to drastically reduce Codekas’s time with C.C. and withdrew her consent

for C.C. to attend the Hawai'i trip Codekas had planned over Winter Break. Ex. 9 at 2-3. Similarly, the fact Codekas offered evidence of Dr. Stanfill's interview of C.C. does not support the court's finding as Cornell suggests; Codekas was simply showing that the allegations were further investigated. Indeed, as Hutchins-Cooks acknowledged, Codekas's investigation of the allegations was reasonable. RP 165-166.

Nor does the testimony at trial support the court's finding that Codekas called the police to investigate the molestation allegations. See Br. Appellant at 25 (citing RP 302-303, 365). Codekas did not make that call, as Cornell's testimony corroborated. RP 302-303. Codekas's mother called the police. See Br. Appellant at 8-9 (citing RP 306, 364, 365, Ex. 3). The court was wrong to find otherwise.³

As to the court's finding that Dr. Poppleton conceded he did not have any problems with Hutchins-Cook's findings and conclusions, the testimony to which Cornell cites is taken out of context to misleading effect. See Br. Respondent at 16 (citing RP 244). In cross-examination, Dr. Poppleton acknowledged his inquiry and opinions were legally and ethically limited to critiquing the report by Hutchins-Cook, testifying to its

³ No one at trial testified that Codekas told his mother to call the police, but Cornell points to a statement in the dismissed SAPO petition to that effect. Br. Respondent at 16. Even if the court wanted to attribute the mother's actions to Codekas, its findings need to be factually correct. Moreover, before drawing an adverse conclusion, the court would also have to recognize the additional fact that, at trial, Cornell agreed she "would have done the same thing Michael did." RP 301.

strengths and weaknesses. He could not and was not testifying on the recommendations made by Hutchins-Cook or on the modification itself. RP 244. In other words, he could not say “yay” or “nay” to that content; he was testifying as to the report itself (e.g., procedures, omissions, etc.). As cited in the opening brief, in his critique of her report he had several problems with it and her analysis. See Br. Appellant at 25 (citing Ex. 7 at 3, RP 241, 218, 224, 235).

Finally, Cornell does not cite to any testimony in support of the court’s finding that both parties testified they believed the current parenting plan was unworkable; instead, she cites to Codekas’s declaration in support of the counter-petition, which he had abandoned by the time of trial. Br. Respondent at 16. Codekas was clear at trial he was now seeking to maintain the current 50/50 plan, RP 394-395, a position consistent with Washington policy favoring custodial continuity. Again, the court’s finding to the contrary is just wrong.

C. THE TRIAL COURT ERRED BY IMPUTING THE FATHER’S INCOME FOR PURPOSES OF CHILD SUPPORT WHEN HIS INCOME WAS KNOWN.

Despite Cornell’s assertions to the contrary, Codekas’s income was known; thus, the trial court erred by imputing his income. While Cornell points to the fact that his pay stubs were not admitted as evidence at trial, they were considered by the trial court at the presentation hearing, which

was before the court ruled on child support.⁴ In its previous written ruling, the trial court did not address child support and permitted the parties to submit proposed orders at the presentation hearing. CP 699. Codekas then submitted his proposed worksheets indicating his actual income, CP 805-813 and supporting paystubs, CP 44-56, which the court considered at the presentation hearing. RP 622 (“Moving to the child support order, I guess the biggest difference here was that the father's paperwork includes his actual income rather than an imputed amount; is that correct?”).⁵

Because the income was known, the court could not impute it unless it made findings Cornell was voluntarily underemployed and underemployed for the purpose of reducing child support. As argued in the opening brief, the trial court did not undertake any of this analysis. Br. Appellant at 28. Rather, the evidence showed that Codekas worked full-time with variable hours (30-40), often depending on whether he has C.C. RP 361.

⁴ Even if the court had ruled, it could reopen to accept additional evidence. CR 59(g).

⁵ The proposed worksheets and orders are not reflected in the docket because there was apparently a glitch in the online filing system (LINX) at the time that prevented Codekas from submitting them online. As a result, the trial judge's judicial assistant advised the parties to email the proposed orders directly to the court. CP 805-806 (Declaration of Nicole Bolan). Cornell asserted in her initial response brief that Codekas failed to offer proposed child support worksheets or produce a single paystub. Br. Respondent at 18 (filed 7/5/18). Once Codekas filed Ms. Bolan's declaration indicating that these items had been sent to both the court and Cornell's trial attorney, CP 806, 815, counsel for Cornell (appellate counsel was also trial counsel) retracted this statement, conceding this evidence was before the court. Subsequently, Cornell submitted a brief with the false statement removed. 8/30/18 Letter from Jason Benjamin to the Court

By contrast, Cornell did not submit any documentation, or any evidence at all for that matter, in support of the numbers she reported as Codekas's income. Rather, she simply testified that she imputed his income after her attorney told her to "look it up on the table." RP 288. Thus, the court's determination that "the mother's numbers are supported by the facts that the parties actually testified to and presented at trial" ignores the court's own consideration of the evidence of actual income at presentation, prior to the court ruling on child support. Again, the finding is at odds with the record.

For similar reasons, the court's finding about Cornell's retirement is wrong. Cornell did not submit any evidence in support of her claimed income or her retirement contributions, as required by statute. See Br. Appellant at 29; RCW 26.19.071. She simply submitted her financial declaration without any supporting documentation, not even any pay stubs, and testified about her income. RP 288. Thus, the court's determination of her income also lacks sufficient basis and cannot support the child support order. Accordingly, the child support order must be vacated and remanded for a proper determination of the parties' incomes consistent with statutory requirements.

D. ATTORNEY FEES AWARD.

The court's fee award based on Codekas's "bad faith" for opposing Cornell's petition and filing a counter petition lacks basis and must be vacated. Cornell asserts that the attorney fees award was "supported by the record and adequate findings," simply referring to the abuse of discretion standard and citing the court's oral ruling referring to the fact that the sexual abuse allegations were found to be without merit. Br. Respondent at 19-20.⁶ However, as argued in the opening brief and above, the record does not support the court's finding that Codekas pursued the sexual abuse allegations and in fact shows just the opposite. Section II.B (above); Br. Appellant at 25-26. Moreover, as noted, Hutchins-Cook found Codekas's limited investigation of the allegations was reasonable. RP 165-166.

Nor is there any proof to support the court's speculation that Codekas was trying to pressure Cornell to dismiss her petition. While Cornell refers to his petition as "retaliatory," the eight-month delay in filing his petition suggests the opposite, as does the petition's content, which omits any call for restrictions based Cornell's response to the molestation allegations. Rather, the record shows Codekas petitioned following a period of heightened conflict between the parties, causing him

⁶ The brief mistakenly cites the court's ruling as RP 416; it is at RP 614.

to doubt whether the 50/50 plan continued to serve C.C.'s best interests. Ex. 9 at 2. Simply, the court's finding that Codekas pursued his counter-petition in bad faith is not supported by the record and cannot support the court's award of attorney fees. See Br. Appellant at 31-33.

Nor does Cornell address at all the Codekas's argument about the court finding Codekas acted in bad faith simply by defending against Cornell's petition for modification. The court offers no explanation for how defense against a petition constitutes bad faith and Cornell does not attempt to defend this finding. As argued in the opening brief, a parent may in good faith disagree about whether and how a parenting plan should be re-structured. Br. Appellant at 31. "It would be sadly ironic for judges in our adversarial system to conclude ... that the mere taking of an adversarial stance is antithetical to the truthful presentation of facts." *Margoles v. Hubbart*, 111 Wn.2d 195, 207, 760 P.2d 324, 331 (1988) (libel case) (internal citation omitted).

Here, Codekas sought to maintain the current 50/50 plan, opposing Cornell's effort to change it; the trial court's finding he did so in bad faith cannot support an award of fees. Notably, the family court commissioner agreed the parties were having a lot of trouble co-parenting during this time. It is not bad faith to advocate for oneself.

Finally, Cornell fails to address the fees segregation argument raised in the opening brief. See Br. Appellant at 33. Even if the court's bad faith finding supported an award of fees for Codekas's cross-petition, the fees would have to be segregated from those incurred by Codekas in defending against Cornell's petition. See, e.g., *Matter of Marriage of Crosetto*, 82 Wn. App. 545, 565, 918 P.2d 954, 964 (1996) ("fee award should be segregated, separating those fees incurred because of intransigence from those incurred by other reasons"). The case was already set for trial on Cornell's petition before his cross-petition filed eight months later; it proceeded to trial on her petition alone; the only fees related to the counter-petition were those incurred for the adequate cause hearing. There was no additional discovery, no motions filed and Cornell did not even file a trial brief. Accordingly, even if the court's bad faith finding applied to the cross-petition, the court would have to segregate fees, awarding only those related to the cross-petition.

E. MOTION FOR ATTORNEY FEES

Cornell seeks her fees under RCW 26.09.140 and claiming Codekas's appeal is frivolous. Br. Respondent at 20. An appeal is frivolous only where it presents no debatable issues upon which reasonable minds could differ and which is so totally devoid of merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679,

732 P.2d 510 (1987). Codekas's challenges to the trial court's orders are well-grounded in law and in fact; indeed, requiring reversal. His appeal is not frivolous.

Moreover, the evidence does not support fees based on the statute, even accepting the inflated view of Codekas's income reflected in the child support worksheets. See CP 747 (both parties with net monthly income of approximately \$2,800). Accordingly, Cornell's request for fees should be denied.

III. CONCLUSION

For these reasons and those stated in his opening brief, Michael Codekas asks this Court to vacate the modification and child support orders and to remand for a new trial before a different judge.

Respectfully submitted this 1st day of October 2018.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

ZARAGOZA NOVOTNY PLLC

3418 NE 65th Street, Suite A

Seattle, WA 98115

Telephone: 206-525-0711

Fax: 206-525-4001

Email: patricia@novotnyappeals.com

Attorneys for Appellant

ZARAGOZA NOVOTNY PLLC

October 01, 2018 - 2:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51305-6
Appellate Court Case Title: Michael C. Codekas, Appellant v. Cameron Cornell, Respondent
Superior Court Case Number: 13-3-01159-9

The following documents have been uploaded:

- 513056_Briefs_20181001145527D2437897_0814.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Codekas BIR FINAL.pdf

A copy of the uploaded files will be sent to:

- Nicole@bkb-law.com
- heather@bkb-law.com
- j.benjamin@envisionfamilylaw.com
- lindsay@attorneys253.com

Comments:

Sender Name: Patricia Novotny - Email: patricia@novotnyappeals.com

Address:

3418 NE 65TH ST STE A
SEATTLE, WA, 98115-7397
Phone: 206-525-0711

Note: The Filing Id is 20181001145527D2437897