

FILED

MAR 29 2012

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

VAN HEEMSTED OBELT, WALTER

Appellant,

vs.

VAN HEEMSTED OBELT, SUSAN

Respondent.

COA NO. 30203-2-III

SUPERIOR COURT
NO. 09-3-02687-2

REPLY BRIEF OF APPELLANT

Bryan P. Whitaker
WSBA #25199
Attorney for Appellant

815 W. 7th Ave., #303
Spokane, WA 99204
(509) 315-9947

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Argument

B. The trial court's finding that Walter was intransigent is reasonable and well supported by the facts.

The various and sundry manners in which a person may be found intransigent in the Response brief are interesting yet inapposite. As is the citation to *In re Marriage of Foley*, 84 Wn.App. 839 (1997), which stands for the proposition that the trial court should review the entire record. The trial court did not “clearly” review the entire record on the issue of intransigence. The Court also had no clear and accurate recollection of the events that had taken place during the hearings in the Court participated.

The evidence on review is the evidence relied upon by the trial court when imposing the sanction of attorney fees based on a finding of intransigence. The additional information provided to the appellate court, the additional arguments presented on appeal, the actions of parties that have resulted in previous findings of intransigence are of no consequence. The trial court in this case limited the evidence upon which it relied to make a finding of intransigence. The evidence on review is limited to the same evidence.

E. Attorney's [sic] fees on appeal are appropriate when the appealing party has demonstrated consistent intransigence throughout trial and appeal. (emphasis original)

The award of fees under RCW 26.09.140 is not appropriate in this case. The statement that the Appellee has been “impoverished by the costs of litigation” is contrary to the earlier argument that the attorney in the underlying case has not been compensated. The standard of ability to pay also continues to be a requirement under said statute and is not addressed.

The discretionary award of fees by this Court is not appropriate based on the argument presented. The issue before the Court is abuse of discretion by the trial court. This is an issue of law appropriately before this Court. The assertion on appeal is that the evidence relied upon by the trial court is insufficient to support the award of attorney fees, which is an issue of fact. The Appellee’s rapier-like evisceration of argument aside, these are legitimate issues on appeal.

A finding of intransigence at trial, even if upheld by this Court, does not make the mere fact of appeal *de facto* intransigence. The extrapolation of this logic results in no trial court finding of intransigence being taken up for review because doing so is *de facto* intransigence. Further, the allegation that the designation of the record on appeal was incomplete is inaccurate. As stated, the designation included all the documents upon which the trial court based its decision. Any additional documents have been provided to bolster argument and have no bearing on the issue on appeal.

Conclusion

The issue on appeal remains the propriety of the Court's imposition of attorney fees as a sanction for intransigence based upon the record utilized by the Court in making that determination. The supplemental information filed by the Appellee has no bearing on this issue. This issue is appropriately before this Court. Fees are not appropriate in this case.

RESPECTFULLY SUBMITTED



Bryan P. Whitaker, WSBA #25199
Attorney for Appellant

MAR 29 2012

SEAL OF THE COURT OF APPEALS
STATE OF WASHINGTON

THE COURT OF APPEALS STATE OF WASHINGTON - DIVISION III		
In re the Marriage of		NO. 302032
Walter Van Heemstede Obelt,	Petitioner,	RETURN OF SERVICE (RTS)
vs.		
Susan Van Heemseted Obelt,	Respondent.	

1. My name is Bryan P. Whitaker. I am 18 years of age or older and not the petitioner.
2. I served Lisa Brewer, Attorney at Law with the following documents:

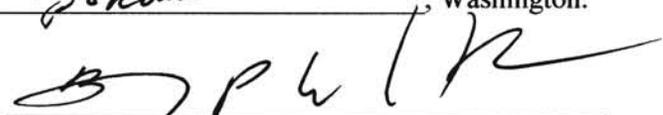
Response to Motion re: Supplementing
Record

3. I served this document on March 29, 2012 at 11:00 am at this address:

Law Office of Lisa Brewer
1201 N. Ash St., Suite 101
Spokane, WA 99201

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED 3/29/12 at Spokane, Washington.



Signature of Server