

FILED
Court of Appeals
Division II
State of Washington
10/8/2019 1:31 PM

No. 52742-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

AUTUMN MOZER

Appellant,

v.

CHRISTOPHER BROWN,

Respondent.

APPELLANT'S REPLY BRIEF

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COMES NOW the Appellant, Autumn Mozer, and hereby submits Appellant's Reply Brief.

I. ARGUMENT

A. Mozer does not raise her objection to the trial court's limitation of witness for the first time on appeal.

Brown argues that Mozer is raising for the first time on appeal the issue of the trial court's limitation on witnesses she was allowed to present at trial. This is not the case.

The relevant exchange between Mozer and the trial court was as follows:

Court: These individuals that you're wanting to call, you said Laura Buterfield, Jennifer Cortez?

Mozer: Uh-huh.

Court: Sarah Crump and Kimberly Pettie?

Mozer: Uh-huh.

Court: What are you expecting them to say. [sic]

Mozer: The truth, Your Honor.

Court: That does not help me.

Mozer: I'm sorry.

Court: Specifically, what are you intending – what are you calling them for.

Mozer: Sarah Crump has been in the same ward, church, as me and the Petitioner. Not only that, she also witnesses some

behaviors of [G.M.N.-B.] since this whole thing has started where we had supervised visits start for the petitioner. So her declaration's in there, and so is the offer of proof of that she state that and any kind of information or on character.

Jennifer Cortez is my sister, so she has been around the whole time. And, again, there's a declaration in there about things that she had witnessed from [G.M.N.-B.]'s behavior and changes.

And then Kimberly Pettie, she's been around since [G.N.M.-B.] – before [G.N.M.-B.] was born and when [G.N.M.-B.] was born. So I do believe that her testimony is going to be very important and a picture of what's happened throughout [G.N.M.-B.]'s life, and she's also met the petitioner.

Court: You can call one of these individuals. Your choice.

RP 9-11.

This was a request made by Mozer to allow these witnesses to testify and a denial by the trial court. Mozer basically made a motion to the trial court and the trial court denied the motion. There is no need to then object to the trial court's ruling to preserve the matter for appeal. Certainly trial practice cannot be seen in such a narrow focus as to require a party who was just denied requested relief by the trial court to make a follow-up "objection," seeking the same relief. This would create a staggering amount of redundancy and would likely test the patience of the trial court.

The matter was raised by Mozer when she asked to present the witnesses. It was then ruled upon by the trial court when only one witness was ordered to be allowed. This is all that is required.

It should also be noted that even if the court finds that Mozer failed to take a necessary step by objecting to or seeking reconsideration of the trial court's decision to not allow her witnesses, this is not an absolute bar to the court considering the issue on this appeal. Smith v. Shannon, 100 Wn.2d 26, 666 P.2d. 351 (1983). Mozer does not concede that the issue is raised for the first time on this appeal, but even if it is the court can still consider the issue should it so choose. Id. at 38.

The Court should reach the merit of this issue and determine whether or not the trial court erred in arbitrarily limiting the number of witnesses Mozer would be allowed to present.

B. The trial court did err when it arbitrarily limited the witnesses Mozer could call to testify at trial.

Brown argues that the trial court has the discretion to limit the evidence and testimony it will allow during trial. In support of this argument Brown first cites State v. Grimes (Respondent's Brief, p. 15). However, the decision in the Grimes case was whether or not a statement made by the defendant in a criminal case could be presented to the jury. 92 Wn. App. 973, 981, 966 P.2d 394 (1998). In making its determination the trial court weighed "the probative value of evidence with its potentially prejudicial impact." Id. at 981.

This analysis makes little sense given the question presented here. The trial court here did not weigh the probative value of the evidence Mozer intended to offer, and there was no prejudicial impact to speak of. Instead, in what can only be explained as an effort to have the Brown v. Mozer trial end as soon as possible, the trial court, without explanation, arbitrarily limited the number of witnesses Mozer could present.

This is simply unfair and should not be sanctioned. Whether she was represented by an attorney or not, Mozer was doing her best to advocate for the most important thing in her life, her daughter, and she should have been afforded the opportunity to offer evidence she felt important and which was relevant. The trial court always has the ability to disregard evidence or rule it inadmissible on other grounds, but we are not here dealing with a ruling based on the rules of evidence. In this case Mozer was never allowed to get that far.

Brown next cites to the Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Counsel (EFSEC) case, again for the proposition that a trial court may limit the testimony it will receive during trial. (Brief of Respondent, p. 12 & 15). The case is clearly distinguishable.

In the Residents case the trial court was performing a review of an administrative action and the question was whether or not to allow supplemental evidence not a part of the administrative record. 165 Wn.2d 275, 300, 197 P.3d 1153 (2008). The Residents court found, not that evidence should be excluded, but that the administrative record was complete for purposes of its review. Id. at 301. The present case is obviously not factually analogous.

However, even if we look past the factual distinctions, the Residents court's decision was not nearly as liberal as the Respondent would have the court believe. The Residents court cited to the decision of Roberts v. Atlantic Richfield Co. (88 Wn. 2d 887, 568 P.2d 764 (1977)), in noting the limitations placed upon the trial court in restricting testimony. 165 Wn.2d at 301. The Roberts case involved a trial court excluding evidence it found to be irrelevant. 88 Wn.2d 887 at 893. The trial court heard an offer of proof and then made a finding that the evidence proposed was "irrelevant and too remote to be of significant value." Id. at 893.

The appellate court in Roberts affirmed the trial court's action, concluding that a trial may exclude evidence it deems irrelevant and defined the threshold as "whether the testimony would have a

tendency to mislead, distract, waste time, confuse or impede the trial, or be too remote either as to issues or in point of time.” Id. at 893.

In the present case the trial court made no finding that the testimony offered by Mozer was irrelevant. In fact, the comment made by the trial court, “You can call one of these individuals. Your choice,” signals just the opposite. Had the trial court believed the testimony from all the proposed witnesses to be irrelevant, it should have excluded them all. It did not. Instead it forced a decision upon Mozer, which indicates that it would have allowed any of the proposed witnesses. This suggests that, based on the offer of proof, the trial court found each witness could have provided relevant evidence.

In every case cited by Brown in support of the idea that a trial court may limit testimony, the trial court undertakes an analysis of the proposed testimony and then declines to allow the testimony based on the results of that analysis. In the present case the trial court conducted no such analysis. The trial court’s decision in this case was based not on an appropriate rule of evidence, but instead on an apparent desire to conclude the case as quickly as possible.

Brown next tries to suggest that Mozer has failed to argue that the outcome of the case would have been different had the witnesses

not been improperly excluded. In fact, this is the very essence of her appeal.

Custody cases, which hinge upon the best interests of the child, are not like typical civil cases where there are elements that must be shown to prove a cause of action. In a custody case the trial court, assuming it has proper jurisdiction, is duty bound to enter a parenting plan for the child, regardless of the extent or the quality of the evidence it receives at trial. Without the elemental considerations it is impossible to make a showing that the outcome would absolutely have been different, but given that the trial court found Mozer's behavior over the course of the parties' relationship amounted to the abusive use of conflict, and the witnesses were there throughout the relationship of the parties, it would certainly seem plausible that they could have shed some light on the situation. Mozer deserved the chance to put on her full case.

Trial courts are supposed to be the bed rock of a fair judicial system. Parties are supposed to get their "day in court." Yet here is a mother attempting to represent herself and tell the story of her life and that of her child in perhaps the most important proceeding she will ever be a part of. And rather than be afforded the opportunity to

tell her whole story, her audience tells her she must cut out multiple chapters. She deserved better from the trial court.

The trial court exceeded its authority in this case by arbitrarily excluding the witnesses and this court should remand this case for a new trial with a directive to allow each side to call witnesses who have relevant evidence to provide.

C. The trial court did err when it allowed Brown to submit a new Proposed Parenting Plan for the first time in closing argument.

Mozer filed a motion for reconsideration asking the trial court to reconsider its decision to take argument from Brown which sought primary residential placement for the first time at trial. This afforded the trial court the opportunity to correct any error made on this issue. It's therefore hard to fathom how Brown can now argue that the issue was not preserved for this appeal.

Brown also tries to equate his switch from seeking visitation to seeking primary residential placement with the changes Mozer made to her proposed parenting plan at trial. Such a comparison seeks to disguise the sheer gravity of Brown's changed position. Short of taking a person's freedom or terminating parental rights, it's hard to imagine a more consequential decision than a court's

decision to remove primary custodial rights of a parent. Particularly when that parent has sat in that position since the birth of a child.

Brown also argues that he gave notice to Mozer of his change in position at the settlement conference. (Respondent's Brief, p. 24). However, this communication was far from clear. In one short sentence, contained in a letter from his counsel addressed to the mediator, Brown's attorney mentions the idea that Brown would like G.N.M.-B. to live with him. (CP 272). Yet, in that same communication Brown's attorney references and encloses Brown's initial Proposed Parenting Plan, which did not seek primary residential placement. (CP 272 & 394). Mozer was not presented with a proposed parenting plan from Brown wherein he was made the primary residential parent until trial. (RP 194).

Brown amended his proposed parenting plan at trial in a way that did not conform with RCW 26.09.181(2). The statute reads as follows:

(2) AMENDING PROPOSED PARENTING PLANS. Either party may file and serve an amended proposed permanent parenting plan according to the rules for amending pleadings.

The language is not ambiguous and clearly requires compliance with Washington State Civil Rule (CR) 15(a), which is equally clear. Brown should have filed a motion to amend his

proposed parenting plan. He did not and thereby violated RCW 26.09.181(2) and CR 15(a).

The lack of notice to Mozer left her ill-prepared to defend against Brown's new position. Brown argues that this did not have a material effect on the result and that the trial court was nevertheless free to make any ruling it deemed to be in the best interest of the child. This may well be true, but when this abrupt change in position is coupled with the limitations placed on Mozer by the trial court in terms of the evidence she was allowed to present, it adds up to an unfair proceeding which was highly prejudicial to Mozer.

Any party to a trial, particularly when the stakes are as high as child custody, should be afforded the right to understand what they are up against and given the opportunity to present evidence in defense of those claims and in support of their own claims. Mozer was denied both in this case.

D. The trial court did err by entering findings that were not supported by substantial evidence.

Brown argues that ample evidence supports the trial court's finding that Mozer engaged in the abusive use of conflict. (Respondent's Brief, p. 30). Yet the instances referred to lack a key component necessary for the finding, the existence of conflict.

Brown fails to answer the key question posed in Appellant's Opening Brief at page 24, which is, if Brown was allowing Mozer to dictate when and how he saw G.N.M.-B., which he admitted in his testimony and which the trial court noted in its decision (CP 164), where is the conflict? How can two parties who are in agreement in terms of how they are proceeding with respect to the raising of a child be said to be in conflict? The trial court, in fashioning its ruling and order, created "conflict" when none actually existed.

Brown next points to Mozer's requests for judicial protections as evidence of conflict. (Respondent's Brief, p. 30). But again, he fails to answer the key question, which is how these resulted in "conflict." According to Brown's own testimony, he never even knew about any of the court filings seeking protection until they were presented to him at trial. (RP 113). If he never knew of them how could it be said they created conflict? And how could it be said that the "conflict" presented a danger to the child. G.N.M.-B. was one year old at the time and certainly knew nothing about any court filings. If the child knew nothing about the filings, Brown knew nothing about the filings, and no orders were actually entered, the petitions simply cannot be said to have created conflict.

Yet the trial court here, in its written decision, points to two denied requests for judicial protect, which Brown knew nothing about and which never had any effect on Brown or his contact with G.N.M.-B. was “evidence, in the Court’s mind, of abusive use of conflict on the part of Ms. Mozer.” (CP 164).

It is disheartening and somewhat terrifying to think about the message this sends to other parents in the community. If the standard becomes that a failed attempt to receive judicial protection will result in the loss of primary custody of a child, many future parents will be put at great risk out of the reluctance to seek protection for fear of a similar result.

The trial court fails to make any findings regarding the manner by which the “conflict” affected the child. A necessary element is that the abusive use of conflict “creates the danger of serious damage to the child’s psychological development.” In re Marriage of Chandola, 180 Wn.2d 632, 647, 327 P.3d 644 (2014). The trial court simply reached this conclusion without making any findings in support. (CP 165).

E. The court should not award Brown attorney’s fees on appeal.

There should be no award of fees on appeal in this case. Brown concedes that he would not be entitled to an award of fees

pursuant to RCW 26.09.140, given his superior earnings. (Respondent's Brief, p. 34). Mozer was not found to have been intransigent at the trial court level. Any award of fees here would therefore necessarily be based upon a finding that Mozer's appeal is frivolous.

An appeal is frivolous and an award of attorney fees may be appropriate when there are no debatable issues on which reasonable minds can differ, when the appeal "is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision." Matheson v. Gregoire, 139 Wash.App. 624, 639, 161 P.3d 486 (2007).

Mozer has raised several claims which warrant attention and reversal of the trial court's decision in this case. She was arbitrarily denied the ability to present witnesses with knowledge of relevant facts in the case. The trial court concluded she engaged in abusive use of conflict without making factual findings sufficient to support such a conclusion, such as how any of Mozer's actions could have affected the child. And the trial court allowed Brown to present a proposed parenting plan at trial which Mozer had never seen before.

Mozer was doing all she knew how to do to protect her daughter from harm she perceived to be coming from Brown. Whether she was correct in her assessment of Brown or not, she deserved the chance to make her case, her entire case, to the trial court. She also deserved a well-reasoned and supportable conclusion from the trial court. She got neither.

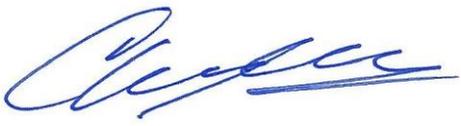
Her appeal here is simply not frivolous. There should be no award of attorney's fees in this case.

II. CONCLUSION

For the reasons set forth herein and also set forth in her opening Brief, Mozer requests that the trial court's decision be reversed and this case be remanded for a new trial. Mozer requests that she be allowed to present her witnesses at trial, Brown's proposed parenting plan be provided at least 14 days in advance of trial, and that the trial court be ordered to refrain from utilizing the friendly parent doctrine in reaching its decision.

DATED this 8th day of October, 2019.

Harbor Family Law

By: 
Chris D. Maharry, WSBA #34462
Of Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be e-served and sent via E-mail a copy of the foregoing Appellant's Reply Brief to:

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October 08, 2019 - 1:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52742-1
Appellate Court Case Title: Parenting of G.N.M.-B., Christopher A. Brown, Respondent v. Autumn L. Mozer, Appellant
Superior Court Case Number: 17-3-02872-9

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