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COA No. 69260-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

HANAA GOMAA,

Respondent,

v.

ABDELKRIM ZEBDI,

Appellant.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
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TABLE OF CONTENTS

I. An award of attorney fees on appeal is unwarranted under RCW 26.09.140 and/or RAP 18.9(a).....1

II. Response as to Ms. Gomaa's other arguments.....3

III. Conclusion.....4

TABLE OF AUTHORITIES

Table of Cases

Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Bd., 170 Wn.2d 577, 245 P.3d 764 (2010)....1, 2, 3

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997).....2

Reid v. Dalton, 124 Wn. App. 113, 100 P.3d 349 (2004), review denied, 155 Wn.2d 1005 (2005).....1

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 119 P.3d 325 (2005).....1, 3

In re Dependency of A.A., 105 Wn. App. 604, 20 P.3d 492 (2001).....3

In re Marriage of Mahalingam, 21 Wn. App. 228, 584 P.2d 971 (1978).....3

In re Marriage of Steadman, 63 Wn. App. 523, 821 P.2d 59 (1991).....2

Statutes

RCW 26.09.140.....1, 2

Rules

CR 11.....2

RAP 18.9(a).....1, 2

I. An award of attorney fees on appeal is unwarranted under RCW 26.09.140 and/or RAP 18.9(a)

RAP 18.9(a) permits an appellate court to award attorney fees as sanctions, terms, or compensatory damages for filing a frivolous appeal. *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004), *review denied*, 155 Wn.2d 1005 (2005). An appeal is frivolous if, considering the entire record, the court is convinced the appeal presents no debatable issues upon which reasonable minds might differ and the appeal is so devoid of merit there is no possibility of reversal. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Bd.*, 170 Wn.2d 577, 578, 245 P.3d 764 (2010). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

Here, the trial court awarded \$16,000 to Ms. Goma based on Mr. Zebdi's September 11, 2011 sale of the Honda Odyssey in violation of a court order entered on October 6, 2011, 15 days after the van had been sold. (CP 892; *see also* 8/1/12 RP 697). Mr. Zebdi could not have been in violation of that court order. Furthermore, there is no indication in the record that the judge misidentified or made a scrivener's error in citing the October 6 2011 order as the basis for its award. The issue raised is not

frivolous as the court certainly erred and Mr. Zebdi pointed it out in this appeal.

He also challenged the award of attorney fees to Ms. Gomaa under RCW 26.09.140. The court found neither party had the ability to pay attorney fees at the time of trial. (CP 895, 922). It also determined Mr. Zebdi had the ability to pay and Ms. Gomaa had the need at the outset of the case. (CP 924, 925). The ability to pay, however, is not measured at the time of filing. Rather, it is determined at the time fees are requested. *In re Marriage of Steadman*, 63 Wn. App. 523, 530-31, 821 P.2d 59 (1991). When requested at trial, Mr. Zebdi did not have the ability to pay and should not have been ordered to pay attorney fees to Ms. Gomaa. Indeed, he remains unemployed. The issue is hardly frivolous as it is not devoid of merit. *Advocates for Responsible Dev.*, 170 Wn.2d at 578.

With respect to the fees for intransigence and under CR 11, the court made no findings supporting its award. (CP 925). Findings are required for an award of sanctions. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). There are none. Mr. Zebdi claims he acted in good faith in taking the actions he did. The issue is not frivolous and reasonable minds could differ. *Advocates for Responsible Dev.*, 170 Wn.2d at 578.

As for the domestic violence findings challenged by Mr. Zebdi, the record speaks for itself as the court did not take into account cultural factors in making its determination. The GAL also failed to consider them in her report. Yet, these are proper factors for the court to take into account. See *In re Marriage of Mahalingam*, 21 Wn. App. 228, 232, 584 P.2d 971 (1978); *In re Dependency of A.A.*, 105 Wn. App. 604, 610-11, 20 P.3d 492 (2001). Furthermore, all indications from Ms. Gomaa and the boys are that there is no present fear of domestic violence. (CP 64, 65, 200). In these circumstances, Mr. Zebdi's challenge of the domestic violence findings is not frivolous.

This appeal is not frivolous as it is not so devoid of merit that there is no reasonable possibility of reversal. *Advocates for Responsible Dev.*, 157 Wn.2d at 578. Moreover, all doubts as to whether the appeal is frivolous should be resolved in the appellant's favor. *Tiffany Family Trust Corp.*, 155 Wn.2d at 241.

II. Response to Ms. Gomaa's other arguments

Ms. Gomaa states in her brief that the trial court "was clearly cognizant of the fact that the husband had done everything he could to discourage the wife from returning to the United States, so that she would lose her eligibility to live in the U.S." (Resp.'s brief, p. 7). The record does not support that statement. Rather, it was Ms. Gomaa who wanted to go to Egypt. (7/24/12 RP 124, 125).

She went to Egypt for three months with Mariam and wanted to return for a month with all the kids during Christmas vacation in 2010. (*Id.* at 90-91, 125). Mr. Zebdi acquiesced and they left the last day of February 2011. (*Id.* at 128).

Ms. Gomaa and the children eventually left Egypt and arrived in East Lansing, Michigan, on August 4, 2011. (7/24/12 RP 134, 155). Mr. Zebdi did not know where they were. (*Id.* at 540). Although painting the picture that he did everything he could to discourage her from returning to the U.S., Ms. Gomaa was not discouraged and apparently orchestrated her return and relocation, along with the children, to another state. (7/24/12 RP 132-34; CP 64). On August 19, 2011, a letter giving notice of her relocation and dissolution papers were served by her lawyers on Mr. Zebdi. (*Id.* at 541). If the point was to show he had an ulterior motive in keeping her in Egypt, the record reflects instead that Ms. Gomaa did not come into this litigation with clean hands.

With respect to her other arguments, Mr. Zebdi rests on his opening brief for his response and the record before this Court.

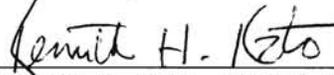
III. Conclusion

Based on the foregoing facts and authorities, Mr. Zebdi respectfully urge this Court to reverse the trial court's decisions as

requested in his opening brief and to deny an award of attorney fees on appeal to Ms. Goma.

DATED this 19th day of August, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Reply Brief of Appellant by first class mail, postage prepaid, on Margaret D. Fitzpatrick, Attorney at Law, 11300 Roosevelt Way NE, Ste 300, Seattle, WA 98125.

