IN THE SUPREME COURT OF THE STATE OF NEVADA

Matthew F. Arcella,

Appellant,

vs.

Melissa Ann Arcella,

Respondent.

Supreme Court Case No. **71503**
District Court Case No. **D-09-418160-Z**

RESPONSE TO FAST TRACK STATEMENT ON CROSS APPEAL

1. **Name of party filing this fast track response:** Matthew F. Arcella ("Matthew").

2. **Name, law firm, address, and telephone number of attorney or proper person respondent submitting this fast track response: Bruce I. Shapiro, Esq.**, and **Shann D. Winesett, Esq.**, of PECOS LAW GROUP, 8925 South Pecos Road, Suite 14A, Henderson, Nevada 89074, (702) 388-1851.

3. **Proceedings raising same issues:** None known.

4. **Procedural history:** The procedural history of the case is adequately set forth in Matthew's Child Custody Fast Track Statement filed in this appeal on December 23, 2016.

5. Statement of facts: The substantive facts of this case are adequately set forth in Matthew's Child Custody Fast Track Statement filed in this appeal on December 23, 2016. For purposes of brevity and judicial economy, those facts will not be restated here except as to their relationship to Melissa's appeal of the district court's denial of her request for attorney's fees.

In order to enforce the decree providing that Rachel, the parties' minor daughter attend private school, Matthew filed his motion for an order directing Rachel to attend Faith Lutheran on June 21, 2016. JA 47. Melissa opposed the motion and refused to consent to allow Rachel to attend Faith Lutheran. JA 111. Although she never had previously expressed such an objection, Melissa, for the first time in her opposition, objected to Faith Lutheran because of its religious association. JA 240.

After oral argument on August 4, 2016, the district court issued a minute order followed by a written order, denying Matthew's motion that Rachel attend Faith Lutheran. JA 328. The court found that attending both Faith Lutheran and the public school would be in Rachel's best interest but denied Matthew's motion solely because Melissa objected to Faith Lutheran's religious association. JA 328. The district court instead ordered Rachel to attend public school. JA 328. Relative to the present cross appeal, it is significant that the district court did not grant either party an award of attorney's fees, but, instead, ordered that each party would bear

their own attorney's fees and costs. JA 329. The district court's refusal to grant Melissa's her request for attorney's fees is what has inspired her cross appeal in this matter.

In as much as this case presented an issue of first impression in Nevada and also implicated significant fundamental rights under both the Nevada and U.S. Constitutions, Matthew determined that he would appeal the district court's ruling. In the hopes that he might render the appeal unnecessary, however, Matthew filed a motion for rehearing on August 12, 2016. JA 357. In his motion, Matthew respectfully requested that the district court reconsider its initial ruling, noting that the district court had misapprehended the constitutional principles which underpin the private school issue. JA 260. Matthew argued that, by giving legal effect to Melissa's "religious objection," the district court dealt Melissa an unconstitutional trump card to play in her favor. JA 260.[1]

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[1] The district court denied Matthew's motion for reconsideration. JA 359. In denying Matthew's motion, the district court did not set forth any additional facts in support of its denial of Matthew's original motion. Instead, the district court stated that its original decision was not "clearly erroneous." JA 359. Since the district court did not grant Matthew's motion for a hearing, it determined Melissa to be the prevailing party and awarded Melissa $2,000.00 in attorney's fees. JA 359, 365. In sum, even though the district court did not award Melissa fees for the underlying motion, the court did award Melissa fees on the motion for rehearing.

6. Issues on appeal: The district court did not abuse its discretion in denying Melissa's request for attorney's fees upon the denial of Matthew's underlying motion to motion for an order directing Rachel to attend Faith Lutheran.

7. Legal argument, including authorities:

Melissa's argument on her cross appeal consists of less than one page of double-spaced argument. In a most cursory fashion, Melissa argues that she requested suit fees under *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971), and as a sanction under NRS 18.010 and EDCR 7.60. Melissa also argues that Matthew's failure to file a financial disclosure form mandates that Melissa receive an award of attorney's fees. Each of these arguments will be addressed and refuted, in turn, below. It should also be noted that if this court reverses the district court's underlying order denying Rachel the ability to attend Faith Lutheran School, Melissa would no longer be the prevailing party and her cross appeal is rendered moot.

A. Matthew Brought His Motion in Good Faith and Sanctions Are Unwarranted.

Nevada Revised Statute 18.010(2)(b) states, in pertinent part as follows:

> In addition to the cases where an allowance is authorized by specific statute, the court ***may*** make an allowance of attorney's fees to a prevailing party . . . . when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in

> favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Similarly, Eighth Judicial District Court Rules, Rule 7.60(b) provides:

> 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 . . . (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously ...

[Emphasis added].

Significantly, both NRS 18.010 and EDCR 7.60 contain the word, "may." As this court has so often held, the word, "may," in statutory text is construed as permissive. *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972). In other words, neither NRS 18.010 nor EDCR 7.60 mandate an award of attorney's fees. In the present case, the district court was not required to make an award of attorney's fees ***even if*** the district court had found that Matthew's underlying motion was frivolous -- which it most definitely was not.

By its very text, the salutary purpose of NRS 18.010 and EDCR 7.60 is to deter frivolous or unnecessary litigation. NRS 18.010 requires the court to find that a claim was "brought or maintained without reasonable ground or to harass the prevailing party." Through its reference to NRCP 11, NRS 18.010 expresses a clear intent to deter frivolous or vexatious claims. Similarly, the text of EDCR 7.60 references "obviously frivolous, unnecessary or unwarranted" motions or "unreasonable and vexatious" litigation strategies.

Nowhere in Melissa's briefing on this appeal does Melissa ever assert that Matthew acted frivolously, vexatiously, or even unreasonably in filing his underlying motion to have Rachel enrolled at Faith Lutheran. Similarly, the district court never found Matthew to have acted frivolously, vexatiously, or even unreasonably in filing the motion.[2] Indeed, implicit in the district court's ruling is a finding that Matthew's motion was not frivolous but was reasonably calculated to serve Rachel's educational best interest. In this regard, the district court found that "it would be in [Rachel's] best interest to attend ***both*** [Faith Lutheran and Bob

[2] Matthew acknowledges that the district court awarded Melissa $2,000.00 in attorney's fees when the district court denied his motion for reconsideration of the its order denying his motion regarding private school. JA 365. While Matthew disagrees with the district court's ruling on reconsideration and the subsequent award of attorney's fees, Matthew does not deny that the fees were within the district court's discretion to award. Even so, the district court made no finding that Matthew had acted unreasonably, vexatiously, or frivolously in filing the motion for reconsideration.

Miller]." JA 328 (emphasis added). Finding, on the one hand, that Rachel's best interest could be served by attending Faith Lutheran, the court could not, on the other hand, sanction Matthew for filing a motion that Rachel be enrolled there.

The policy considerations of deterring frivolous litigation which underlie NRS 18.010 and EDCR 7.60 do not apply to the facts of this case, and the district court was correct in refusing to exercise its permissive discretion to award fees under those statutes.

B. The Absence of a Financial Disclosure Form Does Not Mandate the Imposition of Attorney's Fees against Matthew.

Melissa next argues that Matthew's failure to file a financial disclosure form warrants an award of fees against him under EDCR 5.32(b). This argument is likewise unavailing.

At the time of the proceedings before the district court, EDCR 5.32(b) read, in pertinent part, as follows: "The failure of a party opposing such motion to file an affidavit of financial condition ***may*** be construed as an admission that the opposing party has the resources to pay the amount requested by the moving party..." (Emphasis added). As with NRS 18.010 and EDCR 7.60, EDCR 5.32 contains the permissive "may." Nothing in the rule mandates the district court to award attorney's fees in the absence of a financial disclosure form.

Further, the sanction for not filing the financial disclosure form is written into the text of the rule itself. Specifically, the failure to file an affidavit of financial

condition "may be construed as an admission that the party has the resources to pay." *See* EDCR 5.32(b). Matthew has never argued that he has insufficient resources to pay an award of attorney's fees. Matthew's ability to pay has never been at issue. It simply does not follow that, because a party can pay attorney's fees, the party should be ordered to do so. The district courts, in their discretion, can deny requests for attorney's fees in absence of a financial disclosure form. That is exactly what the district court did here.

C. This Court's Opinion in *Leeming v. Leeming* Does Not Mandate an Award of Attorney's Fees.

Finally, Melissa's reliance upon *Leeming v. Leeming,* 87 Nev. 530, 490 P.2d 342, (1971) is also misplaced. While *Leeming* stands for the proposition that a district court may award fees in a post-divorce proceeding, it does not stand for the proposition that a district court must or should award fees in every post-divorce proceeding. Indeed, the rationale in *Leeming* is based on NRS 125.040 which "empowers our courts to grant 'allowances and suit money' in divorce actions, including sums to enable a wife to employ counsel." *Leeming*, 87 Nev. at 532, 490 P.2d at 343. In upholding the district court's award of fees in *Leeming*, this court noted that "the suit money was needed so respondent might pay her counsel without diminishing the care the court contemplated for the children." *Leeming*, 87 Nev. at 532, 490 P.2d at 343.

According to Melissa's Financial Disclosure Form filed on July 19, 2016, Melissa earns no less than $8,185.00 per month and receives another $2,000.00 per month in child support from Matthew. JA 88. Melissa's gross income from all sources is, therefore, no less than $10,185.00 per month or $122,220.00 per year. JA 88. In asserting how apparently wealthy Matthew is and arguing that he is capable of paying her fees, Melissa ignores that she receives more than $122,000.00 per year in earnings and support. JA 88.

Unlike Mrs. Leeming, an award of fees is not needed in this case so that Melissa "might pay her counsel without diminishing the care the court contemplated for the children." *See Leeming v. Leeming,* 87 Nev. 530, 532 (1971). In other words, Melissa's financial outlook is far brighter than that of Mrs. Leeming and the public policy supporting an award of fees to Mrs. Leeming simply does not

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apply to the present case. The district court did not abuse its discretion when it declined to make an award of attorney's fees to Melissa.

DATED this 9th day of February, 2017.

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VERIFICATION

1. I hereby certify that this fast track response 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:

[x] This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font and Times New Roman type style; or

[ ] This fast track response has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 2,559 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED this 9th day of February, 2017.

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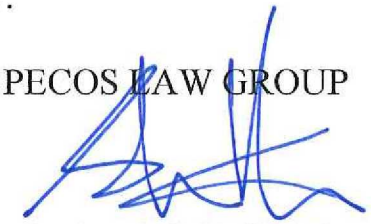

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: *Pecos Law Group*

3. If litigant is using a pseudonym, the litigant's true name: *None.*

DATED this 9th day of February, 2017.

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