COA No. 30851-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

RICHARD T. WIXOM,

Appellant,

v.

LINDA B. WIXOM,

Respondent.

BRIEF OF RESPONDENT

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II. COUNTER-STATEMENT OF THE CASE

At the January 19, 2012 hearing when the court issued its findings and conclusions and orders, the trial judge painstakingly summarized the facts in evidence at trial. (1/19/12 RP 1321-1380). Those facts are supported by the record as reflected in the exhibits and the testimony of each witness. (RP 1-1429). To avoid a duplicative statement of facts, Ms. Wixom incorporates by reference the judge's "complete and exhaustive outline of the facts that were and the evidence submitted to this Court." (1/19/12 RP 1380). Specific citations to the record will be made as the discussion of the issues necessitates.

The trial court entered extensive findings of fact, conclusions of law, and orders. (CP 1104-28; 1129-33; 1134-44; 1145-53;

1154-63; 1164-65; 1166-87). It awarded Ms. Wixom attorney fees of $51,778.58 and costs of $3,949.84 against Mr. Wixom and his counsel, jointly and severally. (CP 1166). The court concluded:

> [Counsel] has abused his professional responsibilities and therefore the Court is making the award of attorney fees the joint and several responsibility of both [counsel] and Mr. Wixom. (CP 1126).

Mr. Wixom and counsel appealed. (CP 1190).

III. ARGUMENT

A. The trial court properly rejected admission of Ms. Wixom's guilty plea agreement pursuant to ER 410.

ER 410(a) provides in relevant part:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection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.

The standard of review for a conclusion regarding the applicability of ER 410 is de novo. *State v. Hatch*, 165 Wn. App. 212, 217, 267 P.3d 473 (2011). The purpose of the rule is to encourage the disposition of criminal cases through plea bargaining by allowing an accused to participate candidly in plea discussions, without the fear that his plea or plea-related statements will be used

against him at trial, civil or criminal. *State v. Nowinski*, 124 Wn. App. 617, 628, 102 P.3d 840 (2004).

Mr. Wixom argues that by twice failing to object properly under ER 410 to admission of the guilty plea agreement, Ms. Wixom waived any objections. The agreement was included in Mr. Wixom's ER 904 notice and she objected on the grounds of relevance and a violation of ER 1005 (public records). CP 678. When offered at trial, Ms. Wixom voiced no other objection. (12/7/11 RP 769). She did, however, ask the court to readdress the issue of admitting the plea agreement because it was prohibited under ER 410. (*Id.* at 790-91). The court, in its discretion, did reconsider admission of the agreement and decided to reject the exhibit under ER 410:

> 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.
>
> I will allow [counsel] to question Ms. Wixom, in the spirit of 613, about her statement in the deposition that she had not been charged and anything that is reasonably related to the fact that she actually was charged, which I don't think's being disputed. I

> think everyone acknowledges she was charged.
> But I'll let you question her about that, but I'm
> going to grant the motion to strike on P-10.
> So P-10 now based on that ruling is not admitted.
> (12/7/11 RP 800-01).

De novo review of this question of law shows that the trial court correctly interpreted ER 410, which, by its very terms, applied to the plea agreement and the guilty plea that was withdrawn by Ms. Wixom. *Hatch*, 165 Wn. App. at 217. Once the evidence rule is properly interpreted, the admission or refusal of evidence lies within the sound discretion of the court. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Discretion is abused only if no reasonable person would take the view adopted by the trial court. *State v. Woolworth*, 30 Wn. App. 901, 910, 639 P.2d 216 (1981). The court did not abuse its discretion by rejecting the plea agreement as an exhibit because it properly reconsidered the issue under ER 410, properly applied the rule, and properly took the view any reasonable person would have taken. *Id.*

Mr. Wixom also argues that the waiver of inadmissibility of statements precludes application of ER 410. He is mistaken. The plea agreement contained this provision:

> 8. Waiver of inadmissibility of Statements:
> LINDA WIXOM agrees to waive the inadmissibility
> of statements, if any, made in the course of plea

> discussions with the United States, pursuant to Fed. R. Crim. P. 11(f), except any such statement made during a "free talk" proffer. This waiver shall apply if she withdraws any of her guilty pleas or breaches this Plea Agreement. LINDA WIXOM acknowledges that any statements she makes during the change of plea hearing would be admissible against her in the United States's case-in-chief if she withdraws from or breaches this Plea Agreement. (CP 771).

In *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S. Ct. 797, 130 L. Ed.2d 697 (1995), the court held that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea statement rules is valid and enforceable. Read as a whole, however, it is clear the intent of the waiver clause here was to make any statements by Ms. Wixom during plea discussions admissible in any criminal trial prosecuted by the United States. A waiver is strictly construed against the government. *See, e.g.*, *United States v. Ready*, 82 F.3d 551, 559 (2nd Cir. 1996). So viewed, the waiver clause is inapplicable in the context of this state court action to modify the parenting plan.

Even if the court had erred by excluding the plea agreement, the error was harmless as Mr. Wixom's counsel was nonetheless allowed to question Ms. Wixom and other witnesses at length about

the plea agreement and its provisions. (*See* 11/8/11 RP 116-22; 11/28/11 RP 33-34, 86; 11/29/11RP 377-78, 381, 450, 513-61; 12/7/11 RP 620-21, 623-24, 627-28, 643-54). An error committed by the trial court in refusing to admit cumulative evidence is harmless error. *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 173, 947 P.2d 1275 (1997) (quoting *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994)). The evidence need not be identical to that which is admitted; instead harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted. *Havens*, 124 Wn.2d at 170.

The essence of the plea agreement and the circumstances from which it arose had already been admitted through witness testimony in the trial. The agreement itself was merely cumulative and the trial court's refusal to admit this evidence was undoubtedly harmless. There was no error. *Havens*, *supra*.

B. The trial court properly entered findings of fact 68, 71, 88, and 136 as they were supported by substantial evidence.

Mr. Wixom argues that undisputed evidence shows that Ms. Wixom was not in compliance with her federal probation and deferred prosecution because she knowingly lied when she

answered in a deposition that she had not been charged with anything. (CP 855). To the contrary, evidence in the record shows that she was compliant and did not intend to deceive anyone when she denied being charged with a crime. (FF 133, CP 1119; 11/29/11 RP 377-78). Indeed, Ms. Wixom corrected the mistake when she signed her deposition. (*Id.*; CP 1007).

The guardian ad litem (GAL) met with Ms. Wixom three times. (11/8/11 RP 114). She had been addicted to hydrocodone, competed treatment, and was still participating in the Washington Recovery Assistance Program for Pharmacists (WRAPP). (*Id.* at 115-16, 118). Ms. Wixom had gone through 70 UAs, all of which were negative. (*Id.* at 120-21). The GAL talked with the federal probation officer, who reported Ms. Wixom was in complete compliance. (11/28/11 RP 33-34). Curiously, in August 2011, Mr. Wixom reported allegations of current drug use by Ms. Wixom when the issue had never been raised before by him either when he filed his counter-petition for modification in March 2011 or just two month prior in June 2011 when the GAL spoke to him. (11/28/11 RP 34-35, CP 165).

William Rhodes, the program manager for WRAPP, testified Ms. Wixom was compliant in the program and was in full sustained remission. (11/30/11 RP 535; 543-545, 550, 561).

Ms. Wixom testified at trial that she had been federally charged and had pleaded guilty. (12/7/11 RP 643). But she was allowed to withdraw her plea and entered into a deferred prosecution agreement. (*Id.* at 644, 647). Ms. Wixom stated she was not aware of ever violating any of her probation requirements. (*Id.* at 648). Her guilty plea had been entered on February 18, 2009, and the dissolution was entered March 3, 2009. (*Id.* at 651). He was aware of the federal charges. (*Id.* at 651-52). Ms. Wixom testified she had answered in a deposition that she had not been charged with anything, but later changed that answer. (*Id.* at 653). She was confused at the time between a charge and a conviction and did not intend to mislead anyone. (*Id.*). Ms. Wixom told the GAL about the criminal case, her federal probation, the pharmacy board's investigation, and her participation in WRAPP. (*Id.* at 64-65).

Substantial evidence supports the challenged findings of fact, which thus should not be disturbed. *Thorndike v. Hesperian*

Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *In re Marriage of Kovacs*, 121 Wn.2d 795, 810, 854 P.2d 629 (1993).

C. The trial court properly entered findings of fact 90, 91, 92, 93, 94, and 194 as they were supported by substantial evidence.

Mr. Wixom argues there was undisputed evidence of domestic violence and recent drug use by residents of Ms. Wixom's home. The record, however, supports the trial court's findings and conclusion.

Mr. Wixom points to the GAL's testimony where J.W., the younger brother, reported "sometimes [A.W., the older brother] scares him, flinches like he is going to hit him." (11/28/11 RP 50). But the GAL went on to say "I think that is pretty typical in a brother relationship." (*Id.*). This is not domestic violence. RCW 26.50.010(1).

Mr. Wixom further contends A.W. used drugs while living with him. (CP 91, 503; 11/8/11 RP 181). Accordingly, a present-day detriment exists in Ms. Wixom's home because A.W. and J.W. now live there. The court's finding of fact 90, however, was based on the uncontroverted evidence and the lack of evidence presented by Mr. Wixom:

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 [sister T.W.'s] experimentation with marijuana was while she was in Linda Wixom's home or that [T.W.] 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 that there is a detriment to [J.W.'s] wellbeing in Linda Wixom's home. (CP 1114).

J.W. told the GAL his older brother was "really nice" since he moved into the mother's home. (11/8/11 RP 143). He did say he got scared when A.W. gave him charley horses and flinched at him like he was going to hit him. (*Id.*) Although the GAL testified [J.W.] told her that [A.W.] picked on him "present day," no testimony was further elicited where it had occurred. The GAL further opined these incidents were not domestic violence in any event. (11/29/11 RP 260). Indeed, [J.W.] did not report to his mental health counselor that he was traumatized. (11/8/11 RP 78). The GAL found there was no detriment in either home. (*Id.* at 155).

Based on this substantial evidence in the record, the court appropriately entered findings of fact 91, 92, 93, and 94. *In re Marriage of Kovacs*, 121 Wn.2d at 210.

The court also entered challenged finding of fact 194:

> Had Richard Wixom conceded Linda Wixom's position 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 a light most favorable to him, likely would not have risen to the level necessary to prevail on his petition to modify. (CP 1124).

The background for that finding, however, was that in the afternoon on the last day of trial, Mr. Wixom disclosed, upon direct questioning by the court, that he was not contesting Ms. Wixom's petition to modify the parenting plan regarding T.W. and agreed with the GAL's recommendations. (12/19/11 RP 1212, 1216, 1253). This again is substantial evidence supporting the court's finding, which cannot be disturbed. *In re Marriage of Kovacs*, 121 Wn.2d at 810.

D. The trial court properly entered findings of fact 151, 152, 157, and 160 as they were supported by substantial evidence.

Mr. Wixom argues Ms. Wixom violated the parenting plan provision requiring two days' notice if she would be late picking up J.W. on July 29, 2011. The court's findings reflect that she gave one-day notice to him by email on July 28, 2011, she was going to be late. (FF 152, CP 1121). He acknowledged receiving the email that day. (*Id.*).

The court also found that both parties had not given the two-day notice to each other in the past. But the "violations" were de minimis at worst and a finding against the mother that she had violated the parenting plan would have been equally applicable to the father. Testimony supported challenged findings of fact 152 and 153. (11/8/11 RP 163-68; 12/19/11 RP 1125-29, 1149-58).

Mr. Wixom does not present argument on assignments of error challenging findings of fact 157 and 160. They are therefore deemed waived. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005).

E. The trial court properly entered findings of fact 140 and 141 as they were supported by substantial evidence.

Mr. Wixom claims the GAL was biased against him because he views the evidence purportedly supporting his allegations of bias differently than the trial judge. But the trier of fact decides credibility questions and the appellate court will not disturb its determination. *Duc Tan v. Le*, 177 Wn.2d 649, 670, 300 P.3d 356 (2013).

The challenged findings state:

> 140. 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. "We" is the proper pronoun for two or more people.
>
> 141. There is absolutely no evidence to suggest Ms. Lund was biased towards or aligned with one side during this hearing or any other hearing. (CP 1120).

Initially, it should be noted that Mr. Wixom does not make any argument in his brief pertaining to finding of fact 140. He points to supposed examples of bias from the GAL's action or inaction, but they do not support any showing of bias. Since there is no argument relating to finding of fact 140, that assignment of error is waived. *Bercier*, 127 Wn.2d at 184.

In any event, the trial court believed Ms. Lund, the GAL, had made an unbiased and thorough report as reflected in the testimony. (*See* 11/29/11 RP 234-321, 323-415). Finding of fact 140 also contains a conclusion of law pertaining to the word "we." Finding of fact 141, which is actually a conclusion of law, will be interpreted as such. *Local Union 1296 Int'l Ass'n of Firefighters v. Kennewick*, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975). When the trial court has weighed the evidence, as the court did here, review is limited to determining whether substantial evidence supports the findings, and if so, whether the findings in turn support

the conclusions of law. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.* Here, substantial evidence supports the court's finding that Ms. Lund testified she used the word "we" to reference the fact that Mr. Caruso, Ms. Swennumson, and she were in a hearing. The court concluded that "we" is the proper pronoun for two or more people. That conclusion is supported by the court's finding. *Id.* at 720. There was no error.

In finding of fact 141, the trial court concluded there was no evidence to suggest Ms. Lund was biased towards or aligned with one side during that hearing or any other hearing. (CP 1120). The record is devoid of any evidence even remotely showing bias. All that is argued by Mr. Wixom is his unsupported belief there was bias. The court's findings, however, are supported by the record and the conclusions in turn flow from those findings. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978). The court did not err.

Moreover, Mr. Wixom did not challenge finding of fact 142:

> It is true that a GAL must make recommendations to the Court which necessarily involves taking positions on issues. This is a normal part of their responsibilities

> to the Court. Those opinions may favor one side or the other during the course of a case. This does not mean the GAL is biased or taking sides. It means they are doing their job. (CP 1120).

This finding is wholly supported by the evidence and explains why the purported examples of bias cited by Mr. Wixom were baseless. There was no error.

F. The trial court properly entered finding of fact 136 as it was supported by substantial evidence.

Finding of fact 136 stated:

> 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 a prior declaration. (CP 1119).

On disputed evidence, the court did not believe Mr. Wixom's testimony that he did not know about potential criminal charges and probation, in light of his prior declaration to the contrary. This court will not disturb the trier of fact's credibility determination. *Duc Tan*, 177 Wn.2d at 670.

G. The trial court properly entered finding of fact 195 as it was supported by substantial evidence.

Finding of fact 195 stated:

> Linda Wixom spent 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).

The trial lasted a contentious seven days. Yet, Mr. Wixom acknowledged at the eleventh hour that he did not contest Ms. Wixom's petition to modify the parenting plan and agreed with the GAL's recommendations. (FF 190, 191; CP 1124). The court found the trial could have been considerably shortened had the concession been revealed earlier. (FF 192, 193, 194; CP 1124). And there is no dispute these lawyers charged by the hour.

The court's findings are supported by substantial evidence and are the basis for its finding that "tens of thousands of dollars" were spent by Ms. Wixom to pursue an uncontested petition and to defend against a meritless counter-petition. Contrary to Mr. Wixom's claim there was a total absence of evidence supporting the challenged finding, the record is replete with such support. The court did not err. *In re Marriage of Kovacs*, 121 Wn.2d at 810.

H. The trial court's award of attorney fees and costs against Mr. Wixom and his counsel under CR 11 and for intransigence was proper as its findings were supported by substantial evidence and its conclusions were in turn supported by those findings.

Mr. Wixom first complains that the trial court erred by finding and concluding there was a conspiracy in this case "between Mr.

Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court." (CL 9; CP 1126). He argues the court's findings of fact 161, 165-67, 169-78, and 183-84 are not supported by the evidence and conclusion of law 9 is erroneous. He is wrong.

He contends that the court's finding a conspiracy was somehow a legal finding of civil conspiracy. The record shows no such thing nor was there any allegation of conspiracy as defined in *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 160, 52 P.3d 30 (2002). It is clear the court was referring to the ordinary meaning of conspiracy and not a claim for relief. (*See* FF 61, CP 1111; FF 70, CP 1112; FF 79, CP 1113; FF 85, CP 1113-14; FF 97, CP 1115; FF 116-17, CP 1117; FF 122-25,, CP 1118; FF 133-41, CP 1119-20; FF 156-59, CP 1121; FF 163, 165-70, CP 1122; FF 174, 177-95, CP 1123-24). Those findings describe what was succinctly summarized in finding of fact 185:

> 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).

This is the conspiracy found by the court – the ongoing course of action of Mr. Wixom and Mr. Caruso "to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court." (CL 9, CP 1126). The court's findings reflecting the actions of Mr. Wixom and his counsel are abundantly supported by the record and those findings support its conclusion of a conspiracy, not as a term of art, but rather as that term is ordinarily defined. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). The court did not err.

Mr. Wixom next argues there was no evidence that he or his counsel harassed the GAL. To the contrary, review of the verbatim report of proceedings of Mr. Caruso's examination of Ms. Lund is in itself the best evidence of the harassment she went through. She was on the stand for three days in a case where Mr. Wixom finally acknowledged he was not contesting Ms. Wixom's petition to modify the parenting plan with respect to T.W. and indeed agreed with the GAL's recommendations. (FF 190-94, CP 1124). Mr. Wixom also decided to sabotage the GAL's investigation. (FF 178, CP 1123). Ms. Lund suffered disparagement of her neutrality and abilities when, as the court found, she was simply doing her job. (*See* 11/8/11 RP 38; 11/28/11 RP 1159-20; 11/29/11 RP 234-78,

393-417 FF 142, CP 1120). The court properly found the GAL was harassed. *In re Marriage of Kovacs*, 121 Wn.2d at 810.

Claiming there was no evidence that he or his counsel intimidated a judge under RCW 9A.72.160, Mr. Wixom argues the trial court erroneously found they harassed the court commissioner. No one, however, alleged that they were guilty of intimidating a judge and committed a crime. Their argument is based on this incorrect premise, thus rendering their conclusion equally incorrect. No First Amendment rights were implicated by the court's findings. The actions of Mr. Wixom and his counsel were chronicled by the trial court's comprehensive findings based on the record. It did not err. *See Local Union 1296*, 86 Wn.2d 161-62.

Mr. Wixom argues there was no evidence he or his counsel harassed Ms. Wixom or her attorneys. All that need be done is to review the record as it is truly the best evidence of the harassment. For example, the court made these telling findings that were supported by the record:

> 180. Richard Wixom and Mr. Caruso decided to raise every possible argument to support his modification, including alleging drug use when they had no evidence to support that assertion.
>
> 181. Richard Wixom denied knowledge of Linda Wixom's criminal case even though

> he had previously admitted he knew of the federal investigation, that she might face jail, and the decree reflected that Linda Wixom was responsible for the restitution.
>
> 182. This was an all-out war against Linda Wixom from that time through trial.
>
> 183. 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.
>
> 184. 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).

The time when Mr. Caruso came on for Mr. Wixom signaled a turn for the worse as reflected in the court's finding of fact:

> 163. There is one significant event that occurred shortly before this exchange that explains the chaos and dysfunction. Shortly before July 29, 2011, Wixom's previous attorney withdrew and he retained Mr. Caruso. That day, that weekend, and virtually part of this case became chaotic and dysfunctional from that point forward. (CP 1122).

These findings are supported by the clerk's papers and the verbatim report of proceedings. The court did not err.

Mr. Wixom next argues that findings of fact 186 and 187 were unsupported by the evidence. Those findings state:

> 186. In the years the Court has been a judicial officer in Spokane County and including the nearly 30 years that the Court has worked around Spokane County Superior Court, the Court cannot recall a case so devoid of merit and so full of misdirection and meritless arguments.
>
> 187. 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).

These are actually conclusions of law and will be treated as such. *Local Union 1296*, 86 Wn.2d at 161-62. The court painstakingly delivered its oral opinion and subsequently entered thorough and detailed findings of fact supporting the frivolous nature of Mr. Wixom's case and the improper course of conduct pursued by him and his counsel. They in turn clearly support findings 186 and 187, whether they be findings of fact or conclusions of law. *Ridgeview Properties*, 96 Wn.2d at 720.

Against this backdrop of facts supporting the imposition of CR 11 sanctions and a finding of intransigence against Mr. Wixom and his counsel, they claim the trial court failed to conduct the proper analysis to make such an award. But the court made the necessary inquiry and considered the appropriate factors in imposing CR 11 sanctions and finding intransigence.

The record is full of court filings showing Mr. Wixom engaged in litigious behavior, excessive motions, and discovery and trial abuses that escalated Ms. Wixom's legal costs. *Bay v. Jensen*, 147 Wn. App. 641, 660, 196 P.3d 753 (2008); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Furthermore, the court made findings setting forth in fine detail evidence of the intransigence of Mr. Wixom and his counsel. (FF 33, CP 1107; FF 34, 1108; FF 57, CP 1110; FF 60-61, CP 1111; FF 70-71, 75, CP 1112; FF 79-80, 85, CP 1113-14; FF 86, CP 1114; FF 116-117, 119-20, CP 1117; FF 121-25, CP 1118; FF 135-36, 139, 140-50, CP 1119-20; FF 151-59, CP 1121; FF 163-95, CP 1122-24).

These findings are particularly relevant and telling in that they support not only a finding of intransigence, but also a violation of CR 11 by Mr. Wixom and his counsel. The court must make findings in support of CR 11 sanctions. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Contrary to Mr. Wixom's contention, the trial court did so in great detail. Interestingly, Mr. Wixom and his counsel focus their entire argument against the imposition of CR 11 sanctions on a discussion of the pleadings, motions, and legal memoranda. The

court, however, focused on their entire course of conduct from Mr. Caruso's appearance at the end of July 20, 2011, through the trial. Abundant evidence, as reflected in the court's findings, supports the imposition of CR 11 sanctions against Mr. Wixom and his counsel. *Burnet*, *supra*.

He also claims finding of fact 157 was erroneous because "rounding up" can be a fraud. That finding states:

> 157. To argue that testifying a phone call was made at 6:00 p.m. when in fact the telephone records show the call began at 5:59 p.m. is fraud is the most extremely unreasonable position the Court has witnessed taken by any attorney in any case in its courtroom. (CP 1121).

This finding is also a conclusion of law and reviewable as such. *Local Union 1296*, 86 Wn.2d at 161-62. The frivolous argument of counsel supports the conclusion, which was thus proper. *Ridgeview Properties*, 96 Wn.2d at 720.

He contends finding of fact 137 was erroneous because the evidence does not support it. The finding states:

> 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).

But the evidence shows that Mr. Wixom did make the admission. (12/9/11 RP 1078-79). Substantial evidence supports the finding so it will not be disturbed. *In re Marriage of Kovacs*, 121 Wn.2d at 810.

He argues no evidence supports finding of fact 193:

> 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).

Mr. Wixom characterizes the court's finding as "total speculation." It is not. The judge sat through the entire seven days of trial, monitoring its progress, and heard the witnesses and arguments of counsel, and ruled on myriad objections. Running a tight courtroom, he knew the likely scenario had the concession been made at the outset. (*See, e.g.*, FF 1, CP 1104; 11/8/11 RP 209). The court's finding is thus supported by the evidence and the record as a whole. It should not be disturbed. *In re Marriage of Kovacs*, 121 Wn.2d at 810.

Although this assignment of error was raised before in his brief, he again claims finding of fact 190 is unsupported by the evidence. This finding addresses Mr. Wixom's concession in the

afternoon on the last day of trial he was not contesting Ms. Wixom's petition regarding T.W. (CP 1124). This finding, however, is supported by the evidence. (12/19/11 RP 1212, 1216, 1253). The court did not err.

Mr. Wixom argues conclusion of law 7 that his counsel "made numerous representations to the Court and offers of proof that were never lived up to" was erroneous. But his brief concedes witnesses, presumably able to testify in accordance with counsel's offers of proof, were not called. The court's detailed findings are supported by the record and they in turn support conclusion of law 7. *Ridgeview Properties*, 96 Wn.2d at 720. There is no error.

Mr. Wixom contends intransigence cannot be the basis for an award of attorney fees against his counsel because it applies only to a party. He is mistaken. Counsel has been held liable for attorney fees based on intransigence. *In re Sanai*, 177 Wn.2d 743, 748, 302 P.3d 864 (2013). This is especially appropriate when, as here, the court found Mr. Wixom and his counsel engaged in a course of conduct that was not in good faith and was the epitome of intransigence. *Id.*

Citing *In re Marriage of* Sievers, 78 Wn. App. 287, 312, 897 P.2d 388 (1995), Mr. Wixom argues that the court could not award

fees "in bulk" because it made no finding of "permeation." To the contrary, the court did so find:

> 183. 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. . .
>
> 185. 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. (CP 1123, 1124).

No magic words need be used to make the finding of permeation and the court's intent was clear. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 226, 285 P.3d 52 (2012). The fees sought by Ms. Wixom were incurred during the time frame indicated by the court. (CP 1084). Even so, Mr. Wixom was afforded some relief from the total amount of fees requested. (CP 1166-67). An award of attorney fees is reviewed for abuse of discretion. *Guillen v. Contreras*, 169 Wn.2d 769, 774, 238 P.3d 1168 (2010). The court properly exercised its discretion here and did not err.

Mr. Wixom argues the court erred by awarding clerical costs. Generally, clerical costs are not properly included as separate compensation when the attorney's hourly rate for services includes the value of such "overhead" expenses. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 83-84, 231 P.3d 1211 (2010).

Here, however, the court made no finding that counsel's hourly rate included these clerical costs. *Id.* Accordingly, the court did not err by awarding certain clerical costs to Ms. Wixom.

Mr. Wixom further argues the reduction in fees was unreasonably low. He fails to show, however, that the court somehow abused its discretion by reducing the fees as it did. Without such a showing, there is no error. *Guillen*, 169 Wn.2d at 774.

I. Mr. Wixom is not entitled to fees on appeal.

He asks for fees on the basis of his need and Ms. Wixom's ability to pay. RCW 26.09.140. But the trial court found their incomes were approximately equal. (FF 115, CP 1117). There is no basis for an award of fees under RCW 26.09.140.

Mr. Wixom also seeks fees for her intransigence. But he points to nothing that shows intransigence. *See In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992). Indeed, the trial court found that his and counsel's course of conduct was intransigence, not Ms. Wixom's. (FF 188, CP 1124). An award of fees for her purported intransigence is unwarranted.

J. Ms. Wixom should be awarded fees on appeal under RAP 18.9.

Ms. Wixom should be awarded her fees for defending against this frivolous appeal. RAP 18.9. It is frivolous because it presents no issues on which reasonable minds could differ. *Heigis v. Cepeda*, 71 Wn. App. 626, 862 P.2d 129 (1993).

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Wixom respectfully urges this Court to affirm the trial court in all respects and award her attorney fees on appeal.

DATED this 5th day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 5, 2013, I served a true and correct copy of the Brief of Respondent by first class mail, postage prepaid, on Robert E Caruso, 1426 W. Francis Ave., Spokane, WA 99205, and Matthew F. Pfefer, 10417 E. 4th Ave. # 10, Spokane Valley, WA 99206-3638.