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Division I
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King County Superior Court No. 12-3-05750-1 SEA

71953-0

No. 71953-0-I

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

In re the Marriage of:

JANETTE R. WELLS, fka PEACOCK,
Respondent,

v.

WILLIAM R. PEACOCK,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Judith Ramseyer, Judge
The Honorable Palmer Robinson, Judge

APPELLANT'S REPLY BRIEF

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I.
STATEMENT OF THE CASE

A. INTRODUCTION

The primary issue in this case is the appearance of unfairness caused by Mr. Peacock's appointed lawyer, Elise Buie, who secretly provided confidential and prejudicial information to the trial judge. First, she stated that a litigation GAL might be needed, which suggested that Mr. Peacock was incompetent and unable to assist his attorney. Later, in an effort to obtain more fees, she cut and pasted into an email to the Court Mr. Peacock's proposals to her for preparation, implicitly suggesting that his ideas were excessive and unreasonable. Her actions caused the judge to immediately cancel a settlement conference with a mediator and to suspend discovery.

Ms. Wells' main argument is that Ms. Buie's actions could not have harmed Mr. Peacock because she "revealed nothing to the court Peacock had not already revealed." Brief of Respondent (BOR) at 26. The record does not support that premise.

B. MS. BUIE'S SECRET EMAILS EXAGGERATED MR. PEACOCK'S MENTAL ISSUES

It is true, of course, that Mr. Peacock's cognitive impairments made it difficult for him to move the case along on his own. That is why

the Court ultimately agreed to appoint a lawyer for him under GR 33. But other than a brief mental breakdown due to the side effects of certain medicines, long before trial, he has always been rational.

By the time of Ms. Buie's representation, Mr. Peacock was stable and under the care of a psychologist and psychiatrist. CP 253, 259-60. To be sure, he still had cognitive difficulties that made it hard for him to concentrate or even to stay awake, but that is a far cry from the standard for appointing a litigation GAL. *See* RCW 11.88.010; RCW 11.88.090. Nevertheless, Ms. Buie twice suggested in her emails to the Court that Mr. Peacock was so incapacitated that he needed to proceed through a guardian ad litem. *See* Appellant's Opening Brief (AOB) at 6, 9, 19-20. This planted the seed that he might be too irrational to engage in mediation.

C. OTHER THAN MS. BUIE'S SECRET EMAILS, THERE WAS LITTLE TO SUGGEST THAT MR. PEACOCK COULD NOT SETTLE THE CASE THROUGH MEDIATION

Ms. Wells maintains that Mr. Peacock was not harmed by the judge cancelling the settlement conference because "the record and the ongoing litigation make plain that Peacock is unwilling or unable to agree to anything." BOR at 24. In fact, he was very much interested in settling the case, but he first needed to obtain financial discovery. He also believed that a neutral mediator would be very helpful.

I was eager to settle but I considered it prudent to obtain discovery from Janette first, especially because she had already obtained about 10,000 pages of discovery from me. Also, I considered the chance of a settlement to be much more likely with the help of an experienced, neutral mediator such as Commissioner Watness. Janette's ideas of settlement were quite extreme. For example, she considered \$5,000 to be a reasonable share of her IRA. This Court awarded me over \$20,000. I believed Commissioner Watness would let us know if he felt any offers from either side were unreasonable, and would help steer the negotiations towards a fair conclusion.

CP 258.

Ms. Wells suggests that discovery was not an issue. She states that Mr. Peacock's former attorney, Rod Pierce, confirmed that Mr. Peacock had 80-90% of all discovery documents needed in the dissolution, months before Ms. Buie made an appearance. In fact, Mr. Pierce stated only that *Mr. Peacock* had made such progress in responding to Ms. Well's extensive discovery requests. CP 1649. Mr. Pierce never filed any discovery requests to Ms. Wells.

Ms. Wells repeatedly claims that the parties were familiar with each other's finances, and therefore needed little discovery. But she did not take that position in the trial court. Rather, she aggressively sought and obtained considerable discovery from Mr. Peacock. CP 431-76; CP 1648-52. Further, Ms. Wells locked Mr. Peacock out of the family home in August 2012, and obtained a restraining order CP 1649; CP 389-95.

Mr. Peacock had no access to Ms. Wells' finances after that, other than through formal discovery.

The record does not reflect all of the reasons Mr. Peacock needed discovery in this case, but some of the points were discussed at the hearings on January 21 and February 28, 2014. Mr. Peacock's counsel, Christopher Rao, noted that Ms. Wells claimed to be unemployed at the time of trial, yet she refused to answer questions about her work based on "privilege." I RP 50. Because Ms. Wells had been working for a personal friend of hers, Mr. Peacock reasonably sought documentary evidence on that point. *Id.* at 59. Ms. Wells also refused to answer questions about what storage units she used and what was in them. *Id.* at 52. Further, Ms. Wells had admittedly made some money by designing web sites, although she claimed she gave that up. II RP 99. Mr. Rao attempted to obtain bank records to determine whether Ms. Wells was making income from this or other sources, but Ms. Wells would not produce the statements from the last sixth months. I RP 53.

Mr. Peacock also needed discovery regarding the dates and amounts of funds Ms. Wells invested in her Fidelity IRA. Ms. Wells claimed that no more than \$5,000 out of the total \$220,000 was community property, yet it was proved at trial that that the community value was much higher. CP 285-86. Similarly, records were needed to

rebut Ms. Well's claim that Mr. Peacock's inheritance was no longer separate property because it was allegedly commingled with other accounts. I RP 58. It was proved at trial that this asset remained separate. CP 286.

Thus, as Mr. Rao pointed out, it would have been "manifestly ridiculous" to go into a settlement conference without first seeing the other side's discovery responses. I RP 12.

Unfortunately, Mr. Peacock was unable to craft discovery requests on his own, and he did not initially have sufficient funds to pay a lawyer to do it. Ms. Buie's appointment should have solved that problem, but it did not. Because she was so busy with other matters, and because she was dealing with health problems, she did very little to move the case along despite Mr. Peacock's urging. In particular, Mr. Peacock wanted her to seek discovery as soon as possible, but the requests did not go out until the parties were close to the date for a settlement conference. CP 2023-25. When Ms. Buie withdrew, and Mr. Rao made his second appearance, he was chagrined to learn that Ms. Buie had taken so long to send out discovery requests. I RP 12 "[I]t appears that this court-appointed attorney over several months did very little other than to file one motion for trial continuance and two motions to withdraw from the case." CP 60. For that reason, Mr. Rao asked:

that the Court relax some of the pretrial deadlines such as discovery so that I make sure my client is not prejudiced but—by what's happened so far. My understanding is that he had originally wanted to send that discovery in August; it finally went out on January 3rd, for whatever reason.

I RP 4.

Ms. Wells seems to argue that Mr. Peacock demonstrated his inability to agree to anything when he failed to pay child support under temporary orders. *See* BOR at 3. She claims that Mr. Peacock was found in contempt for that reason. He was not. *See* CP 1905. Of course, he was later confirmed to be disabled, vindicating his position that he was not voluntarily unemployed. He then obtained \$14,000 from the Social Security Administration in back child support for Ms. Wells. III RP 372.

Ms. Wells also claims that Mr. Peacock demonstrated his inability to settle by changing lawyers. It is true that Mr. Peacock had to change lawyers a few times, but that had nothing to do with his interest in settling the case. His first lawyer, Jay Neff, neglected several matters that were important to Mr. Peacock, including filing a temporary parenting plan in time for the holiday season. CP 2025-26. His second lawyer, Rod Pierce, withdrew because Mr. Peacock did not have the cash to replenish his retainer and Mr. Pierce would not accept credit cards. CP 2026. When Christopher Rao came into the case to defend Mr. Peacock on Ms. Wells'

motion for contempt, it was understood that Mr. Peacock could not afford to keep Mr. Rao on after that hearing. CP 2026-27.

Mr. Peacock then requested appointed counsel under GR 33 but it took several months before the request was granted. As noted above, Mr. Peacock was concerned that Ms. Buie did so little to move the case along. But ultimately, she withdrew on her own motion due to serious health problems. I RP 4. The case moved quickly to trial after Mr. Rao agreed to step in again. In short, Mr. Peacock's problems with attorneys stemmed primarily from his difficulty in paying them, and to the failure of his appointed lawyer to get much work done. None of this reflects on his willingness to settle the case.

Ms. Wells states that Judge Ramseyer described the case as "unprecedented" with its history of delay and appointment of counsel and attendant administrative complexities." BOR at 6. It is clear from the transcript, however, that the word "unprecedented" referred only to the appointment of a lawyer. I RP 10.

II. ARGUMENT

- A. THE TRIAL COURT ERRED IN REJECTING MR. PEACOCK'S MOTION TO VACATE THE JUDGMENT BASED ON CONFLICT OF INTEREST AND THE APPEARANCE OF UNFAIRNESS

Throughout her argument on the appearance of unfairness issue, Ms. Wells focuses on broad, generic principles regarding CR 60 motions. But this case deals with the particular standards that apply to the appearance of fairness doctrine. For example, Ms. Wells repeatedly argues that there is no proof that the judge was actually biased, even though there is no such requirement. *See* AOB at 16-19. Likewise, there is no need to prove that the result was inequitable. *Id.* In any event, Mr. Peacock has shown that the trial court's rulings were unfavorable to him. *See* CP 251-52; AOB at 26-33.

Wells argues that CR 60(b)(11) is not the appropriate vehicle for an appearance of fairness claim. But the Court of Appeals has expressly ruled otherwise. *See Tatham v. Rogers*, 170 Wn. App. 76, 103, 283 P.3d 583 (2012) (“[W]e hold that a motion for relief from a judgment under CR 60(b)(11) is an appropriate procedure for raising a posttrial challenge based on a violation of the appearance of fairness doctrine”).

Ms. Wells seems to suggest that an appearance of fairness claim can succeed only if the facts are exactly on point with a published case. But obviously there are many ways that an appearance of unfairness can arise. The communications at issue in this case are a bit different from those in some published cases because they came from a party's own attorney rather than from the opposing party or a non-party. Nevertheless,

they are just as harmful and improper. If anything, a judge is more likely to be swayed by negative information relayed by a party's lawyer; such information coming from opposing counsel would more likely be taken with a grain of salt.

Ms. Wells stresses that attorney negligence or incompetence is not a basis for relief.¹ This is a straw man because Mr. Peacock is not relying on such factors, but rather on the lawyer's breach of attorney-client privilege and the Court's receipt of unfavorable information that should not have been disclosed.

The second straw man is that "every ex parte communication does not trigger the appearance of fairness doctrine." BOR at 32. Mr. Peacock agrees. But Ms. Wells' brief never addresses the central issue: that on January 15, 2014, Elise Buie provided the Court with precise quotes from Mr. Peacock's emails to her, portraying him as making unreasonable demands. Wells maintains that the disclosures were "implicitly authorized," but they obviously were not because Mr. Peacock expressly requested in writing that they remain confidential. Clearly, Ms. Buie herself did not believe she was authorized to make these disclosures since she hid from Mr. Peacock what she had done. See AOB at 9-11. Ms.

¹ In her discussion of *Burkey*, opposing counsel appears to have inadvertently replaced the names of the litigants with those in this case.

Wells never acknowledges that this disclosure had the immediate effect of staying discovery and striking the planned settlement conference. Nor does she acknowledge that, by hiding her actions from Mr. Peacock, she made it impossible for him to ask Judge Ramseyer to recuse herself.

It is true that lawyers must sometimes make requests for funds ex parte in appointed cases, but that does not mean that the lawyer may share privileged information with the court. In King County, for example, requests for expert services in appointed criminal cases are directed to the Department of Public Defense rather than to the trial court, and the motions and orders are generally sealed.²

Wells cites *Tatham* for the proposition that Peacock must show some “personal or pecuniary interest on the part of the judge.” True, that was the allegation in *Tatham*. But in other cases, the appearance of unfairness arose simply because the judge was privy to information he should not have had. For example, in *State v. Madry*, 8 Wn. App. 61, 504 P.2d 1156, 1161 (1972), the judge happened to be aware of some facts that contradicted the defendant’s allocution. Similarly, in *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406, 407 (1983), there was an appearance of

² See King County Superior Court Criminal Manual at section 10, available at <http://www.kingcounty.gov/~media/courts/SuperiorCourt/Docs/CriminalManual.ashx?la>
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unfairness because the judge did some research to see whether the defendant was correct that income in the jewelry business tended to be seasonal. In *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355, 379 (1995), *amended by*, 1996 WL 137107 (1996), the judgment was reversed because the judge's extern contacted a drug treatment center to confirm plaintiff's progress.

The judges in these cases had no interest in the outcome of the litigation. Rather, as here, the problem was that the judge obtained relevant information without the litigant's knowledge.³

Ms. Wells suggests that the Court was well aware of Mr. Peacock's "litigiousness" prior to Ms. Buie's email of January 15. But, as discussed below, that is not a fair characterization. Clearly, Judge Ramseyer did not think that a settlement hearing would be a waste of time prior to Ms. Buie's disclosures. The judge considered the settlement hearing "imperative" just three weeks before. *See* AOB at 8.

³ It is true that some cases refer to a need to show "actual or potential bias", but it is clear from the cases cited above that this is satisfied merely by showing that the judge was improperly privy to information relevant information. As our Supreme Court established in *Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966), there is no need to show animus. "Bias" in this context means merely that the judge might have some tendency to rule in one party's favor due to some improper influence or information.

Further, Ms. Wells does not acknowledge the most serious consequences of Ms. Buie hiding her actions from Mr. Peacock: he lost the opportunity to ask Judge Ramseyer to recuse herself prior to trial.

Ms. Wells argues that a free mediation is not a substantial right. But the right at issue here is to a trial that appears fair. Losing the opportunity for a free mediation with an experienced commissioner is merely evidence that the right was violated.

Wells maintains that there is no proof that the judge even saw the emails in question. But as Mr. Peacock has shown, the court's staff are treated the same as the judge. *See* AOB at 18-19. In any event, it is obvious that the substance of the email was communicated to the judge because it caused her to make sudden changes to her prior rulings.

Wells maintains that Judge Ramseyer demonstrated her fairness to Mr. Peacock by giving him a "pass" on paying attorney fees to Ms. Wells, despite his "intransigence" and by not requiring him to pay maintenance. BOR at 21, 37. In fact, the finding of fact cited by Wells shows that the

Court recognized Mr. Peacock was *not* intransigent.⁴ As for maintenance, Ms. Wells never requested it. CP 287. The Court did not provide any favors to Mr. Peacock.

B. MS. BUIE'S CONFLICT OF INTEREST IS ANOTHER GROUND FOR RELIEF

Ms. Wells' arguments on this issue are the same as with the appearance of fairness issue. She relies on the notion that Ms. Buie did not breach confidentiality and that the information she provided to the Court was already known. Mr. Peacock has already addressed these points. *See* Section II(A), above.

C. THE OVERALL DISTRIBUTION OF ASSETS IS INEQUITABLE BECAUSE IT DOES NOT LEAVE THE PARTIES IN SIMILAR POSITIONS

Mr. Peacock maintains that the overall property distribution was an abuse of discretion. *See* AOB at 26-33. Ms. Well's concedes the distribution favors her. She appears to argue, however, that Mr.

⁴ "Delays and increased litigation costs can be attributed to Respondent, but as a consequence of his disability and complications caused by a series of attorneys. Accordingly, Petitioner's request for an award of attorney fees due to Respondent's intransigence is denied. Each party to bear his or her own attorney fees, professional fees, and other fees and costs incurred." CP 292. *See also* CP 288 ("While litigation of this matter has been more protracted and costly than needed, its halting progress is largely attributable to Respondent's mental health issues described below. Consequently, Respondent has not deliberately extended the proceedings or increased costs of litigation.").

Peacock's decision not to challenge the trial court's valuation of each asset weakens his position.

Mr. Peacock, however, has merely acknowledged that it is very difficult to prove that any valuation is an abuse of discretion. He has therefore limited his argument on *this* claim to the unfair *division* of assets. That the valuations so strongly favored Ms. Wells, however, strengthens the appearance of fairness claim. *See* AOB at 22.

As Mr. Peacock noted in the opening brief, the valuation of the family home was one of the most significant issues. The trial court awarded the home to Ms. Wells and applied the tax assessed value despite strong evidence that it greatly understated the true value. CP 25-26. Other questionable rulings included: crediting Mr. Peacock with funds he expended on such things as life insurance and maintaining storage units even though they benefited the community (CP 23); valuing the vehicles as if they were in "good" condition when in fact they had serious mechanical problems and structural damage (CP 22-23); failing to assess Ms. Wells half the debt on an American Express card used by both parties (CP 24); failing to correct Mr. Peacock's share of the Fidelity IRA despite a clear, mathematical error (CP 18-19); and refusing to vacate the temporary orders of child support based on imputed income even after Mr. Peacock established his disability (CP 25-26). Although Mr. Peacock has

not assigned error to these one-sided rulings, they can be considered on the issue of appearance of fairness. In other words, an objective observer could find not only that Ms. Buie's actions not only had the potential to affect the Court's ruling, but that they appeared to do so.

Ms. Wells maintains that obtaining the house did not necessarily put her in a favorable position because the house needed "extensive maintenance and repairs." In fact, the appraisal experts on both sides agreed that any problems with the house were insubstantial. III RP 264-65; IV RP 571-72.

Ms. Wells' argument that the parties were put in similar positions is unconvincing. *See* AOB at 29-33. She maintains that she was earning \$3,500 per month at her most recent job. BOR at 15-16 and Fn. 2. But there is no reason she could not make more. She received a glowing endorsement from her former employer at RealChem. *See* AOB at 30. Certainly she can work full time since both boys are in their late teens, and the older one is presumably in college by now. Mr. Peacock, on the other hand, has no income besides his disability payment of \$2,299 per month. CP 289.

Ms. Wells suggests that she was burdened by Mr. Peacock failing to pay costs imposed during the superior court proceedings, but in fact Ms.

Wells did obtain those funds (with interest) through a reduction of Mr. Peacock's share of the Fidelity IRA. CP 294.

D. THE COURT SHOULD NOT IMPOSE FEES ON MR. PEACOCK WHETHER OR NOT HE PREVAILS

For the same reasons that Judge Robinson should not have imposed attorney fees on the CR 60 motion, *see* AOB at 26, this Court should not impose fees on appeal. "Awards have been found to be an abuse of discretion when the benefitted spouse has received a majority of the parties' total assets, the same spouse is therefore in a better position to pay, and the other spouse already has an onerous financial burden." *Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). That reasoning clearly applies here.

In addition, Mr. Peacock has been judicious in his appellate litigation. Although he disagrees with many of the rulings in this case, he has not appealed those that would likely be found to be within the trial court's discretion. He has limited his litigation to two strong issues.

Ms. Wells maintains that this Court should grant her fees on appeal in view of Mr. Peacock's "intransigence" in the *trial* court. This once again ignores Judge Ramseyer's finding that Mr. Peacock was not intransigent. Further, one could as readily make an argument that Ms.

Wells was the litigious one, as Mr. Rao did in his declaration regarding

Mr. Peacock's motion for reconsideration of the final orders:

By her own testimony (repeating what she had written in her letter to Met Life and what she'd told the FCS evaluator), Janette changed the locks on the family home in August 2012, when Bill was suffering acutely from mental illness, directly leading to him sleeping in his truck for about two weeks. The public court record clearly shows that she then spent the next 9 months or so aggressively arguing that Bill was "voluntarily unemployed – thus attaining an OCS (first in January 2013) requiring Bill to pay over \$1300/month in child support, and attorneys' fees totaling over \$7000. . . .

Because of a combination of Ms. Peacock's highly aggressive counsel and his own ineffective counsel, these mental health issues simply slipped through the cracks of the court. At a time when his only financial resource (his separate inheritance funds of \$31,000) had been frozen by motion of Ms. Peacock, he was struggling on \$197/month in state temporary disability funds. Simultaneously he was trying to file for federal disability, sinking fast in credit card debt after being locked out of his family home, and defending the allegations from Janette that he was voluntarily unemployed, that he was not being responsive to discovery requests and that he was not providing adequate access to storage units.

When Bill's counsel tried to reconsider a draconian ruling on child support, the court ruled that service was untimely even though the reconsideration was delivered by hand directly to Ms. Sanders at her office just after 5 pm on the due date. Thus, by dint of zealous advocacy, the substance of that reconsideration was never even heard. . . . And it is more troubling still that Ms. Peacock herself argued vociferously against the court looking into the substance of "voluntary unemployment" knowing all the while that it was untrue. . . . [This] necessarily led to Bill spending huge amounts of money to defend against baseless allegations.

CP 58-62. *See also* CP 315-320.

Mr. Peacock, on the other hand, took reasonable positions regarding temporary orders. For example, he never disputed that Ms. Wells should remain in the family home, and his proposal for a temporary parenting plan provided that Ms. Wells would have the bulk of the residential time. His plan also contained many provisions to ensure the health and well-being of the children. CP 508-515. He agreed to mutual financial restraints with the exception of his separate inheritance, which was his only meaningful source of funds. CP 315-320. He proposed that the parties work collaboratively on discovery, in part because he had no access to his financial documents in the family house, but Ms. Wells did not agree. CP 1649. And he spent hundreds of hours responding to Ms. Wells' discovery requests. *Id.*

Thus, whether or not Mr. Peacock prevails on appeal, the Court should find that Ms. Wells is in the better position to pay attorney fees; that Mr. Peacock's claims were focused and had at least arguable merit; and that Mr. Peacock did not demonstrate intransigence by raising these claims.

**III.
CONCLUSION**

For these reasons, this Court should remand this case for a new trial with a new judge. Mr. Peacock will urge the trial court on remand to permit mediation in the hope of avoiding a trial.

DATED this 22nd day of October, 2015.

Respectfully submitted,



David B. Zuckerman, WSBA 18221
Attorney for William Peacock

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served one copy of the foregoing document by First Class U.S. Mail, postage prepaid, and email on the following:

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Date

Peyush
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