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Petition for Review

Court of Appeal Cause No. 352072

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Cathrine Marchesseault Appellant/Petitioner

v.

Chad Marcheseault, Respondent

PETITION FOR REVIEW

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TABLE OF CONTENTS

CITATIONS TO AUTHORITY

Washington Supreme Court

Washington Court of Appeals

Other Courts

Unpublished Cases

Court Rules & Statutes

Treatise

A. Identity of Petitioner

The Appellant Cathrine Marchesseault (aka, "Roe") requests that the Supreme Court of

Washington accept review of this appeal.

B. Court of Appeals Decision

The Appellant requests this court to review of the Court of Appeals decision wherein it failed to analyze the main issue in this appeal of a request to vacate the final parenting plan based on email communications in which the Respondent and his counsel orchestrated a clandestine plan to inappropriately influence the GAL in the case in favor of himself. The Court of Appeals completely failed to analyze the argument that these emails waived the attorney-client privilege by including the Respondent's mother in those emails; then claiming attorney client privilege. The Court of Appeals simply gave the argument that the emails were no longer confidential by use of a footnote wherein they said.

> Even if the e-mails had not been struck from the record, Ms. Roe would not be able to make a claim for relief under CR 60(b)(3) or (4). Assuming for the sake of argument that it was proper for Ms. Roe to lay bare the content of Mr. Marchesseault's e-mails, she has not demonstrated the e-mails were otherwise undiscoverable through due diligence. The e-mails submitted by Ms. Roe were dated from January 2014 to January 2015. Trial was held in December 2015. Given Ms. Roe had continued access to the Kindle, and by her own admission was able to read some e-mails on the Kindle prior to trial, Ms. Roe cannot establish the e-mails met the terms of newly discovery evidence as contemplated by CR 60(b)(3). In addition, the primary reason Ms. Roe claims the e-mails were relevant was to undercut the testimony of Joan Chase. But the court's oral trial ruling already recognized Ms. Chase was biased. The information before the court at the parenting plan trial was sufficient to demonstrate Mr. Marchesseault had exerted significant influence on Ms. Chase. Ms. Roe does not demonstrate that

additional evidence of influence would have materially affected the outcome of the case as required for relief under CR 60(b)(4).

The Appellate Court's decision by the appellate court failed to recognize important facts relating to the discovery of the emails, as well as the ethical issues of the father's counsel planning to influence a witness in their favor. The Court of Appeals does not have compete stewardship over the ethics rules for attorneys, that is the exclusively rests with the Supreme Court. Therefore, besides the error of suggesting that this new clandestine information was irrelevant, tainted the entire trial process because it showed that the father and his counsel would stop at nothing to influence a significant witness for the trial court. There was no mention of the RPC's nor any analysis on the issue of the waiver of confidentiality.

This failure to deal with the waiver of an alleged RCW 5.60.060 communication was specifically briefed by the Appellant in her opening brief citing for example the case of *David B. SITTERSON d/b/a DBS Financial Services, Appellant/Cross-Respondent v. EVERGREEN SCHOOL DISTRICT NO. 114, a municipal corporation, Respondent Cross-Appellant* 147 Wn.App. 576, 196 P.3d 735 (2008). The Appeals Court merely said that these correspondences were "discoverable", even though the trial court said this information was privileged creating a seeming non-sequitur. How can it be that these correspondences were confidential yet discoverable? They cannot be both. Instead the Court of Appeals said since these were discoverable before trial that CR 60 did not apply, dismissing the appeal. This totally avoided the alleged RPC violations by the Respondent and his counsel, as well as the effect of tampering with a witness. Additionally, the Court of

Appeals indicated that the GAL's testimony did not matter in this case since the Trial Judge agreed that the GAL was biased, however, that is totally speculative and should not be the basis of the Court of Appeals decision. Who knows what an unbiased GAL could do in a clean trial without tainted testimony. We can never know this because that did not happen.

C. Issues Presented for Review

1. Was it proper for the Court of Appeals to both speculate about the outcome of a parenting plan trial without the tainted testimony of the appointed GAL?
2. Were the email communications between the Respondent father and his counsel, wherein they discussed a plan to inappropriately and clandestinely influence the GAL in this parenting plan case a violation of the RPC's, and possible criminal statutes regarding tampering with witnesses that that in and of itself could form the basis itself for a vacation of the parenting plan orders?
3. Did the fact that the Respondent father copied his mother in on these attorney/client communications waive the privileged nature of these emails and so supporting a motion to vacate the original parenting plan?
4. Was it proper for the trial court to sanction the Petitioner/Appellant even though the trial Judge had already ruled that the confidentiality of these emails were waived by the Respondent/father because he sent them to his mother as well?
5. Did the Court of Appeals miss the issue that the attempt itself to influence the GAL in this matter was the actual issue the Petitioner/mother was using to

show that there should be a new trial on the parenting plan that was not tainted with an appearance of bias?

6. Are there significant public policy and ethical issues in this case that need clarification regarding such attorney witness improprieties?

D. Statement of the Case

The parties were involved in a highly-contested dissolution custody case and trial. The trial was bifurcated with the financial issues being finalized first. This appeal is about the parenting plan trial and the mother's CR60 motion to vacate the final parenting plan because of some serious allegations regarding alleged attempts by her husband and his attorney to influence vital trial witnesses. CP 2340-2350.

Historically, the husband was an air force pilot, and the wife was a former air force officer but is now a civilian who has her own investigation service. CP190 & 236. They had 3 children ages 11, 9, and 8. See PP CP 298. Because of the allegations in this case, a GAL was appointed for their children, however, was later discharged by the trial judge because of an apparent conflict of interest between she and the appellant's counsel. CP 258. (No GAL was put back on the case). During the time that the GAL was on the case, she recommended a counselor to do therapy with the parties' children.[1] Id. The counselor that was appointed by order was Joan Chase, a licensed nurse practitioner that specialized in psychiatric issues in children. Id & CP 45.

The court bifurcated the matters and set one trial for the financials and another for the parenting plan. The temporary distribution of some property inadvertently became a parenting plan issue because of the access to alleged confidential emails between the

[1] The GAL was dismissed because appellant's counsel had been the GAL's divorce attorney; however, no new GAL was appointed by the Commissioner or the Trial Judge, leaving the only expert the child's counselor, ironically chosen by the now dismissed GAL.

father and his counsel because of what was on those emails about the GAL and the children's counselor Joan Chase. See CP 1081-1156. At one point in the litigation, and after receiving her laptop back from the husband, that she was awarded in the temporary orders, the wife asked the court to make her husband provide her with the memory image from its hard drive. CP 825-827. There was already another order that required the husband to give her the hard drive, but he did not honor that request. Id. Additionally, the husband and his attorney had apparently hired a third party to professionally delete its hard drive, cleaning off its entire system memory without telling the court or the Petitioner. CP 688-689.[2]

Eventually, there was another hearing on the hard-drive in which the judge found that husband and his attorney had removed the memory from this laptop [CP 646] and made findings in an order that they were both complicit in doing this attempted destruction of evidence. Id. In fact, this was so serious that the judge took over the hearing on the memory and stated that she was about to find someone in contempt if they did not stop arguing in open court about the missing hard-drive, and their arguments would not do any good because she had already made her decision on that issue. CP 1082-1083. The judge then articulated her orders and signed an order on the laptop hard-drive with the following findings of fact,

> "*Respondent's attorney and Respondent were complicit in hiding the original laptop's hard drives forensic image. By giving the laptop to a 3rd party respondent waived privilege.*" CP 646. (Emphasis added & see also CP 1085-1088 wherein there is a colloquy between Mr. Mason, the father's counsel, and Judge Moreno wherein Mr. Mason did not want to turn over the lap-top hard-drive because it also contained attorney-client confidential emails on it; the judge said in that colloquy

[2] The removal of the hard drive from this laptop was because it had all of the husband's personal emails on it and he and his attorney removed the memory to insure that the wife did not have access to those emails, however, any privilege for those emails was waived by their giving it to a third party to remove the memory.

that taking this lap-top to a third party waived any privileged communications).

To make all the facts in this case regarding emails make sense we have to go back to just after the parties separated in 2014.[3] One day in 2014, after the parties had separated, and while the mother was cleaning up the house, she was picking up the Kindle mini pad that their father had given them and accidently ran across what was called "pop-ups" of her husband's emails. CP 1583. The mother stored this in her memory and did nothing about this because she did not know how to use the Kindle to look at the other emails, and so she continued to let the children play with this mini tablet. However, she also knew that emails were important to show how abusive her husband had been. See e.g. CP 845-866.

This laptop issue became more important because of the parenting plan bifurcated trial, wherein the judge ordered a 50/50 parenting plan schedule without any limitations on the father for his alleged domestic violence history. CP 298-307. As indicated the parenting trial portion was held separate from the property distribution trial portion on December 15, 2015 with the ruling on December 22, 2015. CP 234-278. At that parenting plan trial the court's appointed therapist for their children named Joan Chase testified about what she felt was the best parenting plan for the parties' child. CP 543-626. The judge felt that Joan Chase's testimony was completely opposite from what the mother felt was important in the case. CP 236-251. She indicated in her testimony that the father was a good dad without any indications of a domestic violence history and should be allowed as much time as possible with their child, even though the mother had been the primary parent during their marriage, and testified that he was very abusive to her and the

[3] This was obviously before the December 2015 parenting plan trial and is a date to remember in this case's explanations.

children. CP 234-278. Ms. Chase's testimony in fact seems absolutely against the mother in almost every way, except that since she had been the primary parent for the children, she should have equal time with them, even though she was not a good person, and had done things that were inappropriate with the children about their father. CP 542-626 & 234-278.

At one point in the parenting plan trial, when Ms. Chase began to testify, the mother's attorney objected to her giving custodial recommendations, since she was only hired on as the children's therapist. CP 543-560. The court allowed Ms. Chase to testify over the mother's objections[4]. Id. She testified about who would be the "most friendly parent" and who would not interfere with the other parent's parenting time. CP 555-637. Ms. Chase clearly indicated that the mother had parenting problems such as with talking to the children about adult issues, speaking badly about the father, and that she would not be a "friendly parent", things that seemed to mimic what the father had also said about the mother in the case. Id & CP 572-573. Her testimony so slanted in favor of the father that there was no doubt she was not a fan of the mother in anyway, but it seemed that the father could do no wrong when it came to his parenting.[5]

There clearly was some evidence of a special relationship between Ms. Chase and the father, and the judge saw that she favored his version of facts and plan rather than the mother's versions. CP 234-278. The court was aware of Ms. Chase's bias toward the father. Id. It is also clear that from the cross examination of Ms. Chase by the mother's counsel that she was frustrated on how Ms. Chase seemed to defend her relationship with

[4] The objection was that Ms. Chase was not ordered as a forensic counselor, only for therapy purposes. This was over-ruled because the court indicated that it needed an expert to help her with the parenting decision.

[5] The court did recognize this bias but did not seem to consider it in its ruling. CP 234-278.

the father at every turn. CP 574-637. Ms. Chase seemed to be the number one fan of the father and protected him and her opinion about him from every corner. Id & CP 238-278

Even though the court seemed aware of Ms. Chase's bias, the Judge ordered and signed a final parenting plan which gave the parties 50/50 time with their children without any limitations for the father due to the alleged domestic violence history[6]. CP 234-278 & 298-307.

After the court ordered a 50/50 plan based on Joan Chase's testimony, the mother felt that the court did not understand how abusive her husband was so she already knew that Judge Moreno already found that her husband had waived any attorney-client privilege of emails between he and his attorney by delivering the hard-drive the a third party and so she wanted to get to the bottom of why Joan Chase was so biased, and also find out what happened to her abuse records that were stored on the laptop that her husband had cleaned. CP 1240-1342. She also remembered that she still had the Kindles with emails, but did not know how to access them. Id. She took the Kindle to a forensic specialist who explained that the only way to get at the Kindle emails was to use a special forensic software and that the emails on their came from the same laptop that the court said that the father waived the attorney-client privilege in by giving it to a third party, and then she refuted the notion that Ms. Roe somehow "intercepted" these email since the Kindle had no software to do that task. CP 1069-1078 & 1079-1080.

Again, the mother could not get to these emails because she did not know how to do that in the Kindle, other than popups occasionally, and really did not know that these planning emails were on the Kindle from the HP laptops, nor their content.

[6] The record is replete with references to the husband's domestic violence, which was considered untrue by Ms. Chase.

After seeing these emails the mother filed a CR 60 motion to vacate the final parenting plan because of what she felt was a series of both illegal and unethical actions borne out by those emails that the father and his attorney were planning, and in some cases carrying out suborn of perjury, influencing witnesses, and coaching others. CP 1081-1156 (under CR60(b)(4) & 1240-1342 under CR60(b)(3)).

Some of the clear reasons for this filing is because of the evidence of misrepresentation or misconduct, making the time for filing such a basis moot. For example, there was evidence that the father and his attorney planned to send Ms. Chase a "care package" which included a lot of negative evidence about the mother, that was unknown by her or her attorney. CP 1105. That package obviously did come with any explanation by the mother for these records. CP 1105. There was also proof that they intentionally hid this "care package" delivery from the mother and her counsel since they did not want it (the care package) "spun" against them. CP 1283. All the emails showed some type of plan or scheme to influence the case in their direction with concrete plans to influence either the court, or witnesses in some way and to keep all that secret from the mother, her attorney and the court. See CP 1272-1321.

The next step in this process was to have a hearing on the email content and why this showed a need for a new trial. Argument on the emails, their confidentiality and significance was had with the court. See CP 1566-1612 which is the record of the arguments on this CR 60 matter. After argument, the court took the motion to vacate under advisement [CP 1608] and rendered a written decision on the motion to vacate.

The judge came back and denied the motion to vacate the parenting plan. Her ruling cited the RPC's and other sections of those rules that made the emails between Mr.

Mason and the husband confidential, disregarding the law of the case that the husband had waived the confidentiality of these emails by sending them to a third party. She also ruled that the wife's counsel should not have disclosed those before making Mr. Mason aware of that ruling. Finally, that these emails allegedly showing misconduct should have been brought forward before the parenting plan trial. See CP 2196-2199.

The basic thrust of the court's decision was that Ms. Roe and her counsel had a duty to disclose them to the opposition, citing CR 26, however, there was no discovery as to these emails, that they were inadvertently found and could not access until the court ruled the father had waived privilege and they had to be accessed by special software that the Petitioner did not have. The judge also cited RPC 4.4(b) that her attorney should have notified the other side of these emails and not used them or filed them even though this matter was filed under CR60 (b)(4) misconduct basis. Finally, she indicated that there was no indication when Ms. Roe found them, therefore, since she had the Kindle in her position before trial she had access to them so the court did not consider their content. See CP 2196-2199.

Ms. Roe appeals this ruling for many reasons, first, the first-time Ms. Roe received all the emails from the Kindle was when Carol Peden, a forensic computer specialist found them was March 26, 2016. See Cp 1069-1080. This was long after the parenting plan trial and so they could hardly have been used at trial as the judge suggests. With that in mind, and the fact that the Appellant believes that the judge error on the application of the RPC's and the statutes regarding confidentiality and attorney-client privilege, she asks that this court overturn the ruling and grant the CR60 motion for a new trial where she can use this new information.

E. Argument Why Review Should Be Accepted

The ruling by the court of appeals ignores prior rulings in the Supreme Court regarding CR 60 misconduct of an opposing party. The Supreme Court has said that misconduct that rises to the level of rendering the trial court's decision unfair is sufficient to set aside a final order. See *State Exrel. Trickel v. Superior Court*, 52 Wash. 13, 100 P. 155 (1909) [An old but cited case. See e.g. *Capital One Bank (USA), N.A. v. Wallace*, 31216-0-III (2014)]. Our Supreme Court has found that attempts by attorneys to tamper with evidence in a case is a very serious matter. *In re Disciplinary Proceeding against Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134, (2005).

Again, the Court of Appeals did not even deal with the possibility that this was substantial misconduct of the Respondent/father and his counsel, even though such conduct under CR60(b)(4) can be used to set aside a ruling. See e.g. *Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 295 P.3d 239 (2013)* and ROBERT H. ARONSON, *THE LAW OF EVIDENCE IN WASHINGTON* § 501.03[2][h][ii], at 501-24 (4th ed.2012) (see also, *Craig v. A.H. Robins Co.*, 790 F.2d 1, 5 (1st Cir.1986)).

If the fact that the father and his counsel intentionally tried to persuade a key witness against the mother/Appellant, this was a significant basis to set aside the final parenting plan. Nothing was said about the application of this section of CR60 even though that was the key issue in this motion and appeal.

Also, this court has ultimate responsibility for dealing with attorney misconduct. It has said, "This court has plenary power over and holds the ultimate responsibility for lawyer discipline." See, *In re Disciplinary Proceeding Against Romero*, 152 Wash.2d 124, 132, 94 P.3d 939 (2004). It appears that the Court of Appeals did not deal with the

attorney misconduct in this case because the Supreme Court has the ultimate say about such things.

This case also dealt with the fairness of the trial process for the mother, which is a constitutional issue. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. See e.g. *State v. Sanchez*, 171 Wn.App. 518, 288 P.3d 351, (2012); regarding civil trials see *Federated Publications, Inc. v. Kurtz*, 615 P.2d 440, 94 Wn.2d 51 (1980). It cannot be said that if one party tampers with a witness that it allowed for proper due process of the case under the constitution, yet the court of appeals did not deal with that issue.

Besides the misconduct, RPC and constitutional issues there is a substantial public policy issue. GAL's are appointed every day by the court to help in custody cases with children. The Parenting Act, RCW 26.09 has as a significant policy issue the welfare and best interests of our children in this state. What more can be more important than to ensure that professional witnesses in such cases are not tampered with and potentially influence by a specific plan by one of the parties to influence them to their side. This alone should have given rise to a new trial, one that was not tainted. The Court of Appeals bypassed that entire issue basically saying it was irrelevant.

The Appellant/mother asks this court to accept review so that this matter can be reviewed by this court to insure the fairness of her parenting plan trial.

F. Conclusion

The parties were involved in a heated parenting plan case wherein a GAL was appointed. After the trial was over and the father was awarded half time with the children

in spite of the mother's position about his suitability, it was discovered that the father and his attorney had clandestinely planned and executed it to influence the GAL in his favor by a number of tactics, all outlined in emails. The mother discovered the emails on her son's internet pad which still had the father's email program on it, but was given to the son as a gift by the father. The emails were provided to the court to show that the mother did not get a fair trial for their parenting plan and asked to vacate it because of the alleged tampering with a witness by the father.

At the time of the ongoing hearings on this matter the trial judge found that the emails could not have been privileged under the attorney/client statute and initially allowed them in. However, the father was allowed to do a response for reconsideration and the judge then ruled that they were confidential and should not have been used as evidence in the case, denied the motion to set aside the final parenting plan and sanctioned the mother $2,000 for her motion and disclosure of these confidences. The mother appealed the ruling.

The court of appeals denied the appeal saying it was not newly discovered evidence, but did not deal with the attorney/client waiver, the RPC issues, or the issues of a fair trial for the disposition of children in a parenting plan given the issue of a fair investigation by a GAL for the children and that the efforts of the father and his counsel were aimed at tampering with this important witness. The mother asks this court to accept review based on the several and important issues it deals with in the placement and plans for children.

Respectfully submitted,

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FILED
OCTOBER 23, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of CATHRINE J. MARCHESSEAULT, Appellant, and CHAD E. MARCHESSEAULT, Respondent.	)	No. 35207-2-III UNPUBLISHED OPINION

PENNELL, J. — Cathrine Marchesseault, now known as Cathrine Roe, appeals various aspects of a superior court ruling denying her motion to vacate a parenting plan. We affirm.

FACTS

Cathrine Roe and Chad Marchesseault separated in the summer of 2014. They share three children. The parties' dissolution was very contentious. Ms. Roe has made allegations of domestic violence against Mr. Marchesseault. Those allegations have never been proved in any legal proceedings.

During the parties' December 2015 parenting plan trial, the court heard testimony from Joan Chase, a mental health therapist who had been appointed for the parties' children. Ms. Chase had been referred to work on the case by the assigned guardian ad

litem (GAL). But by the time of trial, the GAL was unable to participate due to a conflict of interest. The court allowed Ms. Chase to testify about her recommendations for the children, given the absence of input from a GAL. Ms. Chase testified the children were not abused by Mr. Marchesseault nor were they afraid of him. Ms. Chase also believed Ms. Roe had been involved in coaching the parties' children. The trial court appears not to have placed much emphasis on Ms. Chase's testimony, as it commented Ms. Chase appeared biased in favor of Mr. Marchesseault.

It is evident from the December 22, 2015, oral findings and ruling that the trial court had concerns about both parties' credibility. The court ultimately designated Ms. Roe and Mr. Marchesseault as joint custodians of the children with equal residential time. The court declined Ms. Roe's request to relocate the children to Florida. The court indicated that if Ms. Roe still chose to move during the time that Mr. Marchesseault's military assignment kept him in Spokane, the children would be placed with Mr. Marchesseault. The final order on the parenting plan was entered on February 1, 2016. The order was not appealed.

While the parties litigated the parenting plan, disputes arose over two pieces of personal property relevant to this appeal: a laptop computer and an Amazon Kindle. The laptop had been in Mr. Marchesseault's possession and the Kindle belonged to Mr. Marchesseault, but he left the Kindle in the possession of the parties' children.

Under the terms of the court's orders, Ms. Roe was to be given access to the laptop so she could review and copy some personal files. However, by the time Mr. Marchesseault provided Ms. Roe the laptop, nearly all of her files were gone. Ms. Roe discovered the laptop's hard drive had been replaced and that Mr. Marchesseault had made a forensic copy of the old hard drive. Based on this information, Ms. Roe filed a motion for contempt. The court granted the motion and ordered Ms. Roe be provided the forensic image of the original hard drive that had been obtained by Mr. Marchesseault. The court also ruled that because Mr. Marchesseault misappropriated the laptop and hard drive and shared it with a third party for forensic imaging, he had waived attorney-client privilege as to items on the laptop and its hard drive.

Shortly after the court's ruling regarding the laptop, Ms. Roe filed a motion to vacate the final parenting plan. A motion under CR 60(b)(4) was filed on May 25, 2016, and an amended or corrected motion under CR 60(b)(3), CR 60(b)(4), and CR 59(b) was filed on June 17. Attached to Ms. Roe's motions to vacate were numerous e-mails between Mr. Marchesseault and his attorney. Ms. Roe had recovered the e-mails from Mr. Marchesseault's Kindle that had still been in use by the parties' children.

The court denied Ms. Roe's motion to vacate. The court also ruled Ms. Roe had improperly intercepted attorney-client privileged e-mails from Mr. Marchesseault's Kindle. The court ruled it would not consider the intercepted e-mails in its ruling on

Ms. Roe's motion to vacate. The court ordered "that any privileged material be stricken from the court file" and "none of these privileged documents shall be used in any future filings before the court." Clerk's Papers at 2199. Although the trial court declined to disqualify Ms. Roe's attorney from further representation, it did impose a $2,500 sanction.

Ms. Roe appeals the trial court's order denying her motion to vacate and the order redacting the court file and granting sanctions to Mr. Marchesseault.

ANALYSIS

Motion to vacate parenting plan

A trial court's decision on a motion to vacate under CR 60(b) is reviewed for manifest abuse of discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013); *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009) (citing *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990)). The court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *Tang*, 57 Wn. App. at 653. An appeal from the denial of such a motion under CR 60(b) is limited to the propriety of the denial. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). It does not resurrect an appeal of issues pertinent only to the underlying judgment. *Id*.

Relevant here, CR 60(b) permits relief from a final order on a showing of: "(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)," or "(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Under the "newly discovered evidence" standard, the evidence a party presents in their CR 60(b)(3) motion must truly be newly discovered rather than evidence that was available but not presented at trial. *See In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003). In addition, the evidence must be sufficiently important that it could "probably change the result if a new trial were granted." *Jones*, 179 Wn.2d at 360. Under CR 60(b)(4), a party must establish fraud, misrepresentation, or misconduct by clear and convincing evidence. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). Relief under CR 60(b)(4) is only authorized if the alleged fraud actually caused the entry of judgment "such that the losing party was prevented from fully and fairly presenting its case or defense." *Id*.

The trial court excluded much of the information submitted by Ms. Roe in support of her motion because it was protected by attorney-client privilege. As noted by the trial court, the contempt order pertaining to the laptop did not extend to Mr. Marchesseault's Kindle. To the extent Ms. Roe and her attorney used Mr. Marchesseault's Kindle to access communications with his attorney, they improperly accessed privileged

communications. The trial court appropriately exercised its discretion in excluding the protected e-mails from consideration on Ms. Roe's motion.[1]

With respect to the remaining information supplied by Ms. Roe, the trial court determined it was not material and would not have altered the court's parenting plan. This determination fell well within the trial court's "considerable discretion" and therefore does not qualify for relief on appeal. *Jones*, 179 Wn.2d at 361; *Lindgren*, 58 Wn. App. at 595-96.

Imposition of sanctions

Ms. Roe argues the trial court improperly imposed sanctions because the prior contempt order against Mr. Marchesseault waived attorney-client privilege as to e-mails

[1] Even if the e-mails had not been struck from the record, Ms. Roe would not be able to make a claim for relief under CR 60(b)(3) or (4). Assuming for the sake of argument that it was proper for Ms. Roe to lay bare the content of Mr. Marchesseault's e-mails, she has not demonstrated the e-mails were otherwise undiscoverable through due diligence. The e-mails submitted by Ms. Roe were dated from January 2014 to January 2015. Trial was held in December 2015. Given Ms. Roe had continued access to the Kindle, and by her own admission was able to read some e-mails on the Kindle prior to trial, Ms. Roe cannot establish the e-mails met the terms of newly discovery evidence as contemplated by CR 60(b)(3). In addition, the primary reason Ms. Roe claims the e-mails were relevant was to undercut the testimony of Joan Chase. But the court's oral trial ruling already recognized Ms. Chase was biased. The information before the court at the parenting plan trial was sufficient to demonstrate Mr. Marchesseault had exerted significant influence on Ms. Chase. Ms. Roe does not demonstrate that additional evidence of influence would have materially affected the outcome of the case as required for relief under CR 60(b)(4).

on the Kindle. As previously stated, this argument misconstrues the record. The contempt order was specific to the laptop. It did not cover the Kindle. Nor did it contemplate Ms. Roe would access web-based e-mails simply because those e-mails also could have been accessed from the laptop. The trial court accurately concluded that it had never ordered a waiver of privilege as to e-mails accessed from Mr. Marchesseault's Kindle.

Given the lack of any court order pertaining to e-mails on the Kindle, the trial court appropriately found Ms. Roe's attorney should have affirmatively taken protective measures on discovering the intercepted e-mails between Mr. Marchesseault and his attorney. CR 26(b)(6); RPC 4.4(b). Had protective measures been taken, the court may well have reviewed the e-mails in camera to determine whether an exception to privilege might apply. But due to the lack of protective measures, the trial court acted within its discretion to impose a monetary penalty in lieu of attorney disqualification. The court's penalty assessment is therefore affirmed.

Joan Chase, court-appointed child therapist, as an expert witness

Ms. Roe argues the trial court erred in allowing Ms. Chase to testify as an expert witness at the parenting plan trial. This is an issue pertaining to the court's parenting plan decision, not the motion to vacate. Because Ms. Roe did not appeal the parenting plan order, the rulings underlying that judgment cannot be asserted as part of the current

appeal. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) ("[A]n unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion.").

ATTORNEY FEES

Mr. Marchesseault requests an attorney fee award under RAP 18.9(a), which allows sanctions based on a frivolous appeal. We decline to exercise our discretion to grant this request for fees.

CONCLUSION

The orders of the superior court are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals of the State of Washington
Division III

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October 23, 2018

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CASE # 352072
In re the Marriage of: Cathrine J. Marchesseault & Chad E. Marchesseault
SPOKANE COUNTY SUPERIOR COURT No. 143017039

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Maryann C. Moreno

Log Number: U-232
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 35207-2
Title of Case: In re the Marriage of: Cathrine J. Marchesseault & Chad E. Marchesseault
File Date: 10/23/2018

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 14-3-01703-9
Judgment or order under review
Date filed: 12/14/2016
Judge signing: Honorable Maryann C. Moreno

JUDGES

Authored by Rebecca Pennell
Concurring: Kevin Korsmo
Robert Lawrence-Berrey

COUNSEL OF RECORD

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OPINION FACT SHEET

Case Name: In the Matter of the Marriage of Cathrine J. Marchesseault and Chad E. Marchesseault

Case Number: 35207-2-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Spokane County
Judgment/Order being reviewed: **Order Denying Petitioner's Motion to Vacate; Order Redacting File and Granting Sanctions, But Denying Motion to Disqualify**
Judge Signing: Maryann C. Moreno
Date Filed: December 14, 2016

2. COURT OF APPEALS INFORMATION:

(x)	**Affirmed**	( )	**Other**
( )	**Affirmed as Modified**	( )	**Reversed and Dismissed**
( )	**Affirmed in Part/Remanded****	( )	**Remanded ****
( )	**Affirmed/Rev'd-in part & Remanded**	( )	**Reversed**
( )	**Affirmed/Vacated in part**	( )	**Reversed In Part**
( )	**Affirmed In Part/Rev'd in Part**	( )	**Remanded with Instructions****
( )	**Denied (PRP, Motions, Petitions)**	( )	**Reversed and Remanded ****
( )	**Dismissed (PRP)**	( )	**Rev'd, Vacated and Remanded ****
( )	**Granted/Denied in Part**	( )	**Vacated and Remanded ****
( )	**Granted (PRP, Motions, Petitions)**		

* **These categories are established by the Supreme Court**

** **If remanded, is jurisdiction being retained by the Courts of Appeals? ( ) YES ( ) NO**

3. SUPERIOR COURT INFORMATION:

(IF THIS IS A CRIMINAL CASE, CHECK ONE)
Is further action required by the superior court?
( ) YES ( ) NO

Authoring Judge's Initials

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

In Re:

Cathrine Roe fka Marchesseault

Appellant/Petitioner,

And

Chad Marchesseault

Respondent/Respondent.

No: 352072

VERIFICATION OF SERVICE OF PETITION FOR REVIEW

I make this statement under penalty of perjury under the laws of the state of Washington on this 27th day of November, 2018 at Spokane.

Gary R. Stenzel, WSBA #16974

DECLARATION OF MAILING

I, Lori Scarano, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on November 27, 2018 affiant enclosed in envelopes a copy of the **VERIFICATION OF SERVICE OF PETITION FOR REVIEW** to: Craig Mason, 1707 West Broadway, Spokane, WA 99201

Stenzel Law Office
Gary R. Stenzel – Seju Oh
1304 W College LL Spokane WA 99201
(509) 327-2000 / (509) 327-5151 fax

Said address being the last known address of the above-named individual, and on said date deposited addressed envelope by regular mail with postage prepaid in the United States Post Office in City and County of Spokane, State of Washington.

Lori Scarano

Stenzel Law Office
Gary R. Stenzel – Seju Oh
1304 W College LL Spokane WA 99201
(509) 327-2000 / (509) 327-5151 fax

Petition for Review

Court of Appeal Cause No. 352072

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Cathrine Marchesseault Appellant/Petitioner

v.

Chad Marcheseault, Respondent

PETITION FOR REVIEW

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