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No objection
KHK

No. 308511

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD T. WIXOM,
Petitioner-Father-Appellant,

v.

LINDA B. WIXOM,
Respondent-Mother.

Robert E. Caruso,
Appellant-Judgment Debtor.

BRIEF OF APPELLANT

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A. Assignments of Error (AE)

1. Linda Wixom is in full compliance with her federal probation and all court ordered requirements. [CP 1111, Finding 68.]

2. Richard Wixom . . . has no specific evidence of examples of instances of violations of her probation. [CP 1112, Finding 71.]

3. Linda Wixom's substantial compliance with the deferred prosecution for over two years makes the possibility of incarceration even more remote than it would have been in 2009. . . . [CP 1114, Finding 88.]

4. The evidence is uncontroverted that [A.W.]'s experimentation with drugs occurred while he was primarily residing with Richard Wixom. There is no evidence that [T.W.]'s experimentation with marijuana was while she was in Linda Wixom's home or that Linda Wixom was even aware she had used marijuana until T.W. disclosed it to the GAL. There is no evidence to suggest that either [A.W. or T.W.] have continued their drug experimentation during the last year. The drug use of [A.W. or T.W.] cannot be a basis to find there is a detriment to [J.W.]'s wellbeing in Linda Wixom's home. [CP 1114, Finding 90.]

5. There was nothing presented to the Court that would suggest [J.W.] is exposed to violent tendencies of his older brother in his Mother's home or anything to suggest that the behaviors between siblings are any different

than sibling rivalries and roughhousing that occurs in any home in America. [CP 1114, Finding 91.]

6. . . . . There is no evidence to suggest that [A.W.] has ever caused [J.W.] to flinch or be harmed in his mother's care. [CP 1114, Finding 92.]

7. There is no evidence [J.W.] is in fear of his safety with [A.W.] or any of the other children in Linda Wixom's home. [CP 1114-5, Finding 93.]

8. The GAL [saw J.W.] sitting on [A.W.]'s lap while they made necklaces . . . during the home visit. [CP 1115, Finding 94.]

9. Linda Wixom corrected her deposition testimony . . . to try to mitigate the effects of her inaccurate statement. [CP 1119, Finding 129.]

10. The court finds that Linda Wixom misunderstood the distinction between "charged" and "convicted." . . . Linda Wixom has been candid and upfront regarding her drug addiction, the Board of Pharmacy actions, the WRAPP program involvement, and her deferred sentence in the federal case. [CP 1119, Finding 131.]

11. It is highly unlikely Linda Wixom would freely discuss these federal charges and her probation with the GAL and then naively believe she could deceive the Court or Mr. Caruso by denying she had ever been charged federally. [CP 1119, Finding 132.]

12. The Court is satisfied Linda Wixom did not intend to deceive anyone when she denied being charged with a crime and corrected it when she

signed her deposition. . . . . [CP 1119, Finding 133.]

13. Richard Wixom said he did not know about Linda Wixom's potential criminal charges and probation in court yet he had admitted to knowing about them in prior declaration. [CP 1119, Finding 135.]

14. Richard Wixom testified Linda Wixom had violated her probation, which was not true. [CP 1119, Finding 136.]

15. Richard Wixom freely admitted he fictitiously told his employer he was calling on clients while he was jet-skiing with [J.W.]. While this last statement to his employer was not made under oath, it does go to his truthfulness. [CP 1119, Finding 137.]

16. Mr. Caruso insinuated Ms. Lund was biased in favor of Linda Wixom when Ms. Lund used the word "we" when discussing a court appearance for an ex parte restraining order. Ms. Lund testified at trial she used the word "we" to reference the fact that Mr. Caruso, Ms. Swennumson, and Ms. Lund were in a hearing. . . . [CP 1119-1120, Finding 140.]

17. There is absolutely no evidence to suggest Ms. Lund was biased towards or aligned with one side . . . . [CP 1120, Finding 141.]

18. Richard Wixom and Mr. Caruso assert that Linda Wixom violated the parenting plan and should be held accountable when she did not give Richard Wixom at least two days notice that she would be late picking up [J.W.] on July 29, 2011. Linda Wixom did not give two days notice that

she would be late. . . . [CP 1121, Finding 151.]

19. Linda Wixom's attorney proposed in a letter that Linda Wixom would pick up [J.W.] at 5:00 pm on July 29, 2011. Linda Wixom emailed Richard Wixom that she would be late because she could not get off at 5:00 pm on July 29, 2011. Richard Wixom acknowledged receiving the email on July 28, 2011. [CP 1121, Finding 152]

20. To argue that testifying a phone call was made at 6:00 pm when in fact the telephone records show the call began at 5:59 pm is fraud is the most extremely unreasonable position the Court has witnessed taken by any attorney in any case in its courtroom. [CP 1121, Finding 157.]

21. There is no evidence to suggest Linda Wixom had any reason to believe [J.W.] would not be available for her when she arrived to pick [J.W.] up on July 29, 2011. She sent Richard Wixom an email the day before advising him she could not be there at 5:00 pm but that she would be there by 6:00 pm. [CP 1121, Finding 160.]

22. Richard Wixom did not respond to the email or object to her notice. He did not tell her he had to be at church that night and give her the opportunity to pick [J.W.] up from church. [CP 1121-1122, Finding 161.]

23. Mr. Caruso and Richard Wixom decided to take advantage of the fact that Linda Wixom would be late to pick up [J.W.]. [CP 1122, FOF 165.]

24. Richard Wixom contacted his attorney at 4:00 pm on July 29, 2011.

[CP 1122, Finding 166.]

25. Mr. Caruso called the GAL and left a message for her at 4:15 pm on July 29, 2011 that [J.W.] would probably not be at the home visit the following day because Mr. Caruso and Richard Wixom knew [J.W.] was not going to be delivered to Linda Wixom that evening. [CP 1122, Finding 167.]

26. Richard Wixom borrowed another vehicle so he could take [J.W.] from the family home and decrease the likelihood Linda Wixom could locate [J.W.] at church and retrieve him. [CP 1122, Finding 169.]

27. Linda Wixom arrived at Richard Wixom's home between 5:40 pm and 5:45 pm on July 29, 2011 and Richard Wixom was already gone. She spent several minutes waiting in the car for [J.W.] to arrive, went to the house and knocked on the doors and windows before coming to the conclusion that something was awry. [CP 1122, Finding 170.]

28. Linda Wixom began calling Richard Wixom at 5:57 pm after being at Richard Wixom's house for several minutes. [CP 1122, Finding 171.]

29. If Richard Wixom was still at him home at 5:57 or 5:58 pm as Richard Wixom testified, Linda Wixom would have seen him and would have been able to pick up [J.W.]. [CP 1122, Finding 172.]

30. Richard Wixom's cell phone was in his car at 5:20 pm. If Richard Wixom did drive away from his house at 5:57 pm or 5:58 pm, he would

have been in the car when Linda Wixom began calling. [CP 1122-3, Finding 173.]

31. It does not make sense that Richard Wixom and Mr. Caruso knew at 4:15 pm that day that [J.W.] would not be in Linda Wixom's care the following day unless Richard Wixom knew Linda Wixom could not find him at the church event and pick [J.W.] up from there. Richard Wixom knew Linda Wixom would be unable to find him because he knew he was going to be in a car unrecognizable to Linda Wixom. [CP 1123, FOF 174.]

32. The Court finds there is no good excuse for Richard Wixom not calling Linda Wixom to tell her he was not going to wait or that he was going to take [J.W.] with him to his church activity. [CP 1123, FOF 175.]

33. Richard Wixom could have responded to Linda Wixom's email the day before. [CP 1123, Finding 176.]

34. There was no excuse for Richard Wixom failing to call Linda Wixom that night or the next day. There is no excuse not to answer Linda Wixom's calls, to let her know that [J.W.] was safe and to arrange for her to pick [J.W.] up for the GAL home visit scheduled for July 30, 2011. Richard Wixom testified he did not respond to Linda Wixom's messages that weekend because he was busy and later said it was not his obligation. [CP 1123, Finding 177.]

35. This was a calculated decision by Richard Wixom to sabotage the

GAL's investigation, to keep [J.W.] for as much time as he could, and to begin engaging in a course of conduct that was intended to harass or increase the cost of this litigation. That course of conduct continued through trial. [CP 1123, Finding 178.]

36. This was an all-out war against Linda Wixom from that time through trial. [CP 1123, Finding 182.]

37. Richard Wixom and Mr. Caruso engaged in a course of conduct that was not in good faith beginning in late July 2011 and continued through trial. [CP 1123, Finding 183.]

38. Richard Wixom and Mr. Caruso pursued allegation and innuendos not well-grounded in fact. Instead these allegations and innuendos were interposed for the improper purpose of harassing and causing unnecessary and needless increase in the cost of litigation. [CP 1123, Finding 184.]

39. There has been an ongoing attempt by Richard Wixom and Mr. Caruso to harass, embarrass, threaten, and intimidate the GAL, the Court Commissioner, and Linda Wixom herself. [CP 1124, Finding 185.]

40. . . . the Court cannot recall a case so devoid of merit and so full of misdirection and meritless arguments. [CP 1124, Finding 186.]

41. The Court cannot ignore the behaviors of Richard Wixom and Mr. Caruso as to do so would not be honoring the oath of office the Court took. [CP 1124, Finding 187.]

42. There is a basis for Linda Wixom to receive CR 11 sanctions and attorney's fees based upon intransigence against Richard Wixom and Mr. Caruso. [CP 1124, Finding 188.]

43. It was unconscionable for Richard Wixom to wait until the afternoon of the last day of trial to disclose he was not requesting residential time with [T.W.] and that he agreed with the GAL's recommendations. He only did this when directly asked by the Court. [CP 1124, Finding 190.]

44. Had Richard Wixom conceded Linda Wixom's petition before the end of trial, then Mr. Caruso would have begun his case for Richard Wixom's petition to modify first. Richard Wixom and Mr. Caruso could have used the first three trial days developing whatever evidence they might have had to support the alleged detriment in Linda Wixom's home. [CP 1124, Finding 192.]

45. Had Richard Wixom conceded Linda Wixom's petition before the end of trial, the GAL may not have spent three days on the stand since Richard Wixom likely would not have called her in his case-in-chief since he disagreed with most of her findings and recommendations. [CP 1124, Finding 193.]

46. Had Richard Wixom conceded Linda Wixom's petition before the end of trial, the Court likely would have dismissed Richard Wixom's petition at the conclusion of his case because the evidence he presented, even

looked at in the light most favorable to him, likely would not have risen to the level necessary to prevail on his petition to modify. [CP 1124, Finding 194.]

47. Linda Wixom spent tens of thousands of dollars to pursue her petition that was not contested and to defend a petition filed by Richard Wixom that is without merit. [CP 1124, Finding 195.]

48. This case was thoroughly investigated by one of Spokane County's most experienced Guardian ad Litems. She wrote two reports that totaled over 70 pages. She testified for three court days on the stand. She was not able to find any evidence of detriment in Linda Wixom's home. [CP 1115, Finding 97.]

49. If it is [T.W. and A.W.] who are completely out of control, this Court would expect to see other signs of dysfunction in their lives. There is no evidence that either of them has been involved in the criminal justice system. There is no evidence that either one of them has been using drugs beyond typical teenage experimentation. When Richard and Angel Wixom tested [A.W.] for drug use – he tested negative. CP 1115, FOF 100.

50. Mr. Caruso made numerous representations to the Court and offers of proof that were never lived up to. A few examples are as follows: a. Mr. Caruso represented a witness would testify that [A.W.] was six foot two or three inches and 245 pounds and that he doubled the size of [J.W.]. b. It

was represented that Angel Wixom would testify about her center line and how the Wixom children did not know about it so they could not report it to the GAL. c. It was represented Angel Wixom would deny she ever described her medical condition to the GAL and any evidence of her condition made by the GAL violated Angel Wixom's HIPPA rights. d. It was represented that evidence would be presented that Linda Wixom accessed Angel Wixom's confidential medical records that were available to her as a pharmacist and that she routinely looked up famous people's profiles at random. e. It was represented that Ron Miles (Spokane County Superior Court Administrator) would be called to testify that Linda Wixom left portions of her juror qualification statement blank and that she was otherwise ineligible to serve as a juror. [CP 1125-1126, Concl. 7.]

51. The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court. [CP 1126, Concl. 9.]

52. Under ER 410, as I am reading it and understand this rule, evidence of a plea of guilty later withdrawn – which is what we have in Exhibit P-10 -- or of any statements made in connection with and relevant to any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer. So I think ER

410 excludes from admissibility P-10 so I'll grant that motion. [RP 800-1.] I'm going to grant the motion to strike on P-10. So P-10 now based on that ruling is not admitted. (Exhibit P-10 rejected.)

THE CLERK: Withdrawn or rejected?

THE COURT: Rejected. It wasn't withdrawn. It was over objection.

[RP 801]

53. Caruso insinuated she may be subject to a potential lawsuit and/or bar complaint for allegedly disseminating Angel Wixom's federally-protected and private health and medical information by including details about Angel Wixom's medical conditions in her GAL Report. Ms. Lund had a full release signed by Angel Wixom and never reviewed any medical records of Angel Wixom. Ms. Lund testified the information regarding Angel Wixom's medical conditions came from Angel Wixom. [CP 1111, Finding 61.]

B. Issues Related to Assignments of Error

1. The trial court rejected Linda Wixom's Guilty Plea on the basis of ER 410 after Linda Wixom twice chose not to object to it on that basis: when it was first offered at trial and in her ER 904 objection. AE 52.

2. Because Linda Wixom did not explain her putative deposition corrections at the time, this Court should reject them. AE 9-12.

3. The trial court made several findings against undisputed evidence.

AE 1-8, 13-14, 16-21, 46, & 50.

4. The trial court made several findings without competent evidence or in violation of ER 605. AE 5, 22-41, 44, 46-49, 51, & 53.

5. Without properly analysis as to attorney fees for intransigence and as to attorney fees under CR 11 against either Appellant, the trial court erred in awarding them. AE 15, 20, 37-38, 42, 43, & 45.

6. Even if—under argument, not conceded—any fees and costs were appropriate, the trial court unreasonably awarded improper fees and costs against the Appellants.

II. Statement of the Case

Linda Wixom and Richard Wixom married on September 7, 1991. CP 16. Linda Wixom is a pharmacist. CP 48. Linda Wixom was fired from her employment as a pharmacist in April 2007 because her employer caught her stealing pain medications. CP 89.

They separated on August 13, 2007. CP 16. Their marriage was dissolved on March 3, 2009. CP 28. They have three children together. CP 18. A final parenting plan was entered for the children of the parties. CP 1.

A.W. was scheduled to reside with the father. CP 2. The other two children, T.W. and J.W., were scheduled to reside with the mother. CP 2.

The U. S. Government charged Linda Wixom criminally with one count of obtaining a controlled substance by fraud, forgery, deception, and

subterfuge and two counts of making and using a false, fictitious, and fraudulent statement or entry in connection with delivery of health benefit items. Exhibit P-4 (citing 21 U.S.C. § 843(a)(3) and 18 U.S.C. § 1035(a)(2)). Linda Wixom pled guilty. RP 769:3 ("I did plead guilty initially, yes."); P-10 ("I plead guilty because I am guilty.") CP 776:7-8.

The Drug Enforcement Agency does not allow "registrants (people with DEA numbers such as doctors, pharmacies, hospitals, clinics)" to employ individuals who have been convicted of certain offenses. Exhibit R-306, page 2, lines 3-5 (citing 21 C.F.R. § 1301.76(a)). Linda Wixom moved to withdraw her guilty plea agreement which "contained no advisement regarding debarment under federal statutes involving" the DEA and HHS. Exhibit R-306, 1:23-24 (citing 21 U.S.C. § 1862(a) and (b)). The court granted her motion because the plea "did not address the severe and unanticipated hardship of debarment [] resulting in [future] exclusion from her livelihood as a pharmacist." Exhibit R-307, 1:19-23.

Linda Wixom filed a petition for modification on February 8, 2011. CP 34. Later, Richard Wixom filed his own counter-petition. CP 167-171.

Linda Wixom was deposed on September 1, 2011. CP 846. At the deposition, Mr. Caruso laid "a few ground rules." CP 848:18. Mr. Caruso told Linda Wixom to tell him if she did not understand a question. CP 849:1-7. Mr. Caruso also asked whether she was taking any medicine "that

would interfere with your ability to comprehend questions []?" CP 849:24-850:2. Linda Wixom's answer was, "No." CP 850:3.

"Q. Ever been charged with anything?" CP 855:1. "A. No." CP 855:2 (showing no sign that she did not understand or was confused). Charges could include criminal or administrative charges. The mother denied under oath that she had ever been charged with anything.

Linda Wixom executed putative corrections to her sworn deposition. A correction was as follows: "Page 10, L. 2 I was charged but not convicted." CP 1007. Linda Wixom omitted the Health Department's charges of unprofessional conduct from her putative corrections.

On August 4, 2011, the trial court amended the Domestic Case Schedule with trial set for November 7, 2011. CP 307. ER 904 requires the filing and service of a notice "no less than 30 days before trial." ER 904(b). On October 7, 2011, 31 days before trial, Mr. Wixom filed and served his ER 904 Notice which identified 38 documents. CP 631-635.

The mother stipulated to 2 of the 38 exhibits. CP 680. She objected to her Guilty Plea Agreement, P-10, on the bases of "Relevance; violative of ER 1005." CP 678. Linda Wixom objected to P-10 on no other basis.

A party need not object on relevancy until trial. ER 904(c)(2). Her second objection was ER 1005. She inexplicably chose not to object to her Guilty Plea Agreement on the basis of ER 410.

At trial, the Guilty Plea Agreement was admitted as P-10 without objection. RP 769:10-14. Linda Wixom later moved to strike P-10. RP 791:7 ("I don't think it's admissible."). The trial court granted the motion on the basis of ER 410 and rejected P-10. RP 801.

III. Argument

Standards of Review. Mixed issues of law and fact are involved in a ruling under ER 410. State v. Nowinski, 124 Wn.App. 617, 621 (2004). For this reason, the standard of review for such rulings is de novo. Id.

Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. Brouillet v. Cowles Pub'g Co., 114 Wn.2d 788, 801 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Marriage of Kovacs, 121 Wn.2d 795, 801 (1993). "Abuse of discretion is discretion exercised on untenable grounds for untenable reasons." State v. Sanchez, 60 Wn. App. 687, 696 (1991).

> When an appellate court reviews a district court's factual findings, [a] court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.

Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 401 (1990) (discussing the standard of review for imposition of sanctions under Fed.R.Civ.P. 11).

> A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would

necessarily abuse its discretion if it based its ruling on an erroneous view of the law.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn. 2d 299, 339 (1993) (footnotes and citations omitted). A district court that makes legal errors abuses "its discretion." Cooter & Gell, 496 U.S. at 402.

A. *The trial court rejected Linda Wixom's Guilty Plea Agreement on the basis of ER 410 despite her choice not to object to it when it was first offered at trial and her choice not to object to it on the basis of ER 410 in her ER 904 objection. This Court should reject this erroneous ruling.* AE 52.

1. Because Linda Wixom chose not to object to her guilty plea when it was first offered, she waived any objections forever.

At trial, the Guilty Plea Agreement was admitted without objection as Exhibit P-10. RP 769:10-14. The mother later moved to strike P-10. RP 791. The trial court rejected P-10 on the basis of ER 410. RP 801.

Where an exhibit is admitted for a specific issue and the parties later stipulate on that issue, a trial court may withdraw or reject that exhibit. Thomas v. Wilfac, Inc., 65 Wn. App. 255, 262 (1992). In the Wixom trial, the Guilty Plea Agreement was admitted without limitation. RP 769. Because Linda Wixom did not seek to limit the scope of its admission when P-10 was offered, Linda Wixom waived her objections.

2. Because Linda Wixom did not raise ER 410 as an objection to Richard Wixom's ER 904 Notice, Linda Wixom waived that objection forever.

Given the failure to object, the trial court should admit the disputed document. The "documentary evidence will be admitted absent an objection." Miller v. Arctic Alaska Fisheries, 133 Wn.2d 250, 261 (1997); 5C Tegland, WASHINGTON PRACTICE, Evidence Law and Practice, §904.5, at 229 (4th ed. 1999). An opponent may interpose a late objection only if the opponent has a "compelling reason for its failure to timely object." Id.

Inadvertence, neglect, and lack of diligence are not compelling reasons. Linda Wixom examined the ER 904 exhibits submitted and objected to her Guilty Plea Agreement only on the basis of ER 1005 and relevance. Consequently, Linda Wixom has no such compelling reason.

In Linda Wixom's Guilty Plea Agreement, she "agrees to waive the inadmissibility of statements, if any, made in the course of plea discussions . . ." CP 771, ¶ 8. She also agreed that this waiver applies even "if she withdraws any of her guilty pleas." Id. Linda Wixom even agreed "that any statements she makes during the change of plea hearing would be admissible" if she withdraws from this Guilty Plea Agreement. Id.

A waiver of ER 410 in the Guilty Plea Agreement itself is valid. See 5B Tegland, WASHINGTON PRACTICE, Evidence Law and Practice, §410.8, at 81 (4th ed. 1999). Such waiver is valid unless it was made unknowingly or involuntarily. United States v. Mezzanatto, 513 U.S. 196, 210 (1995).

Linda Wixom did not allege that she plead guilty involuntarily or

unknowingly. Instead, she withdrew her guilty plea because "the severe and unanticipated hardship of debarment [] resulting in exclusion from her livelihood as a pharmacist" warranted allowing withdrawal. Exhibit R-307, 1:19-23. Indeed, Linda Wixom acknowledged that she is "agreeing to plead guilty because I am guilty." CP 776 (P-10), 16:7-8. Linda Wixom's Guilty Plea Agreement illustrates her intransigence and exposes her lack of credibility based on her pleading guilty to crimes of dishonesty, namely, 21 separate acts of deception by forging 21 separate prescriptions.

By twice failing to properly object under ER 410 to her Guilty Plea Agreement, Linda Wixom validly waived any omitted objections to it. Consequently, the trial court erred in sustaining the waived ER 410 objection and in rejecting Linda Wixom's Guilty Plea Agreement, P-10.

B. *Although Linda Wixom's putative deposition corrections had no explanation at the time, the trial court pretended that she had contemporaneously explained them.* AE 9-12.

Linda Wixom's sworn deposition had this exchange: "Q. Ever been charged with anything?" "A. No." CP 855:1-2. The potential charges included criminal or administrative charges. This answer was repeated, or the question was objected to, later many times. CP 891-893, generally.

On September 23, 2011, Linda Wixom executed her putative corrections. One of those corrections was as follows: "Page 10, L. 2 I was charged but not convicted." CP 1007. This putative correction omits the

repeated occurrences. Compare CP 891-893, generally.

Deponents have 30 days to review and make any changes in form or substance to their answers as long as they provide the "reasons" for their changes. CR 30(e); .Seattle-First Nat. Bank v. Rankin, 59 Wn.2d 288, 294 (1962); Sanford v. CBS, Inc., 594 F.Supp. 713, 715 (N.D.Ill.1984); Hawthorne Partners v. AT & T Technologies, Inc., 831 F.Supp. 1398 (N.D.Ill.1993). Although the witness need not provide convincing reasons, "there must be a reason for every change." 831 F. Supp. at 1406. A court will not consider deposition changes without a contemporaneous explanation. Duff v. Lobdell-Emery Mfg. Co., 926 F.Supp. 799, 804 (N.D.Ind. 1996). Linda Wixom's corrections are notable for a complete lack of **any** statement of reasons for her changes.

Given her age, experience, occupation, and agreements at the beginning of the deposition, it is unlikely that she forgot (or was confused) that she had been charged with multiple felonies involving crimes of dishonesty, fraud, and false statements or with unprofessional conduct by the Health Department. Her "correction" was an attempted **retraction** of an apparently deliberate lie about the felony and professional charges.

Linda Wixom's choice not to state the reasons for her changes deprives the Petitioner, the trial court, and this Court of having a contemporaneous explanation from Linda Wixom for her correction.

Because the purported deposition correction was ineffective, this Court should reject the trial court's erroneous Findings 127, 129, and 131-133.

C. *The trial court made several findings against undisputed evidence.* AE 1-8, 14, 16-21, 46, & 50.

1. Against the undisputed evidence of conduct by Linda Wixom that arguably violated the terms of her probation, the trial court found that no evidence existed. AE 1-3 and 14.

Linda Wixom's probation does not allow her to commit any Federal, State, or Municipal crimes. R-308, page 6 (cited at CP 718-719).

False swearing requires "a false statement," which is known "to be false, under an oath required or authorized by law" and is a gross misdemeanor. RCW 9A.72.040. "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he or she knows to be false." RCW 9A.72.080.

Linda Wixom's deposition included this exchange: "Q. Ever been charged with anything? A. No." CP 855. The range of potential charges could include criminal and administrative charges. The GAL reported the charges. CP 718, lines 15-18. See Exhibit P-4. Compare also Exhibits R-306, R-307, R-308, P-10 (all of which presuppose being charged).

Linda Wixom made an unqualified, material, false statement; under oath; required by law; that she knew was not true. For this reason, Linda Wixom appears to be in violation of her probation or deferred prosecution

because false swearing is a gross misdemeanor.

Because the trial court's findings that Linda Wixom complied with the terms of her probation were incorrect, this Court should reject them.

2. Against undisputed evidence of domestic violence between and recent drug use by residents of Linda Wixom's home, the trial court found that no evidence existed. AE 4-8, 46, & 50.

According to the guardian ad litem's trial testimony, J.W. "did report sometimes [A.W.] scares him, flinches like he is going to hit him." RP from Terry Sperry (SRP) 50:13-14. This still occurs "present day." RP 143:5-6 (discussing the time of her trial testimony). A.W. has not lived at or visited father's home since Christmas 2010, moved in with mother. J.W. was in mother's care present day.

A.W. was 18 years old. CP 468:14. J.W. was 11 years old on February 8, 2011. CP 34: 2-5, 20-24. J.W.'s birthday was on August 25. CP 349:14-15. A.W. is "a big kid." RP 248:3. A.W. is "about 2 to 4 inches" taller than the GAL. RP 248:16. The GAL is 5'8" tall. RP 248:14. The testimony reveals that A.W. is between 5'10" and 6' tall. J.W. is about half the weight of A.W. RP 252:19-23. A.W. weighs approximately 230 pounds. RP 248:12. Based on this testimony, the trial court's conclusion that Mr. Caruso did not provide evidence as to the height or weight of A.W. Wixom or that A.W. Wixom "doubled the size of" J.W. is clearly contrary to the evidence. AE 50.

J.W. talked about A.W. giving J.W. "charley horses and flinching at him like he was going to hit him but not really doing so [during flinching]," according to the GAL. RP 143:12-14. The GAL also reported that J.W. "said that he gets scared of when [A.W.] is like that because he's so much bigger than him." RP 143:14-16.

The trial court found incorrectly that J.W. was on A.W.'s lap. CP 1115, Finding 94. Contrary to the trial court's finding, the GAL testified that A.M. was the one on A.W.'s lap, not J.W. RP 120:5-6.

Mr. Wixom stated that he is "aware that [A.W.] used his phone to contact his drug dealer." CP 91:23-25. Mr. Wixom "took the phone away in an attempt to stop that communication." CP 91:25.

The GAL states that A.W. states "that he [A.W.] did use marijuana occasionally when he lived with his father," in the recent past. CP 503.

No one disputes the consistent testimony of the GAL on this subject. What the GAL, the mother, and the trial court refuse to grasp is that A.W.'s conduct clearly fits the legal definition of domestic violence and is a detriment existing present day in the mother's home.

Domestic violence includes, but is not limited to, "Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010(1)(a). A.W. and J.W. are in the same household. RP 244:17-25.

A.W. inflicts the pain of charley horses through assault on J.W. A.W. inflicts fear of imminent physical harm on J.W. when A.W. flinches at J.W. Eleven or twelve years old, J.W. is a victim of domestic violence while living in Linda Wixom's home, "present day." Apparently, no one at the mother's house is doing anything to discourage this conduct on A.W.'s part. Because the mother, the GAL, and the trial court refuse to recognize that this conduct is domestic violence (rather than being nothing more than typical horseplay), they have no reason to discourage it.

This is unequivocal evidence that J.W. fears for his safety with A.W. and his violent tendencies in Linda Wixom's home. These facts of domestic violence are a basis to find a detriment to J.W.'s health and welfare while he is in Linda Wixom's home. The trial court's entry of Finding 93 and Finding 194 to the contrary were error.

For the above reasons, the trial court's Findings 90-94 and 194 were clearly erroneous. This Court should reject these errors of the trial court.

3. Against the undisputed evidence of conduct by Respondent Linda Wixom that arguably violated the parenting plan, the trial court found that no evidence existed. AE 18-21.

The parenting plan required the mother to provide the father 2-days notice that she would be late picking up J.W. CP 7, lines 7-10. The mother was scheduled to pickup J.W. from the father on July 29, 2011. CP 268.

In her sworn deposition, the mother indicated that she provided three

days notice to the father. CP 873:24-874:3. The mother sent an email to the father disclosing her expected tardiness on July 28, 2011. CP 270.

The mother's email was only 1 day before the scheduled pickup, not 2 (as the parenting plan requires) or 3 (as sworn to). The mother did not give the required 2-days notice. The mother violated the parenting plan.

4. Against the undisputed evidence of conduct by the GAL that arguably constituted bias, the trial court found that the Appellants had no evidence for bias. AE 16-17.

The GAL and Linda Wixom "had freely discussed the federal charges and her probation . . . [before] the deposition testimony." CP 1119 (Finding 130). The GAL knew about the criminal charges, omitted them from her initial report (compare CP 1110), and denied the charges (CP 486). The GAL's omitting the criminal charges suggests bias on her part.

On September 1, 2011, the mother's deposition was taken. CP 846:17-24. The GAL was present. CP 847:15-17. During the deposition, the mother stated that she had never been arrested. CP 854:24-25. The mother stated that she had never been charged with anything. CP 855:1-2. The GAL claimed that she was present for the "majority" of the deposition. CP 1159, first row (stating her presence for 3.6 hours).

The GAL chose not to disclose to Linda Wixom's probation officer, Anne Sauther, or in the GAL's initial report that Linda Wixom had lied about her criminal charges during her deposition. These conscious

omissions strongly suggest bias. Mr. Wixom had to bring to the GAL's attention these charges included in the GAL's later report. RP 50:4-25.

On August 1, 2011, Mr. Caruso was present at a hearing on Linda Wixom's motion for a temporary restraining order. CP 345. On Linda Wixom's behalf were present her attorneys Nichole Swennumson and the GAL, Heather Lund. CP 345. When the GAL discussed this hearing on August 5, 2011, the GAL stated as follows: "so then we come in on a motion for ex parte restraining order we present and we get an order for the child to return on Wednesday so that I can do my home visit last night which occurred." CP 367 (emphasis added).

Mr. Wixom's attorney would not likely have sought a restraining order against his own client—and the court issued a restraining order. For this reason, the we being referred to here is the GAL and Linda Wixom's attorney, not Mr. Caruso or the court. Linda Wixom's attorney brought the motion and the GAL participated in the motion on behalf of Linda Wixom. The cooperation of the GAL with Linda Wixom's other attorney, Nichole Swennumson, in this matter strongly suggests bias. The court's explanation of the we in Finding 140 is erroneous.

The worst example of GAL bias was entered on the same day the findings were entered. On April 9, 2012, the trial court signed an "Order Directing Payment of Guardian Ad Litem Fees." CP 1154-1156. The

Order included two judgment summaries. CP 1154. One of those judgment summaries was a judgment summary with Linda Wixom as a judgment creditor and Richard Wixom as a judgment debtor. CP 1154: lines 19-25. This same judgment summary referred to Robert Caruso as "Attorney for Joint Judgment Debtors" twice. CP 1154. This same judgment summary also named Robert Caruso as a "Joint Judgment Debtor" on both judgment summaries. CP 1154. Heather Lund presented these judgment summaries on behalf of herself as GAL as well as **for the benefit of Linda Wixom**. CP 1156: lines 1-4. When Heather Lund presented a judgment summary for Linda Wixom, the GAL was **acting as an attorney for Linda Wixom**.

Heather Lund's presentation of a judgment summary as Linda Wixom's attorney and for Linda Wixom's benefit further shows strong bias on her part against Mr. Wixom. In Finding 141, the trial court said that no evidence existed of bias on the GAL's part. The trial court erred in Findings 140-141; and this Court should reject these erroneous findings.

5. Against the evidence, the trial court found that Appellant Richard Wixom somehow knew at the entry of the Final Parenting Plan that Respondent Linda Wixom was then on probation. AE 13.

Richard Wixom knew about **potential** criminal charges. RP 1194-5.

No competent evidence exists to support the claim that Richard Wixom somehow knew about Linda Wixom's probation at the time of the

entry of the parenting plan. In actual fact, her probation began at the time of the entry of her deferred prosecution agreement on November 12, 2009 (Exhibit R-308), over 8 months after the entry of the final parenting plan on March 3, 2009 (CP 1).

The trial court erred in Finding 135; and this Court should reject this erroneous finding.

6. Against the evidence, without evidence, and in violation of ER 605, the trial court entered Finding 195 in error. AE 47.

With a total absence of competent evidence, the trial court found that the mother "spent tens of thousands of dollars." As no competent evidence was presented for this at trial or otherwise, the trial court must be testifying about these findings in violation of ER 605. Alternatively, the trial court is making a speculative finding without evidence. Either way, the trial court's entry of Finding 195 is erroneous.

Additionally, the father's petition had merit. CP 208-209. No party moved the trial court for reconsideration or otherwise sought review of the adequate cause finding. This Court may not review the adequate-cause finding, especially since the father did not have proper notice that the trial court was impliedly overruling this previous finding sua sponte.

For these reasons, Finding 195 is erroneous.

D. *The trial court made several findings without evidence or in violation of ER 605 that this Court should reject.* AE 5, 22-

41, 44, 46-49, 51, and 53.

1. Without competent evidence, the trial court speculated that the Appellants withheld and conspired to withhold a child from visitation and from a GAL home visit. AE 22-36, 37-38, and 51.

> Civil conspiracy requires proof that (1) two or more people combined to accomplish an unlawful purpose or to accomplish an unlawful purpose by lawful means, and (2) the conspirators entered into an agreement to accomplish the conspiracy.

Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 160 (2002) (citation omitted).

No party ever alleged conspiracy. No proof was provided of conspiracy, whether during trial or not. Conspiracy was alleged for the first time in the Court's oral ruling after the trial was over.

Mr. Wixom is greatly prejudiced by the Respondent's failure to allege conspiracy before trial. He was driving another's vehicle because his personal vehicle had mechanical problems and his company vehicle was too small to return a rented carpet cleaner. RP 1124. If allegations of conspiracy were afoot, Mr. Wixom would have presented proof of these mechanical problems and the carpet cleaner rental. Additionally, the point of the allegation of Mr. Wixom's bad motive for driving someone else's vehicle was apparently that the Respondent would have more trouble

finding Mr. Wixom at his church. CP 1121-1122 (Findings 161 and 169).[1] The Respondent would not have found Mr. Wixom in the church parking lot, as he was not there! The testimony is also absent any evidence that the Respondent even knows what church Mr. Wixom attends.

The allegation of conspiracy relies on assumptions that Mr. Wixom had no mechanical problems with his own car at the relevant time and that Linda Wixom knew where the event was taking place. Linda Wixom has provided no proof whatsoever that these assumptions are correct.

Moreover, the Respondent implies that Mr. Caruso's call to the GAL somehow suggests conspiracy. CP 1122, Finding 167. If Mr. Caruso were conspiring with Mr. Wixom, it is not reasonable that he would call the GAL and leave a message that could suggest a conspiracy. Indeed, having heard an earful from Mr. Wixom about how sketchy and unreliable Linda Wixom has been, Mr. Caruso was concerned that the GAL not incur fees for traveling to a home visit that he thought Linda Wixom was going to torpedo. CP 1038. Mr. Caruso had appeared less than two weeks earlier in the case and had little opportunity to familiarize himself with previous filings. CP 252-253.

The findings hold the Appellants liable for fees without notice and

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[1] Other findings, however, reflect that Mr. Wixom was not at church, but at a church-related event. CP 1122-1123. For this reason, it would not have mattered at all which vehicle Mr. Wixom was driving.

opportunity to defend or provide testimony or evidence on conspiracy.

Mr. Caruso and Mr. Wixom are entitled to "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

The total absence of notice and opportunity to provide testimony or evidence regarding an allegation of conspiracy to Mr. Caruso or Mr. Wixom opposes the related rulings of the trial court. CP 1126, Concl. 9.

Amending the claims after the trial violates due process. Nelson v. Adams USA, Inc., 529 U.S. 460, 463 (2000); Deere & Co., v. Johnson, 271 F.3d 613, 623 (5th Cir. 2001)..

The trial court violated the due process rights of Richard Wixom and his attorney, Robert Caruso. This violation results in a lack of jurisdiction on the part of the trial court to enter the disputed findings. Marriage of Maxfield, 47 Wn. App. 699, 704 (1987) (holding that "a court lacks jurisdiction over the defendant and cannot enter a valid order against him" without adequate procedural safeguards). Similarly, a court lacks jurisdiction to grant relief without notice and opportunity to be heard. Marriage of Leslie, 112 Wn.2d 612, 617 (1989).

An allegation of conspiracy against Mr. Wixom and Mr. Caruso

violates their constitutional rights to due process. The findings alleged to support the allegation of conspiracy do not factually support that allegation. For these reasons, this Court should reverse the award of attorney fees to Ms. Wixom on the basis of an alleged conspiracy by Mr. Wixom and his attorney, Mr. Caruso.

2. Without evidence or against ER 605, the trial court found that the Appellants harassed the GAL. AE 36, 39, 51, and 53.

During trial, Mr. Caruso asked the GAL, "Do you have a belief I have treated you fairly []?" SRP 130:4-5. When Linda Wixom objected to this, her objection was sustained. SRP 130:6-7. The GAL denied that Mr. Wixom had "been belligerent" to her. SRP 132:11-12. The GAL denied that Mr. Caruso had "been belligerent" to her. SRP 132:13-14.

Finding 61 is in error and without evidence that Mr. Caruso insinuated that she may be subject to a potential lawsuit or bar complaint. CP 1111.

The trial court had no evidence of any harassment, embarrassment, threats and intimidation of the GAL. Neither Mr. Wixom nor Mr. Caruso, his attorney, threatened, intimidated, or harassed the GAL. If the GAL was embarrassed, she was apparently embarrassed by her own inconsistent statements, failure to recognize domestic violence, and ethical pronouncements that it was OK to lie in certain situations.

The GAL, Heather Lund, was appointed GAL on this case May 31,

2011 to look into both homes and conduct a full investigation into any issues of detriment in both homes, review the final parenting plan from March 3, 2009 and write a report filed on September 8, 2011 and a supplemental report on November 1, 2011 as to Linda Wixom's fitness as a mother. RP 50:4-25.

There was no opportunity to cross examine any witness on harassment, embarrassment, threats or intimidation of the guardian ad litem. No one of the persons identified testified as to if they were harassed, embarrassed, threatened, and intimidated because these issues were not at issue during the trial. Mr. Wixom has a right to access the courts and disagree with the witnesses and the courts without fear of retaliation or reprisals.

A day has 5 ½ hours of actual court time. RP 5:9-18. The trial court speculated that the GAL would not have testified for three days had Mr. Wixom conceded Ms. Wixom's case. CP 1124, Finding 193. Three days is 16 ½ hours. The trial court alleges that the GAL's time on the stand is attributable to the intransigence of Mr. Wixom and his attorney. CP 1124, esp. Finding 193. The skillful cross of Mr. Wixom's attorney brought out inconsistencies in the assertions of the GAL and Linda Wixom and the continuing detriment of domestic violence in the mother's home.

Mr. Wixom has a right to cross the GAL to challenge and bring out any inconsistencies or oversights in her report. Ms. Wixom could have cut

her time down on direct, had she wanted to. If one reviews the GAL's testimony and counts all the time the trial court attributed to Mr. Wixom, one finds less than 6 hours and 32 minutes. This is less than 40% of the time the GAL was on the stand. Thus, Linda Wixom brought on almost 60% of the GAL's testimony to bolster her case. Neither Mr. Wixom nor his attorney should be held responsible for Linda Wixom's attorneys' lack of skill in taking 60% of the GAL's 3 days to testify for Linda Wixom.

3. Without competent evidence or in violation of ER 605, the trial court found that the Appellants harassed the court commissioner. AE 36, 39, and 51.

"A person is guilty of intimidating a public servant if, by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180(1).

> A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.

RCW 9A.72.160(1). "'Threat' as used in this section means: (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time. (b) Threats as defined in RCW 9A.04.110." RCW 9A.76.160(2) (emphasis added).

To threaten someone includes "any other act which is intended to harm substantially the person threatened or another with respect to his health,

safety, business, financial condition, or personal relationships." RCW 9A.04.110(28)(j). Threatening or intimidating a judge, public servant, or witness are class B felonies. RCW 9A.72.160(3); RCW 9A.76.180(4).

The First Amendment generally prohibits government interference with speech or expressive conduct. State v. Halstien, 122 Wn.2d 108, 121 (1993). But some speech, such as "fighting words" and "true threats" is not protected. See United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 (9th Cir. 1990). A "true threat" induces a reasonable listener to believe he will be subjected to physical violence upon his person. Id.

"The extent to which a statute 'chills or burdens constitutionally protected conduct' turns on whether the statute's prohibition against protected speech or conduct is 'real and substantial' compared to its plainly legitimate sweep." State v. Stephenson, 89 Wn. App. 794, 801 (1998) (citations omitted). "A criminal statute that 'sweeps constitutionally protected free speech activities within its prohibitions' may be overbroad and thus violate the First Amendment." Id., 89 Wn. App. at 800.

The courts above findings criminalize constitutionally protected speech or conduct of the right to access to the courts. Thus, these findings are constitutionally overbroad. Because the parties have a right to present their theories of the case, the First Amendment rights to speech and access to the courts are constitutionally protected rights and not a true threat to

any persons. The court's action unconstitutionally chills and burdens Mr. Wixom's plainly legitimate right to pursue his factual and legal theories.

No court commissioner testified at trial as to any state of mind or factual basis for this finding. The trial court had no evidence of any harassment, embarrassment, threats and intimidation of the court commissioner. The only way the trial court could make this finding, even if true, would have been through ex parte contact with the commissioner. The trial court's testimony regarding harassment, embarrassment, threats and intimidation of the court commissioner amounts to testimony by the judge in violation of ER 605 and is ex parte contact, neither of which is allowed and should be stricken.

No competent evidence exists to support the claim that the Appellants somehow harassed or engaged in an all-out war against the court commissioner. The evidence actually opposes this claim. The trial court erred in Finding 185; and this Court should reject this erroneous finding.

4. Without evidence or in violation of ER 605, the trial court found that Appellants harassed Linda Wixom and her attorneys. This Court should reject these findings. AE 36, 39, and 51.

With a total absence of competent evidence, the trial court also found that Mr. Wixom and Mr. Caruso engaged in an ongoing attempt to harass, embarrass, threaten, and intimidate Linda Wixom. As no competent evidence was presented for this at trial or otherwise, the trial court must be

testifying about these findings in violation of ER 605. Alternatively, the trial court is making speculative findings without evidence. Either way, these findings are erroneous.

5. Without evidence or in violation of ER 605, the trial court found that the Appellants acted in bad faith. AE 40-41.

In Findings 186 and 187, the trial court refers to its lengthy experience and to its oath of office, neither of which are part of this record. The trial court has no evidence in the record to support these findings. As no evidence was presented for them at trial or otherwise, the trial court must be testifying about these findings in violation of ER 605. Alternatively, the trial court is making speculative findings without evidence. Either way, the trial court's Findings 186 and 187 are erroneous.

E. *The trial court chose not to conduct the proper analysis as to attorney fees for intransigence and chose not to conduct the proper analysis as to attorney fees under CR 11 against either Appellant and erred in awarding them to Respondent Linda Wixom.* AE 15, 20, 36-38, 42, 43, and 45.

1. Because the Appellants have not been intransigent or violated CR 11, Respondent Linda Wixom is not entitled to attorney fees on either basis. AE 36, 37, 38, & 42.

The intransigence of a party may support an award of attorney fees. Intransigence includes a "continual pattern of obstruction" which involves failure to cooperate with the GAL, failure to allow visitation, interference with ordered visitation, threatening witnesses with administrative action,

and falsely alleging sexual abuse, Marriage of Crosetto, 82 Wn.App. 545, 550 (1996), "litigious behavior" such as "bringing excessive motions or discovery abuses," Marriage of Wallace, 111 Wn. App. 697, 710 (2002), as well as other flagrant, abusive misconduct.

CR 11 applies to pleadings, motions, and legal memoranda. CR 11(a). To determine whether a document is frivolous, the Court must consider the factors of whether the pleading, motion, or legal memorandum is baseless and whether the signer conducted a reasonable inquiry. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220 (1992). A pleading, motion, or legal memorandum is baseless if it is not well grounded in fact or not warranted either by existing law or by a good faith argument for changing the law. Id. To evaluate whether the signer of a pleading, motion, or legal memorandum conducted a reasonable inquiry, the Court should consider these factors: (1) the time available to the signer, (2) the extent the attorney relied on the client for factual support, (3) whether the attorney received the case from another attorney, (4) the complexity of the legal and factual issues, and (5) the need for discovery to develop the case. Id. As each pleading, motion, or memorandum would have different factual claims and legal arguments, the Court should **separately** evaluate the basis for each pleading, motion, or legal memorandum on these elements.

The signer of a pleading, motion, or memorandum has a different

amount of time available for reasonable inquiry for each pleading, motion, or memorandum. The amount of reliance the signer has in each pleading, motion, or memorandum on the client for factual support differs. A client could have had a prior attorney's representation for issues in some pleadings, motions, or legal memoranda and not for issues in others. The complexity of the factual and legal issues differs for each pleading, motion, or memorandum. Each pleading, motion, or memorandum has a different need for discovery. For these reasons, the Court should **separately** evaluate whether each pleading, motion, or memorandum was based on a reasonable inquiry.

The trial court's findings are strikingly barren of any separate evaluation of pleadings, motions, or legal memoranda. If CR 11 sanctions are appropriate and adequate findings are entered, one would expect such findings to detail how pleadings, motions, or legal memoranda violate CR 11. The trial court's findings fail to adequately address these factors.

The trial court used Finding 182 to justify its CR 11 and intransigence awards against the Appellants. The only remotely possible tie in could be when Mr. Caruso brought to the court and opposing party's attention that the Judge's daughter had called Mr. Caruso after court on December 7, 2011 and had ex parte contact with Mr. Caruso about the purchase of an expensive pure bread dog for her fathers birthday. See RP generally at

867-874. Why the judge had the personal phone number for counsel on a pad of paper beside his bed if the court was not going to call him is not clear. If this encounter with the court's daughter is the all out war on the court, the court was required to recuse itself and hold a CR 11 hearing which it did not. There is no evidence that Mr. Wixom or Mr. Caruso entered into a conspiracy to wage all out war on the court. The trial court's finding is so manifestly prejudicial that it shows great bias.

The evidence opposes the trial court's finding that the motion practice of Mr. Wixom was intransigent and or violated CR 11.

First, Mr. Wixom brought a motion to continue the trial date and related deadlines on July 29, 2011. CP 257. The trial court granted Mr. Wixom's motion in part and denied it in part. CP 306-307. Consequently, this motion was not an instance of intransigence or a violation of CR 11.

Second, Mr. Wixom brought a motion for declaratory relief on August 25, 2011. CP 392-431. This motion is the subject of a separate appeal before this Court. In its opinion in the separate appeal, this Court declined to award either party fees for intransigence. See Marriage of Wixom, Slip Op. No. 30352-7-III, dated March 19, 2013, page 11. This motion was not an instance of intransigence or a violation of CR 11.

Ms. Wixom moved for a protective order. CP 451-452. Mr. Wixom believed in good faith that Ms. Wixom had failed to conduct the

mandatory discovery conference and moved for terms in response. CP 459-462. This counter-motion for terms is Mr. Wixom's third motion. The parties dispute whether a conference occurred. Ms. Wixom's motion indisputably fails to include a certification as required by CR 26(i). Under the above circumstances, Mr. Wixom's motion for terms was not an instance of intransigence or a violation of CR 11, either.

Fourth, Mr. Wixom moved a Commissioner to reconsider. CP 531-4. This denied motion was not intransigent or a violation of CR 11.

Fifth, Mr. Wixom also moved for reconsideration of the trial court's order compelling discovery. CP 535-9. The trial court had granted Ms. Wixom's order compelling discovery without requiring her to comply with the conference requirements of CR 26(i) under Thongchoom v. Graco Children's Prods., Inc., 117 Wn. App. 299, 308 (Div. III, 2003). CP 538. Linda Wixom's counsel chose not to confer regarding the sufficiency of the answers **and** chose to proceed with a hearing on the sufficiency of the answers without certifying that the conference requirement had been met **and** without meeting the conference requirement. This denied motion was not an instance of intransigence or a violation of CR 11 either.

Sixth, Mr. Wixom moved to compel the continuance of Ms. Wixom's

deposition based on her verbose objections[2] and improper instructions not to answer[3] throughout the deposition. CP 593. The verbose objections were at CP 911:24-912:18, 965:20-25, 966:1-2, 989:16-990:3, and 992:16-993:4. The instructions not to answer were at CP 898:2-11, 921-923, 986:14-15, 990:19, and CP 999:15-16. This denied motion was not an instance of intransigence or a violation of CR 11.

Seventh, Mr. Wixom moved on the same basis as above to compel Ms. Wixom's continued deposition with proper, timely notice to all parties. CP 616. If a motion based on CR 30(h) is an instance of intransigence, no one would be able to enforce CR 30(h). The Supreme Court has the authority to adopt, amend, or repeal court rules, including CR 30(h). See, generally, GR 9. This Court has no authority to repeal CR 30(h). This denied motion was not an instance of intransigence or a violation of CR 11 either.

Eighth, Mr. Wixom moved for relief for the Ms. Wixom's violation of CR 45(b)(2). CP 617-630. This Court granted relief to Mr. Wixom for the Respondent's violation of CR 45(b)(2). CP 709-710. This motion of Mr. Wixom was not an instance of intransigence or a violation of CR 11 either.

The award of attorney fees for intransigence or CR 11 is not

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[2] These objections violated CR 30(h)(2) which requires concise objections and forbids verbose objections.

[3] These instructions not to answer were not based on privilege and were not joined with a motion to terminate or limit examination under CR 30(d). Therefore, these instructions violated CR 30(h)(3).

appropriate. The trial court erred in Findings 183, 184, and 188; and this Court should reject these erroneous findings.

2. To defend its erroneous award of attorney fees against the Appellants for Linda Wixom, the trial court entered erroneous findings. AE 20, 15, 45, 43, 45, and 50.

a. This Court should reject the Trial Court's erroneous Finding 157.

This finding presupposes that attorneys are always unreasonable when they claim that rounding up is fraud. Rounding up can be a fraud. See Morris v. Wachovia Sec., Inc., 277 F.Supp.2d 622, 641 (E.D. Va. 2003) (finding that the plaintiff adequately alleged securities fraud related to the defendant's rounding method); Ball v. GTE Mobilnet of California, 96 Cal.Rptr.2d 801, 811, 81 Cal.App.4th 529, 543 (2000) (concluding that plaintiffs have a "reasonable possibility" of alleging "state law causes of action based on inadequate disclosure of non-communication time charges," which includes rounding up phone call minutes). Compare Marcus v. AT&T Corp., 138 F.3d 46, 59-64 (2nd Cir. 1998); Alicke v. MCI Communications Corp., 111 F.3d 909, 912 (D.C. Cir. 1997).

Because cases throughout the country support the claim that rounding up can be fraud, the trial court's finding that such a claim is unreasonable is in error; and this Court should reject this erroneous finding. AE 20.

b. This Court should reject the Trial Court's erroneous Finding 137.

Richard Wixom's actual testimony at trial is radically different from

the finding. Mr. Wixom and his son J.W. went on an educational 4 day trip to show J.W. what the father does for a living. RP 1073 et seq. (generally).

Mr. Wixom had told J.W. that they were going to a business meeting in Chelan to surprise him with riding a jet ski at Lake Chelan. RP 1078. He did not fictitiously tell his employer anything. Richard Wixom and J.W. "spent approximately an hour-and-a-half on the lake having fun on a wet bike," something that they had never done. RP 1079. This event was between office calls. RP 1078. There was no office call in Chelan. Id. After the 1 ½ hour wet bike ride experience, they cleaned up and drove to Leavenworth for the final office call for the day. RP 1078-80.

Even if telling one's child a fiction (like Santa Claus or the tooth fairy) to enable a surprise may be unwise or improper, such conduct is not unreasonable. A parent's justification for Santa Clause or the tooth fairy also applies to the surprise jet ski experience on Lake Chelan.

Because Mr. Wixom did not make a false representation to his employer, the trial court's finding that such representation occurred is an error, which this Court should reject. AE 15.

c. This Court should reject the Trial Court's erroneous Finding 193.

The trial court speculates that Richard Wixom "likely would not have called" the GAL in his case in chief. This is total speculation. Further, if and when Richard Wixom's attorney would hypothetically call the GAL

as a witness would depend on tactical decisions made by Richard Wixom's attorney in that situation, not the trial court.

The trial court heard no testimony or other evidence and made no finding that no reasonable attorney would call in his case-in-chief a GAL with whose findings and recommendations he disagreed. The trial court's finding here was an error which this Court should reject. AE 45.

d. This Court should reject the Trial Court's erroneous Finding 190.

The trial court makes numerous unsupported assumptions in this finding. Without evidence, the trial court assumed that Richard Wixom had decided not to request residential time with T.W. before the last day of trial. The record contains no evidence of when Richard Wixom made this decision. Without evidence, the trial court assumed that Richard Wixom agreed with the GAL's recommendations for T.W. before the last day of trial. The record contains no evidence of when Richard Wixom came to agree with the GAL's recommendations for T.W.

The trial court assumed Richard Wixom agreed with the GAL about T.W. before cross-examination. The trial court assumed that its own question was not the impetus that led him to make this decision.

Even if—under argument, not conceded—the record showed when Mr. Wixom decided not to seek time with T.W., Mr. Wixom's conduct would not necessarily have been unconscionable. In that case, the finding would

remain unproven. The reason why Mr. Wixom did not announce that he no longer opposed Linda Wixom's petition would remain unknown. He may have overlooked that he should make this announcement, may have been looking for an opportunity to make such an announcement and did not see or recognize one, or may have remained silent out of inertia.

The trial court's speculative finding here was error which this Court should reject. AE 43.

e. This Court should reject the Trial Court's erroneous Concl. 7.

The above conclusion implies that the absence of the testimony to which the conclusion refers is somehow improper. Once Linda Wixom stated that she did not sign the jury questionnaire (RP 879), the line of inquiry regarding Mr. Miles became moot. There was no need to pursue it.

More broadly, one can explain a party's not calling witnesses (or eliciting certain testimony), as the trial court did, by referring to the lack of time. RP 1223:9-11 ("there's lots of reasons people may not call witnesses, not the least of which is that we're out of time.") This Court should reject the trial court's erroneous Conclusion 7. AE 50.

3. A court may not award attorney fees for intransigence against a non-party or an attorney for a party. AE 42.

The trial court stated that "intransigence" was one of the bases for its award of attorney fees in April of 2012. CP 1124, Finding 188.

Intransigence cannot possibly serve as a basis for the trial court's award of fees against Mr. Caruso.

In Marriage of Lilly, 75 Wn. App. 715, 718 (1994), the trial court awarded attorney fees against the father. Although the trial court based its award of attorney fees "on the intransigence of Mr. Lilly and his prior counsel," the trial court "entered a 'Judgment Summary' against Mr. Lilly . . . in favor of Ms. Lilly for her attorney fees." Id. The Lilly judgment notably does not appear to have named the "prior counsel" for Mr. Lilly as a judgment debtor. This omission is consistent with other precedent.

A party is intransigent when **that party** engages in litigious behavior, excessive motions, or discovery abuses. Marriage of Wallace, 111 Wn. App. 697, 710 (2002). Intransigence here applies to a party, not to a party's attorney.

The father's attorney is not a party. Intransigence applies to parties and does not apply to non parties. The trial court erred in awarding attorney fees for intransigence against Mr. Caruso. This Court should reject the trial court's error and reverse the award of attorney fees against the father's attorney for alleged intransigence. AE 42.

4. Because the trial court chose not to enter findings that support permeation and entered its fee award as if it somehow made those findings, the trial court erred. Linda Wixom is not entitled to an award of bulk fees without segregation.

A trial court may award attorney fees in bulk for a certain date range without segregation if the trial court finds that bad acts permeate the proceedings for that range of dates. Marriage of Sievers, 78 Wn. App. 287, 312 (1995). The trial court's findings lack any finding that bad acts permeate the proceedings for any range of dates. Consequently, the trial court's findings do not permit it to award fees in bulk. Under argument not conceded, the trial court must segregate any fees it awards.

The bad acts in Sievers involved "a breach of the fiduciary obligations of marriage and a blatant violation of the duties of good faith and fair dealing in the contractual relationship" "together with [the father's] misrepresentations of his income to the arbitrator and his failure to provide the trial court with documentary evidence of his income during the trial." Id. at 311. These bad acts of Sievers constituted intransigence. Id.

A finding of permeation would be contrary to the evidence. Moreover, such a finding would have effectively denied Mr. Wixom reasonable access to the courts. Such a denial is impermissible and forbidden.

The trial court gave Mr. Wixom some relief for his motion to continue the trial date and related deadlines (CP 257), for his motion for relief re: CR 45(b)(2) (CP 617-630), and for his motions regarding Ms. Wixom's deposition (CP 593; 616) None of these motions qualify as "bad acts."

The pretrial motion practice of Mr. Wixom did not consist of "bad

acts." Because the trial court included no finding that Mr. Wixom's alleged "bad acts" permeated the proceedings during any date range, the court must segregate any award of attorney fees. Additionally, no conduct of Mr. Wixom constituting "bad acts" permeated the proceedings.

F. *Even if—under argument, not conceded—an award of any attorney fees or costs was somehow appropriate, the fees and costs awarded were unreasonable and speculative.*

If entitled to attorney fees, a party is only entitled to those fees that are reasonable and necessary. Estate of Jones, 152 Wn.2d 1, 20 (2004).

1. The trial court improperly awarded clerical fees and costs to Respondent Linda Wixom against the Appellants.

The trial court awarded Ms. Wixom professional fees for clerical time, which is not compensable. In re CF & I Fabricators of Utah, Inc., 131 B.R. 474, 492 (Bkrtcy.D.Utah 1991) (stating that "typing, data entry, . . . manually assembling, collating, marking, processing, photocopying, or mailing documents" are "not compensable"); Missouri v. Jenkins, 491 U.S. 274, 288 n.9 (1989) (remarking that "purely clerical or secretarial tasks should not be billed at a paralegal rate") (citation omitted).

The trial court awarded professional fees for making photocopies on 8/2, 9/21, 10/5, 11/1, and 11/4/2011. CP 1169, 1176-7, 1182-3. These clerical charges total 1.3 hours and $86.50. The trial court also awarded fees for faxing documents on 8/4-5, 8/25-26, 10/6, and 11/7/2011. CP

1170, 1173, 1178, and 1183. These clerical charges total .9 hours and $93.50. The trial court also awarded fees for filing, service, pickup, delivery, or some combination of these on 8/24, 8/26, 8/30, 9/1-2, 9/19, 10/14, 10/19, 11/1, and 11/3/2011. CP 1172-4, 1176, 1179, 1182. These clerical charges total at least 7 hours and over $500.00.

The trial court awarded professional fees for emailing documents on 9/28, 9/30, 10/11, 10/14, and 10/31/2011. CP 1177-1178, 1181. These clerical charges total .7 hours and $46.50. The trial court also awarded professional fees for typing, data entry, printing, and manual assembly on 9/16, 9/23, 9/26, 10/18, 10/27, 11/1-3, and 12/2/2011. CP 1175-1184. These clerical charges total 10.6 hours and $712.00.

The above clerical charges total in excess of 20 hours and at least $1,500.00. The trial court erred in awarding fees for this clerical work.

Overhead expenses such as clerical time and costs are included in "the reasonable fees hourly charge." See Collins v. Clark County Fire Dist., 155 Wn. App. 48, 104 (2010). Ms. Wixom charges for clerical expenses paid to Spokane Legal Copy LLC in the amount of $331.49 and for color copies in the amount of $7.05. CP 1082-1083; 1166. The trial court erred in awarding recovery for clerical expenses.

2. Without any basis, the trial court improperly awarded fees for two attorneys at the higher rate—even when the more expensive attorney did nothing!

Without stating an adequate basis for two attorneys in court or at a deposition, the mother charges simultaneously for both ten times: on 9/1-2; 10/3; 11/28-30; 12/7, 9, 16 (in 2011) and 1/19/2012. CP 1168-1187. These unnecessary fees total 47.4 hours at rates from $175-$300 per hour. Because courthouse wait time is not trial time, the mother's charging all such wait time for breaks and so on at the trial rate is an unreasonable fee.

Paul Mack objected to questions for and questioned only one witness, Richard Wixom. RP 1072-1280. Mr. Mack's rate is $300 per hour. CP 1102:4-7. The trial court did not find a basis for Mr. Mack's rate to be charged against the Appellants for the entire trial.

The trial court's charging the higher rate against the Appellants for the entire trial is not reasonable and is error which this Court should reject.

3. The trial court awarded costs that were unsupported.

Linda Wixom asked for $3,949.84 in costs. CP 1082-1083.

Linda Wixom concedes that entries "for appeal work and the copy costs that were done out of our office" should be deducted. CP 1071. Linda Wixom admits that she charged improper fees and costs.

Linda Wixom does not adequately support the costs she charges against the Appellants. For instance, Linda Wixom justifies a charge for research and writing of $1,275.00 (CP 1083) with the bare assertion that Dennis Cronin "helped research and prepare the trial brief in this matter."

CP 1069-1070. This Court should reject this unsupported charge.

The cost dated January 5, 2012 for the "Spokane Superior Court Transcript" is also an appellate cost that the fee affidavit attributes to the appeal. CP 1083. Due to RAP 9.5(a)(1), Linda Wixom's purchase of the transcript for the appeal was also unreasonable.

These costs are unreasonable. This Court should reject these costs.

4. The amount of the trial court's reduction was unreasonably low, speculative, and unsupported by evidence or findings.

After calculating all of the attorney fees and deducting some duplication and appeal fees, the trial court reduced the total attorney fee amount by 10%. CP 1187. The smallness of the percentage by which the trial court reduced the attorney fees was unreasonably low, speculative, and unsupported by findings or evidence. If—under argument, not conceded—the Appellants were somehow intransigent or violated CR 11, this Court should greatly increase the percentage by which the attorney fees are reduced or remand to the trial court for a proper reduction.

G. *The father is entitled to attorney fees.*

The father asks for attorney fees on the basis of his need and the mother's ability to pay. RCW 26.09.140. The father also asks for attorney fees for the mother's intransigence. Marriage of Wallace, 111 Wn. App. at 710; Marriage of Bobbitt, 135 Wn. App. 8, 30 (2006).

Ms. Wixom violated CR 26(i) by failing to confer (CP 436-438) and failing to certify conferral (CP 451-452). Ms. Wixom's counsel "let Mr. Pfefer know" their plans and that they would seek "a protective order/motion to quash." CP 563. This resembles the defective certification in Clarke v. Office of the Attorney Gen, 133 Wn. App. 767, 780 (2006) (requiring "a contemporaneous two-way communication"). Ms. Wixom violated CR 26(i) by failing to confer in an adequate manner.

Ms. Wixom's response to Mr. Wixom's motions on September 19, 2011 were untimely and violated LCR 40(b)(10) or (13). CP 540-543; 550-551. Ms. Wixom moved for a protective order with 6-days' notice in violation of LCR 40(b)(10) or (13). CP 564.

Ms. Wixom violated CR 30(h)'s prohibitions against verbose objections at CP 911:24-912:18, 965:20-25, 966:1-2, 989:16-990:3, and 992:16-993:4 and against instructions not to answer at CP 898:2-11, 921-923, 986:14-15, 990:19, and CP 999:15-16. Ms. Wixom also chose to prevent Mr. Wixom's counsel from cross-examining him during his deposition in violation of CR 30. CP 700-702. Ms. Wixom failed to explain her attempted deposition corrections as required by CR 30(e). CP 1007. She also failed to include sufficient factual specificity in her objections. CP 696-697. Further evidence of Ms. Wixom's intransigence is her objecting to her Guilty Plea Agreement (Exhibit P-10) on the waived

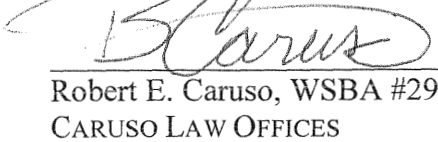
bases of ER 410 or ER 609(c). CP 677-680.

This Court should award the father attorney fees for the mother's intransigence and on the basis of his need and the mother's ability to pay.

IV. Conclusion

In accordance with the evidence and the law, this Court should sustain the father's assignments of error, reject the findings of the trial court, find that the detriment of domestic violence exists in Linda Wixom's home, reverse the trial court, and place J.W. with Richard Wixom.

Respectfully submitted this 8th day of April 2013.



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