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No. 52554-2

**COURT OF APPEALS, DIVISION. II,
OF THE STATE OF WASHINGTON**

DANIEL RITTSCHER, Appellant

v.

ASHLEE RITTSCHER, Respondent

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	<u>Page</u>
TABLE OF AUTHORITIES	3
I. INTRODUCTION	5
II. ASSIGNMENTS OF ERROR	5
A. Issues Pertaining to Assignments of Error	5
1. Was the Court’s denial of Petition for Reimbursement of Overpayments due to an incorrect application of the law to the undisputed facts ?	5
2. Was the Court’s denial of Petition for Reimbursement of Overpayments supported by any factual findings or evidence consistent with requirements of RCW 26.19.080(3) ?	5
3. Did the Court’s reliance on Ms. Anderson’s inconsistent testimony lead to erroneous award of Sanctions and award of attorney fees ?	5
III. STATEMENT OF THE CASE	6
IV. ARGUMENT	7
A. STANDARD OF REVIEW	7
B. THE SUPERIOR COURT ERRED IN DENYING MR. RITTSCHER’S PETITION FOR REIMBURSEMENT FOR OVERPAYMENT OF DAYCARE EXPENSES	7
C. THE SUPERIOR COURT ERRED IN GRANTING SANCTIONS AND AWARD OF ATTORNEY FEES BASED ON MS. ANDERSON’S MISLEADING TESTIMONY	9
a. CR 11 Sanctions	12
V. CONCLUSION	15

TABLE OF AUTHORITIES

	<u>Pages</u>
A. Cases	
<i>Town of Woodway v. Snohomish County</i> , 180 Wn.2d 165, 172, 322 P.3d 1219 (2014)	7
<i>In re Marriage of Nelson</i> , 62 Wn App. 515, 521, 814 P2d 1208 (1991)	7
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)	8
<i>Marriage of Hawthorne</i> , 91 Wn.App. 965, 968-69, 957 P.2d 1296 (1998)	9
<i>In re Marriage of Barber</i> , 106 Wn.App. 390, 23 P. 3d 1106 (2001)	9
<i>Biggs v. Vail</i> , 119 Wn. 2d 129, 830 P. 2d 350 (1992).	11
<i>MacDonald v. Korum Ford</i> , 80 Wn App. 877, 892, 912 P2d 1052 (1996)	13
<i>Citizens for Clean Air v. City of Spokane</i> , 114 Wn.2d 20, 39-40, 785 P.2d 447 (1990)	13, 14
<i>Troxel v. Granville</i> , 530 US57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)	15
<i>Townsend v. Holman Consulting Corp.</i> 929 F2d 1358, 1363-64 (9th Cir. 1990)	15
<i>Biggs v. Vail</i> , 124 Wn 2d 193, 197, 876 P2d 448 (1994)	16
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 801, 854 P.2d 629 (1993)	16
<i>In re Marriage of Wicklund</i> , 84 Wn.App. 763, 770, 932 P.2d 652 (1996)	16

TABLE OF AUTHORITIES (cont).

B. Statues

Wash Rev. Code 26.19.080(3)	5, 9
Wash Rev. Code 4.84.185	7, 10

C. Civil Rules

CR 11	12,13
Fed R.Civ P.11 advisory committee note 97	15

D. Other

<i>3A L. Orland Wash. Prac. Rules Practice</i> 5141 (3d ed. Supp. 1991)	13
RPC 3.1	15

1. INTRODUCTION

This is a family law appeal of a final order on a separate petition for reimbursement of special expenses for daycare pursuant to RCW 26.19.080(3). The Appellant, Mr. Daniel Rittscher, appeals from Cowlitz County Superior Court judgment denying his request for reimbursement of overpayments, and granting sanctions and attorney fees.

The Superior Court's decision was flawed in at least two elements: 1) it denied Mr. Rittscher not only mandatory statutory relief, but 2) it relied on inconsistent testimony in granting sanctions and award of attorney fees.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Mr. Rittscher's Petition for Reimbursement of Daycare Overpayments.
2. The Superior Court erred when it granting Ms. Anderson's request for Sanctions and Award of Attorney fees

Issues Pertaining to Assignments of Error

1. Was the Court's denial of Petition for Reimbursement of Overpayments erroneous due to an incorrect application of the law to the undisputed facts?
2. Was the Court's denial of Petition for Reimbursement of Overpayments supported by any factual findings or evidence consistent with requirements of RCW 26.19.080(3) ?
3. Did the Court's reliance on Ms. Anderson's inconsistent testimony lead to an erroneous award of Sanctions and award of attorney fees?

III. STATEMENT OF THE CASE

The parties were granted a dissolution of their marriage September 23, 2013 by the Snohomish County Court. CP 5. Mr Rittscher was ordered to pay \$1,009.89 in monthly transfer payments for their daughter, aged 4. This amount included \$317.89 in basic support, \$109 for medical insurance, and \$583 for daycare expenses. CP 1. Ms. Anderson relocated a number of times and in 2015, the case was moved to Cowlitz County, where she then resided with their child. CP 5.

Mr. Rittscher filed a Motion for Modification of Child Support and Petition for Reimbursement for the Overpayment of Daycare expenses in October 2017. CP1-4 There is no dispute that no daycare expenses were paid; no response was submitted by Ms. Anderson regarding any daycare expenses incurred since their dissolution granted in September 2013 and the Court orally ordered the payment for special expenses (ie Daycare) to end effective October 2017. The Court did not rule on Mr. Rittscher's request for judgment in the amount of his overpayment for the 49 months of payments he made for daycare expenses which he relied on but which were not incurred.

The parties exchanged several subsequent motions and cross motions regarding parenting plan issues, and Temporary Restraining Orders in multiple counties; a GAL was appointed on February 27, 2018. CP 24-27. The GAL was ordered to investigate three areas: CP 25:

1. The concerns raised by Ms. Anderson regarding Mr Rittscher
2. The concerns raised by Mr. Rittscher regarding Ms. Anderson, and
3. The concerns raised by Mr. Rittscher regarding Ms. Anderson's wife

Subsequently, Mr. Rittscher and his Counsel learned the the GAL had been a

party to a Restraining Order, which might hamper her ability to be objective in the case. CP 29-32. Mr. Rittscher and his Counsel motioned for Removal of the GAL for Bias and the next day, when the GAL filed her report and it was clear that she had not followed the court's order as to her investigation, Mr. Rittscher's Motion to Remove the GAL for Cause was Amended. CP 29-33. The Amended motion was served on opposing counsel.

Ms. Anderson responded with a Declaration comprised of multiple unsupported and misleading assertions, referring to all of Mr. Rittscher's filings as "frivolous" and the litigation as "harassment" and requested attorney fees and sanctions. CP 38-42. The Court granted Ms. Anderson's request for sanctions and attorney fees based on her declaration and concluded that Mr. Rittscher's request to remove GAL was frivolous and also denied Mr. Rittscher's request for reimbursement for overpayment of special expenses (daycare).

V. ARGUMENT

A. Standard of Review

Mr. Rittscher challenges the Superior Court's legal conclusions denying his request for reimbursement. The standard of review for conclusions of law is de novo. See *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172, 322 P.3d 1219 (2014).

Mr. Rittscher also challenges the court's award of attorney fees and sanctions. The standard of review of a trial court's award under RCW 4.84.185 is abuse of discretion. *In re Marriage of Nelson*, 62 Wn App. 515, 521, 814 P2d 1208 (1991);

A trial court abuses its discretion if decision is based on untenable grounds or for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

B. The Superior Court erred in denying Mr. Rittscher's Petition for Reimbursement for Overpayment of Daycare Expenses.

1. Court's denial was erroneous application of the law where facts are undisputed

The facts are undisputed. Mr. Rittscher filed his Petition pursuant to RCW 26.19.080(3), which states:

“Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation. If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court or file an application for an adjudicative hearing with the department of social and health services for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses. Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period. Absent agreement of the obligee, nothing in this section entitles an obligor to pay more than his or her proportionate share of day care or other special child rearing expenses in advance and then deduct the overpayment from future support transfer payments.”

He requested an accounting for the daycare expenses he had paid. No response was provided to support that any amount of daycare expenses were paid.

RCW 26.19.080(3) provides a procedural mechanism an obligor may use to recover payments made for daycare expenses which are not incurred. *Marriage of Hawthorne*, 91 Wn.App. 965, 968-69, 957 P.2d 1296 (1998). Mr. Rittscher followed this procedure in submitting his separate petition for reimbursement. CP 1-4. Ms. Anderson did not provide any substantiation, on or off the record, for the daycare expenses she previously stated, under oath, that she incurred.¹

Division One previously noted that the Legislature regarded the amendment to RCW 26.19.080 as "a long overdue clarification of the law". *Hawthorne*, 91 Wn.App. at 968, 957 P.2d 1296. Courts have refused to recognize an unconditional right of total recoupment of overpaid child support, but the clarification allowed redress where overpayments had been made in certain circumstances, such as for special expenses. This Court held that Reimbursement of overpaid day care or special child rearing expenses pursuant to RCW 26.19.080(3) is generally mandatory for payments made after June 6, 1996. *In re Marriage of Barber*, 106 Wn.App. 390, 23 P. 3d 1106 (2001).

Mr. Rittscher makes child support payments consistently, in good faith and has never been late. Since 2013, he deposits his monthly payments directly into Ms. Anderson's bank account; Prior to their dissolution, he allowed Ms. Anderson, their daughter and Ms. Anderson's other child to remain in the home during the dissolution proceedings at his sole expense. CP 6. The purpose of child support statutes is so both parents can contribute to the costs of their child. Mr. Rittscher takes his responsibility seriously and has gone above and beyond in carrying out his

¹ In separate case with her first ex-husband, she admitted that she incurred no daycare expense for either of her children after December 2013. CP 58, See also *Snohomish County 15-2-06975-4*

responsibilities to not only his daughter, but also her sister, to whom he has no legal obligation. CP 6. Ms. Anderson has consistently taken advantage of Mr. Rittscher's good faith, whether it is misrepresenting the amount of support received from her first husband, CP 6 or whether it is to misrepresent expenses incurred for daycare. expenses CP 50-54. To deny Mr. Rittscher reimbursement of his overpayments for daycare expenses is to reward misrepresentation to multiple courts.

Mr. Rittscher relied on Ms. Anderson's representations, submitted under penalty of perjury, to be an honest declaration of true (daycare) expenses for their daughter. She represented her expenses to the Superior Court as \$860/mo. CP 50-54, of which Mr. Rittscher was assigned \$583 based on the pro-rata calculation of income. CP 45. Not more than two years later, Ms. Anderson stated to another court² that her daycare expenses in 2013, the year of the parties dissolution, were \$6,000/yr., or approx.. \$500/mo. CP 57.³Mr. Rittscher should be granted his request for reimbursement and made whole for his reliance on the changing misrepresentations made at his expense.

2. Court's denial of Petition for Reimbursement was not supported by any factual findings or evidence

There is no factual findings in the trial Court's order which would support the court's denial of Mr. Rittscher's Petition.

C. The Court erred in granting sanctions and awarding attorney fees based on Ms. Anderson's inconsistent testimony

RCW 4.84.185 provides for the prevailing party to receive expenses for

² In separate case with her first husband, in Snoh County CP 57

³ There were no actual cancelled checks that supporting that any daycare expenses were paid for 2013.– See CP 61.

opposing frivolous action or defense, on written findings by the judge and ...on upon motion by the prevailing party. The Washington Supreme Court has interpreted the statute, based on the legislative history, that the lawsuit or defense is to be considered as a whole, and not on a claim by claim basis. *Biggs v. Vail*, 119 Wn. 2d 129, 830 P. 2d 350 (1992). The statute was intended to apply to "actions which, as a whole, were spite, nuisance or harassment suits. *Biggs* at 135. 830 P. 2d 350.

Ms Anderson's declaration wrongly accused Mr. Rittscher and his Counsel of filing "many frivolous documents", without naming one CP39; further Ms. Anderson and her attorney attempt to mislead the court by stating that there had been "17 [Show Cause for] Contempt orders." CP 39. Ms. Anderson made a number of other misleading assertions, all under penalty of perjury, and with liberal use of the words frivolous" and "fabricating", including

- the allegation that Mr. Rittscher and his Counsel "made up false accusations" CP 39, and
- "served documents that were never filed",
- attributed statements of Mr. Rittscher to his attorney and
- accused Mr. Rittscher's Counsel of contacting her outside of counsel about a matter in this case, and
- accused Mr. Rittscher's current Counsel of soliciting him *while he was represented by another attorney in this matter*, as well as misrepresenting a number of other matters. CP 39-42.

Ms. Anderson's statements that Mr. Rittscher and his counsel "made up accusations" about her are false; Any statements were made by people who interacted with and knew Ms. Anderson best, including her ex-husbands, and these statements were already a part of the record. CP 7, 8. There are no "made up allegations" by Mr. Rittscher or his Counsel, as Ms. Anderson mis-states in her

Declaration requesting Sanctions.

The Superior Court record shows only ONE Show/Cause order, which hearing resulted in an Order of Contempt in this matter.⁴ This was readily verifiable to the Superior Court, as well as Ms. Anderson's Counsel; her misleading statement, designed to invoke sympathy from the Court, had zero supporting facts. Instead, the Court favored Ms. Anderson's uncorroborated request by awarding her sanctions and fees.

Ms. Anderson also accuses Mr. Rittscher's attorney of ethical violations. The debt collection letter she references CP 39-40 is part of a separate proceeding between herself and Mr. Rittscher⁵, for her unauthorized access of his bank account and is unrelated to the issues before the family court; other than to provide background and context on Ms. Anderson's character. Ms. Anderson and her attorney inaccurately assumed without reference to any authority that the debt collection proceeding Mr. Rittscher is pursuing against her for accessing his bank account illegally for her own benefit is somehow required to be brought in the family court.⁶ Her Counsel made no affirmative statement of representation in this other matter. No contact was made with Ms. Anderson in any matter that she already had affirmative representation.

Ms. Anderson wrongly attributes Mr. Rittscher's contact with his current

⁴ Mr. Rittscher's Counsel represented Ms Anderson's first husband between 2014-15; a Review of their case in Snohomish County 07-3-00740-9, will also reflect only 1 Show/Cause order was requested. It's unsupported that Ms. Anderson received another "15" contempt orders as she claims, but they were not from any matter involving Mr. Rittscher.

⁵ Ms. Anderson illegally removed funds from Mr. Rittscher's bank account. Mr. Rittscher is pursuing redress through the normal civil channels.

⁶ Ms. Anderson's theft of funds from Mr. Rittscher's bank account was used to pay for her own household utilities. CP 10 and was unrelated to child support and parenting issues.

attorney in 2015 as some obsessive attempt to solicit him as a client for the sole purpose of harassing her; in fact, Mr. Rittscher was already represented and no such solicitation took place. The contact with Mr. Rittscher was merely to corroborate misleading testimony given by Ms. Anderson in the other case with her first ex-husband. It was a few years later when Mr. Rittscher retained his current counsel.

Based on these and other misrepresentations by Ms Anderson which are inconsistent with the record, the Court issued sanctions against Mr. Rittscher and Counsel and awarded attorney fees to Ms. Anderson without examination of the record for corroborating evidence of her allegations, or requiring her to provide any support.

a. **CR 11 Sanctions.**

CR11 sanctions are appropriate where, after discovery reveals a claim is baseless, an attorney continues to prosecute the case by the “filing of pleadings and motions and legal memoranda.” *MacDonald v. Korum Ford*, 80 Wn App. 877, 892, 912 P2d 1052 (1996). This was not the case here. Further, the federal rule and CR 11 were designed to reduce “delaying tactics, procedural harassment, and mounting legal costs.” *3A L. Orland Wash. Prac. Rules Practice* 5141 (3d ed. Supp. 1991).

Mr. Rittscher’s Counsel had a legitimate concern when presented with information that would undermine the objectivity of the court appointed GAL in this investigation; and while a court may believe the underlying claims are weak, that does not mean they are frivolous. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39-40, 785 P.2d 447 (1990). Counsel is entitled to preserve the

issues [of the GAL's lack of objectivity and inability or disregard of the court's order] resulting in a denial of Mr. Rittscher's rights to parent, for Appeal.

Further, the motion was scheduled at the time of Petitioner's hearing so as to minimize legal costs to all parties, and to also preserve a record regarding the violations of Mr. Rittscher's rights resulting from the GAL's determinations. Ms. Anderson experienced no additional costs since the parties were already present on her own Motion.

RPC 3.1

The Comments to RPC 3.1 state "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." The court therefore has a balancing test in weighing whether an advocate was zealously advocating for his/her client, or abusing legal procedure. A court may believe the underlying claims are weak, that does not mean they are frivolous. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39-40, 785 P.2d 447 (1990)

Mr. Rittscher's Counsel had a legitimate concern when presented with information that would undermine the objectivity of the court appointed GAL in the investigation; this concern was mirrored by other family law practitioners, who advised that they would file a Motion to Remove for Cause. Subsequent email communication from the GAL appeared to confirm not only a lack of independent investigation, but a lack of objectivity in the investigation. CP 29-33

Mr. Rittscher's Counsel advocated for her client's interest and filed the Motion to Remove the GAL for Cause, based on research and advice from other

practitioners, along with the subsequent GAL report, written and submitted after spending less than 20 minutes discussion via telephone with Mr. Rittscher; CP This Motion was not made frivolously or to delay or harass Ms. Anderson, as she asserts, but out of concern for the constructive termination of Respondent's parental rights: namely, rights to care, custody and control of his children; the US Supreme Court has described these rights as "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]." See *Troxel v. Granville*, 530 US57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

The Court's erroneous conclusion that this motion was done to somehow "besmirch" one individual (the GAL) presumes that the Motion was personal and not based on the legitimate legal concern over a lack of professional objectivity, ability, or subconscious or conscious bias nor does it grant any allowance that Counsel was seeking to preserve a record for the dismissal of Mr. Rittscher's rights.

Rule 11 is not intended to "chill"an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed R.Civ P.11 advisory committee note 97 F.R.D. at 199 (1983). Indeed, the Ninth Circuit has observed that if:

Vigorous advocacy [were] to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

Townsend v. Holman Consulting Corp. 929 F2d 1358, 1363-64 (9th Cir. 1990).

CR 11 permits reasonable attorney fees and costs incurred because of a bad faith filing of pleadings for an improper purpose. The purpose of the rule is to deter

baseless filings and curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn 2d 193, 197, 876 P2d 448 (1994). The burden is on the movant to justify the request for sanctions. *Biggs*, at 202, 876 P2d 448. As shown above, the movant's declaration was riddled with misleading testimony, designed to inflame the court, rather than meet her burden to justify her request, Ms. Anderson did not meet her burden and the awarded of attorney fees was erroneous.

Ms. Anderson's history of exaggerating and misrepresenting claims in multiple courts has been shown over and over and her Counsel could have easily verified Ms. Anderson's statements. Ms. Anderson's Declaration was submitted presumably after the "due diligence" of her own counsel. For Ms. Anderson to mislead the court and attribute statements in her cases as if they were made up independently by Mr. Rittscher and his Counsel, is itself sanctionable; to then request CR11 sanctions based on her misleading testimony, is unconscionable.

No additional expense was incurred by Ms. Anderson, as she had already noted her own hearing; Mr. Rittscher's motion was heard at the same hearing already scheduled by Ms. Anderson's counsel.

For the court to go beyond mere disagreement with Counsel's argument and concern for the abrogation of Mr, Rittscher's rights and infer a nefarious intent is supposition and abuse of discretion. Discretion is abused when it is based on untenable grounds or for untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Wicklund*, 84 Wn.App. 763, 770, 932 P.2d 652 (1996).

V. CONCLUSION

In conclusion, the trial court erred when it denied Mr. Rittscher request for reimbursement of his overpayments; no factual findings were made to support the court's decision, and the facts are undisputed: there were no daycare expenses incurred.

The trial court erred when it abused it's discretion in awarding attorney fees and sanctions based on Ms. Anderson's uncorroborated and misleading statements.

Based on the foregoing points and authorities, Mr. Rittscher respectfully requests that this Court reverse the decisions of the superior court denying his request for judgment for overpayment of special expenses and reverse the court's grant of sanctions and attorney fees.

RESPECTFULLY SUBMITTED this 16th day of January 2019.

LAW OFFICE OF HOLLY HENSON PS

A handwritten signature in blue ink, appearing to read "Holly Henson", with a long horizontal flourish extending to the right.

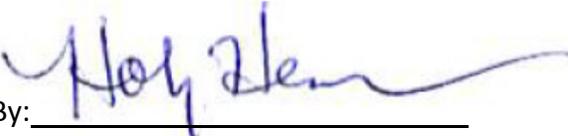
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of January, 2019, that this Appellant's Opening Brief was sent via JIS link to the Clerk of the Court, Court of Appeals, Division II and to Tierra Busby, Attorney for Respondent.

The undersigned further certifies that on the 17th day of January, 2019, I caused a true and correct copy of this Appellant's Brief to be served by First Class Postage prepaid U.S. Mail.

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