

ORIGINAL



FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
MAR - 7 2018

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION I

JOHN D. HADDEN
CLERK

IN RE THE MARRIAGE OF:)
)
[REDACTED],)
Petitioner/Appellee,)
and)
[REDACTED])
Respondent/Appellant.)

Case No. [REDACTED]
Tulsa County District Court
Case No. [REDACTED]

Received 3/7/18
Discovered
Marched
COA/DCO
COA/TUL

**APPELLANT'S RESPONSE TO APPELLEE'S MOTION FOR
APPEAL-RELATED ATTORNEY FEES**

COMES NOW, [REDACTED] Appellant, by and through his attorney of record, Brian R. Swenson, and pursuant to Okla. Sup. Ct. R. 1.14(B), 12 O.S. § 696.4, 20 O.S. § 15.1, and 43 O.S. §§ 110 & 111.1, hereby responds to Appellee's Motion for Appeal-related Attorney Fees submitted on February 20, 2018, objecting and responding as follows:

BRIEF STATEMENT OF FACTS

Appellant, [REDACTED] was found guilty of indirect of contempt of court for failure to pay child support by the trial court on January 6, 2017, after a trial on the same issues held on December 16, 2016. Subsequently a hearing for attorney fees and cost was held in front of the Honorable Tammy Bruce where attorney fees and costs were granted to Appellee. Appellant appealed the trial court's decision. The appeal raised two questions: (1) Whether the trial court abused its discretion and rendered a decision contrary to the evidence at trial in finding Appellant guilty, and (2) Whether the trial court's decision was an abuse of discretion and contrary to the evidence in failing to calculate the arrearage judgment which did not include the specific dates out of the twenty-two (22) dates alleged by Appellee.

After briefing by both parties, the Oklahoma Supreme Court assigned the case to the Court of Civil Appeals of the State of Oklahoma, Division One. The Court of Appeals affirmed the trial

court's decisions. However, the Oklahoma Supreme Court as well as the Court of Appeals both denied Appellee's motions to dismiss, *see* Court Docket May, 30, 2017; *see also* Court of Civil Appeals Decision, ¶ 6 at 3-4, and there were no findings by either court of abuse of process, vexatious litigation or willful violation of any of the Oklahoma Supreme Court Rules.

I.

Appellant agrees in part and denies in part: “[a] motion for an appeal related attorney’s fee must be made . . . [and] must state the statutory *and decisional authority* allowing the fee.” Okla. Sup. Ct. r. 1.14(B). However, Appellee is not entitled to appeal-related attorney fees. While attorney fees are recoverable if statutory and decisional authority exists for their award in the trial court, “[t]he award of appeal-related attorney fees in this appeal is *not dependent on prevailing party status*, but on whether equities warrant the award.” *Phillips v. Hedges*, 2005 OK 77, ¶ 17, 124 P.3d 227, 232 (emphasis added). This case is analogous to *Phillips* and also does not merit an award of appeal-related attorney fees to Appellee.

Appellee contends that Appellant’s request for appellate review was “wholly without merit” which is nowhere stated in this Court’s *Opinion*. There was no such finding that Appellant’s appeal was “without merit” as Appellee contends. The Oklahoma Supreme Court’s denial as well as this Court’s denial of Appellee’s motions to dismiss reveal the same. *See* Court Docket May, 30, 2017; *see also* Court of Civil Appeals Decision, ¶ 6 at 3-4.

Appellee does not give any evidence as to a balancing of the equities other than making baseless accusations toward Appellant. *See* Appellee’s Motion, Paragraph “VIII”, at 4. There were no findings by this Court in its *Opinion* that Appellant was in anyway vexatious or prolonged the appellate proceedings during this appeal process.

Also missing from Appellee's request for attorney fees, and more importantly, Appellee fails to address her financial capacity in her motion for an award of attorney fees. There is no indication at all about her current financial status along with any supporting evidence or a required accompanying affidavit. In turn, Appellee fails to show any relevant factors to indicate that an award of appeal-related attorney fees is warranted pursuant to *Phillips*. (“[A]s to the second factor, Mother has failed to produce any evidence of her financial position.”) *Id.* ¶18 at 232.

II.

Appellant agrees in part and denies in part. Appellant agrees that 43 O.S. §111.1 authorizes an award of attorney fees in the case of indirect contempt to pay child support. However, the trial court already granted attorney fees for the contempt at the trial-court level for \$6,823.25 in favor of Appellee which has been paid by Appellant. Appellee's request that she is entitled to attorney's fees in accordance with 43 O.S. § 111.1 for the appeal is misplaced and deficient. As discussed *infra.*, Appellee's motion does not meet the requisite standards set forth in *Phillips*.

III.

Appellant denies in part. Appellee incorrectly states that 43 O.S. § 110 (D), (E) generally authorizes awards of attorney fees and costs in litigation stemming from divorce actions. Both section D and section E of said statute leaves the award of expenses up to the court's discretion. However, section D specifies: “*Upon granting a decree of dissolution of marriage, annulment of a marriage, or legal separation,*” and does not apply to the current situation of an appeal of a contempt citation from the trial court. 43 O.S. § 110 (D) (emphasis added).

Appellant agrees that an award of attorney's fees in the present case should be determined upon the balancing of equities, as case law provides that “[a]n award of appeal-related attorney fees is not dependent on prevailing party status but whether equities warrant the award.” *Kerby v.*

Kerby, 2002 OK 91, ¶ 1, 60 P.3d 1038, 1040. However, Appellee fails to state her reasoning as to why the Court should find that a balancing of the equities falls in her favor. Case law provides that in the balancing of equities, the Court is to look to two relevant factors including the merit of the claims and the parties' financial conditions. *Phillips v. Hedges*, 2005 OK 77, ¶ 17, 124 P.3d 227, 232. Appellee's motion fails to address either of these factors and thus fails as she is the movant and it is, therefore, her burden. As in *Phillips*, Appellee's failure to show that the equities, particularly the parties' financial conditions, warrant an award of appeal-related attorney fees merits a denial of her motion for appeal-related attorney fees. *Id.* at 232.

IV.

Appellee argues that "attorney fees *may be awarded* where 'the Supreme Court or its designee finds that the appeal is without merit.'" See Appellee's Motion, ¶ "VI" at 3 (*citing* 20 O.S. § 15.1). Appellant agrees with the statute citation but not the premise upon which Appellee uses to warrant her request for fees. This Court's *Opinion* did not grant Appellee's Motion to Dismiss nor did it find that Appellant's appeal was in anyway "without merit."

V.

Appellant had every right to appeal the trial court's decision and his doing so was not arbitrary nor capricious. All litigants are entitled to one appeal as a matter of right. Further, this case did not involve simply having to repay child support a second time and a \$500 fine; Appellant also lost his liberty as the trial court sentenced him to six months in jail. Appellee also ignores that there was no finding by this Court in its *Opinion* that the expenses of litigation in this case were caused by arbitrary and capricious conduct of Appellant which unduly increased the overall cost of litigation for either party.

VI.

Appellee's argument that Appellant's appeal was found to be "without merit" is a made-up construct of Appellee and her attorney. The Court of Appeals simply affirmed the lower court's decision but did not in any way determine that the appeal was without merit. Conversely, this Court denied Appellee's Motion to Dismiss the Appeal as did the Oklahoma Supreme Court previously. *See* Court Docket May, 30, 2017; *see also* Court of Civil Appeals Decision, ¶ 6 at 3-4.

VII.

Appellee incorrectly states that "the clear language of 43 O.S. § 111.1 (C) mandates an appeal-related attorney fee award" in her favor. This is a completely incorrect statement and yet another made-up assertion by Appellee. As previously mentioned, 43 O.S. § 111.1 (C) provides for an award of attorney fees at the trial court level on indirect contempt for failure to pay child support. However, the issue is appeal-related attorney fees which case law has consistently found requires the balancing of equities and not simply a prevailing party status. *See Kerby v. Kerby*, 2002 OK 91; *see also Phillips v. Hedges*, 2005 OK 77. Appellee's assertion that appeal-related attorney fees are "mandated" here pursuant to 43 O.S. § 111.1(C) is false. Again, Appellee requested Appellant's case be dismissed twice and both requests were denied. *See* Court Docket May, 30, 2017; *see also* Court of Civil Appeals Decision, ¶ 6 at 3-4.

Furthermore, Appellee's assertion that her fees and costs were unnecessarily exacerbated by Appellant's litigation conduct is as outrageous as it is fictitious. It was in fact Appellee who unnecessarily exacerbated attorney expenses at the trial court level by requesting a continuance after having represented to the court on November 18, 2016 that she was ready to proceed upon announcement of appearances. *See* Appellant's Brief in Chief, ¶8 at 6. Appellee also fails to

mention that she filed two additional contempts against Appellant which were both summarily denied by the trial court.

Contrary to Appellee's claim, this Court's *Opinion* did not find that Appellant's appeal was "wholly without merit." It merely affirmed the trial court's decision. Moreover, this Court's *Opinion* denied Appellee's claim to dismiss Appellant's Appeal.

VIII.

Appellee's motion for appeal-related attorney fees should be denied as it fails to address the two relevant factors required pursuant to *Phillips*. The "[t]wo relevant factors in balancing the equities are the merit of the claims and the parties' financial conditions." *Id.* ¶ 17 at 232. The Court of Civil Appeals did not in any way state that Appellant's appeal was frivolous or "without merit." This Court also did not find that Appellant prolonged the litigation, was in anyway vexatious during the appeal process, or demonstrated any "willful disregard" of the Supreme Court Rules.

However, Appellee, by and through counsel, does attempt to rewrite this Court's Opinion when accusing Appellant "*and his counsel*" of "*churning of litigation*." See Appellee's Motion for Appeal-Related Attorney Fees, ¶ "VIII" at 4. This claim is so egregious and unprofessional by Appellee's counsel that it is difficult to simply rebut with a civil response. Appellant *and his counsel* did nothing Appellee's counsel so irresponsibly accuses them of except exercise Appellant's *right to an appeal*. Appellee's counsel should take some time when not standing on his pedestal to read the Oklahoma Supreme Court Brochure which states in the very first line of "Bringing Cases Before the Appellate Courts", to wit: "In Oklahoma, *all litigants are entitled to one appeal as a matter of right*." See Oklahoma Supreme Court Brochure, "Bringing Cases Before the Appellate Courts," <https://www.oscn.net/oscn/schome/appelcase.htm> (emphasis added).

IX.

Appellant mistakenly filed an appendix as a court aid due to the fact that both parties' respective Narrative Statements were omitted from the designated record by the Tulsa County Court Clerk's desk when putting same together for appellate review. *See* Appellant's Show Cause Brief, filed Oct. 16, 2017, at 7. As explained in Appellant's Show Cause Brief, the only items added for clarity of the whole record to be reviewed were the two parties' Narrative Statements. There was no intent to mislead or willfully violate any of the Supreme Court Rules as Appellee accuses; and, neither this Court nor the Oklahoma Supreme Court found there to be any such willful intent to violate Supreme Court Rules by Appellant.

However, Appellee still insists that she should receive attorney fees because this Court in its *Opinion* did strike Appellant's appendix. Appellee provides no authority other than prevailing party status on this issue. As stated *supra*, "[t]he award of appeal-related attorney fees in this appeal is *not dependent on prevailing party status*, but on whether equities warrant the award." *Phillips v. Hedges*, 2005 OK 77, ¶ 91, 124 P.3d 227 (emphasis added). Using Appellee's same flawed logic then, Appellant should be awarded attorney fees for any part in which he had to respond to Appellee's multiple motions to dismiss – all of which were summarily denied by both this Court and the Oklahoma Supreme Court. *See* Court Docket May, 30, 2017; *see also* Court of Civil Appeals Decision, ¶ 6 at 3-4.

CONCLUSION

Appellee's request for attorney fees and costs for her request to strike as well as her entire request for attorney fees should be denied. Appellee's motion does not at all comply with the two-pronged balancing of the equities requirements. Appellee falsifies Appellant's "litigant behavior" as somehow vexatious and even goes so far as to make the outrageous accusation of "churning"

where none existed because it did not ever happen in this case or any other of which Appellant's counsel has participated. Secondly, Appellee fails to give any evidence of her financial position as required, which is the basis for giving merit to such an award of attorney fees as set forth in *Phillips*. Based on the foregoing, Appellee is not entitled to any appeal-related attorney fees.

WHEREFORE, premises considered, Appellant prays Appellee's Motion for Appeal-Related Attorney Fees be denied and that no order be issued remanding this case back for hearing to the trial court for any further determination, and for such other and further such other relief as the Court deems just and equitable.



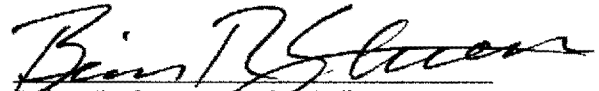
Brian R. Swenson, OBA # 30746
Swenson & Swenson, PLLC
1719 East 71st Street
Tulsa, Oklahoma 74136
(918) 481-5898
Fax: 488-5899
Attorneys for Respondent/Appellant

Rule 4c Verification

STATE OF OKLAHOMA)
)
COUNTY OF TULSA)

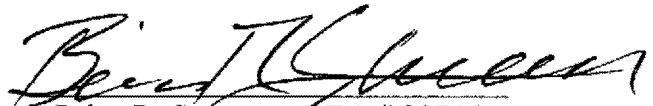
ss:

The undersigned, of lawful age and after being duly sworn upon his oath, deposes and states, pursuant to Rule 4c of the Rules for District Courts of Oklahoma, that he is the attorney for the Appellant above named, and that the allegations and averments are consistent with what the proof will show.


Brian R. Swenson, OBA # 30746

I, as an officer of the Court, state under penalty of perjury under the laws of Oklahoma, that the foregoing statements and averments above contained are true and correct to the best of my knowledge and information.


Dated this 5 day of March, 2018.


Brian R. Swenson, OBA # 30746

CERTIFICATE OF SERVICE

I, hereby certify that on this 8th day of March, 2018, a true and correct copy of the above and foregoing document was mailed by U.S. Mail, with proper postage thereon fully paid to:

N. Scott Johnson
Patrick H. McCord
N. Scott Johnson & Assoc.
302 East 10th Street
Tulsa, OK 74120


Brian R. Swenson