FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARIANNE MEEKER, Appellant, v. CLAYTON SWIM, Respondent.	No. 81249-1-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Marianne Meeker petitioned for a protection order against Clayton Swim over a dispute about her fence and their shared property line. The trial court found the petition frivolous and awarded Swim attorney fees and costs. Meeker appeals the award. We remand for entry of findings to support that determination and deny Swim's request for attorney fees and costs on appeal.

I. BACKGROUND

In 2018, Meeker and her husband David Sage built a fence that encroached onto their neighbor Ray Swim's property. Ray's[1] attorney wrote a letter to Meeker and Sage demanding that they remove the fence. In 2019, Ray sued Meeker and Sage for trespass, nuisance, and waste, and sought a writ of ejectment, writ of assistance, and damages. Meeker and Sage did not respond and in June 2019, the trial court entered a default judgment against them. Ray's

[1] For clarity, we refer to Ray and Clayton Swim by their first names. We mean no disrespect.

attorney personally served Meeker with the default judgment in July 2019. But Meeker did not remove the fence.

On November 13, 2019, the trial court issued an order for a writ of ejectment and/or assistance ordering the King County Sheriff's Office to assist in the removal of the fence. Three days later, Ray sent the King County Sheriff's Office a copy of the judgment and the writ of ejectment and/or assistance.

On November 23, 2019, Ray died, and his property transferred to Clayton and his sister Angela Rose.

On November 29, 2019, Clayton went to the property with his family members to discuss the removal of the fence. While the family was standing by the fence, Meeker approached and demanded to know who they were and what they were doing. Clayton told Meeker they were the new owners of the property and that they were there to prepare for the removal of the fence the week after when the Sheriff's Office would be present. Clayton asked Meeker to keep her horses confined and away from the fence on the day of removal so they would not escape. Meeker responded that the fence would not be coming down and offered to buy Ray's property. The family declined her offer.

Clayton cut the electric wire on the fence so that he could cross it without shocking himself. According to Meeker, Clayton and his family threatened to harm her horses and herself with an excavator during the removal if they were "in his way."

On December 3, 2019, Meeker petitioned for an antiharassment order of protection against Clayton. In her petition, Meeker alleged that Clayton made physical threats against her, acted physically aggressive towards her, and told her that she had better move her horses away from the fence or they would get hurt. She also alleged that he had cut the "hotwire" on her fence, which endangered her and her horses. She stated that Clayton had plans to remove the fence the following morning, on December 4. And she said that there was no litigation between her and Clayton and did not mention the default judgment. The King County District Court granted her petition ex parte, entered an order restraining Clayton from being within 500 feet of Meeker's fence line, and set a hearing for December 17.

On December 4, 2019, Clayton and his family waited at the fence for the arrival of the Sheriff's Office and their approval to begin removal of the fence. But when the Sheriff's Office arrived, they served Clayton with Meeker's temporary protection order. The fence remained.

At the December 17 hearing, Clayton requested the District Court deny Meeker's petition for an order of protection and that the court transfer the case to King County Superior Court for further proceedings. He also requested attorney fees under RCW 4.84.185 and CR 11. The District Court reissued the temporary protection order but struck the 500-foot stay-away provision, and transferred the case to Superior Court for a hearing on January 7 because the action involved title or possession of real property.

Following transfer, Clayton moved to dismiss, which motion Meeker opposed. At the January 7 hearing, Meeker said that Clayton made threats to her personal safety, saying: "[T]hey said, you know, that they would run anything over if it was in the way, including me and my horses, and anybody who was in the way would get hurt. That was the statement made by Clayton Swim." The trial court granted Clayton's motion to dismiss, reasoning:

> First of all, there is not course of conduct. [Clayton] was acting with lawful purpose. Whether or not he told Ms. Meeker that morning that there was a Court order or whether, as she testified at the hearing obtaining this temporary order, that she knew of the order is—it's irrelevant as to when she learned of it and how she learned of it. Her testimony at the district court was that she knew there was an order. That is in the transcribed information contained in the documents.
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> Even if she didn't know, assuming she did not know until Mr. Swim said, I have a Court order to remove this, the proper procedure at that point would have been for her to back off because Mr. Swim was acting with lawful purpose.
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> There was no course of conduct here as described. In fact, the testimony is that they were trying to execute the writ that they had, and this was not conduct, willful conduct, which was directed and was designed to seriously alarm, annoy or harass, but does fall within the absolute definition of serving a lawful purpose. Any time a Court issues an order and a party executes that order, that is the definition of lawful purpose.

Clayton later moved for attorney fees under RCW 4.84.185, claiming that Meeker's protection order petition was frivolous. The trial court granted Clayton's motion, finding that the petition "was frivolous and advanced without reasonable cause," and awarded him $15,181 in attorney fees and $61.78 in costs.

II. ANALYSIS

Meeker says the trial court lacked authority to impose the order of attorney fees and costs under RCW 4.84.185 and that it abused its discretion in

determining that her petition was frivolous. She also says the trial court erred by failing to enter findings supporting its frivolity determination and in calculating the amount of attorney fees owed. We agree that the trial court erred by failing to enter findings supporting its frivolity determination, but we reject her other arguments.

A. Authority to Impose Attorney Fees and Costs

Under RCW 4.84.185, "[i]n any civil action," upon determining that the action is frivolous, a court may require the nonprevailing party to pay the prevailing party's attorney fees and costs. Meeker says that a petition for an antiharassment order under chapter 10.14 RCW is not a "civil action." Meeker also says the trial court did not have such authority because chapter 10.14 RCW does not specifically allow fees awards for respondents. We disagree.

We review de novo questions of statutory interpretation. Blue Spirits Distilling, LLC v. Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 785, 478 P.3d 153 (2020).

Meeker points to Emmerson v. Weilep, in which Division Three of this court concluded that a petition for a temporary protection order "is not a civil action *for damages*" under the meaning of RCW 4.24.500 and .510. 126 Wn. App. 930, 937, 110 P.3d 214 (2005) (emphasis added). It thus determined it would not consider an attorney fees request under RCW 4.24.500, which only allows an award of fees in civil actions for damages. The court also analyzed whether it should equitably grant the attorney fees request. Id. at 940–41. The

court declined to do so, reasoning in part that "allowing an award of attorney fees to those who successfully defend against a permanent order of protection would deter private parties from seeking temporary and immediate relief from harassment. This is contrary to the legislature's expressed intent to prevent unlawful harassment." Id. at 941.

But the Emmerson court did not rule that a petition for a temporary protection order is not a civil action; instead, it ruled that such petitions are not civil actions *for damages*. And chapter 10.14 RCW refers to the proceedings here as "civil." See RCW 10.14.010 ("This chapter is intended to provide victims with a speedy and inexpensive method of obtaining *civil* antiharassment protection orders."); .080 ("if the court finds by a preponderance of the evidence that unlawful harassment exists, a *civil* antiharassment protection order shall issue." (emphasis added)). While the Emmerson court said that provision of fees to successful respondents would undermine the legislature's intent to prevent unlawful harassment, it expressed those policy considerations in the context of the court's authority to equitably award fees, and not in the statutory context of frivolous suits under RCW 4.84.185, as here. Finally, Meeker does not explain why, here—when the trial court determined no unlawful harassment occurred—the legislature's intent to prevent unlawful harassment should override its intent to prevent frivolous lawsuits and abuse of the judicial system. See Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) ("The purpose of

[RCW 4.84.185] is to deter baseless filings and curb abuses of the judicial system.").

RCW 10.14.090(2) allows a court to award attorney fees to a successful petitioner but does not provide the same as to respondents. Meeker says that under the canon of statutory interpretation of *expressio unius est exclusion alterius*—i.e., "to express one thing in a statute implies the exclusion of the other"—the court could not award attorney fees to Swim. See Adams v. King County, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) (quoting In re Det. of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)). But RCW 4.84.185 allows a court to grant an attorney fees award to the prevailing party in a frivolous suit "[i]n any civil action . . . unless otherwise specifically provided by statute." And RCW 10.14.090 does not so specifically provide.

We conclude that the trial court had authority to grant Swim an award of attorney fees and costs.

B. Frivolity of Meeker's Petition

RCW 4.84.185 provides in pertinent part that

> In any civil action, the court . . . may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

An action is frivolous if it cannot be supported by any rational argument on the law or facts. Hanna v. Margitan, 193 Wn. App. 596, 612, 373 P.3d 300 (2016).

"By its own terms, RCW 4.84.185 applies *unless otherwise specifically provided by statute.*" Reid v. Dalton, 124 Wn. App. 113, 125, 100 P.3d 349 (2004).

We review for abuse of discretion a trial court's determination that a lawsuit was frivolous under RCW 4.84.185. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Reid, 124 Wn. App. at 125. "'If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion.'" Hanna, 193 Wn. App at 612 (quoting Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)).

RCW 10.14.080 allows a court to grant an ex parte temporary antiharassment protection order upon a showing of "reasonable proof of unlawful harassment of the petitioner by the respondent and that great or irreparable harm will result to the petitioner" if the order is not granted. RCW 10.14.020, the chapter's definitional provision, clarifies the meaning of "unlawful harassment":

> (1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."
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> (2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

To determine whether a respondent's course of conduct serves any legitimate or lawful purpose, the court should consider whether:

> (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
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> (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
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> (3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;
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> (4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:
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> (a) Protect property or liberty interests;
>
> (b) Enforce the law; or
>
> (c) Meet specific statutory duties or requirements;
>
> (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
>
> (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

RCW 10.14.030.

Meeker says the trial court abused its discretion in three ways: (1) because the default judgment and writ of execution were issued in Ray's name, and not Clayton's name, Clayton did not act with legitimate or lawful purpose when he approached the fence on November 29; (2) Clayton came on to her property and threatened her and her horses on November 29; and (3) the District Court at first granted her petition and later transferred it to the Superior Court.

1. Default judgment and writ not in Clayton's name

Most of the "legitimate or lawful purpose" factors under RCW 10.14.030 are inapplicable to whether Clayton lacked such a purpose because the default judgment and writ were not in his name.

The most salient factor is whether Clayton acted under any statutory authority and to protect a property interest. Although, as Meeker notes, the default judgment and writ of execution were not in Clayton's name, the fence was on his property and Meeker knew that the default judgment ordered her to remove it. Clayton told her that the Sheriff's Office would be present in a few days to help remove it. Meeker cites no law establishing that Clayton could not have had a legitimate or lawful purpose unless the judgment and writ were issued in his name; and it is absurd to think that, for example, Ray could not have hired someone to remove the fence.

Meeker knew of the default judgment. And Clayton told her that the Sheriff's Office would arrive in a few days to remove the fence. No rational argument on the law or facts exists that Clayton engaged in unlawful harassment because the default judgment and writ were not in his name. The trial court acted within its discretion.

2. Threatening behavior

As to Clayton's alleged threatening behavior, whether his statements to Meeker on November 29 would cause a reasonable person to suffer substantial emotional distress boils down to a credibility determination. Clayton says he

calmly and politely told Meeker that on the upcoming day of the fence removal, she should move her horses away so that they do not get hurt in the process of removing the fence. Meeker says Clayton yelled at her, and threatened that he would hurt her and her horses with an excavator unless they moved out of the way. Thus, implicit in the trial court's frivolity ruling was a determination that Clayton's recounting was more credible, and we leave to the trial court determinations about a litigant's credibility. In re Marriage of Wilson, 165 Wn. App. 333, 340, 267 P.3d 485 (2011). The trial court did not abuse its discretion in determining that no rational argument on the law or facts exists that Clayton engaged in unlawful harassment by threatening Meeker.

3. Grant and transfer

Meeker highlights that the District Court at first granted a temporary protection order and that it later transferred the matter to Superior Court rather than dismiss; she says this establishes that her petition was not frivolous. She cites no law in support of this argument, so we need not consider it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding a court need not consider arguments unsupported by legal authority). And we note again that Meeker did not inform the District Court about the default judgment.

Finally, in deciding whether the trial court abused its discretion, we cannot ignore the backdrop of the dispute. Meeker had notice of the default judgment ordering her to remove her fence; after receiving notice, she told Ray's attorney,

"When our grandchildren are dead, the fence may be removed." Faced with the long-awaited but now impending removal, Meeker sought to circumvent the default judgment and writ of execution and delay removal by petitioning for a protection order. In petitioning, Meeker omitted the fact of the default judgment. The language of the petition form did not prompt her to include information about Ray's default judgment; but her responses, while accurate, were somewhat less than forthcoming about the nature of the dispute.[2] And in an email sent to Clayton's attorney the day before she petitioned for the protection order, Meeker threatened that if Clayton did not sell the property to her, she would try to delay the sale "for years," and that she had "means to litigate for years." The purpose of RCW 4.84.185 is to curb abuses of the judicial system. Skimming, 119 Wn. App. at 754. Given the foregoing, an award here serves that purpose.

The arguments raised by Meeker do not demand the conclusion that the trial court abused its discretion in determining that her petition was frivolous.

C. Findings Supporting RCW 4.84.185 Award

Meeker says the trial court erred by entering its attorney fees and costs order without making the findings on why her petition was frivolous, and erred by entering its attorney fees and costs order without conducting a lodestar analysis. We agree that it should have entered findings supporting its frivolity determination and remand.

[2] "[Question]: Is there any other litigation between the victim/s and the respondent? This includes all matters—pending or past—such as parenting plans, landlord-tenant disputes, employment disputes, or property disputes . . .

[Response]: No."

1. Explanation of frivolity

"[B]efore awarding attorney fees under RCW 4.84.185, the court must make written findings that the lawsuit in its entirety is frivolous and advanced without reasonable cause," and go beyond summary findings that the lawsuit is frivolous and advanced without reasonable cause. N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 650, 151 P.3d 211 (2007). Where the trial court fails to enter such findings, we may remand for it to enter them. Id. The trial court did not enter findings to support its decision beyond stating that the petition was frivolous and advanced without reasonable cause. CP 227. And the trial court did not enter other findings upon which we might rely. Cf. Hanna, 193 Wn. App. at 613 (affirming the trial court's frivolity determination where its supporting finding used stock language, but its other merits findings allowed for adequate review). We thus remand for the trial court to enter findings supporting its frivolity determination.

2. Lodestar analysis

A court need not use the lodestar analysis when deciding the amount of fees under RCW 4.84.185. Highland Sch. Dist. No. 203 v. Racy, 149 Wn. App. 307, 316–17, 202 P.3d 1024 (2009). But the court should have an objective basis for the award and must sufficiently explain that basis to permit appellate review, and the award cannot exceed the costs incurred. Id. at 316.

Clayton's attorney submitted records detailing the number of hours expended on tasks related to the petition and the hourly cost for each task; the

records listed tasks such as conferencing with Clayton, drafting briefing, and corresponding with opposing counsel and the court. Based on the records, the trial court granted an award of $15,181 in attorney fees and $61.78 in costs. It concluded that its award was "reasonable for the Seattle area given the level of experience and the nature of the cause and reasonable for obtaining dismissal of the action." The trial court had an objective basis for awarding the attorney fees and costs and it does not appear the award exceeded the costs incurred. The trial court did not err on these grounds.

D. Appellate Attorney Fees and Costs

Clayton requests an award of attorney fees and costs on appeal. We deny his request.

"RAP 18.1(a) allows this court to grant attorney fees if applicable law grants the right to such recovery." Washington Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 719, 282 P.3d 1107 (2012). "A party requesting fees under RAP 18.1 must provide argument and citation to authority 'to advise the court of the appropriate grounds for an award of attorney fees [and] costs." Robinson v. Am. Legion Dep't of Wash., Inc., 11 Wn. App. 2d 274, 298, 452 P.3d 1254 (2019) (quoting Stiles v. Kearney, 168 Wn. App. 250, 267, 277 P.3d 9 (2012)).

Clayton says that because Meeker is appealing a sanctions award, he should be awarded additional attorney fees and costs if he prevails. He relies on Washington Motorsports in which Division Three of this court affirmed a trial

court's grant of CR 26(g) discovery sanctions, and then granted attorney fees and costs on appeal under CR 26(g); it reasoned that "the sole reason for this appeal is the discovery violation that led to the sanction of attorney fees against counsel." 168 Wn. App. at 719–20 (citing Magaña v. Hyundai Motor America, 167 Wn.2d 570, 220 P.3d 191 (2009)). But CR 26(g) allows an award of an "appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation"—and attorney fees incurred because of an appeal of a CR 26(g) award are expenses incurred because of an underlying CR 26 violation. Unlike in Washington Motorsports, the attorney fees and costs here do not stem from a discovery violation.

We remand for entry of findings to support the trial court's frivolity determination. And we deny Clayton's request for attorney fees and costs.

Chun, J.

WE CONCUR:

Brennan, J.

Mann, C.J.