Recd 1/6/14
KH

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.

REPLY BRIEF OF APPELLANTS

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I. Argument

A. Tacit Admissions in Counter-Statement of Case

Ms. Wixom included no explanation with her putative deposition corrections (Br.App., 14), omitted the Health Department charges from those putative corrections (Id.), did not object to her Guilty Plea Agreement—Ex. P-10—on the basis of ER 410 (Id.; CP 678), and initially allowed the admission of Ex. P-10 without objection (Br.App., 15).

Her Counter-Statement of the Case ignored all these matters. Br.Resp., 1-2. A party to an appeal who has an opportunity to respond to an opponent's factual claims and neglects to do so thereby concedes the accuracy of the opponent's factual claims. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 270, 840 P.2d 860 (1992). Ms. Wixom's lack of response here tacitly admits these facts.

B. Standards of Review

Mr. Wixom supplements his previous briefing with the following:

> A trial court abuses its discretion only if any of the following is true:
> (1) The decision is manifestly unreasonable, that it, it falls outside the range of acceptable choices, given the facts and the applicable legal standard;
> (2) The decision is based on untenable grounds, that is, the factual findings are unsupported by the record; or
> (3) The decision is based on untenable reasons, that is, it is based on an incorrect standard or the facts do not meet the requirement of the correct standard.

State v. Dye, 178 Wn.2d 541, 548 ¶16 (2013) (citing Marriage of

Littlefield, 133 Wn.2d 39, 46-47 (1997) (quotation marks omitted). The " 'manifestly unreasonable' and 'untenable reasons' tests require" the court "to determine a legal standard to use." Dye, 178 Wn.2d at ¶16.

C. *Because Ms. Wixom did not raise ER 410 against her Guilty Plea Agreement in her ER 904 Response, because she was silent when it was offered and initially admitted, and because the trial court removed it due to her waived objection, this Court should reject this erroneous ruling.* AE 52.

Ms. Wixom states incorrectly that she "voiced no other objection" to her Guilty Plea Agreement, Ex. P-10. Br.Resp., 3. When Mr. Wixom offered it, she initially did not object at all. RP 769. She did not mention the objections from her ER 904 Response or an objection from ER 410.

She now provides no legal basis for the trial court's rejecting Ex. P-10 after its admission without objection. As she cites no legal authority here, this Court should reject her position. RAP 10.3(a)(6); DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126 (1962).

Ms. Wixom had no compelling reason for failing to timely object by ER 410 to her Guilty Plea Agreement under ER 904. Br.App., 17. She ignores this point and tacitly admits it. Washburn, 120 Wn.2d at 270.

Addressing the criminal impacts of the waiver in her Guilty Plea Agreement, she ignores how ER 904 and ER 410 interrelate. Br.Resp., 4-5. Under ER 904(a), ER 904 only applies in "a civil case." Thus, her discussion of the criminal impacts of the waiver shed no light here.

ER 904's specific purpose is to address evidentiary objections, including admissibility. ER 904(c). Consequently, ER 904 should trump any other evidence rule that arguably conflicts with it, including ER 410.

Mr. Wixom's waiver argument showed why ER 904's trumping ER 410 makes sense. Br.App., 17-18. Because waiver is possible, ER 410 does not somehow trump ER 904. Ms. Wixom does not discuss how ER 904 and ER 410 interrelate. Br.Resp., 4-5. By this omission, she tacitly admits that the trial court's failure to follow ER 904 by admitting Ex. 10 was error. Compare Washburn, 120 Wn.2d at 270.

Ms. Wixom argues that this error was harmless because Mr. Wixom's counsel questioned witnesses "at length about the plea agreement and its provisions." Br.Resp. 5-6. Most of her transcript cites are to inquiry by her own counsel and do not mention her guilty plea. 11/8/11 RP 116-122; 11/28/11 RP 33-34, 86; 11/29/11 RP 377-378; 11/29/11 RP 450, 513-561; 12/7/11 RP 620-621, 623-24, 627-28. In one cite, her own counsel asked the GAL for the date of the guilty plea. 11/29/11 RP 381.

In her last cite, she admits that she "plead guilty." 12/7/11 RP 643. She does not state to what specific crimes she plead guilty and concealed that she plead guilty because she was guilty.

Because this testimony omits the specific crimes to which she plead guilty and because this testimony omits that she plead guilty because she

was guilty, Mr. Wixom suffered harm due to the trial court's erroneous rejection of Ex. P-10, Ms. Wixom's Guilty Plea Agreement. Likewise, the trial court's rejection of Ex. P-10 also means that the trial court did not consider testimony or other evidence that mentioned the guilty plea as proof of any content of the guilty plea. Because the trial court did not consider the content of the guilty plea, the trial court's erroneous rejection of the Guilty Plea Agreement of Ms. Wixom harmed Mr. Wixom.

By twice failing to object under ER 410 to her Guilty Plea Agreement, Linda Wixom waived ER 410. Thus, the trial court erred in rejecting her Guilty Plea Agreement, P-10, based on her waived ER 410 objection.

B. *Because Linda Wixom's putative deposition corrections included no explanation, treating them as valid is error.*

A deposition correction that does not include an explanation is ineffective. Br.App., 18-20. Ms. Wixom ignores the fact that her putative corrections included no explanation. Thus, she tacitly admits that her putative corrections were ineffective. Washburn, 120 Wn.2d at 270.

Because the purported deposition correction was ineffective and because Linda Wixom tacitly admits so, 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. By making a false statement under oath, Linda Wixom

violated the terms of her probation. AE 1-3 and 14.

Mr. Wixom discussed one violation by Ms. Wixom of her probation. Br.App., 20-21 (discussing Ch. 9A.72 RCW). Her brief ignores Ch. 9A.72 RCW. She "did not intend to deceive anyone." Br.Resp., 7. Intent to deceive is not an element. She does not otherwise address false swearing.

By ignoring false swearing in her brief, Ms. Wixom admits that she swore falsely and violated her probation. Compare Washburn, 120 Wn.2d at 270. This Court should reject the incorrect findings that Ms. Wixom complied with her probation. Alternatively, this Court should recognize that Mr. Wixom has evidence of such violation as described above and should at a minimum reject Finding 71, which states the contrary.

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.

Noting undisputed evidence, Ms. Wixom asserts nakedly that this "is not domestic violence." Br.Resp., 9. As she cites no legal authority, this Court should reject her view. RAP 10.3(a)(6); DeHeer, 60 Wn.2d at 126.

This Court should distinguish 1) whether any evidence supports a claim of domestic violence in this case from 2) whether the evidence requires a finding of domestic violence in this case.

Findings 91-93 imply that Mr. Wixom had no evidence for domestic violence and that domestic violence did not occur. This Court could

conclude that he had some evidence of domestic violence without itself finding that domestic violence is occurring in Ms. Wixom's home.

Ms. Wixom briefs whether the evidence requires a domestic-violence finding here but ignores whether Mr. Wixom has any such evidence.

She has also not refuted his careful explanation why the admitted conduct is domestic violence. For this reason, she tacitly admits not only that he has evidence of domestic violence but also that domestic violence is occurring in her home. Compare Washburn, 120 Wn.2d at 270.

The trial court and Ms. Wixom speculate that it would have dismissed Mr. Wixom's case if he had presented his case before she presented hers. FF 194; Br.Resp., 11. Even if this speculation is somehow true [arguendo], the questions of whether Mr. Wixom had any evidence to support a claim of domestic violence or recent drug use are separate questions.

For the above reasons, the trial court's Findings 90-94 and 194 lack substantial evidence. This Court should reject these errors.

3. Against the evidence that Ms. Wixom had violated the parenting plan, the trial court found no evidence. AE 18-21.

The parties shall provide notice two days before a visit of anticipated problems that are not emergencies. CP 7. Ms. Wixom emailed Mr. Wixom 1 day before the scheduled pickup, not 2. CP 268, 270. She did not give the required 2-days notice and violated the parenting plan.

Ms. Wixom claims this violation was "de minimis." Br.Resp., 12. She states that this parenting-plan violation applies to both. Id. If she is correct, the court's finding would remain error. Her statement resolves nothing.

Finding 160 states that Ms. Wixom had no reason to believe that J.W. would not be available for pickup. This is a conclusion of law and incorrect because two-day notice was required but not provided. Knowing this, she had reason to believe that J.W. would not be available for pickup.

Even if a finding that Ms. Wixom did not violate the Parenting Plan was somehow correct [arguendo], Mr. Wixom had evidence of a violation of the Parenting Plan. For this reason, a finding by the trial court that Mr. Wixom had no evidence that she violated the parenting plan was error.

4. Against the evidence of the GAL's bias, the trial court found in error that Mr. Wixom had no evidence for bias. AE 16-17.

Ms. Wixom merely quotes and paraphrases the language of Finding 140. Br.Resp., 12-14. Ms. Wixom does not refute Mr. Wixom's explanation of why this finding is incorrect. Compare Br.App., 25.

For this reason, Ms. Wixom tacitly admits that this finding is incorrect. She also tacitly admits that Mr. Wixom has evidence of the GAL's bias and that the GAL is biased. Cp. Washburn, 120 Wn.2d at 270.

The GAL knew about the charges at the deposition when Ms. Wixom denied them. Br.App., 24. The GAL also knowingly omitted them from

her initial report. Id. Although the GAL knew about these charges and Ms. Wixom's denial of them, the GAL hid the charges from Mr. Wixom and hid Ms. Wixom's sworn denials from her probation officer.

In Ms. Wixom's briefing, she ignores the above factual recital from Mr. Wixom. Thus, she tacitly admits that the GAL knew about and hid the charges against Ms. Wixom. She also tacitly admits that this is evidence of bias and tacitly admits that this proves bias. Washburn, 120 Wn.2d at 270.

The GAL sought a judgment on behalf of Ms. Wixom. Br.App., 25-26. By ignoring this, Ms. Wixom tacitly admits that this occurred, that this is evidence of bias, and that this proves bias. Washburn, 120 Wn.2d at 270.

Additionally, if the trial court somehow finds that the GAL is not biased [arguendo], whether Mr. Wixom has evidence of bias is a separate question. Finding 141 states that no evidence of bias exists. Based on this analysis, Finding 141 was error. This Court should review the so-called Finding 141 de novo and reject it.

5. Finding that Mr. Wixom knew at or before the entry of the Final Parenting Plan (FPP) that Ms. Wixom was on a probation that did not start until months after the FPP was error. AE 13.

Mr. Wixom knew about **potential** criminal charges. RP 1194-5; Br.App. 26-27. He did not know about any actual charges. Id. The declaration to which the finding alludes is consistent with this. Id. For this reason, his denying knowledge of a criminal case against her was **true** and

does not contradict his knowing of the federal inquiry, of the possibility of jail, or of her financial liability her pharmacy. See Finding 181.

Ms. Wixom merely restates the finding without discussing the record. Br.Resp. 15. By her silence here, she tacitly admits his factual recital. Washburn, 120 Wn.2d at 270.

Ms. Wixom disclosed to the GAL that "she wasn't convicted, arrested, or charged of anything." II RP 121. To the GAL, Ms. Wixom also "reported that she wasn't being prosecuted because of her participation in the WRAPP program." Id. at 123. Ms. Wixom's false statements about her own criminal situation parallel Mr. Wixom's statements. XI RP 1192. The trial court's evident assumption that Mr. Wixom's misunderstanding was somehow bad faith implies a fortiori the same for Ms. Wixom!

In any event, her probation began when her deferred prosecution agreement was entered 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 it.

6. The evidence opposes the erroneous Finding 195. AE 47.

Both parties established adequate "cause for hearing" their petitions. Br.App., 27; CP 209 (entered April 22, 2011). CP 209. No order revised or modified this un-appealed ruling. The trial court, however, found somehow that the Mr. Wixom's petition "is without merit." Finding 195.

Ms. Wixom ignored the fact that this finding of adequate cause found merit to his petition. CP 208-9; Cp. Br.App., 27. By ignoring this fact, she tacitly admits that his petition has merit. Washburn, 120 Wn.2d at 270.

Because adequate cause for Mr. Wixom's petition was found and not removed and because Ms. Wixom tacitly admits that his petition has merit, Finding 195 is error which this Court should reject.

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.

No party alleged or proved conspiracy. Br.App., 28-31. For Ms. Wixom, "the court was referring to the ordinary meaning of conspiracy not a claim for relief." Br.Resp., 17 (citing Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 920-1 (1998)). Without contrary legislative intent, "an undefined term should be given its plain and ordinary meaning." Ravenscroft, 136 Wn.2d at 920-1 (citation omitted). Because this case is not about statutory interpretation, Ravenscroft is irrelevant. Id.

She nowhere states what "the ordinary meaning of conspiracy" is and provides no explanation for this supposed ordinary meaning of conspiracy.

Without Ravenscroft, Ms. Wixom provides no authority for her claim that this Court should somehow replace the legal definition of conspiracy

with some undefined "ordinary meaning." As she cites no relevant legal authority for her position, this Court should reject it. RAP 10.3(a)(6); DeHeer, 60 Wn.2d at 126.

Ms. Wixom neglects to provide adequate legal authority or argument. Ms. Wixom has also ignored some of Mr. Wixom's arguments.

If she alleged conspiracy before trial, he would have proven that he drove someone else's vehicle because his personal vehicle had mechanical problems and that the rented carpet cleaner he returned was too big for his work vehicle. Br.App., 28-29. Apparently, she also does not know the location of his church or his church-related event. Id. at 29. Because she ignored these facts, she tacitly admits them. Washburn, 120 Wn.2d at 270.

This conspiracy allegation violated the Appellants' due process rights. Br.App., 29-31. Ms. Wixom failed to discuss any of the five cited cases. Thus she tacitly admits that the trial court violated the due process rights of Mr. Wixom and his attorney. Compare Washburn, 120 Wn.2d at 270.

The findings alleged to somehow support conspiracy do not factually support that allegation. Also, the post-trial alleging of conspiracy deprived the Appellants of the opportunity to meaningfully contest this allegation and thus violated their due process rights. 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 and against ER 605, the trial court found that Mr. Wixom harassed the GAL. AE 36, 39, 51, and 53.

The GAL denied that Mr. Caruso was belligerent to her. Br.App., 31. Because Ms. Wixom ignored this testimony, she tacitly admits that Mr. Caruso was not belligerent to the GAL. Washburn, 120 Wn.2d at 270.

Ms. Wixom also ignored the time each side spent examining the GAL. Cp. Br.App., 32-33. Thus, Ms. Wixom tacitly admits that the examination of the GAL was not harassment. Washburn, 120 Wn.2d at 270.

Additionally, the trial court should "protect witnesses from harassment or undue embarrassment." ER 611(a)(3). Ms. Wixom cites no instance of the trial court's protecting the GAL from Mr. Wixom. Similarly, Ms. Wixom cites no instance of her **asking** the trial court to protect the GAL from him. The inference is clear: He did not harass the GAL.

Counsel asked the GAL a question, soon saw that it was unclear, and sought to clarify it. 11/28/11 RP 122:8-22. This is not objectionable. Then the trial court stated that it "is not going to" "allow anybody to harass, threaten or try to intimidate a witness." Id. at 123:4-5. This statement may suggest that it does not find counsel's inquiry of the GAL convincing and that counsel may want to spend his time with a different witness. In any event, the GAL answered that her testimony could aid the judge even if she hid important facts! Id. at 123:14-17.

Ms. Wixom strings a few transcript cites that allegedly support the disputed findings. Br.Resp., 18-19. As these cites to the transcript average over a dozen pages each, Mr. Wixom simply cannot address them entirely but will discuss two examples. Ms. Wixom cites a discussion of the "center line" for proof that Mr. Wixom harassed the GAL. Br.Resp. 18 (citing 11/28/11 RP 1159-20 [sic]). Angel Wixom, the current wife of Richard Wixom, has a medical center line, which Mr. Wixom claimed Linda Wixom improperly discovered by accessing confidential patient information to which she has access at her work. 11/28/11 RP 119-120. In this discussion, Mr. Wixom claims improper behavior on Linda Wixom's part, not on the part of the GAL. This transcript citation is irrelevant.

The trial court's findings that Mr. Wixom harassed the GAL are in error. This Court should reject the trial court's erroneous findings.

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.

These findings are error for these three reasons: (1) the Appellants did not intimidate a public servant, (2) the findings chilled their First Amendment rights, and (3) the findings violated ER 605, came from ex parte communication, or were unsupported speculation. Br.App., 33-35.

In response, Ms. Wixom points to findings that do not mention the court commissioner! Br.Resp., 19-20. No commissioner testified to any

state of mind or factual basis for these findings. Br.App., 35. Because Ms. Wixom ignored the facts that no commissioner testified and that no state of mind is in the record (and these facts prove that the findings were speculation), she tacitly admits that the finding that Mr. Wixom harassed the commissioner was error. Compare Washburn, 120 Wn.2d at 270.

This finding also wrongly chills the Appellants' First Amendment rights. Br.App., 34. Ms. Wixom states that the findings implicate no "First Amendment rights." Br.Resp., 19. As she cites no legal authority to support her view, this Court should reject her position. RAP 10.3(a)(6); DeHeer, 60 Wn.2d at 126.

No competent evidence exists to support the claim that the Appellants somehow harassed or engaged in an all-out war against the court commissioner. Ms. Wixom tacitly admits that this claim is incorrect. The trial court erred in Finding 185, which this Court should reject.

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.

The trial court should "protect witnesses from harassment or undue embarrassment." ER 611(a)(3). Alleging that Mr. Wixom harassed her, Ms. Wixom cites no instance of the trial court's protecting her from him. Br.Resp., 19-20. She also cites no instance of her **asking** for protection from him. Id. Again, the inference is clear: Mr. Wixom did not harass her.

No competent evidence supports the findings that he harassed, embarrassed, threatened, or intimidated Ms. Wixom. Br.App., 35. These findings either violate ER 605 or are speculative. Id., 35-36. In response, she asserts—without support—that he acted litigiously, filed too many motions, and abused discovery. Br.Resp., 22. Ms. Wixom also cites numerous findings, most of which Mr. Wixom disputes.

A party to an appeal who has an opportunity to respond to an opponent's factual claims and neglects to do so thereby admits the opponent's factual claims. Washburn, 120 Wn.2d at 270. With opportunity, Ms. Wixom failed to provide specific factual citations to any alleged misconduct. For this reason, she tacitly admits that Mr. Wixom did not harass, embarrass, threaten, or intimidate her.

Finding that Mr. Wixom engaged in an ongoing attempt to harass, embarrass, threaten, and intimidate Ms. Wixom violated ER 605 or was speculation. In any event, this Court should reject these findings as error.

5. Finding bad faith without evidence or in violation of ER 605, the trial court committed error. AE 40-41.

No evidence supports findings that refer to the trial court's experience or its oath of office. Br.App., 36. Ms. Wixom responds that these are conclusions of law. Br.Resp., 21. She does not refute the fact that the record has no evidence for them. For this reason, she tacitly admits that

the record has no evidence for them. Washburn, 120 Wn.2d at 270.

Ms. Wixom also asserts nakedly that other disputed findings support FOF 186 and 187. Br.Resp., 21. As she cites no legal authority here, this Court should reject her view. RAP 10.3(a)(6); DeHeer, 60 Wn.2d at 126.

Whether Findings 186 and 187 violate ER 605 or are based on speculation, they are erroneous.

E. Without properly analyzing intransigence or CR 11, the trial court's award of attorney fees against the Appellants was error. AE 15, 20, 36-38, 42, 43, and 45.

1. Because the Appellants complied with CR 11, Ms. Wixom is not entitled to attorney fees on this basis. AE 36, 37, 38, & 42.

Ms. Wixom nakedly asserts that Mr. Wixom filed too many motions and abused discovery. Br.Resp., 22. She also cites numerous findings, mostly disputed. She neglects to allege that any specific motions were excessive or that any specific discovery requests were abusive.

Ms. Wixom states the rule that the "court must make findings in support of CR 11 sanctions." Br.Resp., 22 (citing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997)). Burnet does not mention CR 11 and is about discovery violations. Her multiple citations to Burnet are irrelevant, misleading, and distract from the correct legal rule.

Ms. Wixom complains that Mr. Wixom focused his "entire argument" about CR 11 on "the pleadings, motions, and legal memoranda." Br.Resp.,

22. As CR 11 only involves those documents, her point is not well taken. CR 11(a); cp. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220 (1992).

Mr. Wixom's pleadings, motions, and legal memoranda did not violate CR 11. Br.App., 37-41. Because Ms. Wixom ignored his explanation of how his filings comply with CR 11, she tacitly admits that Mr. Wixom did not violate CR 11. Br.Resp., 21-23; compare Washburn, 120 Wn.2d at 270 (holding that a party who has opportunity to respond to an opponent and fails to do so thereby admits that the opponent is correct).

The trial court and Ms. Wixom had ample opportunity to detail the specifics of Mr. Wixom's alleged violation of CR 11 under the correct legal standard. Despite this opportunity, the trial court and Ms. Wixom neglected to do so. This Court should decide that the trial court's imposition of CR 11 sanctions against Mr. Wixom and his attorney was error and reverse the imposition of those sanctions.

2. Because Mr. Wixom has not been intransigent, Ms. Wixom is not entitled to attorney fees on this basis. AE 36, 37, 38, & 42.

Intransigence is a "continual pattern of obstruction" or excessively "litigious behavior." Br.App., 36-37. A call from the judge's daughter to Mr. Wixom's counsel about buying a dog from him during the trial was not intransigence. Id., 38-39. His motion practice was also not intransigent. Id., 39-41. Because Ms. Wixom ignored these factual claims,

she tacitly admits that he was not intransigent. Br.Resp., 16-27; Washburn, 120 Wn.2d at 270 (holding that a party who has opportunity and fails to respond to an opponent's claims thereby admits those factual claims).

The award of attorney fees for intransigence is not appropriate. Findings 183, 184, and 188 are error which this Court should reject. This Court should also reverse the fees imposed on the basis of intransigence.

3. To defend its erroneous award of attorney fees against the Appellants and 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.

Finding 157 presupposes that any claim that rounding up is fraud is unreasonable. Mr. Wixom gave **legal authority** that rounding up can be a fraud. Br.App., 42. Ms. Wixom states that he presents no argument against FF 157. Br.Resp., 12. She cites no legal authority to support her view. For this reason, this Court should reject her position. RAP 10.3(a)(6); DeHeer, 60 Wn.2d at 126. This Court should reject the FF 157 as error. AE 20.

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

This finding—that Mr. Wixom told his employer a falsity—misstates the testimony. Br.App., 42-43. Ms. Wixom states only that he "did make the admission." Br.Resp., 24. As she ignores his factual proof the finding is a misstatement, she tacitly admits the finding is error. Washburn, 120 Wn.2d at 270. Because he did not tell a falsity to his employer, because

the finding misstates the testimony, and because Ms. Wixom tacitly admits so, this Court should reject this finding as error. AE 15.

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

Speculating that Mr. Wixom "likely would not have called" the GAL in his case in chief, this finding assumes that "no reasonable attorney would call in his case-in-chief a GAL with whose findings and recommendations he disagreed." Br.App., 44. This assumption has no testimony or other evidence and is speculation. Id.

Because Ms. Wixom ignored his explanation of what testimony and evidence is missing and how the finding is speculation, she tacitly admits that the finding is speculation. Compare Washburn, 120 Wn.2d at 270. As this finding was speculation, this Court should reject it as error. AE 45.

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

This finding assumes the following facts: 1) that Mr. Wixom decided not to request residential time with T.W., 2) that he agreed with the GAL's recommendations for T.W., 3) that these occurred before the last day of trial, and 4) that he did not decide this while answering the trial court's question. Br.App., 44. No evidence supports these nonfactual assumptions. Id. Because Ms. Wixom did not address them, she tacitly admits that they are false and that this finding was error. Washburn, 120 Wn.2d at 270.

This finding would lack support if [arguendo] the record showed when

Mr. Wixom chose not to seek time with T.W. Br.App., 44-45. His silence would be justified if he overlooked that he should speak up, if he saw no time to speak up, or if he remained silent out of inertia. Id. at 45. Ms. Wixom also ignored this factual recital. Consequently, she tacitly admits that it is correct and that Finding 190 is error. Washburn, 120 Wn.2d at 270. This Court should reject this speculative finding as error. AE 43.

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

This conclusion alleges that Mr. Wixom failed to elicit five pieces of testimony and that his missing this testimony is somehow improper. One piece of testimony involves Mr. Miles as a witness. Mr. Wixom explained why he did not call Mr. Miles as a witness. Br.App., 45. Another piece of testimony involves the relative sizes of J.W. and A.W. The trial court heard testimony on their relative sizes. Br.App., 21; RP 252. Mr. Wixom also ran out of time to elicit the other three pieces. Br.App., 45 (citing the comment that time may prevent calling a witness (at RP 1223)).

Ignoring these factual claims, Ms. Wixom tacitly admits them. Washburn, 120 Wn.2d at 270. This Court should reject the erroneous Conclusion 7 which these factual claims oppose and refute. AE 50.

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

A trial court may not award attorney fees for intransigence against a non-party. Br.App., 46 (citing 2 cases). Ms. Wixom ignores both cases.

Thus, she tacitly admits that these cases oppose attorney fees against a non-party or an attorney for a party. Cp. Washburn, 120 Wn.2d at 270.

"Counsel has been held liable for attorney fees based on intransigence." Br.Resp., 25 (citing In re Sanai, 177 Wn.2d 743, 748 (2013)). A court awarded a party "attorney fees on grounds of frivolousness **and** intransigence." Sanai, 177 Wn.2d at 748 (emphasis added). If this award applied to the party's attorney [arguendo], it applied for **frivolousness** and not intransigence. Similarly, Sanai does not state if the award was against the other party only or also against the attorney!

For these reasons, Sanai does not stand for the proposition that attorney fees for intransigence are proper against a non-party. This Court should reject Ms. Wixom's misreading of Sanai, should hold that attorney fees for intransigence are not available against a party's attorney (a non-party), and reverse the award of attorney fees against Mr. Wixom's counsel for alleged intransigence. AE 42.

5. As neither the facts nor the findings support permeation, the award of fees without segregation was error (arguendo).

Finding that bad acts permeate a certain date range allows a trial court to award fees for that date range in bulk without segregation. Marriage of Sievers, 78 Wn. App. 287, 312 (1995). Mr. Wixom recited facts that refute permeation. Br.App., 47. Because Ms. Wixom ignored his factual recital,

she tacitly admits the absence of permeation. Br.Resp., 26; Washburn, 120 Wn.2d at 270 (holding that a party admits an opponent's factual claims when the party could oppose them but and fails to do so). If the trial court had found permeation [arguendo], such a finding would be error.

"No magic words need be used to make the finding of permeation and the court's intent was clear." Br.Resp., 26 (citing Auto. United Trades Org. v. State, 175 Wn.2d 214, 226 (2012)). Auto. United does not mention permeation. Instead, a court may find waiver of tribal immunity without "magic words." Auto. United, 175 Wn.2d at 226. This Court should ignore Ms. Wixom's attempt to distract and confuse by citing this irrelevant case.

Because Mr. Wixom's alleged "bad acts" permeated nothing and no finding asserts permeation, any fee award requires segregation. Also, no conduct of his constituting "bad acts" permeated the proceedings.

F. *Even if any award of fees or costs was somehow proper [arguendo], the fees and costs were unreasonable.*

1. The award of clerical fees and costs was error.

Mr. Wixom explained why clerical time is not compensable and listed the improper clerical time. Br.App., 48-49. Ms. Wixom did not refute his legal explanation or his factual list of clerical time. For this reason, she tacitly admits the noncompensability of clerical time and the amount of clerical time improperly charged. Washburn, 120 Wn.2d at 270.

Without a finding, the Collins trial court "concluded" that the "hourly

rate for services includes the value of such 'overhead' expenses." Collins v. Clark County Fire Dist., 155 Wn. App. 48, 104 (2010). Attempting to distinguish Collins, Ms. Wixom says that this trial court "made no finding that counsel's hourly rate included these clerical costs." Br.Resp., 27. As Collins does not require such a finding to make clerical costs noncompensable, Collins does not support her position.

Clerical time and costs are not compensable. In re CF & I Fabricators of Utah, Inc., 131 B.R. 474, 492 (Bkrtcy.D.Utah 1991); Missouri v. Jenkins, 491 U.S. 274, 288 n.9 (1989). The trial court erred in awarding fees for clerical work and other overhead expenses.

2. Awarding fees for two attorneys at the higher rate—even when the more expensive attorney did nothing—was error.

Paying two attorneys in court or at a deposition at the higher of the two rates when the more expensive attorney did nothing is unreasonable. Br.App., 49-50. Because Ms. Wixom ignores Mr. Wixom's explanation, she tacitly admits that these fees are unreasonable. Washburn, 120 Wn.2d at 270. 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.

The charge for research and writing by Dennis Cronin and the charge for the transcript were unreasonable. Br.App., 50-51. Because Ms. Wixom did not mention or refute Mr. Wixom's explanation, she tacitly admits that

he is correct and that these costs are unreasonable. Compare Washburn, 120 Wn.2d at 270. This Court should reject these unreasonable costs.

4. The amount of the reduction (10%) was unreasonably low, speculative, and unsupported by evidence or findings.

The findings and evidence do not support the amount of the reduction of the fee award against Mr. Wixom, which was 10%. Br.App., 51.

An attorney was found to have performed certain percentages of work for clients. In re Kagele, 149 Wn.2d 793, 813 (2003). "The record is silent on the method" of calculating these percentages and "contains no time analysis" of his work. Id. "The evidence does not establish what specific services Kagele agreed to render and lacks any assessment of the reasonable value of" his services. Id. The pertinent findings were "not supported by the record" and were not upheld on review. Id. at 814.

The trial court here also concealed its method, its analysis, and its assessment. If Mr. Wixom was somehow intransigent or violated CR 11 [arguendo], this Court should reverse any fees due to inadequate findings.

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

Ms. Wixom is intransigent. Br.App., 51-53 (esp. 52). She responds that Mr. Wixom identifies nothing that shows her intransigence. Br.Resp., 27. Because she ignores his explanation of why she is intransigent, she tacitly admits her own intransigence. Cp. Washburn, 120 Wn.2d at 270.

He also asked for fees based on his need and her ability to pay.

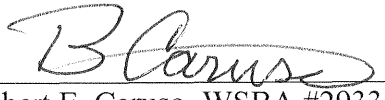
Br.App., 51. She responds that the trial court found that the parties' incomes are nearly the same. Br.Resp., 27. The affidavits of financial need determine the needs for appellate fees and abilities to pay them. RAP 18.11(c). Thus, the finding about the parties' income resolves nothing.

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.

II. Conclusion

In accordance with the law, the record, and the mother's numerous tacit admissions, 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 6th day of January 2014.



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