

FILED
Court of Appeals
Division II
State of Washington
3/19/2019 12:27 PM

No. 52554-2

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

DANIEL RITTSCHER, Appellant

v.

ASHLEE RITTSCHER, Respondent

REPLY BRIEF OF APPELLANT

Holly C. Henson
Attorney for Appellant

Law Office of Holly Henson, P.S.
PO Box 39586
Lakewood, Washington 98496
206-203-3259
WSBA No. 45625

TABLE OF CONTENTS

TABLE OF CONTENTS	<u>Page</u>
TABLE OF AUTHORITIES	3
I. ARGUMENT	7
A. STANDARD OF REVIEW	7
B. TIMELY FILING	
C. DENIAL OF PETITION FOR REIMBURSEMENT FOR OVERPAYMENT OF DAYCARE EXPENSES WAS ERROR	7
D. THE SUPERIOR COURT ERRED IN GRANTING SANCTIONS AND AWARD OF ATTORNEY FEES BASED ON MS. ANDERSON’S MISLEADING TESTIMONY	9
1. Allegation using the word “frivolous” does not meet the burden to justify additional award of attorney fees	10
II. CONCLUSION	11

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)	5
<i>In Re Marriage of Fairchild v. Davis</i> , 148 Wn App., 828, 207 P.3d 449 (2009)	8
<i>Biggs v. Vail</i> , 119 Wn. 2d 129, 830 P. 2d 350 (1992).	8
<i>Citizens for Clean Air v. City of Spokane</i> , 114 Wn.2d 20, 39-40, 785 P.2d 447 (1990)	9
<i>Biggs v. Vail</i> , 124 Wn 2d 193, 197, 876 P2d 448 (1994)	10
<i>Streater v. White</i> , 26 Wn.App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980)	10
B. Statues	
Wash Rev. Code 26.19.080(3)	6
Wash Rev. Code 4.84.185	8
C. Civil Rules	
CR 59(b)	5
CR 58(b)	5
RAP 5.2(a)	5
CR 11	8, 9
RAP 2.2	10

TABLE OF AUTHORITIES (cont).

D. Other

3A L. Orland Wash. Prac. Rules Practice 5141 (3d ed. Supp. 1991) 9

I. ARGUMENT

A. Standard of Review

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).

B. Timely Filing

Respondent confuses the timeline for Reconsideration with the timeline for Appeal, both of which were met by Appellant, Mr. Rittscher. The Superior court entered its order on July 24, 2018. A copy of that Order was included with Mr. Rittscher's Notice of Appeal which was filed on August 16, 2018. Appellant did request a Reconsideration of the Court's order. CR 59(b) states:

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision.

CR 58(b) states:

(b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge permits the judgment to be filed directly with the judge as authorized by Rule 5(e).

Appellant's motion for reconsideration was timely filed with the court on July 24, 2018 – the same day as “entry of the order.” Appellant's Motion for Reconsideration was stricken by the court for no explainable reason. This appeal was also timely filed within 30 days of the entry of the court's order, on July 24.

RAP 5.2(a) states:

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

Mr. Rittscher's Notice of Appeal was timely filed on August 16, 2018, within 30 days after entry of the court's order on July 24, 2018.

C. Denial of Petition for Reimbursement for Overpayment of Daycare Expenses was error.

The facts are supported by the record. Mr. Rittscher filed his Petition in September 2017 and 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.”

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

Indeed, Ms. Anderson's prior statements were that she had no daycare expenses after 2013. CP 58-60. She filed nothing in response to Mr. Rittscher's Petition.

Ms. Anderson's Response Brief to this court states that she "provided a written accord of who was the private nanny or caregiver and the amounts paid for each year". *Resp. Brf. pg 5*. It is noted that Ms. Anderson provides no date for when she allegedly provided this "written accord". The Cowlitz Superior Court Clerk has no written response in the record of the trial court to support this statement, let alone support that this "written accord" was ever provided to Mr. Rittscher. The only statements regarding daycare on file with this trial court are a copy of Ms. Anderson's statement's made in the separate case with her first husband and attached as Exhibit B to Mr. Rittscher's Motion for Reconsideration of his Petition for Reimbursement of Overpayment on Daycare expenses. See CP 58-60. Respondent's arguments are a red herring and do not address the daycare expenses paid by Mr. Rittscher from 2014 through 2017; the Court ordered that he no longer pay expenses for daycare at the October 16, 2017 hearing.

Even allowing Ms. Anderson's statements to slide as fact, there is zero discussion by the court regarding the twenty percent threshold, and how it was met (or not met) by the information allegedly provided by Ms. Anderson. Instead, Ms. Anderson argues that Mr. Rittscher has a burden to prove that Ms. Anderson did not incur childcare expenses. *See Resp. Brf. Pg 7*. This is contrary to the statute and completely misses the requirement of the obligee to account for funds received for specific purposes.

After the obligor institutes an action, the burden then shifts to the obligee to provide evidence that the daycare expenses paid by the obligor were actually incurred within twenty percent of the amount that the initial Child Support order

anticipated. In *Fairchild v. Davis*, Division Three recognized that self-serving statements were not proof that expenses were incurred. *In Re Marriage of Fairchild v. Davis*, 148 Wn App., 828, 207 P.3d 449 (2009).

Ms. Anderson has consistently taken advantage of Mr. Rittscher's good faith, misrepresenting the amount of support received from her first husband, CP 6 as well as misrepresenting expenses incurred for daycare expenses CP 50-54. During the time Ms. Anderson actually had daycare expenses, (according to her prior testimony, she only had daycare expenses until 2013, see CP 58-60), Ms. Anderson was using the total expenses for two children (with different fathers) in two separate cases, resulting in a skewed allocation of both fathers paying a pro-rated amount for what amounted to the same daycare expense of two children, one of them not even their own child.

To deny Mr. Rittscher reimbursement of his overpayments for daycare expenses is to reward this type of deception on the court.

D. 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 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 specifying any document CP39; 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 has initiated three motions in this family law matter:

1. A Motion to Modify Child support heard on October 16, 2017
2. A Show/Cause Order for Contempt heard in November 2017
3. A Motion to Modify the Parenting Plan scheduled for December 2017; this was stricken based on misrepresentations by Ms. Anderson's Counsel

All of these come four years after he was the Respondent in a dissolution action. All other hearings have been scheduled at the request of Ms. Anderson. Mr. Rittscher's Motion to Remove the GAL was requested to be heard at the same time as one of Ms. Anderson's motions. Any incremental legal costs were minimal at best; Ms. Anderson experienced no additional costs since the parties were already present on her own Motion. Three motions hardly support the Respondent's claims of harassment.

An opposing party will nearly always argue that litigation is harassing; while Mr. Rittscher's Appeal of a wrongly decided Motion by the Superior Court has some additional associated costs, his appeal is based on the violation of his own parental rights, and not for any other purpose. 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).

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. Other than the claims of harassment, Ms. Anderson still does not show in her Brief how Mr. Rittscher's filings were "baseless" or otherwise unjustified. The Court did not require Ms. Anderson to meet her burden to justify her request and the award of sanctions and fees was in error.

1. Allegation using the word "frivolous" does not meet the burden to justify additional award of attorney fees

Ms. Anderson states that the parties had "their day in court", which is a misunderstanding of this Court's role in correcting errors of the trial court. Ms. Anderson's entire argument misunderstands the burden of accounting on the obligee – the one receiving the funds - for specific special expenses. No authority was provided by Respondent for the additional requests of Attorney fees. Indeed, Appellant agrees with this court's holding in *Streater v. White*, as cited by Respondent. *Streater v. White*, 26 Wn.App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980). The holding of this Court in *Streater* in determining whether an appeal was frivolous were the following considerations: 1) an appellant's right to appeal under RAP 2.2, and 2) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and so totally devoid of merit that there was no possibility of reversal. *Id.*

Mr. Rittscher has a right to Appeal. RAP 2.2. His appeal is based on his

statutory right of reimbursement. No argument or case law overriding this statute has been offered. Respondent does not indicate how the issues presented are “totally devoid of merit” to meet this court’s standards for a frivolous filing”. Based on the applicable standards of review and the statutory provisions, there are absolutely debatable issues, as presented in Appellant’s Brief and Reply Brief, and Respondent should not be awarded additional attorney fees.

V. CONCLUSION

The trial court erred when it denied Mr. Rittscher’s request for reimbursement of his overpayments; no factual findings were made to support the court’s decision, and there is no evidence or “written accord” submitted to the Cowlitz Court Clerk regarding any 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, 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 19th day of March 2019.

LAW OFFICE OF HOLLY HENSON PS



HOLLY HENSON
WSBA # 45625
Attorney for Mr. Daniel Rittscher

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of March, 2019, that this Appellant's Reply 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 19th day of March, 2019, I caused a true and correct copy of this Appellant's Brief to be served by First Class Postage prepaid U.S. Mail.

Counsel for <u>Petitioner</u>	<input checked="" type="checkbox"/> U.S. Mail
Name <u>TIERRA BUSBY WSB 30054</u>	<input type="checkbox"/> Hand Delivery
Address <u>715 Broadway Street</u>	<input type="checkbox"/> _____
Longview, WA 98632	

By:  _____

LAW OFFICE OF HOLLY HENSON PS

March 19, 2019 - 12:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52554-2
Appellate Court Case Title: Ashlie Renee Rittscher, Respondent v. Daniel Gilbert Rittscher, Appellant
Superior Court Case Number: 15-3-00304-1

The following documents have been uploaded:

- 525542_Briefs_20190319122539D2466970_1994.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellant REPLY BRIEF.pdf

A copy of the uploaded files will be sent to:

- tierra@cf-law-llc.com

Comments:

Sender Name: Holly Henson - Email: hollyhensonlaw@outlook.com
Address:
PO BOX 1555
BELLEVUE, WA, 98009-1555
Phone: 206-203-3259

Note: The Filing Id is 20190319122539D2466970