

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRK ROSS HARRISON,

Appellant/Cross-Respondent,

v.

VIVIAN MARIE LEE HARRISON,

Respondent/Cross-Appellant.

Supreme Court No. 66072
District Court Case No. 10443611
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Tracie K. Lindeman
Clerk of Supreme Court

**APPEAL FROM JUDGMENT
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR COUNTY OF CLARK
BRYCE DUCKWORTH, DISTRICT JUDGE**

RESPONDENT / CROSS APPELLANT'S REPLY BRIEF

DATED this 17 day of March, 2016

RADFORD J. SMITH, CHARTERED

By: 

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8

9 **NRAP 26.1 DISCLOSURE**

10 The undersigned counsel of record certifies that the following are persons and entities described in
11 NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this
12 court may evaluate possible disqualification or recusal.
13

- 14 1. All parent corporations and publicly –held companies owning 10 percent or more of the party’s
15 stock: None
16 2. Names of all law firms whose attorneys have appeared for the party or amicus in this case
17 (including proceedings in the District Court or before an administrative agency) or are expected
18 to appear in this court:
19

20 RADFORD J. SMITH CHARTERED

- 21 3. If litigant is using a pseudonym, the litigant’s true name: None

22 DATED this 21 day of March, 2016.

23 RADFORD J. SMITH, CHARTERED
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REPLY ARGUMENT ON VIVIAN'S CROSS APPEAL

I. KIRK HAS FAILED TO ADDRESS VIVIAN'S CORE ARGUMENT: THAT HIS PLEADINGS GREATLY, AND UNJUSTIFIABLY, INCREASED THE SCOPE OF WORK

Vivian's argues upon appeal that district court's findings should have led to a reimbursement to her of all or a portion of the fees and costs she expended to respond to Kirk's massive filings in the custody action that unnecessarily multiplied the proceedings in this case under EDCR 7.60(2)(b). The court made findings that form the basis for an award of fees and sanctions:

Each party sought primary physical custody of the children, and because they settled for joint physical custody, neither prevailed. However, "it is not lost on the Court that Kirk's allegation that Vivian suffered from a serious psychological disorder that impeded her parenting abilities was not proven by *competent* evidence." 16 A.App. 3444 [Emphasis in original];

An evidentiary hearing resolving the custody issue would have been set and held earlier than the parties' stipulation regarding custody had Kirk not plead for the Court to appoint Dr. Paglini; 16 A.App 3385.

The Court could not find that either party suffered from any mental deficiency compromising his or her ability to care for the children in light of Kirk's refusal to allow the custody evaluation of Dr. Paglini to be completed. "It is inconsistent to vociferously oppose the completion of the report while at the same time continue to suggest that Vivian suffers from a psychological infirmity that impairs her parenting ability." 16 A.App. 3385.

Dr. Norman Roitman's report, in which he diagnosed Vivian "to a reasonable degree of medical certainty" based upon allegations from Kirk without ever meeting her or reviewing her medical records, "effectively framed the complexity of the custody issue and established the blueprint for highly contentious litigation." 16 A.App 3386.

“Considering the gravity of the custody issue before the Court and the framework of litigation established by Kirk’s Custody Motion (Sept. 14, 2011) this Court does not find the amount of time spent by Vivian’s counsel to be unreasonable.” 16 A.App. 3387-3388.

The quality of the representation by all attorneys for both sides was “at an exceptional level.” 16 A.App 3391.

The district court found that Kirk never proved his claim of NPD, and as reflected in the court’s findings, that was the issue that “established the blueprint for highly contentious litigation. Vivian does not dispute the court’s findings, but requests that this Court find that this court hold that when a part greatly increases the cost of litigation by claims for which he provides no competent evidence, delays the hearing of the matter by insisting on filing phone book sized briefs, and delays the process of proceeding to trial by demanding a neutral expert where four different experts have examined the individual in question, the court should compensate the other party for extraordinary fees incurred by that party’s actions. Those are the findings of the district court, but without an award based upon those findings by the court.

In his opposition brief, Kirk sidesteps Vivian’s argument by marginalizing the consequence of his filing of massive briefs. He first claims that he was only seeking primary custody, and that Vivian never faced the loss of her children. A cursory review of his pleadings shows that to be false. In his initial Motion, filed September 14, 2011, he states “Vivian has a pathologically Narcissistic Personality Disorder and, if not stopped, will continue to inflict damage and injury upon Brooke and Rylee

with severe long term adverse effects.” (1 A. App. 22). He then quoted the report of Dr. Roitman that he helped prepare:

[. . .] Unfortunately, the only viable option for the health and well-being of children is to visit with their mother only. They should not be controlled or directed by her. She should not try to reinsert herself into their lives as their parent.

1 A.App. 23. Kirk motion expressly seeks “the establishment of a timeshare schedule, with such order providing for supervision for Defendant to ensure appropriate sleeping arrangements and behaviors for the protection and best interests of the minor children[.]” 1 A. App. 9 On appeal, Kirk attempts to recast that clear request as only arising from his concern about sleeping arrangements, but the content of the motion demonstrates he was generally requesting supervised visitation of the children to “protect” them from Vivian. Kirk wanted the court to eliminate Vivian as a parent to the children because of his claim she would harm them.

His request to eliminate Vivian from the lives of the children did not end with his initial motion. In his Reply to Vivian’s Opposition to his initial motion (which he filed 63 days after Vivian served her Opposition), he claimed that Vivian was “unstable, volatile, aggressive, assaultive, callous, emotionally abusive, physically abusive, deceitful and harmful[.] 4.A.App 675 He again included the above quoted portion of Dr. Roitman’s “diagnosis,” and claimed at the end of his 81 page brief that, “Brooke and Rylee do not have to suffer from the same disorder Vivian suffers from for the rest of their lives.” 4 A.App 753.

The best evidence that Kirk knew clearly he was asking for supervised visitation are the words of his attorney. As addressed in Vivian's Answering Brief, at page 16, at the hearing of December 3, 2011, Vivian's counsel desperately requested that the district court do something to prevent Kirk from filing more massive briefs. Instead, Kirk's counsel asked to delay the hearing on the motion then scheduled for December 19, 2011, and instead move the hearing to some time in February. The district court incredulously asked, "If we have children who are potentially at risk, which is the nature of the underlying motion delay this any further?" (13 A. App 2799) Mr. Standish responded that Kirk needed more medical information on Vivian (13 A.App), even though Kirk had already sent out and received responses to 17 separate subpoenas to various providers. Kirk already had months of clean drug tests from Vivian. His other attorney Mr. Kainen's responded that they were expecting the medical records to support Kirk's claim for supervised visitation:

MR KAINEN: And my concern is quite frankly, the temporary orders which we're seeking to rush to will be used as an advantage in this case on the ultimate resolution. In other words, if you can move early and move in a way that's favorable to their position, that will then create a situation where it benefits their case in the long run, which is why you have two sides here, one that's rushing to judgment, because what they want to do is start staking out grounds on custody and other things, okay, and you have one side that's saying, look, move a little cautiously, get all the information.

If we're right, okay, and the medical evidence is what will determine that, then putting the children in an unsupervised situation with Mrs. Harrison would be extremely dangerous. And so the idea is let's rush in and make preliminary orders prior to information being fully available.

(13 A.App 2800)(Emphasis supplied). Kirk's claim at ARB p. 33 that "Kirk only wanted primary physical custody and whatever safeguards were necessary to protect the children" is false. He wanted Vivian to have supervised visitation because he believed she had a psychological disorder.

The other conclusion from Mr. Kainen's statement was that Kirk was more concerned about the preliminary orders being "used as an advantage in this case," not about the safety of the children. That fact was emphasized by Vivian's counsel.

MR. SMITH: Let me just note that Mr. Harrison left the children in her care without supervision this weekend, so if it was such a concern, why in the world would he worry about these briefings.

[. . .]

In regard to the damage to the children or the alleged problems with these almost straight – A, well-loved, active children, you can - - there is no psychological evidence whatsoever before you, but certainly the way to get to that point, is as you described, to allow the parties to either have the children evaluated or set an outsource evaluation. That's what makes sense. The rest of this is an attempt to gather up all this information and basically do what they did with the initial salvo, and that was [throw] enough at the wall and see if it sticks.

13 A.App 2801-2802. Kirk's voluminous discussion of the elements of the NPD claim in his briefs, and the exchanges at court during which Kirk's counsel repeatedly alleged that Vivian would be shown to be psychologically unfit,

supported the district court's finding recognizing that Dr. Roitman's report "effectively framed the complexity of the custody issue and established the blueprint for highly contentious litigation." 16 A.App 3386. In other words, the court recognized that it was the NPD claim that fueled the litigation. That finding should have led the court to order Kirk to bear the responsibility for that "blueprint" (that greatly delayed and increased the cost of litigation) because he created it.

Roitman's diagnosis was solely based upon Kirk's 132 page affidavit, and two affidavits of the parties' adult daughters that Kirk initially prepared 2 A.App 222-223. Kirk admits "resorting" his allegations by the elements of a DSM-IV diagnosis in a draft provided to Roitman. 9 A.App. 1873. That "resorting" was in the form of a 43 page draft complete with a Table of Contents that was inadvertently produced by Dr. Roitman in his response to subpoena 7 A.App 1484. Kirk claims the draft he prepared "resorted" factual allegations, but that does not explain why the Table of Contents to that draft contained sections for "Qualifications" "Books & Treatises Reviewed" "Assumptions" and "Limitations on Opinions." 7 A.App 1484. None of those categories fall into the "resorting" of factual allegations. In his deposition of conducted April 27, 2012, Roitman first claimed he did not remember the draft. (7 A.App. 1487-1490). Kirk claimed in his deposition that he threw the draft away. (13 A.App. 2742). In a letter to counsel several weeks later, Roitman then claimed he had used the electronic file Kirk had sent him to write his final report, and thus

did not have the original electronic file. The fact that a written Table of Contents of Kirk's draft was in Roitman's file belied that claim. 7 App. 1484. Even if Roitman's claim was true, it suggested that he utilized the language Kirk's draft to form his report. Roitman further admitted in his deposition that Kirk presented research in his draft, and that he used that research. 7 A. App. 1484.

The DSM-IV elements of NPD, and the allegations Kirk arranged, are at page 11 of Dr. Roitman's report. Those elements are the precise elements that are contained in the written Table of Contents Kirk had prepared for Dr. Roitman. 7 A. App. 1484. To meet the elements of NPD, Kirk alleged facts supporting each element. He eliminated facts that he initially provided to Dr. Roitman that were contrary to the claims he used to prepare the draft of Dr. Roitman's report. He retained careful control over the "facts."

The Court found that "Kirk's allegation that Vivian suffered from a serious psychological disorder that impeded her parenting abilities was not proven by *competent* evidence." 16 A.App. 3444 [Emphasis in original] If the claim of NPD was not supported by competent evidence, it follows that the court gave little regard to Kirk's allegations underlying that claim. That fact is demonstrated by the district court's award of temporary joint physical custody after having reviewed all of the preliminary pleadings.

Kirk argues in his Opposition to Cross Appeal, at page 31 that “Vivian placed an inordinate focus on the NPD issue because she had not defense to the detailed documented history of parental misconduct and neglect.” Kirk’s argument is confused. All of the allegations of parental misconduct that Kirk alleged or just made up were “resorted” by Kirk into Dr. Roitman’s report. The NPD issue was composed of all of those allegations.

Kirk, to this day, has never disavowed Dr. Roitman’s report. Roitman’s action of diagnosing Vivian “to a reasonable degree of medical certainty,” without meeting her or reviewing any medical records was unethical. 13 A. App. 2628

A. Kirk’s Actions Forced Vivian to Incur Unnecessary Fees

Kirk had the right to bring a motion for primary custody, and allege facts supporting that claim. Had Kirk stated his fundamental factual contentions in a motion seeking primary custody within the mandated page limits (30 pages with 100 pages of exhibits under EDCR 2.20(a)) , and requested a child custody assessment with psychological testing, the parties likely would have spent a minute fraction of the cost they ultimately spent on expert and attorney’s fees. Many litigants present claims to the family courts in which they seek primary custody of their children by alleging drug use by the other party, claiming they have spent more time with children than the other party, claiming that the other party is inattentive to the needs of the children, claiming the other party is engaged in co-sleeping with the children

that is harmful, and/or claiming that the other party has committed acts of domestic violence. There is nothing unusual at all about those meritless claims that Kirk leveled in this case. Vivian would have met that Motion with a response to the essential facts, and the matter would have proceeded to assessment without the expenditure of anything close to the fees the parties expended.

Kirk's actions in presenting his NPD claim, and his emphasis on that claim as a basis for his motion practice is addressed in a timetable in Vivian's Reply Brief in support of her motion for attorney's fees filed below. (13 A.App. 2633-2639) That timetable alone was sufficient basis for the district court's findings that Kirk did not provide competent evidence, laid the blueprint for the litigation, and delayed the matter.

B. Kirk's Claims of "Parental Misconduct" are Not Supported by Either the Findings of the District Court or the Facts of the Case, and His Insistence on Referencing them in his Brief is Evidence of His Continued Unnecessary Multiplication of This Case

Kirk claim that the record of this case establishes parental misconduct is preposterous. That claim is false. All of Kirk's claims were meticulously rebutted by records, affidavits from 27 affidavits, charts of expenditures and travel, and expert reports and hundreds of pages of briefing. (*See*, 2 A.App 362-418; 3 A.App 419-652; 5 A.App 935-1147; 6 A.App 1148-1292; 13 A. App. 2616-2698) So the Court is clear, Vivian rebutted all of Kirk's false allegations below.

Almost all of Kirk's citations are to his own affidavit, or the affidavits of the adult daughters that he initially prepared.

Appellant's Opening Brief:

	A. App Cite	Document	Pages
1.	4 A. App. 755-758	Kirk's Affidavit in Support of Motion for Primary Custody and Exclusive Possession of Marital Residence, 1/4/12	8, 22, 23
2.	9 A. App 1836-1853	Kirk's Affidavit	1, 2, 3, 4, 5, 6, 8, 11, 12, 13, 19, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 36
3.	9 A. App. 1857 – 1860	Exhibit B to Kirk's Affidavit: Unnecessary and Duplicative Discovery of Financial Records	31
4.	9 A. App 1804	Exhibit to Kirk's Opposition – Chart Comparing Fees	3, 31, 32
5.	9 A. App. 1855	" Letter " Kirk wrote to "Vivian" but no stamp, email time/date stamp/COS	31

Appellant/Cross-Respondent's Amended Reply Brief and Answering Brief on Cross Appeal ("ARB")

	A. App Cite	Document	Pages
1	4 A. App. 755-758	Kirk's Affidavit in Support of Motion for Primary Custody and Exclusive Possession of Marital Residence, 1/4/12	1, 2, 3, 5, 6, 10, 26,
2	2 A. App. 348 – 361	Kirk's Affidavit in Support of Plaintiff's Motion for Primary Custody and Exclusive Possession of Marital Residence, 9/9/11	2, 3, 4, 5, 6, 25, 26, 27,
3	1 A. App. 58 – 175	Kirk's Affidavit in Support of Plaintiff's Motion for Primary Custody and	2, 3, 4, 5, 10, 11, 12, 18, 27,

		Exclusive Possession of Marital Residence, 6/9/11	
4	1 A. App. 181 – 196	Tahnee’s Affidavit 3/22/11	2, 3, 4, 5, 10, 11, 14,
5	1 A. App. 198 – 207	Whitney’s Affidavit 3/22/11	2, 3, 4, 5, 10, 11, 14,
6	9 A. App 1804	Exhibit to Kirk’s Opposition – Chart Comparing Fees	27
7	9 A. App 1836-1853	Kirk’s Affidavit	19, 22, 23, 24, 25, 27, 31, 32, 34,

In other words, Kirk almost exclusively relied allegations that he placed in his own statements, or the statements of the parties’ adult daughters. Noticeably absent from the litigation was any follow up affidavits from the daughters that disavowed Vivian’s rebuttal of their claims.

The district court did not issue any finding on the claims that Kirk leveled both below and now on appeal. On the contrary, the district court specifically indicated that its review of the merits of the parties’ pleadings would “inhibit constructive settlement” 16 A.App. 3388.

Further, Kirk’s contention that Vivian’s counsel did anything to impede a settlement in the mediation is demonstrably false. 13 A.App. 2650-2660. Kirk’s contention that he did everything he could to settle the case is belied by his pleadings, the statements of his counsel quoted above, and his continued insistence that Vivian suffered from a psychological disorder that prevented her from safely having the

children in her care. Kirk's claim that he did not proceed forward even after receiving Vivian's expert reports is false. Those reports were attached to Vivian's pleadings, and Kirk nevertheless proceeded to hearing, and asked that Vivian be seen by a "neutral" expert. 5 A.App. 935-1147 Perhaps most important, the district court made no finding supporting Kirk's claim of misconduct by Vivian's counsel because none existed.

II. KIRK HAS MISTATED THE AMERICAN RULE AS INTERPRETED UNDER NEVADA LAW

Kirk characterizes the "American Rule" as requiring each party to bear their own attorney's fees, and based upon that characterization, asks that the application of NRS 125.150(3) be limited. The American Rule as interpreted by this court is that "attorney fees may not be awarded absent a statute, rule or contract authorizing such award." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). It requires that each party bear their own fees when one of those conditions does not exist. Here, NRS 125.150(3) specifically authorizes a district court to award fees in a divorce action.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO ADDRESS VIVIAN'S CLAIM FOR SANCTIONS UNDER EDCR 7.60(b)(2) BASED UPON KIRK'S UNNECESSARY INCREASE OF THE COSTS OF THE CUSTODY LITIGATION

Kirk incorrectly claims that the district court adjudicated Vivian and Kirk's claims under EDCR 7.60. In reality, the district court findings on those issues was

limited to motions, and did not address Vivian's request for sanctions related to Kirk's conduct and filings in the custody portion of the case. Contrary to Kirk's contention, the district court made no finding regarding Vivian's claim under EDCR 7.60 raised in her Motion for Attorney's Fees filed. EDCR 7.60 reads in relevant part:

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

(1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.

[. . .]

(2) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

The court arguably made a finding that Kirk's action of filing voluminous pleadings caused the a substantial and unreasonable increase in the costs of the litigation, but it chose not to perform an analysis. It instead pointed to the fact that the parties resolved the case, albeit recognizing that Kirk had not proved the fundamental claim upon which his allegations were based, his contention that suffered from a serious psychological disorder. (16 A.App. 3357). In finding that the time Vivian's counsel spent on the case was "not unreasonable" the district court observed:

In retrospect, the overall tenor of this initiating motion and Kirk's argument suggests that if Vivian would not succumb to the specific relief sought by way of the Custody Motion and psychological

diagnosis, she would at least capitulate to the manner in which Kirk proposed that the issue of custody be litigated.

(16 A.App 3353). Stated another way, Vivian's options were to capitulate, or litigate in the manner Kirk set by his motion. Vivian could not capitulate to supervised visitation, so she was required to meet Kirk at every turn. This is the essence of a claim under EDCR 7.60. That rule is designed to sanction those parties that conduct litigation in a manner that unnecessarily increases costs. The merits of the claims are not the issue under 7.60(b)(2). Claims that are "frivolous, unnecessary or unwarranted" are addressed in 7.60(b)(1).

Vivian did not seek to relitigate the issue in her Motion for Attorney's Fees and Sanctions, and after Kirk filed his 133 pages (with 805 pages of Exhibits) in response (8 App. 1549-1698), she filed a Reply requesting that the court direct Kirk to condense his brief. (12 A.App. 2503). The district did not rule on that motion, but instead set the matter for hearing. Only then did Vivian file a substantive response (77 pages) to all of the claims Kirk sought to relitigate after the settlement. Vivian asked the district court to award her fees under EDCR 7.60, but the court did not perform an analysis to determine whether Kirk's voluminous pleadings caused the parties to incur unnecessary expense.

Moreover, the Court's emphasis on the fact that the parties settled the custody matter as a factor in determining the fees should have considered the parties' reservation of that issue in their resolution. The parenting agreement reads: The

evidence in the record, quoted in Vivian's Brief on cross appeal, made it clear that Vivian never agreed to resolve the issue of the attorney's fees that Kirk had caused her to expend to arrive at nearly the same order she had proposed before the litigation commenced. The parties expressly agreed to address the issue of attorney's fees at the end of the case. 15 A.App 3281- 3282.

Vivian requests that this Court find that the district court has abused its discretion by failing to determine Vivian's claim under EDCR 7.60(b)(2) that Kirk's manner of litigation of the custody matter, addressed in the findings of the court, greatly and unnecessarily multiplied the proceedings and grossly exacerbated the fees and costs expended.

Dated March 17, 2016


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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Font Size 14, in Times New Roman;
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 3,813 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this ²¹... day of March, 2016.

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