

FILED

SEP 14 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 308511

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In re the Marriage of:

RICHARD T. WIXOM

Appellant,

And

ROBERT E. CARUSO,

Appellant/Judgment Debtor,

v.

LINDA B. WIXOM,

Respondent.

APPELLANT'S BRIEF RE: SANCTIONS

Michael J. Gainer, WSBA # 20219
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II. INTRODUCTION

Appellant has once again been placed in a Catch-22 position by his former attorney, Robert Caruso. Should Appellant (1) stay in the same boat as Mr. Caruso, relying on his advice and strategy, with the hope that this court will agree that the trial judge abused his discretion, or (2) jump ship and get new counsel to review Mr. Caruso's conduct and strategy, with the hope of minimizing any penalties Appellant might receive for following Mr. Caruso's advice.

On the one hand, Mr. Caruso stopped billing Appellant after the trial and took care of any fees, costs or deposits required to move forward with the appeal. It was not unreasonable to expect Mr. Caruso to indemnify Appellant for any fees and costs awarded due to his conduct, whether found to be intransigence, CR 11 or frivolous. Until Appellant received and reviewed this court's August 12, 2014, opinion, he reasonably relied on Mr. Caruso's education, experience and training as a divorce attorney in pursuing all actions since he was retained. Mr. Caruso is an experienced, articulate, persuasive divorce attorney who convinced his client that what was happening throughout the case was typical; aggressive, but typical.

On the other hand, when Judge Triplet made his Findings of Fact

and Conclusions of Law, it called into question whether Mr. Caruso's strategy and conduct might have been beyond what is typical in a custody case. However, still relying on Mr. Caruso's expertise, Appellant agreed to pursue the present appeal.

This court made Appellant's choice for him in its August 12, 2014, opinion when it explained the clear conflict of interest and removed Mr. Caruso from representing Appellant. Mr. Caruso could have avoided the conflict by (1) not throwing his client under the bus or (2) agreeing to indemnify his client. He chose to throw his client under the bus and hire new counsel to drive the bus.

Appellant respectfully requests that this court reverse the trial court's decisions requiring him to pay anything to Respondent or her counsel and requests that if anything is required to be paid, that it be paid by Mr. Caruso. Although he realizes all briefs have been filed relating to the other issues on appeal, Appellant nevertheless withdraws any and all assignments of error that do not relate to the attorney's fees, costs, intransigence, CR 11 issues and apportionment between Mr. Caruso and Appellant.

II. ARGUMENT

A. Appellant Withdraws Assignments of Error Not Related to Attorney's fees and Costs Issues.

Appellant understands that he has the burden of showing that the trial court manifestly abused its discretion in its findings and conclusions - manifestly unreasonable or based on untenable grounds or untenable reasons.

Trial court decisions in a dissolution action will seldom be changed upon appeal—the spouse who challenges such decisions bears the heavy burden of showing a **manifest abuse of discretion** on the part of the trial court. *In re Marriage of Landry*, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). A 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.* at 47, 940 P.2d 1362.

In re Marriage of Bowen, 168 Wn.App. 581, 586-87, 279 P.3d 885 (Wash.App. Div. 3 2012)(emphasis added).

Appellant does not believe he can meet this burden relating to any issues that do not relate to the attorney's fees, costs, intransigence, CR 11 issues and apportionment between Mr. Caruso and Appellant. Therefore, he hereby withdraws all assignments of error that do not relate to these issues. Moreover, he also does not support the anticipated assignments of

error or arguments Mr. Caruso's new attorney has made and is anticipated to reargue relating to "Telephone call by daughter of Judge Triplet to Robert Caruso," as set forth in his Motion For Reconsideration Or To Be Allowed To File Brief, page 5, filed on or about September 2, 2014. It was and is a nonissue we all waived at trial.

B. The Trial Court Erred When It Awarded Attorney's Fees and Costs Jointly And Severally Against Appellant And His Attorney; Attorney's Fees And Costs Should Be Borne by Mr. Caruso.

The court erred in finding that Appellant was responsible for the actions, strategy and legal decision made by his attorney. A review of the Findings of Fact reveal that the basis for awarding attorney's fees and costs was the conduct of Appellant's attorney Mr. Caruso, strategy orchestrated by Mr. Caruso or advice given by Mr. Caruso. Mr. Caruso's conduct and advice were the major, if not the sole, reason the court awarded sanctions. He should be solely responsible for them.

The following are some examples from the findings showing Mr. Caruso's abusive tactics. Mr. Caruso requested GAL action and then denied further contact between GAL and Appellant. (FF 57, CP 1110). "Mr. Caruso insinuated [GAL] may be subject to a potential lawsuit" (FF 61, CP 1110). Appellant's "failure to raise these issues until after he retained new counsel [(Mr. Caruso)] causes the Court to doubt" (FF

75, CP 1112). “All of the other allegations by [(Appellant)] . . . come nowhere close to the type of detriment that is necessary in order to establish a basis for a major modification.” (FF 96, CP 1115). Appellant’s requests for fees were based on Mr. Caruso’s legal analysis. (FF 116, CP 1117). Respondent’s requests for fees were based on Mr. Caruso’s conduct and advice. (FF 117, CP 1117). Court dismisses arguments based on Mr. Caruso’s legal actions and advice. (FF 119-125, 139, CP 1117-19). “Mr. Caruso insinuated Ms. Lund [(GAL)] was biased” (FF 140, CP 1119-20). “There is absolutely no evidence to suggest Ms. Lund was biased” (FF 141, CP 1120). Appellant “and Mr. Caruso assert a misrepresentation occurred” (FF 143, CP 1120). Appellant “and Mr. Caruso spent a great deal of time [at trial] establishing The court could find no evidence” (FF 145-46, CP 1120). “Any assertion of fraud or misrepresentation . . . is simply without merit.” (FF 150, CP 1120-21). Frivolous arguments made by Mr. Caruso. (FF 151-157, CP 1121). “Mr. Caruso advised [Appellant]” (FF 164, CP 1122). “Mr. Caruso and [Appellant] decided to take advantage” (FF 165, CP 1122). “Mr. Caruso called the GAL” Appellant “and Mr. Caruso decided to raise every possible argument to support his modification” (FF 180, CP 1123). “This was an all out war against

Linda Wixom from that time through trial.” (FF 182, CP 1123). Appellant “and Mr. Caruso engaged in a course of conduct that was not in good faith beginning in late July 2011 and continued through trial.” (FF 183, CP 1123). Appellant “and Mr. Caruso engaged in a course of conduct that was not in good faith beginning in late July 2011 and continued through trial.” (FF 182, CP 1123).

Moreover, the Findings of Fact include findings making it clear that the behavior and tactics that led to the award started when Mr. Caruso appeared in the case. “The events of July 29, 2011 represent the clear dividing point in this case.” (FF 158, CP 1121). “Prior to July 29, 2011 there had never been a contempt proceeding nor the type of litigation that occurred after July 31, 2011.” (FF159, CP 1121). “There is one significant event that occurred shortly before this exchange that explains the chaos and dysfunction. Shortly before July 29, 2011, [Appellant’s] previous attorney withdrew and he retained Mr. Caruso. That day, that weekend, and virtually every part of this case became chaotic and dysfunctional from that point forward. (FF 163, CP 1122).

There was no evidence of a “conspiracy.” This has been a case of a client relying on his attorney and suffering the consequences. Appellant relied on the expertise of his attorney Mr. Caruso in deciding the

legitimate strategy and actions to pursue. When a client hires an attorney, it is reasonable to rely on the attorney's expertise. What allegations should be pursued? What is relevant? What can be proved? What motions should be brought? Who should be called at trial? What issues should be addressed?

In the present case, Appellant presented his information and thoughts to his attorney, Mr. Caruso, and Mr. Caruso decided how to proceed and acted. That's why Appellant hired his attorney. Between Mr. Caruso and his client, Mr. Caruso was in the position of advising and acting on the information provided. If it is found that the actions Mr. Caruso took are frivolous, unfounded and intransigent, Mr. Caruso should bear the sanctions, not Appellant.

C. Sanctions Should Be Awarded Against Mr. Caruso and Not Appellant.

It is anticipated that Mr. Caruso will argue that sanctions cannot and should not be awarded against him as the attorney, even though sanctions were the result of his advice, conduct and strategy. Sanctions can clearly be awarded against the attorney and only the attorney when it is the attorney's conduct that caused the sanctions. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). In *Bryant*, the Supreme Court addressed a number of the arguments it is anticipated Mr. Caruso's

new attorney will bring. Although the court in Bryant was addressing CR 11 sanctions, the same reasoning should be applied to an attorney's intransigence.

Division II addressed the issue of whether the attorney, who should be in control as the expert hired by the client, should be sanctioned:

A famous lawyer once said: "About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop." Consistent with that admonition, CR 11 allows courts to sanction lawyers who do not know when to stop.

Watson v. Maier, 64 Wn.App. 889, 891, 827 P.2d 311 (1992)(footnote omitted.) In the present case, Mr. Caruso was hired as the experienced, expert attorney he is to represent Appellant. He had a duty not to harass, frustrate and abuse the system as found by Judge Triplet. His conduct was so very bad that Judge Triplet awarded sanctions. The sanctions should be upheld against him alone and not Appellant. This court should also award sanctions to Appellant against Mr. Caruso for pursuing his attacks on Appellant and trying to shift the sanctions solely to Appellant.

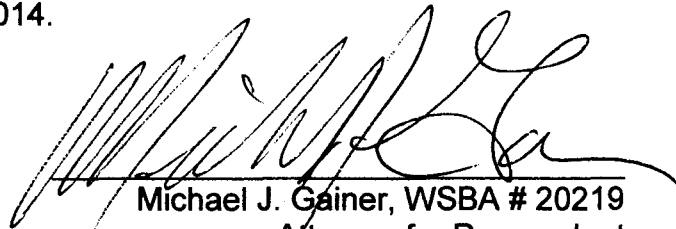
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III. RELIEF REQUESTED

Appellant respectfully requests that this court dismiss any appellate issues that do not relate to the sanctions, reverse the trial court's decision awarding sanctions against Appellant and, if it awards sanctions, award them against Mr. Caruso alone. Appellant also requests sanctions against Mr. Caruso for proceeding with this appeal while trying to throw Appellant under the bus.

Dated: September 5, 2014.

A handwritten signature in black ink, appearing to read 'Michael J. Gainer', is written over a horizontal line.

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Declaration of Service re:

APPELLANT'S BRIEF RE:
SANCTIONS AND NOTICE
OF APPEARANCE

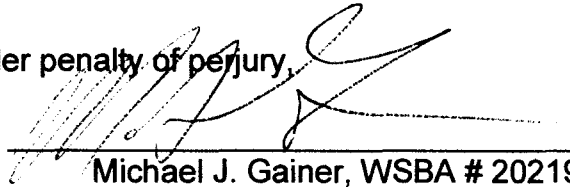
On this date, I personally delivered a true and correct copy
of the APPELLANT'S BRIEF RE:SANCTIONS AND NOTICE OF
APPEARANCE and this Declaration of Service to:

Kenneth H. Kato
1020 N. Washington St.
Spokane, WA 99201
Attorney for Respondent

And
Stephen Eugster 2418 W. Pacific Avenue
Spokane, WA 99201-6422

September 5, 2014.

Respectfully submitted under penalty of perjury,

A handwritten signature in black ink, appearing to read 'Michael J. Gainer', is written over a horizontal line. The signature is stylized and cursive.

Michael J. Gainer, WSBA # 20219

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