FILED

NOV 25 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 316904-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re Marriage of

CINDY BROWN

Appellant

v.

LAWRENCE BROWN

Respondent

BRIEF OF RESPONDENT

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ORIGINAL

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I: ISSUES

1) Whether Appellant was properly sanctioned when she filed a motion for postsecondary review without a factual basis for the court to weigh and consider.

2) Whether Appellant should have realized that the motion for postsecondary support was factually baseless when filed.

3) Whether a minor and irrelevant factual error by the trial court concerning the age of the children for whom Appellant sought postsecondary review renders the lower court's decision untenable or invalid.

4) Whether RCW 26.09.140 creates a "responsibility to consider attorney fees" when the plain language of the statute employs words of discretion and the underlying legal action is baseless.

II: STATEMENT OF THE CASE

Respondent accepts the Appellant's statement of the substantive and procedural facts. Any additional facts relevant to the respondent's argument will be included in the argument portion of this brief.

III: ARGUMENT

A) The trial court's decision should be affirmed as the Appellant brought pre-mature action for post secondary motion before the facts were even developed which would have allowed the court to weight the factors under RCW 26.19.090(2).

The proper standard of review for sanction orders is abuse of discretion. *See Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P. 2d 1054 (1993) & *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218, 829 P. 2d 1099 (1992). CR 11 was designed to: (1) deter baseless filings; (2) curb abuses of the judicial system; and (3) reduce delaying tactics, procedural harassment, and mounting legal costs. *Bryant v. Joseph Tree,* at 219. The intended effect of CR 11 is to provoke parties and

attorneys to "stop, think and investigate more carefully before serving and filing papers." *Id.*

The controlling statute for post secondary support RCW 26.19.090(2) states that:

> When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child **is in fact** dependent **and is relying** upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: age of the child; **the child's needs**; the expectations of the parties for their children when the parents were together; **the child's prospects, desires, aptitudes, abilities or disabilities**; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

(Emphasis added).

Yet, in the present case, almost none of the facts had been developed which would have permitted the court to even consider the factors outlined in RCW 26.19.090(2). The trial court correctly determined that the issue was not "ripe for decision from the court" for either of the two children, saying it would not speculate on what the educational "needs, desires, aptitudes, abilities or disabilities" of children will be, two to seven years prior to even applying for college. RP 2. The court expressed frustration with the nature of the Appellant's motion, because: "there are virtually no facts that have been provided that don't require speculation by the court. Nearly every fact...that's been provided, in fact would require the court to assume things that the court simply cannot assume." RP 4-5. Appellant's position in the matter has been to request that trial court ignore the factors required to be considered

under RCW 26.19.090(2) and simply asserts that it would be efficient to have considered post secondary support years before the case was ripe.

A claim is baseless and is the proper subject of a CR 11 sanction if it lacks a factual or legal basis. *Bryant v. Joseph Tree, Inc.* at 220. In the present case, seeking postsecondary educational support on behalf of children without providing a factual basis to even suggest that either child is even committed to pursuing a post-high school degree is tantamount to filing a claim that lacks a factual basis. Appellant effectively hoped to secure postsecondary educational support on the basis of conjecture and speculation. Bizarrely, appellant even sought post secondary support for the parties' 11 year old child.

Once a complaint is found to lack a factual or legal basis, the court must find that "the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim." *Bryant v. Joseph Tree, Inc.* at 220. The reasonableness of a party or attorney's inquiry is evaluated by an objective standard under the circumstances. *Id.* Even a cursory reading of RCW 26.19.090 reveals that filing a motion for postsecondary educational support for an 11 year-old child is premature and without a legal or factual basis. More importantly, CR 11 conveys the necessity that a party provide the court with present day facts concerning the child's aspirations, abilities, etc., which RCW 26.19.090(2) requires courts to base their decision on.

Appellant notes that CR 11 was never intended to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Condon v. Condon*, 177 Wn.2d 150, 166, 298 P. 3d 86, 93-94 (2013). However, when the appellant

requires the court to become "creative" – guess or speculate what the parties' children might aspire or have the aptitude to be several years down the road, the court acted within it's discretion to find that the appellant's action was baseless. The plain language of RCW 26.19.090(2) should have made it obvious to Appellant that the motion required Appellant to present the court with present day facts concerning the children factors for awarding post secondary support.

B) The plain language of RCW 26.19.090(2) demands that motions must be accompanied by present day facts, which enable courts to make fact-based decisions with regard to the issue of postsecondary support.

Appellant acknowledges precedents where postsecondary was denied or held to be premature when the children who were the subject of the motion were eight-years-old or younger. *See In re Parentage of Goude,* 152 Wn.App. 784, 219 P. 3d 717 (2009); *In re Marriage of Kelly*, 85 Wn.App. 785, 934 P. 2d 1218 (1997).

The plain language of RCW 26.19.090(2) requires present facts which are sufficiently ripe enough for the court to begin the analysis for post secondary support. Neither child was in college when postsecondary support was requested. Neither child had even applied to college. How then could the court determine: 1) whether the children will be "dependent" when they graduate from high school; 2) what college or education facility they would be accepted into, if any at all; 3) the future grades of the children and their likelihood of success; or 4) the financial resources, standard of living of the parents and the children; without requiring "the court to assume things that the court simply cannot assume." RP 4-5. The financial aid, scholarships, educational path, costs of room and board, books, tuition, in or out of state tuition were still unknown. Under the Appellant's reasoning, parties to a

divorce action should be able to bring an action for post secondary support at any time regardless of the age of the child and have the court guess as to the facts and circumstances that will be present under RCW 26.19.090(2) years in the future when and if the children attend college.

The record suggests that Appellant understood at the time that this motion was premature. As Commissioner Rugal explained:

> I understand that Ms. Brown's argument is that they have to enroll at some point in the future and if some of those things change that then we can come back and that would save money today. Although I can't see how that would because if we use the past as any gauge of the future we know that legal costs are going to continue to be rising...I appreciate Ms. Brown giving that advice to her client that in fact that this would save money, although I don't agree that it would, but I don't know that for sure.

RP: 4-5.

> C) The minor discrepancies in the age of the parties' children is irrelevant to the issue before the court as they were far too young for many of the factors in RCW 26.19.090(2) to have been considered.

The parties child Christian Brown was born March 14, 1996, and Carson Brown was born June 16, 2000. Thus, the children were 16 and 11, respectively, on the date of filing of the petition and were 16 and 12 by the time postsecondary support was denied and sanctions were given. The differences of the ages of the children is not one that makes a difference. Naturally, it is the age of the children on the date of *filing* of the petition for post secondary support that controls.

Yet, based on these discrepancies, Appellant cites *Katare v. Katare*, 125 Wn.App. 813, 822-823, 105 P.3d 44, 48-49 (2004) to argue that the Court abused its discretion to grant sanctions. *Katare v. Katare* declared that:

> A trial court abuses its discretion if its decision is manifestly

> unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id. (emphasis added). However, the case of *Katare* is much different.

In *Katare v. Katare* the trial court entered inconsistent and contradictory findings regarding its concerns about the risk of the father's abducting his children and taking them to India. *Katare v. Katare*, 105 P.3d at 45. Although the trial court concluded there was no basis for finding that the factors in RCW 26.09.191 justified imposing restrictions in the parenting plan, and that the father did not present a serious risk, the court imposed restrictions on the father's visitation because of earlier threats – witnessed by others – to take the children to India and the irreversible consequences of abduction. *Id.* at 46. On review, the court remanded the case to clarify its intent with regard to foreign travel restrictions. *Id.* at 45. The only abuse of discretion the court found was a restriction in the parenting plan prohibiting the father from taking the children outside a two-county area in Florida, which the Court of Appeals concluded was not logically related to the trial court's concerns for abduction and was not supported by any evidence in the record. *Id.* at 53.

Likewise, RCW 26.19.090(2) provides the court with the discretion, not the obligation, to provide postsecondary support and outlines a series of factors which the court must weigh first before it can exercise its discretion. As discussed, the plain language of the statue requires the court to work with facts, not forecasts for

the future. It is clear that the Court denied postsecondary support and granted partial sanctions because of the absences of facts that would have enabled to have the court weigh the relevant factors. As the Court explained: "I don't feel that the issue is ripe for decision from the court either *for the* 15 year old *or the* 11 year old." RP 2: 5-7 (emphasis added).

By qualifying the ruling with the word "the" instead of "a", the court was not declaring that all motions for postsecondary support on behalf of 15 year-olds are premature. There may be some exceptional students who enter college at 15 or 16. However, in the present case, neither of the parties' children had even applied to college and one was only 11 years old. But before the court can grant postsecondary support, it must be presented with developed facts to start the process of applying the factors under RCW 26.19.090(2).

As the Court explained, again and again:

> We don't know what the child's needs are for the post-secondary support purposes. Although I understand that Ms. Brown's argument is that the child's' needs can be determined or at least could be determined as of today's date, but at 11 years old it's a little early for thinking that we're going to send the kid to college.

RP 2:16-21

> I don't know what the child's prospects would be at 11 years old. At l5 years old at least at this point it looks, you know, likely I guess, but we don't know that for sure.

RP 3:1-4

> Well we do know that the desires of at least...one of the kids was that he either wanted to be dentist or a physical therapist, and I think I heard today that he may go into the service. So we're not exactly sure what the desires are. We certainly don't know what the desires of the 11 year old are.

RP: 3:5-10.

The Court went on to say that: (1) not much information concerning the aptitudes or disabilities of the children had presented, but that both were likely to change as they got closer to college; (2) the nature of the postsecondary support sought could not be determined because "we don't have any idea where they would go"; and (3) neither child had yet enrolled in an accredited academic or vocational school and no evidence was presented that either child was pursuing a course of study commensurate with any vocational goals. RP 3-4. It was this absence of facts that made the motion premature, baseless and caused the court to lament that "there are virtually no facts that have been provided that don't require speculation by the court. Nearly every fact...that's been provided, in fact would require the court to assume things that the court simply cannot assume." RP 4-5.

In short, the court's decision was not based upon unsupported facts, but rather in response to Appellant's attempt to substitute forecasts for facts. The court could thus only conclude, based upon a plain reading of RCW 26.19.090(2), that it lacked the discretion to act on an unripe undeveloped case. The postsecondary support issue in this case truly had "no basis in fact" to pursue. Hence, it was well within the trial court's discretion to find that indeed there was no basis in fact or law to pursue her action for children years away from even applying to college.

D) The trial Court acted within its discretion to decline any request for attorney fees given the lack of merit to the motion.....11

RCW 26.09.140 declares that:

> *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 attorneys' fees or other professional fees in connection therewith...

(Emphasis added).

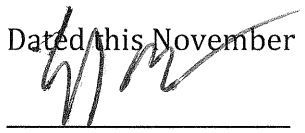
Nothing in RCW 26.09.140 creates a responsibility for the court to consider granting attorney fees to a party who has filed a factually baseless claim. Likewise, for reasons already outlined above, fees for pursuing an appeal are not warranted under the facts of this case.

Furthermore, the appellant should not be financially rewarded for bringing a premature and baseless action without a basis in fact or law.

IV: CONCLUSION

Mr. Brown asks the Court to affirm the trial court's decision to sanction the Appellant for filing and continuing to pursue a factually baseless motion, years premature and without facts developed to even permit the court to begin applying the factors under RCW 26.19.090(2). The trial court's decision was well within its discretion.

Dated this November 22, 2013



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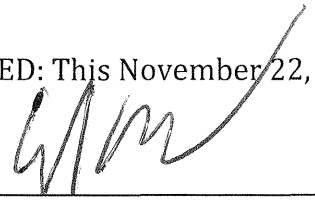
V. CERTIFICATE OF SERVICE

ERIK BJORNSON being first duly sworn under penalty of perjury under the laws of the state of Washington oath states that on November 21, affiant deposited in the mail of the United States Post Office a properly stamped envelope with the proper amount of prepaid postage to the attorney for the Appellant Amy Rimov at 505 W. Riverside, Suite 400, Spokane WA 98201 the brief of respondent.

DATED: This November 22, 2013



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