

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

97528-1

Court of Appeals # 51273-4-II

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

---

CARMALITTA ESCARCEGA, Respondent

v.

DANIEL J. BARRETT, Petitioner

---

PETITION FOR REVIEW

---

Daniel J. Barrett  
Appellant, pro se  
PO Box 361  
South Prairie, WA 98385  
DanielJBarrett@outlook.com

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**A. IDENTITY OF PETITIONER**

DANIEL J. BARRETT asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Appellant asks for review of the Court of Appeals Division Two order granting attorney fees. The order granting attorney fees was entered on May 14, 2019. This Petitioner motioned for reconsideration, which was denied on July 10, 2019, starting the tolling of time until today for the deadline to petition for review.

A copy of the original order granting attorney fees is in the Appendix at pages A-1 through A-5. The ruling is in the first paragraph on page A-5. A copy of the order denying Petitioner's motion for reconsideration is in the Appendix at page A-6.

**C. ISSUE PRESENTED FOR REVIEW**

Issue No. 1: The only issue of this Petition is the award of attorney fees on appeal. This court should accept review and reverse that part of the order.

**D. STATEMENT OF THE CASE**

I prevailed in the Court of Appeals Division Two. See A-4 to A-5.

But, Division Two awarded attorney fees to the non-prevailing party and cited RAP 18.1 a statute that favors me (RCW 26.09.140) See last paragraph of A-4. You can see these authorities favor me in the argument below. Division Two violated multiple other well-established case law decisions and policies...the same policies that Division Two said the superior court ignored.

In Pierce County Superior Court, I sought termination of a restraining order, entered because of a lack of father/children bond, after several months of no contact between this Petitioner/father and his children with Respondent. At the last hearing with oral argument in superior court, my attorney of record was a no-show and the judge was angered with him, since there had already been previous continuances. The Respondent was therefore awarded attorney fees.

On May 14, 2019, the Division Two held that that the Superior Court judge did NOT follow public policy when granting an award of attorney fees. Division Two remanded for that judge to reconsider her decision in light of the law and public policy. See A-4 to A-5.

So, this Petitioner prevailed on appeal.

The Respondent requested attorney fees with the entirety of her argument resting on RAP 18.1. See index of her brief on A-36 mentions page 8 as the argument for "Attorney Fees". Page 8 of Respondent's brief is A-45. Section IV on that page has ONE sentence therein and it only cites RAP 18.1 as an authority. RAP 18.1 basically states a hypothetical by saying "IF there is a legal authority"...but she did not cite one other than the rule which requires a different authority.

The Court of Appeals granted the requested fees. See A-5.

This Respondent moved for reconsideration. The Motion for Reconsideration is attached herewith as A-13 to A-28. That argument is incorporated herein by reference and should persuade this court to accept

review, along with the argument below.

In short, and ironically, the Court of Appeals violated the SAME public policy that the Court of Appeals said Pierce County Superior Court violated. To wit, Division Two said, in essence, “Pierce County judge cannot award attorney fees without considering public policy first. But, we WILL award attorney fees on appeal WITHOUT considering that same public policy.”

The court awarded attorney fees automatically with a vague reference to RAP 18.1 and RCW 26.09.140 which has been expounded upon in case law below. To wit, that statute and the subsequent public policy require that the Respondent prove BOTH:

(1) her need for help to pay fees, and

(2) my ability to pay her fees.

Her own Financial Declaration states that she paid a significant portion of her fees and had an agreed low repayment plan of the balance. See A-33, last page of Financial Declaration (entire document starts at A-29. That proves that she has no need. She is disqualified from an award of fees by that alone.

Moreover, she did not even attempt to prove the other element (my ability to pay).

## **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

### **1. Court of Appeals found error with Superior Court, then committed the VERY SAME error – outrageous factors for RAP 13.4(b)**

Since Division Two found error with the Pierce County judge’s award of attorney fees without statutory/case law factors considered, then Division Two

committed the same error (awarding attorney fees without following the factors). So, the Court of Appeals committed error under RAP 13.4(b)(1) and (2) violating or being in “conflict” with well-established, long-standing public policy of decisions of this Supreme Court and the appellate courts.

It is rather outrageous that Division Two would err in the same way that the lower court erred and Division Two is the one who found, held and declared the error and remanded. This case reaches the level of outrageous since it defies all the extraordinary rules on departing from the status quo, not following stare decisis and ignoring other decisions of the higher courts.

**2. I prevailed, so I am the one who should be getting any fees awarded**

RCW 4.84.010 allows costs to the prevailing party, including filing fees as stated under subsection .010(1). There’s NO RIGHT of a non-prevailing party when this prevailing party is entitled to costs and fees. RCW 4.84.010 is cited by Division Three in Kalich vs. Clark, 152 Wn. App. 544, 215 P.3d 1049 (2009). Division Two awarded costs when THIS PETITIONER won.

**3. Court MUST consider the circumstances of the parties and then find “need and ability to pay” before awarding attorney fees – no such argument or demonstration of evidence was even attempted by the party who bore this burden to prove these elements**

Neither party is entitled to attorney fees as a matter of right. In re Marriage of Leslie, 90 Wn. App. 796, 805, 954 P.2d 330 (1998), review denied, 137 Wn.2d 1003 (1999).

Requesting attorney fees without authority is reversible error. Our higher courts always, automatically deny attorney fees when **no** authority is cited—even



though everyone knows the maxim regarding attorney fees (“need vs. ability to pay”). For example, In re Marriage of Hoseth, 115 Wn. App. 563, 63 P.3d 164 (2003) reads in part:

“But he cites no applicable authority justifying such an award...Accordingly, James is not entitled to fees. See In re Marriage of Coyle, 61 Wn. App. 653\_665, 811 P.2d 244 (1991).”

The Respondent did cite a rule, RAP 18.1, but that rule says that there has to be another authority that must be cited. So, that rule technically is not an authority in and of itself for granting attorney fees.

A party relying on RCW 26.09.140 "must make a showing of need and of the other's ability to pay fees in order to prevail." Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 808, 929 P.2d 1204 (1997) (citing In re Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97 (1985)).

The Court of Appeals cited the statute above as basis for awarding attorney fees but there was no “showing” on the part of the Respondent. In fact, her “showing” of her Financial Declaration was a self-incriminating “death blow” to her own argument. To wit, Section 5.11 and 5.12 show that Respondent had paid \$5,634.01 out of \$7,671.96 owed. See A-33. And that the balance of \$2,037.95 was being paid on a plan of \$50 easy monthly installments. Her own declaration shows NO NEED for help. She cannot prevail on a request for attorney fees.

This is one of the very reasons that the Court of Appeals found error with the Superior Court.

More specifically, the party requesting the attorney's fees under RCW 26.09.140 must make a **present** showing of need to support the award. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, CERT. DENIED, 473

U.S. 906 (1985).

But, the Respondent never made **any mention** of what statute she relies upon, if any. Moreover, she made **no attempt whatsoever** to “make a showing of need and other the other’s ability to pay” in her request.

But, the Court of Appeals cites and followed the statute below that this Petitioner cited in my briefing (RCW 26.09.140) which reads in part:

**“Payment of costs, attorney’s fees, etc.**

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 attorney's fees **or other professional fees** in connection therewith, including sums for legal services rendered **and costs** incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.”

It was an uncontested fact that Attorney Dan Smith has represented Respondent Escarcega off and on for 16 years. It is obvious that she has paid the attorney up front. He would not represent her consistently for 16 years without any payment. This deductive-reasoning conclusion shows that she HAS the ability to pay. It is HER BURDEN to show that she cannot and the other factor that I can. She didn’t even attempt to do that and attorney fees CANNOT be awarded.

On point is In re the Marriage of Pennamen 135 Wn. App. 790, 808, 146 P.3d 466 (2006). Therein, the court awarded **neither** party fees, as the parties demonstrated **in their financial affidavits** that they had no ability to pay. Financial Declarations are the **bare minimum** method of demonstrating the element of ability to pay.

If one of the two elements is missing then there is no award. Neither of the two requisite elements were present.

**4. There was no substantial evidence to award fees – in fact there was no evidence at al**

Courts must make findings of facts and conclusions of law in entering orders. Its findings and rulings must be based upon clearly construed evidence.

The court's findings of fact must be supported by substantial evidence. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007).

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

The court's findings of fact must, in turn, support its conclusions of law and decree. Rockwell at 242.

Even if the court applied the correct legal standard to any supported facts, it's still untenable and reversible if the court adopts a view that no reasonable person would take. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.2d 638 (1990)).

There is NO EVIDENCE AT ALL, let alone SUBSTANTIAL evidence that the Respondent has any need for help to pay her attorney fees. And there's absolutely not evidence that I can afford to pay her fees. I am pro se now, without the ability to afford my own attorney.

## **F. CONCLUSION**

Division Two abused its discretion by ignoring mandatory public policy in considering attorney fees (and outrageously, it did so after I prevailed on the same issue and error of a superior court judge).

Not only did Division Two depart from the status quo, statute, public policy and the normal course of proceeding and considerations, the judge therein ignored their own ruling in this very case. The issue and guiding authorities were no different than with the superior court issue they found error with...and they committed the exact same error.

Even worse, the Respondent never had a Financial Declaration in superior court. But, when filing one in Division Two, the Respondent incriminated herself and her attorney (with 34 years' experience) that her request for fees was frivolous and not rooted or grounded in fact and law, which actually calls for Civil Rule 11 sanctions against the attorney. He should know better. The request was made solely to harass and financially burden me AFTER the Respondent had already paid over 73% of her balance of attorney fees and had an easy \$50 per month agreement to pay off the balance.

This Supreme Court should accept review, then reverse the award of attorney fees, and then sanction veteran attorney Daniel W. Smith (WSBA# 15206) for making a CR 11 violating, frivolous request for payment of fees when he was already paid and had arrangements to receive the 27% remaining balance.

Respectfully submitted on August 9, 2019.

A handwritten signature in black ink, appearing to read "Dan Barrett". The signature is written in a cursive, flowing style.

Daniel J. Barrett, Appellant, pro se

# APPENDIX

<b>DATE</b>	<b>DESCRIPTION</b>	<b>PAGE #'S</b>
<b>5/14/2019</b>	<b>Court of Appeals Division Two: Unpublished Opinion (remand)</b>	<b>A-1 to A-5</b>
<b>7/10/2019</b>	<b>C of A Div. Two: Order Denying Motion for Reconsideration</b>	<b>A-6</b>
<b>3/6/2019</b>	<b>Financial Declaration of Respondent Carmelita Escarcega</b>	<b>A-7 to A-12</b>
<b>5/28/2019</b>	<b>Motion for Reconsideration (by Petitioner Dan Barrett)</b>	<b>A-13 to A-28</b>
<b>3/6/2019</b>	<b>Financial Declaration of Respondent Carmelita Escarcega</b>	<b>A-29 to A-34</b>
<b>5/1/2018</b>	<b>Brief of Respondent</b>	<b>A-35 to A-45</b>

# APPENDIX

May 14, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

In re the Marriage of:

CARMELITA ESCARCEGA, (f/k/a  
BARRETT).

Respondent,

v.

DANIEL J. BARRETT,

Appellant.

No. 51273-4-II

UNPUBLISHED OPINION

SUTTON, J. — Daniel Barrett filed a motion to lift a permanent restraining order between him and his ex-wife, Carmelita Escarcega. The superior court denied Barrett’s motion without prejudice and awarded Escarcega attorney fees. Barrett appeals, arguing that the superior court erred by awarding Escarcega attorney fees without first finding need and ability to pay. We hold that the superior court failed to develop an adequate record to support an award of attorney fees. Consequently, we remand for entry of findings of fact and conclusions of law regarding the attorney fee award. We also grant Escarcega’s request for attorney fees and costs on appeal.

**FACTS**

In 2002, during a trial regarding custody of Barrett’s and Escarcega’s five children, the superior court awarded Escarcega a permanent restraining order against Barrett.

On May 26, 2017, Barrett filed a motion to lift the permanent restraining order. Barrett did not submit any supporting declaration. On June 30, 2017, the superior court held a hearing on Barrett’s motion and determined it needed more information from Barrett before it could lift the

restraining order. The superior court denied Barrett's motion to lift the restraining order without prejudice and reserved a determination of attorney fees. The superior court ordered Barrett to provide a sworn declaration, treatment records, evaluations, and a current domestic violence evaluation.

After two continuances, the superior court held another hearing on Barrett's motion on September 29, 2017. Barrett appeared at the hearing without his attorney and requested a continuance. The superior court expressed frustration over the delays and that Barrett had still not filed any documentation supporting his motion to lift the restraining order. The superior court denied the motion for a continuance and the motion to lift the restraining order and awarded Escarcega \$3,972.71 in attorney fees.<sup>1</sup> Later, Barrett filed a motion for reconsideration, which the superior court denied.

Barrett appeals the superior court's award of attorney fees.

## ANALYSIS

### I. ATTORNEY FEES- TRIAL

Barrett argues that the superior court erred by awarding Escarcega attorney fees without properly considering Escarcega's need and Barrett's ability to pay.<sup>2</sup> Escarcega responds that under

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<sup>1</sup> The superior court entered a nunc pro tunc corrected order clarifying that Barrett's motion to lift the restraining order was denied without prejudice.

<sup>2</sup> To the extent Barrett attempts to argue that the superior court judge was biased against him or predetermined the fee award, Barrett does not provide sufficient argument or citation to legal authority to support his claim. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court need not consider claims that are inadequately argued or unsupported by relevant authority). Moreover, the record does not support that the superior court judge was biased against Barrett.



RCW 26.50.060(1)(g), the superior court was not required to consider need or ability to pay. Because this case arises under chapter 26.09 RCW and not chapter 26.50 RCW, we agree with Barrett.

We must first determine under what chapter the superior court in 2002 entered the permanent restraining order against Barrett. As relevant here, a restraining order can be based on RCW 26.09.050 or RCW 26.50.060. A restraining order issued under RCW 26.50.060 is labeled an “order of protection.” A restraining order issued under RCW 26.09.050 is issued during proceedings for dissolution of marriage or legal separation. In actions arising under chapter 26.50 RCW, the superior court may exercise its discretion and order the respondent to pay attorney fees and court costs. RCW 26.50.060(g). In actions arising under chapter 26.09, the superior court may only award fees and costs after considering the needs of the requesting party against the other party’s ability to pay. RCW 26.09.140.

Here, the superior court entered the “permanent restraining order” at the conclusion of a trial regarding custody of Barrett’s and Escarcega’s five children. Clerk’s Papers at 139, 162. The order contained the warning mandated by RCW 26.09.050(2). *See State v. Turner*, 118 Wn. App. 135, 140, 74 P.3d 1215 (2003) (determining that an order was issued under chapter 26.09 and not chapter 26.50, in part, because it contained the warning required by RCW 26.09.060). We hold that the permanent restraining order was issued under chapter 26.09, and thus, the superior court’s award of attorney fees is governed by RCW 26.09.140.

We must next determine whether the attorney fee award met the requirements of RCW 26.09.140. “We review statutory attorney fee award decisions for an abuse of discretion.” *In re Marriage of Coy*, 160 Wn. App. 797, 807, 248 P.3d 1101 (2011). RCW 26.09.140 authorizes the trial court to award fees and costs “after considering the financial resources of both parties.” *Coy*, 160 Wn. App. at 807 (quoting RCW 26.09.140). The primary considerations for an award of fees under RCW 26.09.140 are equitable. *In re Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509 (1996). “Lack of findings as to either need or ability to pay requires reversal.” *In re Marriage of Steadman*, 63 Wn. App. 523, 529, 821 P.2d 59 (1991).

Here, neither the superior court’s oral ruling nor its written order awarding fees reflects any consideration of Barrett’s ability to pay or Escarcega’s need. As a result, we hold that the trial court failed to develop an adequate record for appellate review of a fee award. *See In re Marriage of Bobbitt*, 135 Wn. App. 8, 31, 144 P.3d 306 (2006). Consequently, we remand for entry of findings of fact and conclusions of law regarding the attorney fee award.

#### APPELLATE ATTORNEY FEES

Escarcega requests that we award her attorney fees and expenses on appeal “as authorized by RAP 18.1.” Br. of Resp’t at 8. RCW 26.09.140 permits a court to order a party to pay a reasonable amount for the cost to the other party after considering the financial resources of both parties. Escarcega filed a financial declaration indicating financial need. We grant Escarcega’s request for attorney fees and costs for defending against Barrett’s appeal.

No. 51273-4-II

In conclusion, we remand for entry of findings and conclusions regarding the trial attorney fee award and grant Escarcega's request for appellate attorney fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, J.

We concur:



MELNICK, P.J.



GLASGOW, J.

July 10, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In re the Marriage of:

CARMELITA ESCARCEGA, (f/n/a  
BARRETT),

Respondent,

v.

DANIEL J. BARRETT,

Appellant.

No. 51273-4-II

ORDER DENYING MOTION FOR  
RECONSIDERATION

Appellant moves for reconsideration of the Court's May 14, 2019 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. MELNICK, SUTTON, GLASGOW

**FOR THE COURT:**

  
SUTTON, JUDGE

**A - 006**

NO. 51273-4-II

COURT OF APPEALS FOR DIVISION II  
OF THE STATE OF WASHINGTON

CARMELITA ESCARCEGA (fka  
CARMELITA BARRETT),

Respondent,

v.

DANIEL J. BARRETT,

Petitioner/Appellant.

FINANCIAL  
DECLARATION

**I. SUMMARY OF BASIC INFORMATION**

Declarant's Total Monthly Net Income (from § 3.3 below) – \$2,673.46

Declarant's Total Monthly Household Expenses (from § 5.9 below) –  
\$2,324.11

Declarant's Total Monthly Debt Expenses (from § 5.11 below) – \$300.00

Declarant's Total Monthly Expenses (from § 5.12 below) – \$2,624.11

**II. PERSONAL INFORMATION**

2.1 Occupation: Tribal Support Advocate

2.2 The highest year of education completed: MLS-IPL

2.3 Are you presently employed?  Yes  No

### III. INCOME INFORMATION

#### 3.1 GROSS MONTHLY INCOME.

- a. Imputed Income
- b. Wages and Salaries -- \$3,025.60
- c. Interest and Dividend Income
- d. Business Income
- e. Spousal Maintenance From Other Relationships
- f. Other Income
- g. **Total Gross Monthly Income -- \$3,025.60**
- h. Actual Gross Income (Year-to-date) -- \$6,051.20

#### 3.2 MONTHLY DEDUCTIONS FROM GROSS INCOME.

- a. Income Taxes -- \$145.64
- b. FICA/Self-employment Taxes -- \$115.73
- c. State Industrial Insurance Deductions
- d. MANDATORY Union/Professional Dues
- e. Pension Plan Payments -- \$90.77
- f. Spousal Maintenance Paid
- g. Normal Business Expenses
- h. **Total Deductions from Gross Income -- \$352.14**

#### 3.3 MONTHLY NET INCOME. -- \$2,673.46

#### 3.4 MISCELLANEOUS INCOME.

- a. Other miscellaneous income (list source and amounts) -- None
- b. **Total Miscellaneous Income -- None**

### IV. AVAILABLE ASSETS

- 4.1 Cash on hand & deposits in checking/savings accounts -- \$14.00
- 4.2 Stocks and bonds -- None  
Cash value of life insurance -- None
- 4.3 Other liquid assets: -- None

## V. MONTHLY EXPENSE INFORMATION

Monthly expenses for myself and 0 dependents are:

- 5.1 HOUSING.  
Rent, 1st mortgage or contract payments -- \$500.00  
Installment payments for other mortgages or encumbrances  
Homeowner's or Rental Insurance -- \$125.00  
**Total Housing -- \$625.00**
- 5.2 UTILITIES.  
Heat (gas & oil)  
Electricity -- \$150.00  
Water, sewer, garbage -- \$84.94  
Telephone -- \$100.00  
Cable -- \$29.99  
Other:  
**Total Utilities -- \$364.93**
- 5.3 FOOD AND SUPPLIES  
Food for 1 persons -- \$150.00  
Supplies (paper, tobacco, pets) -- \$30.00  
Meals eaten out  
Other:  
**Total Food Supplies -- \$180.00**
- 5.4 CHILDREN.  
Day Care/Babysitting  
Clothing  
Tuition (if any)  
Other child related expenses  
**Total Expenses Children -- \$0.00**
- 5.5 TRANSPORTATION.  
Vehicle payments or leases -- \$401.64  
Vehicle insurance & license -- \$446.62  
Vehicle gas, oil, ordinary maintenance -- \$130.00  
Parking  
Other transportation expenses  
**Total Transportation -- \$978.26**

- 5.6 HEALTH CARE. (Omit if fully covered)  
 Insurance  
 Uninsured dental, ortho., medical, eyecare expenses -- \$51.92  
 Other uninsured health expenses -- \$100.00  
**Total Health Care -- \$151.92**
- 5.7 PERSONAL EXPENSES (Not including children).  
 Clothing  
 Hair care/personal care expenses \$24.00  
 Clubs and recreation  
 Education  
 Books, newspapers, magazines, photos  
 Gifts  
 Other:
- Total Personal Expenses -- \$24.00**
- 5.8 MISCELLANEOUS EXPENSES  
 Life insurance (if not deducted from income)  
 Other: Storage Unit  
 Other:
- Total Miscellaneous Expenses -- \$0.00**
- 5.9 **TOTAL HOUSEHOLD EXPENSES** (The total of Paragraphs 5.1 through 5.8) -- **\$2,324.11**
- 5.10 **INSTALLMENT DEBTS INCLUDED IN PARAGRAPHS 5.1 THROUGH 5.8.**

<u>Creditor/Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>
Alaska Federal C.U.; auto loan	\$28,319.66	February, 2019
Federal Loan Servicing; federal school loan	\$157,109.16	Forbearance



5.11 OTHER DEBTS AND MONTHLY EXPENSES NOT INCLUDED IN PARAGRAPHS 5.1 - 5.8.

<u>Creditor/Description of Debt Payment</u>	<u>Balance</u>	<u>Month of Your Last Payment</u>	<u>Amount of Monthly</u>
Home Depot credit card	\$475.13	2.2019	\$75.00
TJX credit card	\$467.80	2.2019	\$50.00
Les Schwab	\$12,051.18	2.2019	\$75.00
Dr. Stephen Kern	\$1,425.00	2.2019	\$50.00
Campbell Barnett	\$2,037.95	1.2019	\$50.00

Total Monthly Payments for Other Debts and Monthly Expenses – \$300.00

**5.12 TOTAL EXPENSES** (Add Paragraphs 5.9 and 5.11) – **\$2,624.11**

**VI. ATTORNEY FEES**

6.1 Amount paid for attorney fees and costs to date: – \$5,634.01

6.2 The source of this money was: Loan


6.3 Fees and costs incurred to date: -- \$7,671.96

6.4 Arrangements for attorney fees and costs are:

Monthly payments.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Payallup, Washington, on March, 2019.

  
**Carmelita Escarcega**

**CAMPBELL, DILLE, BARNETT & SMITH, P.L.L.C.**

**March 06, 2019 - 3:22 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51273-4  
**Appellate Court Case Title:** Carmelita Barrett, Respondent v. Daniel J. Barrett, Appellant  
**Superior Court Case Number:** 97-3-02158-7

**The following documents have been uploaded:**

- 512734\_Financial\_20190306152129D2326105\_0337.pdf  
This File Contains:  
Financial - Affidavit of Financial Need  
*The Original File Name was Escarcega Financial.pdf*

**A copy of the uploaded files will be sent to:**

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- kwaites@cdb-law.com

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Sender Name: Kimberly Waites - Email: kwaites@cdb-law.com

**Filing on Behalf of:** Daniel W. Smith - Email: dsmith@cdb-law.com (Alternate Email: )

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Phone: (253) 848-3513

**Note: The Filing Id is 20190306152129D2326105**

**A - 012**

**NO. 51273-4-II**

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

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In re the Marriage of:

**DANIEL J. BARRETT, pro se**

Appellant,

v.

**CARMELITA ESCARCEGA**

Respondent.

---

**OBJECTION TO AND/OR MOTION FOR MODIFICATION AND/OR  
MOTION TO RECONSIDER 5/14/2019 ATTORNEY FEE AWAD  
REMAND DECISION**

---

Daniel J. Barrett  
Appellant, pro se  
PO Box 361  
South Prairie, WA 98385  
DanielJBarrett@outlook.com

**A - 013**

### **I. IDENTITY OF MOVING PARTY**

Appellant Daniel J. Barrett is filing this Objection / Motion to Modify.

### **II. RELIEF SOUGHT**

Movant asks this court to modify and vacate or change the part of its 5/14/2019 decision awarding attorney fees on appeal. I also ask the court to reverse its finding that the trial court was not bias, because by NOT finding bias, then by default this court is finding the trial judge incompetent in the law because ONLY one of those TWO explanations explain the total disregard for clear, obvious, basic, fundamental, elementary, well-known, "Legal 101" mandates that are clearly laid out in the case law I thoroughly briefed the trial court on. If this court can remand, but the trial court "just doesn't get it" and it wasn't her pro lawyer / anti-pro-se bias, then it had to be incompetence why she could not get this basic fundamental public policy that this court easily understood.

### **III. REFERENCE TO RECORD**

I incorporate by reference all of my authorities on record in my brief regarding the Respondent's obligation to demonstrate HER need and MY ability to pay, the latter of which she did not

even attempt to do.

For the same reasons this court remanded to superior court, this Court of Appeals also needs to change its decision awarding attorney fees because the Respondent did nothing but file a Financial Declaration (without stating the purpose thereof, so at first it looked like they were adding to the record in order to make an untimely argument for the superior court action).

I especially incorporate Leslie which says that neither party is ENTITLED to attorney fees as a matter of RIGHT. But, this court granted attorney fees just because the mother asked and just because she filed a Financial Declaration, without any explanation – even though the Financial Declaration obviously proves she had no need.

This court violated the Code of Judicial Conduct (CJC) by granting attorney fees just because a WSBA Member comrade (attorney) asked against a pro se appellant, even though I cannot afford it. Section IV of Respondent's brief only devoted a one-sentence request. There was no cost bill. There was no specific statement as to how much attorney fees were billed for appeal. The court just flippantly granted the request JUST BECAUSE THEY ASKED not because they made any argument or fulfilled ANY legal

requirements for such a request.

#### IV. GROUNDS AND ARGUMENT

##### **1. I am the prevailing party and entitled to fees or costs**

RCW 4.84.010 allows costs to the prevailing party, including filing fees as stated under subsection .010(1).

My complaint was that the trial court did not follow the requirements to award fees and did not demand the other party to demonstrate her need and my ability to pay among other statutory errors. This court ordered a remand for her to consider the things that I complained of. I prevailed. Now the trial court has to do what I asked it to do in the first place, but it refused. So a remand, though not a reversal, is still me prevailing.

There's NO RIGHT of a non-prevailing party when this prevailing party is entitled to costs and fees. RCW 4.84.010 is cited by Division Three in Kalich vs. Clark, 152 Wn. App. 544, 215 P.3d 1049 (2009). This court awarded costs based upon the appellant prevailing.

##### **2. One-sentence request only cites RAP 18.1 and doesn't fulfil requirements (only explanation is bias)**

Division Two awarded attorney fees JUST BECAUSE the Respondent asked.

She made a vague reference to RAP 18.1. She did not cite any other authority. This court did legal research for her and advocated for her and came up with RCW 26.09.140, which was not cited by Respondent.

My legal authorities in my brief include Hoseth that says attorney fees cannot be granted when legal authority is not cited. RAP 18.1 basically states a hypothetical by saying “IF there is a legal authority”...but she did not cite one. So, this court did her a favor, did legal research for her, in violation of the CJC and countless public policy against bias, or even the appearance of bias. Why did I have to do a brief that cites legal authorities when this court will ostensibly look up laws when a party fails to cite them? Well, I did that because appellate courts constantly deny relief when no authority is cited because that is not the job of this court to do legal research for a party. But, the court did so here. It's not even the mere appearance of bias, but blatant obvious anti-pro se and pro attorney bias. Even more evidence of this bias is that I PREVAILED on appeal. To wit, I said NO AUTHORITY was followed in superior court. This court remanded for authorities to be followed. I prevailed based upon the REQUIREMENTS of the Respondent having to PROVE her need and also my ability to pay.

That's her burden, not mine. So, this court remanded.

But, astonishingly, this court did not apply the very same authorities to the request on appeal, even though they do apply. The only explanation for this bizarre contradiction is that there is a bias and a formality of a routine to grant attorney fees simply when asked for by a reputable, well-known law firm that these justices likely have associations and/or relationships with.

“Under the appearance of fairness doctrine, a judicial proceeding *is valid only if* a reasonably prudent and disinterested person would conclude that *all parties* obtained a fair, impartial, and neutral hearing.” *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, review denied, 167 Wn.2d 1002 (2009).

Judicial officers must recuse “that is, disqualify themselves from hearing a case” if they are biased against a party or if their impartiality *may* reasonably be questioned. *Meredith* at 903

Due process, the appearance of fairness doctrine, and the Code of Judicial Conduct all require a judge to disqualify herself if she is biased against a party or her impartiality reasonably may be questioned. *In re Matter of Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); CJC 3(A)(5); CJC 3(D)(1).



The test is objective: whether a reasonable person with knowledge of the relevant facts would question the judge's impartiality. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). Prejudice is not presumed, and the party claiming bias or prejudice must support the claim with evidence of the judge's actual or potential bias. State v. Dominguez, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

“...[T]he judge's honesty and integrity serves as a bulwark against prejudice: under CJC Canon 3(D)(1), judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” State v. Chamberlain, 161 Wn.2d 30 (2007).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

Since Respondent filed a Financial Declaration out of the blue with no explanation or clarification or supporting argument, it appeared Respondent did so to supplement the record for TRIAL COURT purposes. I had no idea that it was for appellate court requests for fees. My objection to the Financial Declaration demonstrates my state of mind. This court did not demand a Financial Declaration from me and case law and the statute that this court dug up ON BEHALF OF

Respondent says this court has to consider the resources of BOTH parties. This court did NOT have a Financial Declaration from me and didn't demand or request one. But, then ruled against me in violation of public policy while researching the best statute for a veteran 100 year old law firm as if they needed the help to figure out how to look up the law. This court should have denied for failure to cite authority instead of acting as Respondent attorney's legal secretary. Moreover, this court did not have required elements from both parties to make a decision on the very law this court supposedly relied upon. This shows more bias and also a basis to reverse/vacate or undo that errant decision which would be reversible error.

This court's flippant award of attorney fees is egregious and very disconcerting in that:

- (1) It was done without any authority cited by the Respondent
- (2) It was done without any regard for public policy and the decision flies in the face of the reasoning for remand, so this court properly followed public policy on remand but in the "same breath" said that such public policy doesn't matter on the fee award in this appellate action.
- (3) The only explanation for this contradiction in the same order and total disregard for public policy and this court doing the work for Attorney Dan Smith is bias

- (4) Such bias totally destroys the public's confidence in the court system – which is an egregious violation of this court's duty of care under the CJC to maintain the confidence.

Like the protections of due process, Washington's **appearance** of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. State v. Carter, 77 Wn. App. 8, 12, 888 P.2d 1230 (1995). Under this doctrine, evidence of a judge's actual bias is not required; it is enough to present evidence of a judge's actual **or POTENTIAL bias**. Post, at 619 n.9.

The CJC recognizes that “where a trial judge's decisions are tainted by **even a mere SUSPICION** of partiality, the effect on the public's confidence in our judicial system can be debilitating.” Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).

The Code of Judicial Conduct (CJC) opens up in its Preamble as follows:

[1] An **independent, fair and impartial** judiciary is **indispensable** to our system of justice. The United States legal system is **based upon** the principle that an **independent, impartial, and competent judiciary**, composed of men and women of integrity, will **interpret and apply the law** that governs our society. Thus, the **judiciary plays a central role** in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, **must respect and honor** the judicial office as a public trust

and strive to ***maintain and enhance confidence*** in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety ***and the appearance of impropriety*** in their professional and personal lives. They should aspire at all times to conduct that ensures ***the greatest possible public confidence in their independence, impartiality, integrity, and competence.***

[3] The Washington State Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide. The Code is intended, however, to provide guidance and assist judges in ***maintaining the highest standards of judicial and personal conduct***, and to provide a basis for regulating their conduct through the Commission on Judicial Conduct.”

The actual CJC reads in pertinent part and apposite case law is also cited:

“RULE 1.2

Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that ***promotes public confidence*** in the independence,\* integrity,\* and ***impartiality\**** of the judiciary, and shall avoid ***impropriety and the appearance of impropriety.\****

COMMENT

[1] Public confidence in the judiciary is ***eroded*** by ***improper*** conduct. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises the independence, integrity, and impartiality of a judge **undermines public confidence** in the judiciary.

...[5] Actual improprieties include **violations of law, court rules**, or provisions of this Code. The test for **appearance of impropriety** is whether the conduct would create in **reasonable minds a perception** that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge..."

Removal from office [as] the appropriate sanction in the face of the totality of a judges' conduct which violated previous Canons 1, 2(A), 5(C)(3) and (6)(C) – (now Rules 1.1, 1.2, 2.2, 3.11 and 3.15). In re Anderson, 138 Wn.2d 830, 981 P.2d 426 (1999); and In re Deming, 108 Wn.2d 82, 736 P.2d 639 (1987).

“RULE 2.2

Impartiality and Fairness

A judge shall uphold and apply the law,\* and shall perform all duties of judicial office **fairly and impartially**.\*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be **objective and open-minded**.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

RULE 2.3  
Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, ***without bias or prejudice***.

(B) A judge shall not, in the performance of judicial duties, ***by words or conduct manifest bias or prejudice***, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall ***require lawyers*** in proceedings before the court ***to refrain from manifesting bias or prejudice, or engaging in harassment***, against ***parties***, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making reference to factors that are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding ***impairs the fairness*** of the proceeding and brings the judiciary ***into disrepute***.

[2] ...A judge must avoid conduct that may reasonably be perceived as prejudiced or biased....

**3. Respondent's Financial Declaration PROVES that the Respondent DOES HAVE the ability to pay**

Respondent's Financial Declaration clearly shows in Section VI that she paid \$5,634.01 of the \$7,671.96 billable attorney fees. This payment of \$5,634.01 is almost \$2,000 greater than the trial court award. So, the Respondent has BEEN PAYING fees on a regular basis since that award so she is consistently paying for appellate work.

So, by her own declaration she HAS the ability to pay and is CURRENTLY PAYING on the agreed payment plan that she has with her lawyer. She loses on the RCW 26.09.140 "need and ability to pay" argument JUST ON THAT POINT. She is supposed to also prove my ability to pay which she did not even attempt to do. She loses if she fails on just one. To wit, if I do have the ability to pay but she does not need help, she loses on her attorney fee request. If she has need but I don't have the ability to pay she loses. She has to PROVE BOTH and it is HER burden NOT mine.

A party relying on RCW 26.09.140 "must make a showing of need and of the other's ability to pay fees in order to prevail."

Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 808, 929 P.2d

1204 (1997) (citing In re Marriage of Konzen, 103 Wn.2d 470, 693

P.2d 97 (1985)).

Respondent actually didn't rely on 26.09.140, nor cite any statutory authority at all. But, since this court advocated for her, did legal research for her and cited that law for her, that is what the ruling is relying upon. But, the elements of that statute, according to Id case law are that SHE PROVE both her need and my ability. She didn't prove either, nor attempt to clearly.

More specifically, the party requesting the attorney's fees under RCW 26.09.140 must make a **present** showing of need to support the award. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, CERT. DENIED, 473 U.S. 906 (1985).

Again, the Respondent's Financial Declaration states that she is CURRENTLY PAYING a payment plan of \$50 / month. In Section 5.11. She has the ability to pay that and is doing it.

The requests for attorney fees was a frivolous CR 11 violation just to burden and harass me when the veteran attorney knows that his client can pay and is paying. That law firm has obviously taken this matter personally. Since they are getting paid, there's no reason to request that I also pay them, other than a



personal vendetta. The court should exercise its inherent authority to sanction Dan Smith for even attempting such a frivolous, harassing request.

**4. If this court does not find bias with trial court, then this court, by default is finding incompetence – there can be no other explanation**

How does a judge, with a law degree, years of practice as an attorney and 13 years as a judicial officer (commissioner, ALJ and judge) not understand or rule properly on such a basic, fundamental, well-known, “Legal 101” doctrine such as “need and ability to pay”? How does such a judge ignore a plethora of clearly briefed authorities that require her to follow “need and ability to pay” and all the related mandates when awarding attorney fees?

The only explanations are that she is biased against me and for the opposing attorney OR she doesn’t understand the law OR she doesn’t care about the law and will just do whatever she wants regardless of what the law says.

The first two explanations are disturbing but the last is the most outrageous possibility of all. Surely a judge does not think like that. And since this court says there’s no way there was even the mere appearance of bias, then all that’s left is the trial judge is

incompetent and/or doesn't understand this basic, elementary, obvious law.

It's still obvious that at best there was the appearance of bias. But, when this court says "no" then this court is admitting to something far more egregious.

#### V. CONCLUSION

This court should reverse/change its decision and vacate the award of attorney fees and actually award me the filing fee. The court should also find that the trial court judge was biased for the opposing attorney and against me.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted on May 28, 2019.

A handwritten signature in black ink, appearing to read "Dan Barrett". The signature is written in a cursive, flowing style.

Daniel J. Barrett, pro se Appellant

NO. 51273-4-II

COURT OF APPEALS FOR DIVISION II  
OF THE STATE OF WASHINGTON

CARMELITA ESCARCEGA (fka  
CARMELITA BARRETT),

Respondent,

v.

DANIEL J. BARRETT,

Petitioner/Appellant.

FINANCIAL  
DECLARATION

**I. SUMMARY OF BASIC INFORMATION**

Declarant's Total Monthly Net Income (from § 3.3 below) – \$2,673.46

Declarant's Total Monthly Household Expenses (from § 5.9 below) –  
\$2,324.11

Declarant's Total Monthly Debt Expenses (from § 5.11 below) – \$300.00

Declarant's Total Monthly Expenses (from § 5.12 below) – \$2,624.11

**II. PERSONAL INFORMATION**

2.1 Occupation: Tribal Support Advocate

2.2 The highest year of education completed: MLS-IPL

2.3 Are you presently employed?  Yes  No

### III. INCOME INFORMATION

#### 3.1 GROSS MONTHLY INCOME.

- a. Imputed Income
- b. Wages and Salaries -- \$3,025.60
- c. Interest and Dividend Income
- d. Business Income
- e. Spousal Maintenance From Other Relationships
- f. Other Income
- g. **Total Gross Monthly Income -- \$3,025.60**
- h. Actual Gross Income (Year-to-date) -- \$6,051.20

#### 3.2 MONTHLY DEDUCTIONS FROM GROSS INCOME.

- a. Income Taxes -- \$145.64
- b. FICA/Self-employment Taxes -- \$115.73
- c. State Industrial Insurance Deductions
- d. MANDATORY Union/Professional Dues
- e. Pension Plan Payments -- \$90.77
- f. Spousal Maintenance Paid
- g. Normal Business Expenses
- h. **Total Deductions from Gross Income -- \$352.14**

#### 3.3 MONTHLY NET INCOME. -- \$2,673.46

#### 3.4 MISCELLANEOUS INCOME.

- a. Other miscellaneous income (list source and amounts) -- None
- b. **Total Miscellaneous Income -- None**

### IV. AVAILABLE ASSETS

- 4.1 Cash on hand & deposits in checking/savings accounts -- \$14.00
- 4.2 Stocks and bonds -- None  
Cash value of life insurance -- None
- 4.3 Other liquid assets: -- None

## V. MONTHLY EXPENSE INFORMATION

Monthly expenses for myself and 0 dependents are:

- 5.1 HOUSING.  
Rent, 1st mortgage or contract payments -- \$500.00  
Installment payments for other mortgages or encumbrances  
Homeowner's or Rental Insurance -- \$125.00  
**Total Housing -- \$625.00**
- 5.2 UTILITIES.  
Heat (gas & oil)  
Electricity -- \$150.00  
Water, sewer, garbage -- \$84.94  
Telephone -- \$100.00  
Cable -- \$29.99  
Other:  
**Total Utilities -- \$364.93**
- 5.3 FOOD AND SUPPLIES  
Food for 1 persons -- \$150.00  
Supplies (paper, tobacco, pets) -- \$30.00  
Meals eaten out  
Other:  
**Total Food Supplies -- \$180.00**
- 5.4 CHILDREN.  
Day Care/Babysitting  
Clothing  
Tuition (if any)  
Other child related expenses  
**Total Expenses Children -- \$0.00**
- 5.5 TRANSPORTATION.  
Vehicle payments or leases -- \$401.64  
Vehicle insurance & license -- \$446.62  
Vehicle gas, oil, ordinary maintenance -- \$130.00  
Parking  
Other transportation expenses  
**Total Transportation -- \$978.26**

- 5.6 HEALTH CARE. (Omit if fully covered)  
 Insurance  
 Uninsured dental, ortho., medical, eyecare expenses -- \$51.92  
 Other uninsured health expenses -- \$100.00  
**Total Health Care -- \$151.92**
- 5.7 PERSONAL EXPENSES (Not including children).  
 Clothing  
 Hair care/personal care expenses \$24.00  
 Clubs and recreation  
 Education  
 Books, newspapers, magazines, photos  
 Gifts  
 Other:
- Total Personal Expenses -- \$24.00**
- 5.8 MISCELLANEOUS EXPENSES  
 Life insurance (if not deducted from income)  
 Other: Storage Unit  
 Other:
- Total Miscellaneous Expenses -- \$0.00**
- 5.9 **TOTAL HOUSEHOLD EXPENSES** (The total of Paragraphs 5.1 through 5.8) -- **\$2,324.11**
- 5.10 **INSTALLMENT DEBTS INCLUDED IN PARAGRAPHS 5.1 THROUGH 5.8.**

<u>Creditor/Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>
Alaska Federal C.U.; auto loan	\$28,319.66	February, 2019
Federal Loan Servicing; federal school loan	\$157,109.16	Forbearance

5.11 OTHER DEBTS AND MONTHLY EXPENSES NOT INCLUDED IN PARAGRAPHS 5.1 - 5.8.

<u>Creditor/Description of Debt</u> <u>Payment</u>	<u>Balance</u>	<u>Month of Your</u> <u>Last Payment</u>	<u>Amount of</u> <u>Monthly</u>
Home Depot credit card	\$475.13	2.2019	\$75.00
TJX credit card	\$467.80	2.2019	\$50.00
Les Schwab	\$12,051.18	2.2019	\$75.00
Dr. Stephen Kern	\$1,425.00	2.2019	\$50.00
Campbell Barnett	\$2,037.95	1.2019	\$50.00

Total Monthly Payments for Other Debts and Monthly Expenses – \$300.00

**5.12 TOTAL EXPENSES** (Add Paragraphs 5.9 and 5.11) – **\$2,624.11**

**VI. ATTORNEY FEES**

6.1 Amount paid for attorney fees and costs to date: – \$5,634.01

6.2 The source of this money was: Loan


6.3 Fees and costs incurred to date: -- \$7,671.96

6.4 Arrangements for attorney fees and costs are:

Monthly payments.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Payallup, Washington, on March, 2019.

  
Carmelita Escarcega

**CAMPBELL, DILLE, BARNETT & SMITH, P.L.L.C.**

**March 06, 2019 - 3:22 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51273-4  
**Appellate Court Case Title:** Carmelita Barrett, Respondent v. Daniel J. Barrett, Appellant  
**Superior Court Case Number:** 97-3-02158-7

**The following documents have been uploaded:**

- 512734\_Financial\_20190306152129D2326105\_0337.pdf  
This File Contains:  
Financial - Affidavit of Financial Need  
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**A copy of the uploaded files will be sent to:**

- danieljbarrett@outlook.com
- kwaites@cdb-law.com

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Sender Name: Kimberly Waites - Email: kwaites@cdb-law.com

**Filing on Behalf of:** Daniel W. Smith - Email: dsmith@cdb-law.com (Alternate Email: )

Address:  
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**Note: The Filing Id is 20190306152129D2326105**

**A - 034**



No. 51273-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**CARMELITA ESCARCEGA**  
**(fka CARMELITA BARRETT),**  
Respondent,

v.

**DANIEL J. BARRETT,**  
Appellant.

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Appeal from the Superior Court for Pierce County  
The Honorable Karena Kirkendoll

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**Brief of Respondent**

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Daniel W. Smith, WSBA #15206  
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## I. INTRODUCTION

Attorney's Fees. The Court's award of attorney fees was appropriate. Mr. Barrett's Motion to Lift the Permanent Restraining Order was brought pursuant to RCW 26.50. Attorney's fees are authorized by RCW 26.50.060(1)(g) which allows for reasonable attorney's fees. Ms. Escarcega filed under seal two (2) Declarations regarding attorney's fees incurred in support of her request for an award of attorney's fees. The Court had statutory authority to award attorney's fees in this case.

## II. STATEMENT OF THE CASE

Judge Bryan Chushcoff entered a Permanent Restraining Order at trial in 2002 against Daniel Barrett on Ms. Escarcega's Petition to Modify the Parenting Plan relative to the parties' five (5) children. (CP 167.) At the conclusion of the trial, Mr. Barrett was awarded no visitation with any of the parties' five (5) children. (CP 167.) Prior to the trial, Mr. Barrett had shot Carmelita Escarcega's boyfriend in the stomach while in the presence of two (2) of the children. (CP 168.) Mr. Barrett was subsequently charged with first degree assault. (CP 168.)

Daniel Barrett filed a Motion on May 16, 2017 to lift the Permanent Protection Order that had been entered by Judge Bryan

Chushcoff. (CP 134-137.) Mr. Barrett cited RCW 26.50.130(1), (2), and (3) in support of his Motion. (CP 134-135.) Mr. Barrett did not file a sworn statement in support of his Motion, nor did he sign his Motion which was only signed by his attorney. (CP 137.) Mr. Barrett's attorney also filed a one (1) page statement entitled "Affidavit in Support of Motion to Lift Permanent Protection Order Pursuant to RCW 26.50.130" that attached copies of the Permanent Restraining Order entered by the Court on August 9, 2002, a copy of Judge Chushcoff's Verbatim Oral Ruling of the Court dated July 3, 2002, and a criminal history document for Daniel Barrett. (CP 138-165.) On May 26, 2017, Mr. Barrett filed a Motion to Lift Permanent Restraining Order. (CP 1.) In this second Motion Mr. Barrett cited RCW 26.09.050, .300, and RCW 26.50.130 in support of his Motion. (CP 1.) Again, the Motion was signed only by Mr. Barrett's attorney. (CP 4.)

Petitioner, Carmelita Escarcega, responded on June 26, 2017, by filing her Declaration, a Memorandum in Response to the Motions, (CP 167-184.) and a statement from the parties' daughter, Dawn Escarcega. (CP 185-186.)

At the initial hearing on June 30, 2017, before Judge Karena Kirkendoll, the Court denied without prejudice Mr.

Barrett's Motion to lift the Restraining Order. (CP 5-7.) The Court ordered that the Motion be heard at a later date and ordered that Mr. Barrett provide to the Court a sworn Declaration, treatment records, evaluations, and a current domestic violence evaluation. (CP 6.) The Court reserved the request of an award of attorney's fees to Carmelita Escarcega. (CP 6.) Mr. Barrett never did comply with this Court Order in regard to providing treatment records and evaluations. (CP 91.)

On August 9, 2017, Ms. Escarcega filed a Motion for her Attorney's Fees along with a Declaration in support of her Motion. (CP 11-55.) Ms. Escarcega advised the Court that Mr. Barrett had not disclosed to the Court that the Kittitas Superior Court, on May 15, 2006, entered a Permanent Restraining Order against Mr. Barrett after a custody trial under Cause No. 05-3-00148-4. (CP 11, 26.) The Kittitas County Court had ordered no contact between Mr. Barrett and the two (2) minor children until a full assessment of Mr. Barrett had been made by a clinical psychologist. (CP 12-13, 18.) The Court had found that prior to any visitation between Mr. Barrett and the children that Mr. Barrett complete a domestic violence perpetrator treatment by a licensed counselor. (CP 12-13, 18.) The Court had found that though Mr. Barrett had been

~~advised over the course of the past nine (9) years to engage in counseling and/or treatment for his abusive treatment of his children and to learn better parenting techniques, Mr. Barrett had not engaged in any counseling nor other treatment to correct and resolve the abuse of his children. (CP 12, 19.)~~

The Kittitas Court entered a Restraining Order that stated as follows:

Father shall have no contact whatsoever with the petitioners, the petitioner's family, or the two minor children who are the subject matter of this action, nor come within 500 feet of them, their residence, or any places which they may be; including but not limited to: places of employment of the petitioners, the schools of the minor children, and any other place they may frequent or visit at any time. (CP 13, 19, 25-26.)

The final Kittitas County Superior Court Decree included a Permanent Restraining Order against Daniel Barrett, Sr. (CP 13, 25-26.) The Permanent Restraining Order stated in part:

Daniel Barrett, Sr. shall have no contact, in writing, by phone, or personally, whatsoever with Daniel Barrett, Jr, Carrie Barrett, their children, and the minor children of Daniel Barrett, Sr. and Carmelita Barrett, BJB and BNB.

This restraining order does not expire and is permanent. (CP 13, 26.)

Mr. Barrett appealed the Kittitas County Superior Court Trial Court's ruling. (CP 13.) The Court of Appeals, Division III affirmed the rulings of the Trial Court regarding the Parenting Plan and the Restraining Orders. *In re the Custody of BJB and BNB*, 146 Wn. App. 1, 189 P.3d 800 (2008). (CP 13, 38-55.)

In summary, Mr. Barrett did not disclose to Judge Kirkendoll that a Superior Court in the State of Washington had entered a Permanent Restraining Order against him involving the Barrett family. (CP 1-4, 134-137.) Nor did Mr. Barrett provide proof of any domestic violence evaluation that was ordered by the Kittitas Superior Court. (CP 1-4, 134-137.) Nor did he comply with Judge Kirkendoll's June 30, 2017, Order. (CP 91, 128.)

Ms. Escarcega's Motion for Attorney's Fees was noted for September 1, 2017. (CP 10, 194.) On August 28, 2017 Mr. Barrett's counsel requested a continuance. (CP 194.) Ms. Escarcega agreed and the matter was renoted for September 29, 2017. (CP 59-60.) On September 27, 2017 Mr. Barrett's counsel filed another Motion to Continue. (CP 56-58, 109-111.) The Court, on September 29, 2017, denied the request for a continuance and entered an Order denying Mr. Barrett's request to lift the Restraining Order. (CP 56-58, 109-111.) The Court



awarded Ms. Escarcega her attorney's fees in the amount of \$3,972.71. (CP 56-58, 60, 109-111.) (CP under seal.) The award was based on the two (2) Declarations for attorney's fees filed by Ms. Escarcega's counsel prior to the hearing. (CP 13.) (CP under seal.) Mr. Barrett still had not filed a single Declaration in response to the Court's June 30, 2017 Order. (CP 128.)

Mr. Barrett then filed a Motion for Reconsideration on October 9, 2017. (CP 61-90.) His Motion for Reconsideration became the first sworn statement filed by Mr. Barrett in support of his Motion. (CP 61-69.) Though Mr. Barrett filed a nine (9) page Motion with attachments totaling twenty-one (21) pages, Mr. Barrett did not comply with Judge Kirkendoll's Order requiring disclosure of treatment records, evaluations, or a current domestic violence evaluation. (CP 61-90.) Nor did he comply with the requirements of RCW 26.50.130. (CP 61-90.)

Ms. Escarcega filed a short responsive Declaration pointing out that Mr. Barrett had never filed a sworn Declaration in support of his original Motion to Vacate the Protection Order and that he never provided the documentation as ordered by the Court on June 30, 2017. (CP 91-92.) Mr. Barrett's Strict Reply, filed on November 2, 2017, totaled nine (9) pages with seven (7) pages of

attachments, but, once again, did not comply with the Court's June 30, 2017 Order. (CP 93-108.)

The Court, on November 3, 2017, denied Mr. Barrett's Motion for Reconsideration. (CP 109-111.) The Court did correct the Order Denying Mr. Barrett's Motion to Lift the Restraining Order that had been entered on September 29, 2017, by entering an Order *Nunc Pro Tunc* that eliminated language that Mr. Barrett's Motion to Lift the Restraining Order was denied with prejudice. (CP 109-111.) The Court's denial of the Motion to Lift the Restraining Order was denied without prejudice. (CP 109-111.) In other words, Mr. Barrett's Motion was still pending before the Court.

Mr. Barrett subsequently filed this appeal.

### III. ARGUMENT

**Attorney's Fees.** Mr. Barrett filed a Motion to Vacate a Permanent Order for Protection that was entered after trial before Judge Chushcoff in the year 2002. Mr. Barrett cited RCW 26.50.130 in support of his Motion, specifically RCW 26.50.130(1), (2), and (3).

RCW 26.50.060(1) states as follows:

Upon notice and after hearing, the Court may provide relief as follows: . . . .

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees.

The Court denied Mr. Barrett's Motion repeatedly. Mr. Barrett did not comply with the provisions of RCW 26.50.130(1). Mr. Barrett did not comply with the Court's Orders entered June 30, 2017. The Court properly awarded Ms. Escarcega her attorney fees as authorized by RCW 26.50.060(1).

**IV. ATTORNEY FEES**

Carmelita Escarcega requests her reasonable attorney fees and expenses as authorized by RAP 18.1.

**V. CONCLUSION**

Judge Karena Kirkendoll's Order should be affirmed. The Court's award of attorney fees was appropriate.

Respectfully submitted this 1<sup>st</sup> day of May, 2018.

  
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Daniel W. Smith, WSBA #26208  
Attorney for Respondent

**DANIEL BARRETT - FILING PRO SE**

**August 09, 2019 - 3:36 PM**

**Filing Petition for Review**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** Carmelita Barrett, Respondent v. Daniel J. Barrett, Appellant (512734)

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