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No. 65739-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

In Re the Marriage of

FAITH L. SMITH,

Appellant/Cross Respondent

And

Ford B. Smith

Respondent/Cross Appellant

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STATE OF WASHINGTON
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REPLY BRIEF OF RESPONDENT/CROSS APPELLANT FORD B. SMITH FOR REQUEST FOR ATTORNEY'S FEES AT TRIAL COURT LEVEL AND COURT OF APPEALS

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ORIGINAL

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I. INTRODUCTION

The bulk of the attorney's fees that the husband incurred are a direct result of the intransigence of the Respondent. Respondent went through four attorneys as a result of her unreasonable demands, her intransigence in defying court orders in regards to discovery requests, and her walking out of the Mediation. Her fourth attorney then added to the attorney's fees by making 11th hour changes to her answers to Interrogatories, hiding documents which she produced the day before trial, and her introduction of real estate valuations that had not been produced until after the trial had commenced. At trial, the wife's fourth attorney objected to the husband's introduction of any expert valuation on the grounds that it was not produced 30 days before trial which the court accepted. In the respondent's case in chief he then sought to have admitted King County assessment reports that were not produced until **after the trial had commenced**. The husband incurred additional attorney's fees after trial because the wife refused to leave the Northridge property by August 1, 2010 and refused to sign the Interspousal Transfer Deed. Her defense is inability to pay. For intransigence, that is not grounds for denial of attorney's fees, especially where she failed to provide an accounting for what she did with the \$167,000.

II. RESTATEMENT OF FACTS

In the wife's response to the husband's request for attorney's fees, the wife acts like the husband had not previously attempted to obtain from the wife answers to interrogatories, to obtain documents from his wife with regard to valuation of assets, reports concerning these assets, statements relating to that she withdrew from Washington Mutual, her IRA's, and production of records regarding where the \$167,000 was deposited, what it was used for and where it was. First, there was a motion heard on October 16, 2008, for the wife to provide an accounting of what she did with the funds from the line of credit, to wit; \$167,000 that she withdrew within 30 days of the order. (CP 177-79) She failed to do that. On or about November 14, 2008, the husband again moved to compel answers to Interrogatories. (CP 881-907) On December 12, 2008, the court granted sanctions against the wife for her failure to comply with the Temporary Order dated October 16, 2008 and for her failure to answer the interrogatories and Requests for Production of documents. (CP 879-80) On April 22, 2009, the husband moved to compel the wife to comply with discovery orders and to provide an accounting for what she did with the \$167,000. She did not. As a consequence, on May 6, 2009, the Motion for Reinstatement of Maintenance was denied and attorney's fees were awarded against the respondent in favor of the Petitioner in the

amount of \$3,000. (CP 177-79, CP 879-80, and CP 715-16) None of those fees have been paid.

On April 21, 2010, the husband moved to admit the First and Second Set of Requests for Admission and the ER 904 documents into evidence before the trial commenced. At this hearing, the wife's attorney asserted that the 30 days before trial local rule that unless expert witnesses and documents are produced 30 days before trial, they are inadmissible. (RP II, p. 10, ll. 8-17) The trial setting order sets a 30 day deadline. (CP 118) At the trial, ignoring this very rule used, the wife in an attempt to exclude the husband's documentary evidence such as appraisals and witnesses, the wife sought to admit a King County assessment even though she did not produce this report until after the trial had commenced. The trial court denied the admission, among other grounds, for failing to provide this report in response to RFP # 13 (RP III Part B, pg. 74, ll. 7-19) and the local rule. This tactic unduly increased the time of the trial and caused additional fees incurred because of the lengthy deliberations on this basis.

A. **Wife Produced hidden Documents on the Day Before Trial.** On the day before trial, the appellant's fourth attorney delivered 74 pages of newly disclosed documents and a new set of answers to interrogatories and requests for production of documents. (RP

I, p. 30, l.7 and RP III, Part B, pg. 74, ll. 7-19) None of those documents included the real estate assessments on the two properties, to which were subsequently excluded from evidence as a discovery sanction. Reviewing all these documents revealed upon the eve of trial caused an additional \$12,160 in attorney's fees in seeking to exclude these documents to prevent the wife from changing her testimony. (CP 1127-30)

Similarly, the wife's attorney spent an entire morning and part of an afternoon, seeking to prevent the court from considering the Request for Admissions which the wife and her attorneys had never answered as admissions. She ignored these admissions and sought to establish that these were not true. The wife's attorney continued to seek to challenge these admissions at trial. For example, at trial and in the wife's briefs, he still is challenging that the Philippines living standard should be used even though she admitted that she built the house in the Philippines so that she could live there permanently. (PET 40 - Loan Agreement) Indeed, she admitted in her Request for Admission that she was planning to live there, did in fact live there during the marriage for periods as long as 13 months after she left her husband in Bellingham and then lived there again after separation. (RP I, p. ll. 21-25 and RP IV, p. 132, l. 7) (PET 90 – First Request for Admissions Nos. 10 and 11) Furthermore, her justification for withdrawing the \$167,000 was to build a house in Cebu, Philippines and

live there. She bought a car there and has a house in her name alone. The cost of living is set forth in RFA # 11. (PET 98 – Cost of Living in the Philippines)

Finally, she made a breath-taking request for \$4,000,000 cash from the husband even though there was no evidence that he had any liquid assets. She refused to listen to her numerous counsels, take the husband's offer and as a consequence of her refusal, she forced this matter to go to trial, which was unnecessary. In addition, she wanted \$6,000 a month for life in maintenance for a 10 year marriage, where his gross income is less than \$11,000 per month and she wanted the entire equity in the Northridge property. After trial, she would not sign California's Interspousal Transfer form, would not comply with the court's order requiring her to leave the Northridge property by no later than July 1, 2010. This required the husband to make obtain an Order to Show Cause Hearing for Contempt including service and then attend a hearing on the 17th of August, 2010, finding her in contempt for failing to sign the Interspousal Transfer Form and then the court required her to leave by August 25, 2010.

III. ARGUMENT

A. Attorney's Fees should be awarded against the wife for her pre-trial intransigence. The wife's fourth attorney attempts to

distinguish *In Re Marriage of Greenlee*, 65 Wn.App.703 (1992) from the wife's intransigence. In *Greenlee*, the wife was forced to go to court, despite repeated attempts to pay off a lien of the ex-wife against the ex-husband. That is exactly what has happened in this case. The wife refused to answer interrogatories and requests for production of documents; refused to provide an accounting for the \$167,000 she withdrew from the account, refused to acknowledge that she had agreed to transfer the Northridge real property from her separate property to the community of Ford Smith and Faith Smith. Even though, by her failure to respond, she had admitted that the Northridge family home was community property. Under CR 37 (c), the court should have granted the husband's request for attorney's fees incurred for her failure to adhere to CR 36. Moreover, the documentary evidence was clear cogent and convincing and she had nothing to rebut that evidence. She signed a Deed making such a transfer, signed an agreement that the Northridge home was joint property which was recorded and she also had agreed to repay the \$167,000 because she wanted to build a house in Cebu, Philippines. The money he used to pay off the loan was traced. In light of the overwhelming evidence, she still claimed the Northridge home as her separate property. (PET 39) This forced the husband to go to trial.

B. Intransigence after Decree Entered. After trial, the intransigence of the wife forced the husband to bring and Order to Show Cause Hearing, and caused additional attorney's fees of over \$9,000 for those actions. In addition, with respect to this appeal, she is still refusing to concede that the Northridge property was community property, that she had withdrawn \$167,000 as a loan which was a loan against her share of the equity in the house, that this is a medium term marriage and that the husband's support of her after separation is both reasonable and fair. The husband has both voluntarily and under court order provided her over \$3,000 per month for over 5 years. (RP III Part B, pp. 90, 17 – 91, 1. 18) He has spent well over \$180,000 in supporting her since she moved back to Northridge in May 2006. (CP 722-40) For a 10 year marriage, the amount and duration of maintenance is not a manifest abuse of discretion. Therefore, the appeal of the maintenance award is frivolous. Attorney's fees should be awarded against the wife for bringing such a frivolous appeal.

C. The trial court should have awarded attorney's fees against the Wife for discovery violations and for withholding documents until the day of trial. The court failed to grant any attorney's fees even though the wife continued to be intransigent and made wholly unreasonable requests, provided financial documents only the day before trial. Such

actions were sanctionable under CR 26 (g) and CR 37 (b). In *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-41, the Supreme Court reversed the denial of sanctions against the attorney who provided evasive documents. In *Fisons*, our Supreme Court held that sanctions are mandatory overruling the trial court's denial of sanctions:

“Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found.^{FN90} Sanctions are warranted in this case. What the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry, and that is the trial court's function. While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible.

... .

In the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.” *Id.* at 355-56

In this case, the prior awards did not deter the wife from continuing to hide documents from the husband up until the eve of trial and then even after the trial had commenced. Obviously, the sanction award was not a sufficient deterrent since she continued to hide documents until the day before the trial.

D. Attorney's fees should be awarded against the wife on Appeal. Pursuant to RCW 26.09.140 and RAP 18.1 and for filing an appeal without merit, this court should award attorney's fees against the

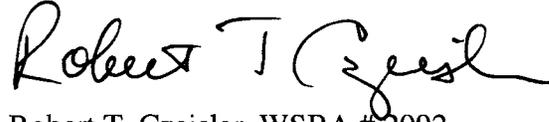
wife. In looking at whether there should be an award of fees, this court should examine the arguable merits of the appeal. *See In re Marriage of Booth*, 114 Wn. 2d 772, 779-80 (1990). In this appeal, the issue of the division of assets and the award of maintenance were well within the discretion of the trial court. Since the appeal has no merit, attorney's fees should be granted.

The wife claims that she does not have the ability to pay, yet she has not made a full disclosure of her withdrawals from the home equity line of credit, drives a Lexus, has assets in the Philippines, including a house in Cebu, Philippines with no debt against it and has gold coins that her husband gave to her during the marriage. Consequently, she has the ability to pay. On the other hand, the husband does not have the capacity to work, has financial obligations including his apartment in Bellingham, his maintenance obligation arising out of this matter, and his attorney's fee bill which is over \$100,000. She should pay all of the husband's attorney's fees incurred on appeal.

IV. CONCLUSION

For the above reasons, this court should grant reasonable attorney's fees against the wife in the amount of \$24,297.50 and for reasonable attorney's fees on appeal.

Respectfully Submitted,

A handwritten signature in black ink that reads "Robert T. Czeisler". The signature is written in a cursive style with a large initial "R" and a distinct "T" and "C".

Robert T. Czeisler, WSBA # 2092
Attorney for Ford Smith Respondent/
Cross Appellant

No. 65739-1-I

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I, Elaine Larsen, declare as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington and over 18 years of age.

2. I am the legal assistant to Robert T. Czeisler, attorney for Respondent/Cross-Appellant. On July 15, 2011, I sent out via Federal Express and Legal Messenger directed to:

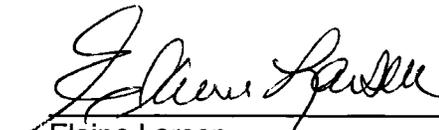
David G. Porter
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containing a true and correct copy of:

Reply Brief of Respondents'/Cross-Appellant's Ford B. Smith for Requested Attorney's Fees at Trial Court Level and Court of Appeals; and Declaration of Mailing.

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

DATED at Kirkland, Washington, this 15th day of July 2011.



Elaine Larsen

DECLARATION OF MAILING