

73207-2

73207-2

No. 73207-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE PARENTAGE OF T.W.J & I.B.J,

ANDREA ANTHONY, Respondent

v.

AWAN JOHNSON, Appellant

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUL 27 PM 2:03

H. Michael Finesilver (fka
Fields)
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

TABLE OF CONTENTS

I. Assignments of Error.....4

II. Statement of the Case.....4

III. Argument.....7

TABLE OF AUTHORITIES

Table of Cases

Nevers v. Fireside, Inc., 133 Wn. 2d 804, 809,
947 P.2d 721 (1997).....7

Statutes

RCW 26.09.191(1).....4
RCW 26.09.191(2).....4
RCW 26.50.010.....6,7
RCW 26.50.010(1).....7

Regulations and Rules

RPC 1.6(b)(1).....8

I. Assignments of Error

Assignment of Error No. 1: In the absence of any evidence that Respondent would attempt to carry out any threat to Petitioner's physical safety, the court erred in determining that he committed domestic violence, in that he posed a credible threat to her physical safety.

II. Statement of the Case:

On October 2, 2014 the parties, Awan Johnson and Andrea Anthony filed a final parenting plan order regarding their two children, Tieke age 2 and Isla age 1. (CP 501). The October final parenting plan order under section 2.1 pertains to limitations under RCW 26.09.191 (1), and (2). Domestic violence provisions related to decision making authority and residential time are included under RCW 26.09.191 (1) and (2). The plan order did not find any limitations, and it did not reserve any. Instead the plan provided "not applicable" under each section.

On December 12, 2014 Ms. Anthony filed a petition to modify the October 2 parenting plan order. She sought reductions and restrictions on Mr. Johnson's residential time and decision-making authority based upon allegations that Tieke's 12 year old sister, Mr. Johnson's daughter of a prior relationship had either sexually abused Tieke or exposed him to sexually inappropriate material that traumatized him. (CP 19).

Ms. Anthony also pursued a temporary parenting plan order seeking to impose restrictions on the children's contact with their 12 year old half-sister, as well as to establish adequate cause to pursue her petition for modification. Mr. Johnson hired a California attorney named Tamara Benefield for the purpose of preparing responsive materials to the adequate cause and temporary parenting plan modification hearing. (CP 22).

Mr. Johnson ended up representing himself due to conflict with attorney Benefield over concerns that she had received \$10,000 and wanted another \$10,000 but had done virtually nothing in the month or so that she was hired to prepare responsive pleadings. (CP 195). The trial court observed that she did not follow proper procedure to entitle her to be his lawyer pro hac vice and raised questions about her lack of competence in purporting to represent him (RP 40).

On January 20, 2015 Attorney Benefield was concerned that a payment of \$10,000 had not yet been wired to her bank account. She was fired that day (CP 199 and 201). On January 21, 2015, as she was withdrawing, she wrote an email to Ms. Anthony's attorney in which she stated that Mr. Johnson had repeated that if he got screwed in court he was going to kill Ms. Anthony. (CP 199).

Ms. Anthony that same day filed a petition for a protective order using that email as evidence and obtained an immediate temporary protection order barring him from contact with her or the children. It incorporated her declaration of December 12, 2014 which did not contain any representations of domestic violence, as defined under RCW 26.50.010.

Mr. Johnson asserted that the attorney had falsified what he told her in retaliation for being fired. He filed a bar complaint in California. (CP 196).

Ms. Anthony sought a permanent domestic violence order (RP 9). The court entered a one year domestic violence protection order. The court observed in its court's oral decision:

“...it would really be an extraordinary thing for an attorney to falsely claim that their client had threatened to harm the other party... extraordinary and remarkable... since I don't know her, I have to go with the assumption that she was reporting what she heard and for that reason, I'm going ahead and enter the protection order.”

Thus, on that basis it entered an order that provides: “Respondent committed domestic violence as defined in RCW 26.50.010. Respondent represents a credible threat to the physical safety of the protected person/s”. This is an appeal of that order.

III. Argument

The only allegation of behavior upon which the court relied that could constitute domestic violence as defined by RCW 26.50.010 was the alleged threat by him as described by his former attorney when they argued about her representation of him. The only provision under RCW 26.50.010 to which his alleged remark relates is: "...the infliction of fear of imminent physical harm, bodily injury or assault..." (See RCW 26.50.010 (1). That statement in the email dated January 21, 2015, sent by Johnson's lawyer is:

"...I called you several times today to warn you on behalf of your client that a conditional threat to kill was made by my former disgruntled client indicating that if he "gets screwed" which he may interpret as any restrictions on his custodial rights, he is going to kill Andrea. He repeated this and variations, perhaps in anger more than once." (CP 199).

Questions of law are reviewed de novo. *Nevers v. Fireside, Inc.*, 133 Wn. 2d 804, 809, 947 P.2d 721 (1997). The legal question is whether that statement alone, in the absence of other evidence, that he would likely carry out the threat is sufficient to support a finding that he committed domestic violence that was a credible threat to her physical safety?

The only evidence of any communications that led to her withdrawal as his attorney was an email communication between Attorney

Benefield and Mr. Johnson on January 20, 2015. (CP 201). In his declaration, he denied ever making the threat (CP 195). Other than the statement itself, there is no other evidence on the basis of which a court could conclude that he would likely carry it out in the absence of an order. In fact, the only evidence related to the whether he would, demonstrated that he would not.

Prior to the hearing on February 10, 2015, an order had already been entered that took away his custodial rights pending the hearing. On January 21, 2015 a temporary order was entered in which Mr. Johnson was “restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means directly or indirectly except for mailing or service of process of court documents by a 3rd party with the petitioner or the minors named in the table above.” (CP 89). The children named are Tieke and Isla (CP 88).

That order “screwed him”. It took away his rights of residential access he had been granted in the October 2, 2014 final parenting plan order. RPC 1.6(b)(1) provides:

“A lawyer to the extent the lawyer believes necessary:
Shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm.”

That exception to the prohibition to disclose confidential communications between lawyer and client imposes upon the lawyer the obligation to have information on which the lawyer believes there is a risk of certain death or substantial bodily harm before the lawyer can make the disclosure.

In Ms. Benefield's email of January 20 to Mr. Johnson, she references his stating that he'll kill her if he gets screwed. She does not try to dissuade him. Benefield does not express concern that he would carry out the threat. She does not warn that because she believes he will try to do it, she has a duty to warn Ms. Anthony through her attorney, as she would, if she really had reason to believe he would do it.

Instead, she mentions it in the context of explaining that his decision to represent himself is misguided, that his emotions are controlling his better sense of judgment. To illustrate her point she characterizes his statement that he'll kill her if he gets screwed as "irrational." (CP 201).

However, neither the lawyer, nor Ms. Anthony, nor anyone else presented any evidence that Mr. Johnson was likely to carry out the threat.

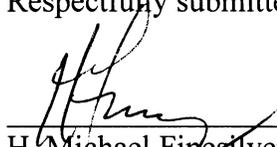
There was no evidence that he had engaged in any behavior that would then presently justify a fear that he would try to kill her, or commit

any acts harming her physical safety. There was no evidence that he had done anything through any means to cause her to fear for imminent harm after January 21, 2015 when he had already been “screwed” by the temporary order. If he was serious, no order would protect her. Only criminal sanctions and incarceration would be an adequate remedy if in fact there was reason to believe that he would carry out such a threat.

In the absence of that evidence the court abused its discretion in finding that he committed domestic violence and that the physical safety of Ms. Anthony and the children was in jeopardy. The finding of domestic violence should have been denied. The court did not need to find domestic violence to fashion the other relief that it did.

DATED this 7 day of July, 2015.

Respectfully submitted,



H. Michael Finesilver
(f/k/a Fields)
Attorney for Appellant
W.S.B.A. #5495

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Parentage of T.W.J & I.B.J,)
)
 AWAN JOHNSON,)
)
 Appellant,)
)
 v.)
)
 ANDREA ANTHONY,)
)
 Respondent,)
 _____)

DECLARATION OF
SERVICE

I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 27th day of July, 2015, I emailed true and correct copies of the Brief of Appellant to the Court of Appeals for delivery on July 27, 2015 to:

Elizabeth Hershman-Greven
Skellenger Bender
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
(206) 623-6501
ehershman-greven@skellengerbender.com

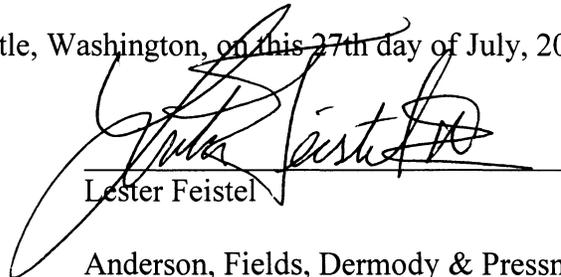
FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUL 27 PM 2:03

DECLARATION OF SERVICE - 1

Patricia Novotny
Attorney-at-Law
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711
novotnylaw@comcast.net

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

DATED at Seattle, Washington, on this 27th day of July, 2015.



Lester Feistel

Anderson, Fields, Dermody & Pressnall
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060