

75377-1

75377-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 SEP -6 PM 2:55

NO. 75377-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

CAROLINE M. VAUGHAN,

APPELLANT

v.

NATHANIEL T. CAYLOR,

RESPONDENT

BRIEF OF APPELLANT

Karma L. Zaike, WSBA #31037
Erika S. Reichley, WSBA # 46811
Attorneys for Appellant

MICHAEL W. BUGNI & ASSOCIATES, PLLC
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125
Telephone: (206) 365-5500

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....3

II. ASSIGNMENTS OF ERROR.....4

III. STATEMENT OF THE CASE.....4

IV. ARGUMENT.....9

V. ATTORNEY’S FEES.....15

VI. CONCLUSION.....17

TABLE OF AUTHORITIES

Statutes

RCW 26.09.140.....16

RCW 26.09.160.....10

Cases

224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 740, 281 P.3d 693(2012).....9,11,14

Berryman v. Metcalf, 177 Wn. App. 644, 657, 312 P.3d 745 (2013)
.....9, 11, 13, 14

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983).....9, 11, 12

Chuong Van Pham v. City of Seattle, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).....9

In re Marriage of Crosetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996)
.....16

In re Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999)
.....16

In re Marriage of Wixom, 190 Wn. App. 719, 725, 360 P.3d 960 (2015)
.....16

Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).....11, 12

Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993)....9

Other Authorities

RAP 18.1.....15, 16

I. INTRODUCTION

This matter is before the Court on appeal of the trial court's 5/24/16 award of \$4,500 in attorney fees to the Respondent/Father. The parties were before the Court on 5/24/16 on two separate issues:

- (1) for a review hearing on the Father's previous contempt motion¹ (hereinafter "Review Hearing"); and
- (2) on the Father's second, April, 2016 motion for contempt (hereinafter "New Contempt").

Counsel for the Father requested \$4,800 in fees in total at the New Contempt hearing, but failed to identify or segregate the fees incurred in connection with the Review Hearing (for which he submitted one four-page declaration). The Father's counsel's only fee declaration related to the New Contempt motion and included only lump billing totals; she did not itemize her fees and costs.

The Father's 4/11/16 New Contempt motion was denied in its entirety, leaving no basis for an award of fees for that motion. The Court then awarded \$4,500 in attorney fees to the Father for the Review Hearing alone. The Court made only conclusory findings that the Father's fee

¹ The Mother was held in contempt and attorney's fees were awarded on 2/24/2016. CP 138-33.

declaration was sufficient for purposes of conducting an analysis under *Berryman* standards, but made no findings as to its analysis under those standards. Because the Court abused its discretion in awarding \$4,500 to the Father, based on the assignments of error, argument and authority set forth below, the Mother respectfully requests that the award of attorney fees be reversed.

(3) ASSIGNMENTS OF ERROR

1. The Court erred in making conclusory findings as to the reasonableness of the attorney fees requested by the Father.
2. The Court erred in failing to make specific findings explaining the court's analysis with regard to attorney fees.
3. The Court erred in finding that “sufficient specificity under a *Berryman* analysis was provided by Caylor’s counsel” where there was no testimony or other evidence identifying attorney work related to the Review Hearing and not the New Contempt motion.
4. In making specific findings that the Mother was not in contempt under new claims made by the Father, the Court erred in finding that the attorney fee declaration submitted for the New Contempt motion was a basis for fees related to the Review hearing.
5. It was an error of law for the Court to award \$4,500 to the Father in attorney fees, without a statutory or evidentiary basis to do so.

(4) STATEMENT OF THE CASE

This matter was before the Court on 5/24/16 for a Review Hearing on contempt. On February 24, 2016, the Court entered an order on show cause re contempt/judgment, finding the Mother in contempt. CP 128-33. This order provided that the Mother could purge the contempt by meeting certain conditions, and set a review hearing for 5/24/16. CP 128-33.

In April, 2016, the Father filed the New Contempt motion against the Mother (CP 1-16) and set a hearing for 5/4/16 (CP 17-18). The hearing was later continued to 5/24/16. CP 73-75. On April 19, 2016, the Father filed a supplemental declaration in support of his New Contempt motion. CP 23-68. Concurrently with said supplemental declaration, Father's counsel filed a declaration in support of his request for attorney fees, including a request for \$4,800 in fees and \$66 in costs related exclusively to the New Contempt motion. CP 19-22. That same day, Ms. Hawkins filed a correction to her fee declaration, recanting her statement that, "The court has already ruled that attorney fees would be granted to Mr. Caylor." CP 71-72, 241-42.

On May 13, 2016, counsel for the Mother filed a legal memorandum in response to the Respondent's New Contempt motion. CP

76-242, 304-328. That memorandum included specific authority and argument against an award of attorney fees to the Father because his attorney's fee declaration failed the *Berryman* standard. CP 87-88. The memorandum cites that Ms. Hawkins' declaration included lump billing totals as opposed to itemized work, making an analysis under the *Berryman* case impossible, and also that the documents submitted by the Father to the Court were virtually identical to those previously submitted by the Father in for arbitration on the same issue. CP 87. The Father was thus requesting that both the arbitrator and the Court award full attorney fees for the same work. CP 87. The Mother's memorandum includes, as its Exhibits 9 and 10, the duplicative work referenced therein. CP 136-239.

On May 19, 2016, the Mother filed a declaration for the Review Hearing, explaining that she was in compliance with the parenting plan and requested that her contempt be purged. Pet. Supp. CP __ (Docket Sub No. 383).

On May 20, 2016, counsel for the Father submitted yet another fee declaration in reply to the Mother's responsive memorandum. CP 292-296. This fee declaration included, for the first time, an "explanation" as

to how she endeavored to segregate fees incurred in connection with the arbitration versus the contempt proceedings, but continued to fail to provide any itemized time entries. *Id.* Furthermore, it is clear that the “contempt” to which counsel refers is exclusively the New Contempt motion, not the Review hearing. *Id.* For example, in support of attorney’s fees “for contempt,” Ms. Hawkins cites to her April, 2016 declaration (CP 19-22) which have no relation whatsoever to the Review Hearing. Ms. Hawkins is specific that the “contempt” action to which she refers in making her attorney fee declaration, is “the contempt matter scheduled for May 4, 2016.” CP 22, 296. This could only relate to the New Contempt and had no relation to the Review Hearing which was at all times scheduled for 5/24/2016. Counsel also incorrectly argues that the *Berryman* case has no application to these proceedings stating that the Court’s only obligation is to determine the “reasonableness” of fees. CP 295-96.

On 5/19/2016, the Father filed his only declaration for the Review Hearing. This declaration totaled four pages (seven pages including exhibits). Pet. Supp. CP __ (Docket Sub No. 394). Additionally, he filed a separate reply declaration for his 4/11/16 New Contempt motion

(totaling fifty-three pages), bringing up new allegations, for the first time, which were unrelated to prior allegations. CP 243-291.

At the 5/24/16 hearing, the Court denied the Father's 4/11/16 New Contempt motion in its entirety. CP 297-303. The Court entered a separate order finding that the Mother had failed to purge contempt, set new purge conditions and set a new review hearing for 7/8/16.² Pet. Supp. CP __ (Docket Sub No. 401, Docket Sub No. 417). The Review Hearing order awarded \$4,500 to the Father in attorney fees, but failed to provide the underlying basis for the award other than "reasonableness." Pet. Supp. CP __ (Docket Sub no. 401, Docket Sub No. 417). Section 3.1 of the Order explicitly states that the Mother is not in contempt under new claims. Pet. Supp. CP __ (Docket Sub no. 401, Docket Sub No. 417). Despite counsel's failure to segregate fees or include itemized time entries in any fee declaration, and despite that the only fee declaration for contempt specifically references work for the "contempt matter scheduled for May 4, 2016),³ not the Review Hearing, the court included in Section 2.8 of the order the following finding, "The court finds sufficient

² The Mother successfully purged contempt at the 7/8/16 review hearing. Pet. Supp. CP __ (Docket Sub No. 431).

³ CP 293.

specificity under a Berryman analysis was provided by Caylor’s counsel.”
Pet. Supp. CP __ (Docket Sub no. 401, Docket Sub No. 417). Thus, on
June 17, 2016, the Mother filed a notice of appeal pertaining to this order,
and she now seeks review solely regarding the issue of the award of
attorney fees therein. Pet. Supp. CP __ (Docket Sub No. 417).

(5) ARGUMENT

A. Standard of Review.

The reasonableness of an attorney fee award is subject to review
for abuse of discretion. *224 Westlake, LLC v. Enqstrom Props., LLC*, 169
Wn. App. 700, 740, 281 P.3d 693 (2012) (citing *Bowers v. Transamerica
Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). Discretion is
abused when the trial court exercises it on untenable grounds or for
untenable reasons. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d
745 (2013) (citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527,
538, 151 P.3d 976 (2007)). The burden of demonstrating that a fee is
reasonable is upon the fee applicant. *Berryman*, 177 Wn. App. at 657
(citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210
(1993)). Because the Respondent/Father failed to meet his burden of
demonstrating that his requested fees were reasonable, and the trial Court

thus abused its discretion in awarding attorney fees to the Father based on the assignments of error set forth above, the award of attorney fees in the Court's 5/24/16 order should be reversed.

B. The Court Abused its Discretion in Awarding \$4,500 in Attorney Fees to the Father.

The attorney fees and costs awarded to the Father in the court's 5/24/16 order were not reasonable. Additionally, there was no evidence as to how the fees incurred were related to the Review Hearing for which only one four-page declaration was filed. The Father's fee declarations which were provided expressly state that the attorney's fees were related to "12 hours on the contempt matter scheduled for May 4, 2016..." *See* CP 21, 293. The May 4 hearing was moved to May 24 to be heard on the same day as the Review hearing. However, the Father's 4/11/16 New Contempt motion was denied in its entirety, providing no basis for an award of fees relating to that motion. *See* CP 297-303. Not only is there no basis for an award of attorney fees pursuant to RCW 26.09.160(2)(b), as no contempt was found, but pursuant to RCW 26.09.160(7), if the Court finds that a contempt motion was brought without reasonable basis, the

Court *shall* order the *moving party* to pay the nonmoving party all costs, reasonable attorneys' fees and a civil penalty of not less than one hundred dollars. Thus, the Court should have awarded attorney fees, costs and sanctions to the Mother in association with that proceeding. The materials submitted by the Father for the Review Hearing, as opposed to his 4/11/16 New Contempt motion, total only four pages (seven including exhibits). The time in court was duplicative of the work required for the "New Hearing," thus it would be double charging the Mother for work relating to the unfounded motion. An award of \$4,500 in fees is thus a manifest abuse of discretion.

Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought; courts should not simply accept unquestioningly fee affidavits from counsel. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998)). A determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 660. The "lodestar" is only the starting point, and the fee thus

calculated is not necessarily a “reasonable” fee. *Id.* The lodestar must be limited to hours reasonably expended. *Id.* at 662. The total hours an attorney has recorded for work in a case is to be discounted for hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Id.* at 662 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193(1983)).

A useful way for a court to determine a lodestar is to prepare a simple table that lists the hours reasonably performed for particular tasks and the rate charged, which may vary with the type of work. *See Berryman*, 177 Wn. App. at 664. Such tables help to cut through the fog generated by block billing. *See id.* (citing *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 740, 281 P.3d 693 (2012) (fee request did not “distinguish among the tasks accomplished during the hours claimed”)). In *Mahler v. Szucs*, the Court explained:

Counsel must provide contemporaneous records documenting the hours worked. As we said in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983), such documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).

The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services. [Cite omitted.]

Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, may, in rare instances, be adjusted upward or downward in the trial court's discretion. [Cite omitted.]

In the past, we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology. [Cite omitted.] Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel. *Mahler*, 135 Wn.2d at 434-35.

In this matter, the evidence supports that very little time was devoted toward the Review Hearing compared to the New Contempt hearing. Thus, awarding \$4,500 to the Father for the Review Hearing was manifestly unreasonable. Ms. Hawkins' fee declaration for contempt provides that she "had or will spend" over twelve hours on the Father's "contempt matter scheduled for May 4, 2016." CP 21, 293. The \$4,800 request was submitted long before any work or time was devoted to the Review Hearing, plus the fee declaration expressly states time is related to the "May 4, 2016" hearing. *See* CP 19-22, 292-296. As explained above, the Father's 4/11/16 New Contempt motion was denied in its entirety so

there is no basis for an award of attorney's fees to the Father which were incurred for that motion. *See* CP 297-303.

For the Review Hearing, the Father filed a filed a four page declaration (seven pages including exhibits), most of which appears to be recycled from previous pleadings. *See* Pet. Supp. CP __ (Docket Sub No. 394). That is the equivalent of awarding over \$1,000 per page for the Father's recycled materials. Pursuant to the case law above, the fee declarations submitted by the Father failed to provide the Court with any information related to attorney time related to the Review Hearing. A blanket award of \$4,500 in attorney fees for four pages of work (translating to over \$1,000 per page), is thus an abuse of discretion.

Furthermore, a court's findings with regard to attorney fees may not be conclusory; rather, "...to facilitate review, the findings must do more than give lip service to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman*, 177 Wn. App. at 658. Here, the Court made only the conclusory finding that the fee declarations were sufficient to conduct an analysis under *Berryman*, but there was no explanation as to the Court's analysis thereunder. Pet. Supp. CP

__(Docket Sub No. 401, Docket Sub No. 417). Thus, the Court erred both in making conclusory findings and failing to make findings explaining the Court's analysis with regard to fees.

The Father may argue that the application of a multiplier or upward adjustment of the lodestar is appropriate in this case. However, the Father failed to make this argument at the proceedings before the trial Court, the Court made no findings regarding an upward adjustment of fees, and the Father should not be permitted to make those arguments now. Moreover, "Generally, the complexity of a case does not warrant application of a lodestar multiplier." 224 *Westlake*, 169 Wn. App. at 737. "An enhancement for quality of work performed is 'an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.'" *Id.* citing *Bowers*, 100 Wn.2d at 598–99. *See also Berryman*, 177 Wn. App. at 665 ("In Washington, adjustments to the lodestar product are reserved for 'rare' occasions."). The burden of justifying any deviation from the lodestar rests upon the party proposing it. *Berryman*, 177 Wn. App. at 666. Here, the Father did not meet his burden for justifying the application of an upward deviation. In fact, his counsel's declarations support the denial of any

such deviation, as it explains that her expertise is reflected in her high hourly rate, and the complexity of the matter is reflected in the number of hours she expended on these proceedings. *See* CP 21, 293. However, because the fee declaration provided was exclusively related to the New Contempt action, there was no way for the Court to determine the reasonable fees incurred in connection with the Review Hearing.

The Mother thus respectfully requests that the award of attorney fees in the Court's 5/24/16 order be reversed.

(6) ATTORNEY'S FEES

The Mother requests that her fees and costs on appeal be paid by the Father pursuant to RAP 18.1 and RCW 26.09.140, on the basis of need and ability to pay, and based on the Father's intransigence. An affidavit of financial need will be filed pursuant to RAP 18.1(c). A party's intransigence can also substantiate an award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). In deciding whether to award fees, the trial court may consider the extent to which one party's intransigence caused the other party who is seeking an award of fees to undertake

additional legal services. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Determining intransigence is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly. *In re Marriage of Wixom*, 190 Wn. App. 719, 725, 360 P.3d 960 (2015). The Mother has been relentlessly persecuted by Father since dissolution. While it is true that she has been held in contempt in the past, it is also true that on May 24, 2016, the Father's request for contempt was denied. The Father failed to provide any evidence to the court as to the amount of fees incurred for his four page declaration. Without evidence, the court should have denied the Father's fee request. The Mother thus respectfully requests an award of attorney fees and costs on appeal based on the authority set forth above.

(7) CONCLUSION

Based on the argument and authority provided above, the Mother respectfully requests that this Court reverse the trial court's 5/24/16 award of \$4,500 in attorney fees to the Father.

Respectfully submitted this 1st day of September, 2016.



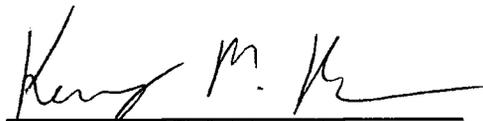
Karma L. Zaiko, WSBA #31037
Erika L. Reichley, WSBA# 46911
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2016 the original of the Brief of Appellant was transmitted for filing to the Court of Appeals, Division I, by fax, and that copies were sent via email and U.S. Mail as follows:

Attorney for Respondent:

Nancy Hawkins
681 Greenwood Ave. N.
Seattle, WA 98103



KERRY BOWERS