No. 99150-2

IN THE SUPREME COURT

STATE OF WASHINGTON

SHANNON CUNNINGHAM,

Respondent,

vs.

JON R. KARWOSKI and ELIZABETH ANNE COLLINS A/K/A ELIZABETH ANNE KARWOSKI, husband and wife and the marital community comprised thereof,

Petitioners.

RAP 13.4(d) REPLY RE: NEW ISSUE

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Petitioners reply to the new issues raised in Respondent's Answer to the Petition for Review as authorized by RAP 13.4(d), including: (A) limitations on recovery of excessive and unnecessary attorney fees [p. 1-4]; (B) Respondent's frivolous RAP 3.1 assertion [p. 4], and; (C) RAP 13.4 governs this Petition but the Court's has discretion to apply RAP 13.3(d) if needed [p. 4-5].

A. The Court Must Limit Recovery of Fees and Expenses to Those Reasonably and Necessarily Incurred.

Petitioners acknowledge, as they did in the Court of Appeals,[1] that Respondent will be entitled to recover *reasonable* fees in this Court pursuant to the CR 2A Agreement *if* the Court denies their Petition for Review. However, Petitioners also maintain that fees recoverable by either side must be reasonable and that attempts by a litigant to run up unnecessary and excessive fees should be discouraged. Here, Division I applied an erroneous legal standard when it

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[1] Appx. 061, 075, 109-111. Cunningham acknowledged that concession. Appx. 43.

awarded fees to Ms. Cunningham, upon which it relied to justify an award of excessive fees that should have been segregated between successful and unsuccessful issues.[2]

Respondent's Answer to the Petition for Review aptly illustrates the kind of abuse that the Division I error encourages. More specifically, Respondent's Answer opens with an attempt to poison the well by accusing Mr. Karwoski of having threatened to kill Ms. Cunningham. However, neither the trial court decision enforcing the CR 2A Agreement nor the Division I appeal had anything to do with Ms. Cunningham's one-sided account of the neighborhood war between the parties or their conduct toward each other. Instead, the only issues before Division I consisted of whether to affirm the trial court order enforcing the CR 2A Agreement between the parties and the amount of attorney fees recoverable by the prevailing party on appeal pursuant to RCW 4.84.330. Appx. 065-66, 075. Thus, Respondent's attempt to punish Appellants' counsel in Division

[2] Petition for Review, pp. 5-9.

I with sanctions pursuant to RAP 18.9(a), for having concluded that the appeal was *not* frivolous and proceeding,[3] was an entirely separate issue and Ms. Cunningham's fees related to that separate issue should have been segregated and should not have been awarded.[4]

Here, the ramifications of the Division I decision relative to fees becomes transparent. Thus, Respondent only devotes approximately 5-6 pages of her 20-page Answer to the issue presented for review. She similarly submitted an "Appendix" consisting of 46 pages, all of which Petitioner had already filed in Petitioners' Appendix (with the exception of several "declaration excerpts which have nothing to do with the issue presented for review). Respondent thus obviously attempting to justify excessive and unnecessary fees—a result which the Division I error encourages.

Petitioners thus request that, *if* the Court awards fees to

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[3] Appx. 109-111, 115-117.

[4] Significantly, Respondent has *not* sought RAP 18.9(a) sanctions against Petitioners' counsel in this Court.

either side, the Court limit any such award to fees and expenses *reasonable* and *necessary* to the issues actually presented and exclude excessive and unnecessary fees.

B. Respondent's RAP 3.1 Argument Is Frivolous.

Respondent bizarrely asserts that Petitioners are *not* aggrieved by the Division I deny a significant part of Respondent's attorney fees through segregation of fees related to her unsuccessful claims in Division I. Respondent's assertion is patently frivolous. Segregation of fees would have resulted in a significant reduction of the fees awarded by Division I in favor of Respondent and against Petitioners. Petitioners are therefore clearly and quite obviously "aggrieved" within the meaning of RAP 3.1. See, *e.g.*, *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949).

C. RAP 13.4 Governs; If Not, the Court Should Nevertheless Exercise Its Discretion Under RAP 13.3(d).

Respondent also asserts that Petitioners should have filed

a motion for discretionary review. However, RAP 13.4 governs this Petition because the Division I ruling relating to fees was not an "interlocutory" decision within the meaning of RAP 13.3(a)((2), but a decision "terminating review" under RAP 13.3(b). Moreover, Division I explicitly instructed the parties (including Respondent) that to obtain review of that Court's decision denying Petitioners' Motion to Modify they must file a "petition for review" to this Court.[5] Respondents' contention that Petitioners should have filed a motion for discretionary review, rather than a Petition, is thus in error.

Nevertheless, if the Court concludes that the Division I Clerk gave the parties erroneous instructions, Petitioners ask (out of an abundance of caution) that the Court consider the Petition as a motion for discretionary review as authorized by RAP 13.3(d) and schedule a hearing with the Commissioner.

D. Conclusion

Petitioners therefore request that the Court: (1) limit the

[5] September 24, 2020 letter to all counsel. Appendix Attached.

parties' recovery of attorney fees and litigation expenses to only those fees and expenses reasonable and necessary; (2) find Petitioners' "aggrieved" within the meaning of RAP 3.1, and; (3) conclude that RAP 13.4 governs this Petition or, if not, that the Court should nevertheless consider the Petition in the manner authorized by RAP 13.3(d).

DATED: December 7, 2020.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
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CERTIFICATE OF SERVICE

This document was filed via CM/ECF and will be automatically served on all registered participants. Additional copies served by mail: None

December 7, 2020.

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September 24, 2020

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CASE #: 79753-1-I
Shannon Cunningham, Respondent v. Jon Karwoski, Appellant

Counsel:

Please find enclosed a copy of the Order Denying Motion to Modify the Commissioner's ruling entered in the above case today.

The order will become final unless counsel files a petition for review within thirty days from the date of this order. RAP 13.4(a).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

enclosure

HCL

APPENDIX

WAID LAW OFFICE

December 07, 2020 - 1:04 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99150-2
Appellate Court Case Title:	Shannon Cunningham v. Jon Karwoski, et al.

The following documents have been uploaded:

- 991502_Answer_Reply_20201207130001SC681236_6435.pdf
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Comments:

RAP 13.4(d) Reply Re: New Issue

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