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COURT OF APPEALS OF
THE STATE OF WASHINGTON DIVISION THREE

SEP 26 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30851-1-III

IN RE THE MARRIAGE OF:

RICHARD TODD WIXOM,

Appellant,

and

LINDA BUCHHOLZ WIXOM,

Respondent,

and

Robert E. Caruso,

Additional Appellant.

RESPONSE OF ROBERT E. CARUSO TO BRIEF OF RICHARD T. WIXOM

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I. INTRODUCTION

This brief is in response to the brief of Richard T. Wixom entitled Appellant's Brief Re: Sanctions, dated September 5, 2014.

II. STATEMENT OF FACTS

The trial court entered an Order as follows:

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR 11 Sanctions and Attorneys Fees based on intransigence.

Order, CP 1132, fourth paragraph.

The judgment entered by the trial court was \$57, 531.58.

Judgment Summary CP 1166.

The \$57, 531.58 amount was the attorney's fees to be paid under the order – the “90% amount of the Linda Wixom’s attorneys” Such entire amount ordered was for “Attorneys Fees based on intransigence.”

Order, CP 1132, fourth paragraph.

No amount was ordered which represented CR 11 Sanctions.

Brief of Robert E. Caruso dated September 5, 2014 (Brief) 12 - 14.

Mr. Wixom (1) "requests that this court reverse the trial court's decisions requiring him to pay anything to [Linda Wixom] or her counsel" and (2) "requests that if anything is required to be paid, that it be paid by

Mr. Caruso." Appellant's Brief Re: Sanctions (herein R. Wixom Brief) 2, 9.

III. SUMMARY OF ARGUMENT

Mr. Caruso has shown in his Brief that "CR 11 Sanctions and Attorneys fees based on intransigence" cannot be imposed against him. Brief at 10 and following, 15, 16, and 18 and following.

In this Response, with attention to Mr. Wixom's arguments, Mr. Caruso again shows that "CR 11 Sanctions and Attorneys Fees based on intransigence" cannot be imposed on Mr. Caruso, and that they cannot be shifted from Mr. Wixom to Mr. Caruso.

IV. ARGUMENT

A. Summary of What Mr. Caruso Has Previously Established.

Mr. Wixom takes the position that the "court erred in finding that [he] was responsible for the actions, strategy and legal decision made by his attorney." R. Wixom Brief at 4. He asserts that Mr. Caruso should be "solely responsible" "attorney's fees and costs." *Id.*

Although Mr. Wixom refers to "sanctions" which relate to CR 11 sanctions, Mr. Wixom also uses the term to refer to the attorney's fees award based upon Mr. Wixom's intransigence. Order, CP 1132.

As Mr. Caruso has previously shown, there can be no award of sanctions in this case either against Mr. Wixom or Mr. Caruso. CR 11

does not apply to Mr. Wixom or Mr. Caruso. The elements required for CR 11 sanctions have not been met by the trial court. For example, there is no showing or conclusion that the sanctions under CR 11 imposed by the court were based upon a pleading. Brief generally and at 10 and following and 15 and following.

Further, as Mr. Caruso has shown, he cannot be held responsible for the intransigence of his client, Mr. Wixom. Attorney's fees based upon an exception to the American Rule – that attorney's fees can be awarded in a domestic relations case based upon intransigence may be imposed against a party in a domestic relations case. Brief at 14 and at 16. The exception, as shown, can only applied to a party in a domestic relations case. Brief 16.

B. CR 11 Sanctions.

Mr. Wixom argues that "sanctions can clearly be awarded against the attorney and only the attorney when it is the attorneys conduct that caused the sanctions." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). Mr. Wixom is in error. *Bryant v. Joseph Tree, Inc.* does not stand for what Mr. Wixom says it stands for. CR 11 sanctions are not limited just to attorneys. *See also*, CR 11.

C. Attorneys Fees for Intransigence.

Mr. Wixom goes on to say that although *Bryant* was “addressing CR 11 sanctions , the same reasoning should be applied to an attorney’s intransigence.” R. Wixom Brief at 8. Thus, the *Bryant* case is cited for this proposition. *Bryant* in no way supports this proposition, this “reasoning.”

It is not the law in Washington that an attorney in a domestic relations case can be ordered to pay attorney's fees under the intransigence exception to the American rule pertaining to attorney's fees. Brief at 16.

Next, Mr. Wixom asserts that "Division II addressed the issue of whether the attorney, who should be in control as the expert hired by the client, should be sanctioned." R. Wixom Brief at 8. The case of *Watson V. Maier*, 64 Wn. App. 889, 891, 827 P.2d 311 (1992) is cited for this proposition. Specifically, the following quotation from the case to supposedly make the point.

A famous lawyer once said: "[a]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." [fn1] Consistent with that admonition, CR 11 allows courts to sanction lawyers who do not know when to stop.

The omitted footnote provides:

Elihu Root, THE UNITED STATES SECRETARY OF STATE FROM 1905 TO 1909, quoted in *McCandless v. Great Atl. & Pac. Tea Co.*, 697

F.2d 198, 201-02 (7th Cir. 1983).

Again, a case cited by Mr. Wixom as a basis for a proposition clearly does not stand for the proposition. More so, the selection Mr. Wixom has taken from the case does not even support the proposition.

The quotation is not a holding. It is quite unrelated to the holding of the court in *Watson v. Maier*. The quotation does not even rise to the level of dictum. It is merely an introductory statement.

D. Attorneys Fees on Appeal.

Mr. Wixom says that he “also requests sanctions against Mr. Caruso for proceeding with this appeal while trying to throw [Mr. Wixom] under the bus.” R. Wixom Brief at 9.

RAP 18.1 requires that if attorneys fees are sought on appeal they must be made a part of an argument in the claimant’s brief and the specific basis for the award of attorney’s fees should be delineated and argued. It is axiomatic that a party seeking attorney fees under RAP 18.1 must provide argument and citation to authority supporting its request. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 704 - 705, 915 P.2d 1146 (1996).

To receive an award of attorney fees on appeal, a party must devote a section of the brief to the fee request. RAP 18.1(b). The rule requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required

under the rule. [Citations omitted.]
Id.

Mr. Wixom has failed to make a request for attorneys fees in this proceeding.

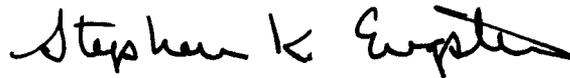
Furthermore, the appeal by Mr. Caruso is not in any way frivolous. Furthermore, Mr. Wixom is not trying to "throw appellant under the bus." Mr. Caruso is merely saying that the court cannot impose attorneys fees for CR 11 sanctions against him and that it cannot impose attorneys fees based upon intransigence against him.

V. CONCLUSION

CR 11 sanctions and attorneys fees for intransigence cannot be imposed against Mr. Caruso. Further, Mr. Caruso cannot be ordered to indemnify or be jointly and severally liable for Mr. Wixom's CR 11 sanctions and attorney's fees for a party's intransigence.

September 26, 2014.

Respectfully submitted,
EUGSTER LAW OFFICE PSC



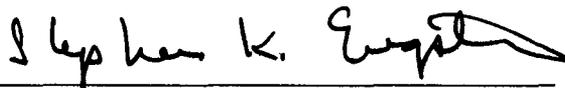
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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served this Brief of Additional Appellant Robert Caruso on the people identified below and in the manner so designated opposite their names, on September 26, 2014.

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Signed at Spokane, Washington on September 26, 2014.



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