

71398-1

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No. 71398-1-I  
**IN THE COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON**

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In re the Marriage of:  
Nathan Brown, *Appellant*  
*and*  
Mi Brown, *Respondent*

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**AMENDED REPLY BRIEF**

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Nathan Brown  
*Appellant, pro se*  
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**TABLE OF CONTENTS**

Rebuttal Argument	-	-	-	-	-	-	-	03
Conclusion	-	-	-	-	-	-	-	08

**TABLE OF AUTHORITIES**

Table of Cases

Woodhead v Discount Waterbeds, 78 Wn.App. 125 (1995)	-	-	-	-	-	-	03
Graves v Duerden, 51 Wn.App. 642 (1988)	-	-	-	-	-	-	05
Scott Fetzer Co. v. Weeks, 122 Wn.2d 141 (1993)	-	-	-	-	-	-	07

Statutes & Court Rules

RCW 7.21.040	-	-	-	-	-	-	05
CR 41	-	-	-	-	-	footnote	06

Appellant Nathan Brown hereby submits his reply brief in strict rebuttal to Respondent's brief.

**Rebuttal Point One.**

Respondent's brief, from page 9 to the middle of page 14, is a response to Appellant's argument regarding the finding adopting the GAL report. Primarily, Respondent argues that this case does not qualify for review because it was dismissed without prejudice, and therefore the review should be dismissed.

Assuming that such a view is correct, it is not directed to the material aspect of this review which is the double sanctions imposed on Appellant. Whether the case can be re-filed or not in the trial court does not affect the sanctions imposed nor does it affect the type of review. Unless Respondent can articulate authority for re-visiting the money sanctions if the case is re-filed, her argument is both off point and irrelevant.

**Rebuttal Point Two.**

Respondent, in section 3 (pages 14-15), summarizes Appellant's argument. However, she immediately swerves into a straw man argument Appellant never made - whether the trial court had authority to dismiss the action. In so doing, she cites to authority that is not helpful to this court regarding whether the trial court had authority to both dismiss *and* impose monetary penalties.

Respondent, on page 16, quotes Woodhead v Discount Waterbeds. The quote she selects, however, completely supports Appellant's argument that the record must contain a colloquy regarding the insufficiency of lesser sanctions. The record of this appeal does not contain such consideration nor does Respondent cite to where this can be found. Interestingly, Woodhead contains a provision that holds that a citation without authority means such authority does not exist. See Woodhead, at 134. The same presumption should apply to essential parts of a record that lack a citation. This court should assume that such a record does not exist because otherwise counsel would have cited to it.

Respondent also cites to Woodhead for the proposition that a client is responsible for the acts of his attorney. That is accurate but it is not the thrust of Appellant's argument. Appellant argued that it is manifestly unreasonable to have an attorney admit responsibility on the record for procedural misfeasance and have the penalty for the misfeasance fall solely on the client. In Woodhead, there was noncompliance with several orders/provisions *and* efforts to mislead the court about the matter. Putting aside the absence of any evidence of willfulness on the part of the client or absent any evidence showing collusion between the client and attorney to commit the misfeasance, no effort was ever made to warn the client that his attorney was exposing him to possible personal monetary penalties.

None of these missing elements are consistent with the requirement that sanctions always be the least severity necessary to achieve the purpose of the sanctions.

Frankly speaking, Appellant was ambushed with a monetary penalty for conduct that he had no ability to control or override. That is the issue on appeal - is it proper to do this under our precedent?

***Rebuttal Point Three.***

Respondent, on page 16, cites to an opinion (**Graves v Duerden**) that dealt with a contempt appeal. This is not an appeal from contempt, where at least the case against the appellant could be laid out in a show cause hearing prior to imposition of penalties.

In **Graves**, the opinion held that a court's inherent contempt powers could be used to punish violations of orders or judgments. Not only is that completely unrelated to this appeal but a contempt requires compliance with RCW 7.21 procedures in order to comport with due process. It is likely that a trial court judge lacks the authority to punish for contempt unless there is some remedial aspect. See **RCW 7.21.040**.

Respondent cites to a recitation on the record (**VRP 29-30**) by the trial court as sufficient for the court to dismiss the action for noncompliance with the schedule. Again, Respondent misses the mark because Appellant has not argued that the court did not have the authority to dismiss.

Appellant's argument is that the trial court did not have the authority to both dismiss and financially penalize Appellant. The trial court could do one or the other but not both.

**Rebuttal Point Four.**

Respondent, in subsection b on page 18-19, recites a summary of salient historical points and argues that **Woodhead** and **Graves** both authorize an award of terms for 75% of Respondent's attorney fees plus GAL fees for Appellant's "inexcusable violations of the court's orders" forcing a "useless and pointless court proceeding" upon Respondent.

Appellant does not believe that either one of those cases is on point here because neither of them argued what Appellant argues here - that the trial court ignored the conjunction "or" in the sole authority used by Respondent to support the relief she requested.

Since the local rule is not ambiguous, statutory construction holds that each word **must** be given its meaning and no word can be ignored. It is impossible to read the local rule to authorize both dismissal and terms.<sup>1</sup> Nothing Respondent has put forth overcomes this determinative argument.

**Rebuttal Point Five.**

Respondent can go on and on about the misfortune of her client

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<sup>1</sup> It should also be noticed that when the case was dismissed without prejudice, the action was ended and the court had no further authority to do anything. This is akin to a voluntary dismissal per CR 41 which does not allow an award.

having Appellant as a former spouse but that is not legal prejudice even if accurate. Respondent has shown no legal prejudice that she suffered which caused additional attorney fees to be incurred due to behavior of Appellant or his attorney. The reason for this absence is that no prejudice to Respondent exists. Certainly there is nothing in the record to show prejudice except inflammatory rhetoric. None of Respondent's legal costs increased because of Appellant missing procedural deadlines.

Respondent's comment about malpractice actions is an effort to distract the court while being unnecessarily insulting to a person who is not available to defend himself.

On page 20, Respondent claims that the sanctions order educated and deterred. It would be helpful if she would identify what was deterred. As far as educated goes, Appellant clearly described in his opening brief why any education was lost upon him personally since he was unlikely to ever be in this situation again. Again, what was the subject of this asserted education is not stated. If it was to educate him on hiring the 'right' attorney, Appellant confesses that he misses that part of the 'lesson.'

Also on page 20, Respondent states that "the trial court clearly acted within its broad discretion." Nothing could be further from accurate. The trial court committed clear error plus Respondent never provided the trial court with the required evidence which could authorize the court to award

her fees. She was required to show the *extra fees incurred* by Appellant's misfeasance; she never did. And even if a motion to compel discovery is deemed to be 'additional fees incurred', it certainly does not account for 75% of her total fees. A fee award must be reasonable. See **Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993)**. (*[B]oth Texas and Washington have ethical rules mandating that attorneys charge only a reasonable fee. . . . We take this occasion to remind practitioners that such considerations apply whether one's fee is being paid by a client or the opposing party.*)

**Rebuttal Point Six.**

On page 21 of her brief, Respondent states that "all the issues raised by Appellant are either clearly controlled by settled law ..." Appellant agrees. The problem for Respondent is that the settled law not only favors Appellant, it compels this court to reverse the sanctions award because the trial court ignored a conjunction in the text of the law.

Alternatively, this court should reverse because an award of 75% of fees obviously cannot be justified on this record. According to the math of the award, Respondent should only have been charged 25% of the total fees for litigating an entire modification action that did not go to trial.

That is the flip side of the award of 75% of the fees, allegedly for bad faith caused increase in the amount of legal work.

**CONCLUSION**

The Court should reverse the sanctions awards and judgments.

*Respectfully submitted:*

11/26/14

date

Nathan Brown, Appellant *pro se*

A handwritten signature in cursive script that reads "Nathan Brown". The signature is written over a horizontal line that extends from the date "11/26/14" on the left. The signature is positioned to the right of the date and above the printed name "Nathan Brown, Appellant pro se".