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(Consolidated with #34163-8-II)

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Gregory Howe, *Appellant/Cross-Respondent*

vs.

Mia Frye, *Respondent/Cross Appellant*

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1	Page 1
No. 2	Page 1
No. 3	Page 1-2
No. 4	Page 2
No. 5	Page 2
No. 6	Page 2
No. 7	Page 2-3
No. 8	Page 3
No. 9	Page 3
No. 10	Page 3
No. 11	Page 3
No. 12	Page 3
No. 13	Page 3

Issues Pertaining to Assignments of Error

No. 1	Page 4
No. 2	Page 4

No. 3 Page 4

No. 4 Page 4

B. STATEMENT OF THE CASE Page 5-10

C. SUMMARY OF ARGUMENT Page 10-13

D. ARGUMENT Page 13-46

E. CONCLUSION Page 46

TABLE OF AUTHORITIES

Table of Cases

Allard v. First Interstate Bank, 112 Wn.2d 145,
768 P.2d 998, 773 P.2d 420 (1989) Page 39-40

Coalition for Homeless v DSHS, 133 Wn.2d 894, 949
P.2d 1291 (1997) Page 14

Doe v. Gonzaga Univ., 143 Wn.2d 687, 700,
24 P.3d 390 (2001) Page 28

In re James, 79 Wn. App. 436, 903 P.2d 470 (1995) Page 15–18, 24

Marriage of Myers, 123 Wn. App. 889 (2004) Page 22-23, 42-43

Marriage of Rideout, 150 Wn.2d 337,
77 P.3d 1174 (2003) Page 18-22

State v. Sizemore, 48 Wn. App. 835, 837, 741 P.2d 572 (1987) Page 30

Thorndike v. Hesperian Orch., 54 Wn.2d 570, 343 P.2d
183 (1959) Page 29

Statutes

RCW 26.09.002 Page 10, 14, 42

RCW 26.09.004 Page 10, 14

RCW 26.09.160 Page 11, 13-15, 22-24, 29-31, 33, 40

Other Authorities

Book of Proverbs 18:17, Complete Jewish Bible,
translation by David Stern, 1998 Page 28

Webster's New 20th Century Dictionary, 2ed. (1983) Page 41

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it made Finding of Fact 2.2 that no obligation existed to provide a true copy of the Parenting Plan to Little Christian Daycare and declined to find Ms. Frye in Contempt of Court for presenting a redacted Parenting Plan to Little Christian Daycare, which thus hindered Mr. Howe from the performance of his parental functions as they pertain to his child and this day care provider.
2. The trial court erred when it made Finding of Fact 2.3 that no obligation existed to provide a true copy of the Parenting Plan to Castle Rock Elementary School and declined to find Ms. Frye in Contempt of Court for presenting a redacted Parenting Plan to Castle Rock Elementary School, which thus hindered Mr. Howe from the performance of his parental functions as they pertain to his child and this educator.
3. The trial court erred when it made Finding of Fact 2.4 that no obligation existed to provide a true copy of the Parenting Plan to the Child and Adolescent Clinic and declined to find Ms. Frye in Contempt of Court for presenting a redacted Parenting Plan to the

Child and Adolescent Clinic, which thus hindered Mr. Howe from the performance of his parental functions as they pertain to his child and this health care provider.

4. The trial court erred when it made Finding of Fact 2.5 which finding was Ms. Frye's untruthful excuses regarding transportation were efforts to renegotiate the parenting plan and not an effort to hinder Mr. Howe from exercising his day visit on Friday May 28, 2004.
5. The trial court erred when it made Finding of Fact 2.6 wherein the court found that any efforts by Ms. Frye to utilize medical excuses to preclude weekend residential time were not a hindrance to Mr. Howe because he had a coincidental right to contact the medical provider and confirm the child's health status.
6. The trial court erred when it made Finding of Fact 2.7 in declining to find that disparaging comments made by Ms. Frye to the daycare provider, educator, and medical staff did not violate the provisions of the parenting plan because they were not disparaging comments made in front of the child.
7. The trial court erred when it made Finding of Fact 2.8 in finding only three dates wherein Ms. Frye obstructed the telephonic visits

of Mr. Howe with his child to be in bad faith and declining to find all of Ms. Frye's efforts on the other dates wherein Mr. Howe was denied his telephonic visits to be in bad faith.

8. The trial court erred when it made Finding of Fact 2.13 because there is no substantial evidence to support such finding that Ms. Frye is willing to comply with the Parenting Plan.
9. The trial court erred when it made Finding of Fact 2.16 in that the court ordered the prevailing party Mr. Howe to pay attorney fees to Ms. Frye who was found by the court to be in contempt.
10. The trial court erred in ¶ 3.3 when it failed to order mandatory compensatory residential time.
11. The trial court erred when it ordered in ¶ 3.6 that Ms. Frye could purge herself of contempt by deducting from the fee award payable by Mr. Howe to her in the amount of \$500.00 which was the statutory penalty imposed upon her for her contempt.
12. The trial court erred when it ordered in ¶ 3.7 an award of attorney fees and costs to be paid by Mr. Howe the prevailing party payable to Ms. Frye who was found to be in contempt.
13. The trial court erred when it did not order in ¶ 3.8 a review date.

Issues Pertaining to Assignments of Error

Issue One

“Does RCW 26.09.160 state that if one parent in bad faith hinders the other parent in pursuit of their statutory parental functions they should be found in contempt? Yes.

Issue Two

“Did the trial court err when it failed to award Mr. Howe make-up residential time when Ms. Frye was found in contempt for denial of residential time and such award of compensatory time is mandated by statute?” Yes.

Issue Three

“Does RCW 26.09.160 authorize the trial court to order Mr. Howe (the aggrieved party) to pay the attorney fees of the party found to be in contempt (Ms. Frye)? No.

Issue Four

“Must the court apply the doctrine of law of the case as to its earlier rulings on interpretation of the parenting plan in subsequent rulings on the same parenting plan? Yes.

B. STATEMENT OF THE CASE

Greg Howe, the appellant, is a father of a child born out of wedlock; he desires to function as a father to this child. Mr. Howe alleges that the mother, Mia Frye, has contemptuously hindered his role in parenting the child. The mother has been found by the trial court to be in contempt of the Parenting Plan.

This case involves an appeal from the trial of multiple contempt actions brought by Mr. Howe charging Ms. Frye with contemptuous acts based upon her bad faith failure to adhere to their Parenting Plan as well as her affirmative acts to hinder Mr. Howe in the performance of his parental functions.

Shortly after the birth of their son, Ms. Frye left King County and elected to move to Cowlitz County where she could reside rent free in her father's triplex. At the time of these hearings she was unemployed choosing to live off of the support monies paid by Mr. Howe for the support of their son.

On March 2, 2001 an agreed Parenting Plan (CP 49) was signed and along with a judgment determining parentage, a child support order and child support worksheets were agreed to entry (all documents were drafted by Ms. Frye's attorney). Thereafter, Mr. Howe filed a petition for

modification and a proposed parenting plan on July 2, 2004 (CP 57). Ms. Frye filed a motion to dismiss the petition (CP 64). On July 27, 2004, Mr. Howe filed the first contempt action and an order to show cause (CP 68-72). Ms Frye's motion to dismiss the modification was orally granted on August 6, 2004; which Order denying Adequate Cause was entered on August 20, 2004 (CP 85). The contempt action remained and the trial judge scheduled an evidentiary hearing for December 2004 (CP 85).

Under the Parenting Plan (CP 49 P 02) Ms. Frye was designated as the primary care giver for the child and given the distance from King to Cowlitz County, Mr. Howe was given residential time every first, third and fifth weekend and Friday visits between 10 AM and 4 PM on the weekends after he had exercised his residential time. Additionally, provision for a Tuesday telephonic visit with his son was incorporated into the Parenting Plan in lieu of face to face "residential time" which typically occurs with parents who live in close proximity.

Mr. Howe learned that Ms. Frye had presented redacted parenting plans to various institutions directly involved with the care of their son – his day care (Trial Exhibit 11), his elementary school (Trial Exhibit 29) and the child's health care provider (Trial Exhibit 14). Significantly yet another redacted parenting plan was presented to the elementary school on

September 13, 2004 (RP 344) subsequent to Ms. Frye being ordered to show cause (July 27, 2004, CP 68-72) for previously making exactly such a redacted presentation to the day care.

The initial contempt action cites Ms. Frye with multiple episodes of hindering Mr. Howe's efforts to perform parental functions as well as denying access to the child. The trial court ultimately found that only three of Ms. Frye's actions in denying telephonic access by Mr. Howe with his son were contemptuous (CP 193). Despite this finding of contempt, the trial court ordered the prevailing party, Mr. Howe, to pay attorney fees to Ms. Frye, the party found to be in contempt (CP 193).

Mr. Howe claims that the trial court abused its discretion in refusing to find that Ms. Frye's redactions and excisions of the parenting plan which she presented to the day care, elementary school and medical provider were contemptuous acts. It is clear that Ms Frye wished to hinder Mr. Howe in the pursuit of his parental functions with the child as it related to these providers, yet the trial court ruled that the Parenting Plan did not compel her to provide a complete copy of the plan to any of these providers.

In addition the trial court found that Ms. Frye's actions in regard to manipulations of the plan provision regarding withholding of residential

time with the child due to “illness” did not violate the parenting plan, as the father has the right to confirm the existence of any illness, with the health care provider. (RP 639)

Mr. Howe has considered why the trial court denied the relief he requested. During the course of multiple hearings of this matter the trial court made its feelings known regarding the high conflict that had developed in this matter, apparently faulting Mr. Howe, who without question zealously sought out his opportunity to parent his child. The trial court also reflected upon the zeal of Mr. Howe in regard to the parenting questions at hand indicating the Mr. Howe was both literal and unrealistic with regard to his interpretation of the plan. Yet the court observed that both parties demanded strict and literal interpretation of the plan.

It was in part based upon this stated basis, a strict and literal interpretation, that the trial court denied and dismissed the modification petition in August 2004. The court in its oral ruling on the contempt action indicated that it felt Mr. Howe was inflexible and unrealistic in his expectations regarding the Parenting Plan particularly in regard to the Friday day visits wherein Mr. Howe would drive all the way to Cowlitz County from Seattle to see his son and on some occasions return to Seattle (RP 649). Ms. Frye would then be called upon to pick up the child in

Seattle, under the terms of the Parenting Plan. Under both the strict and literal interpretation of the Parenting Plan these were the duties, yet the trial court felt Mr. Howe was wrong in this expectation and the trial court made its feelings known in this regard (RP 642). Speculation as to why the court ruled in the manner it did would be only that – speculation, beyond this point. In denying a portion of the contempt at the initial hearing the court also indicated that Mr. Howe was litigious and noted the parties were insisting on a “strict and literal interpretation of the plan.”

Regardless of whether a strict or literal interpretation is used, the parenting plan is the bedrock upon which the parties must depend in their expectations and duties as pertaining to their performance of parental functions. Under the totality of the circumstances, this court must agree that Ms. Frye has used every interpretive spin she could think up in an effort to deprive Mr. Howe of parental functions and residential time with his son.

Contempt Hearings

Mr. Howe’s motion for contempt essentially turned into a full blown trial with formal discovery and live witness testimony, which occurred pursuant to court order. In this action Mr. Howe pled a series of distinct acts and/or failures to act by Ms. Frye, which he alleged were bad

faith violations of the parenting plan and thus were contemptuous. Mr. Howe endeavored to conduct discovery from various providers mentioned above and make determinations from various sources which would enable him to further fortify allegations contained within his contempt citations. Portions of Mr. Howe's efforts to gather evidence were quashed by the trial court.

Evidence was presented at trial on March 16-17, 2005, April 15, 2005, April 28, 2005, and May 2, 2005. Presentation of the final order also took place over protracted and delayed series of hearings which occurred on May 13, 2005, May 26, 2005, June 30, 2005, and August 15, 2005, after which time a final order was signed by the court on September 12, 2005.

This appeal followed.

C. SUMMARY OF ARGUMENT

Mr. Howe is entitled to rely upon the provisions of the Parenting Plan as a bench mark for the unhindered exercise of his parental functions. These parental functions are outlined in our Parenting Act and set forth with particularity at RCW 26.09.002-.004. Ms. Frye has utilized multiple means and methods to deprive Mr. Howe of the exercise of his parental

rights and functions. The legislature has spoken in regard to Ms. Frye's duties to not hinder the father's exercise of parental functions, yet in this matter she has in various ways hindered Mr. Howe. In deciding upon this matter the trial court found her in contempt of court for violating the Parenting Plan, despite this finding the trial court ordered that Mr. Howe, the prevailing party, pay Ms. Frye's attorney fees.

The trial court further abused its discretion by finding various other acts of Ms. Frye in hindering Mr. Howe from the exercise of his parental functions were not contemptuous.

RCW 26.09.160 utilizes coercive means to enforce the parenting plan. Since contempt actions are creatures of statute (on parenting plans) they must adhere to the literal text of the statute. The trial court is given very little discretion.

Under the Parenting Act RCW 26.09, a bad faith attempt to hinder the other parent in the performance of parenting functions as allocated under the parenting plan shall be punished by the trial court.

The trial court possesses discretionary authority upon a finding of contempt to fashion custodial provisions (a jail term) within the order which will coerce the desired result. Once found in contempt, the trial court has no discretion regarding whether to order a contemnor to give

make up time, pay a fine of not less than \$100, and to pay the moving party their reasonable costs and attorney fees. The standard of review is de novo.

On the other hand, the discretion that a trial court can exercise regarding evidence admissibility, weight to be accorded to evidence, and credibility of witness testimony is the same in a contempt action as it is in any civil action. The standard for review of trial court evidentiary decisions is whether substantial evidence exists to support the court's findings.

In order to find remedial contempt of court under the statutory scheme at issue herein, the trial court must find that substantial evidence favors the moving party and also that the acts of the alleged contemnor were accomplished in bad faith. Specifically in the instant case, the trial court was tasked with finding either that (1) the court ordered parenting plan was violated, or (2) one parent hindered the performance of parental duties by the other parent; that the violation(s) were in bad faith, and that no affirmative defenses to those acts have been proven by a preponderance of the evidence.

Ms. Frye was found to be in contempt by the trial court, yet in making this finding, the trial court made numerous errors of law during

and after making that finding. The most notable was upon finding Ms. Frye in contempt the court ordered Mr. Howe to pay her attorney fees. Additionally worthy of note in this matter was a marked shifting of the burden of proof by the trial court. This shifting burden by the trial court was unfair to Mr. Howe and ran afoul of the legislative intent, as that intent is expressed in the language of the statute.

The trial court ruling in this case encourages and condones open defiance of the Parenting Plan by the primary care parent and validates inappropriate behaviors at the child's expense. The trial court ruling worst of all shows disregard for the child who is dependent on the court to ensure his best interests. The child is dependant upon the court to insure adherence to the Parenting Act RCW 26.09 and adherence to the Parenting Plan.

Except for the finding of contempt, the trial court decision in this case is wrong on the law and it is wrong on the results. It must be reversed completely and remanded with explicit instructions to the trial court.

D. ARGUMENT

“Does the trial court have authority to add conditions or to alter express terms of an unambiguous statute?”

The answer is no. The Parenting act is codified in RCW 26.09. The

very first section sets forth the legislative intent regarding the functions of the various parties in a broken family situation. Penultimate in this now dysfunctional relationship is the “best interests of the child” RCW 26.09.002, even so the child can become a pawn in a matter over which the parents continue to struggle. RCW 26.09.004 defines and identifies the “parental functions” which are clearly baseline responsibilities and duties a parent owes to a child. RCW 26.09.160 comes into play when one or the other parent endeavors to hinder the other in the performance of the parental functions or duties. It is a remedial contempt statute with a “make whole” punishment component. The legislative intent of the statute is determined as follows:

The duty of the court in interpreting a statute is to ascertain and give effect to the intent and purpose of the Legislature, as expressed in the statute as a whole. [Cite omitted]. If a statute is unambiguous, its meaning is to be derived from the language of the statute alone. [Cites omitted]. *An unambiguous statute is not subject to judicial construction, and we will not add language to a clear statute even if we believe the Legislature intended something else but failed to express it adequately.* [Cites omitted] [Emphasis added]

Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997).

In the instant case, the trial court failed to award attorney fees to Mr. Howe, the prevailing party, adding components and considerations to the express language of the statute. The effect of this was to punish Mr.

Howe even though he proved his case while allowing a known contemnor to escape any direct consequences for her bad behavior.

As a preliminary point, there are over 700 pages of Verbatim Reports of Proceedings and almost 400 pages of Clerk's Papers. This record is probably the most thorough and complete record possible for a remedial contempt. Nowhere in this record on review is there any question raised regarding the statute's meaning. Neither party claimed ambiguity.

The court did not declare the statute unconstitutional nor did either party ask it to do so.

There are primarily three cases in Washington which establish the precedent which controls this appeal and which compel reversal to the trial court. Each is discussed below, followed by argument.

Analysis of In re James, 79 Wn. App. 436, 903 P.2d 470 (1995)

In re James is the first definitive ruling on a contempt action under the Parenting Act. The **James** case began as dueling contempt motions, with both father and mother seeking sanctions against each other under RCW 26.09.160.

Ironically, the father's allegation of contemptuous acts in **James** is factually identical to Mr. Howe's allegations in the instant case; in both

the mother was accused of failing to provide telephone contact with the minor child of the parties. The mother in James, on the other hand, also accused the father of failing to show up and physically take the minor child when the parenting plan required him to do so. The trial court found both parties in James in contempt but failed to make written findings of bad faith on either parent even though the statute required the trial court to enter findings. Both parties appealed.

The James opinion was fairly straightforward, holding that a finding of bad faith was required in order to hold a party in contempt, stating, “Thus, both the judicial concern for the rights of contemnors *and the statute* itself support a requirement that the trial court make a specific finding of bad faith or intentional misconduct as a predicate for its contempt judgment.” [Emphasis added]. Because the trial court did not make such a finding, the Court of Appeals reversed and remanded for further proceedings.

Additionally, the father in James claimed that he could not be forced to accept “visitation” with his child despite the mandatory language of the parenting plan. In rejecting this claim, the James court issued one of the most definitive interpretations of the scope and nature of the Parenting Act. It stated, on pages 444-445:

Our Parenting Act is a legislative attempt to reduce the conflict between parents during and after dissolution by focusing on continued parenting responsibilities, rather than on winning custody and visitation battles. The Act replaced the terms "custody" and "visitation" with concepts such as "parenting plans" and "parental functions." In *re Kovacs*, 121 Wn.2d 795, 800-01, 854 P.2d 629 (1993). It thus established a type of joint custody in which each parent is responsible for performing parental duties during his or her residential time with the child.

The inference is that the (old style) noncustodial parent will have the right and also the duty to provide the residential care during particular times of the year and will be subject to contempt for failure to comply with this duty in the same manner as if he or she failed to pay child support or to perform any other duty under the court order. 2 Washington State Bar Ass'n Family Law Deskbook § 46.5(6)(a), at 46-22 (1991). The Act makes contempt orders mandatory ("shall be punished by . . . contempt") in some instances. By its overall purpose and wording, the Act also makes it clear that parenting is not only a right and a privilege, as Richard argues, but also a duty and a responsibility obligating both parents. A parent's failure to assume responsibility during the designated residential time is harmful to the child and to the parent/child relationship. In addition, it has a detrimental effect on a parent who may have conflicting obligations and relies on the other parent to care for the child at the specified times.

Richard argues that, if a parent chooses not to spend time with his or her children, the court cannot force him or her to do so. This ignores the fact that parental privileges, divided between the parents when their marriage is dissolved, carry concomitant duties and responsibilities. Divorce does not change each parent's fundamental obligation of care and support, including residential care during the times specified in the parenting plan. Once the court has ruled, either in the parenting plan or in a subsequent order, that spending time with a parent is in the best interests of the

child, that parent is expected to care for the child during the time the plan gives him or her custody. To rule otherwise would be to ignore the important role that both parents play in caring for the child as well as both parents' right to rely on the provisions of the parenting plan.

For over a decade, the **James** opinion has made it clear that the amount of residential time assigned to one parent does not affect the value of the other parent to the child. The **James** opinion directly holds that it is harmful to the child when a parent does not perform parenting duties for the child, and it ruled that those parenting duties are properly discharged by following the terms of the parenting plan.

Analysis of Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003)

Eight years after **In re James**, the Washington Supreme Court issued its landmark decision in a contempt proceeding deriving from a dispute over compliance with residential provisions of a parenting plan.

The first issue the Court addressed was the standard of review. Unlike the instant appeal, **Rideout** was tried solely on declarations and/or affidavits. Mr. Rideout asserted that the standard of review was to determine whether substantial evidence supported the lower court's findings. Mrs. Rideout, on the other hand, favored a de novo review similar to summary judgment review standards.

The Supreme Court decided that the proper standard of review was substantial evidence, even though it was an exception to the general rule that disputes resolved solely on documentary evidence are reviewed de novo. It reasoned that superior court commissioners are in a much better position to determine credibility:

The procedural safeguards of our court system strongly support the application of the substantial evidence standard of review. As noted, trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence. In sum, we affirm the decision of the Court of Appeals, holding that the appropriate standard of review here is not de novo, but rather is whether the trial court's findings of fact are supported by substantial evidence.

Rideout at 352.

Thus, the Supreme Court settled the standard of review. A contempt appeal is not a “second bite of the apple.” If there is substantial evidence to support the trial court’s findings, they will not be disturbed.

Having established the correct standard of review, the Supreme Court moved to the merits. The trial court had held Mrs. Rideout in contempt, albeit with seemingly contradictory findings of “no bad faith” in regard to the parenting plan itself but found “bad faith” regarding her disregard of a separate order enumerating specific summer vacation dates.

The question as the Supreme Court viewed it was whether the

conclusions of law and the contempt finding were supported by the evidence. Since Mrs. Rideout did not challenge the findings in the Supreme Court, the findings were verities. The Court held:

. . . [A] parent who refuses to comply with duties imposed by a parenting plan is considered to have acted in "bad faith." RCW 26.09.160(1). Parents are deemed to have the ability to comply with orders establishing residential provisions and the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance. See RCW 26.09.160(4).

Rideout at 352-353.

Because the rebuttable presumption is that parents possess the ability to comply with the parenting plan, an allegation of non-compliance with a provision of the plan is a prima facie showing of bad faith according to **Rideout** and the statutory language. Once a violation is shown, the burden of proof shifts to the contemnor to show either inability to comply or some other "reasonable excuse for the non-compliance."

Mrs. Rideout essentially said she did not know how to get her daughter to go with her father on his residential time. She fatally damaged her defense and her credibility when she also stated that, ". . . his dispute is with our daughter. Since she is still a minor, she is at a great disadvantage in this dispute and I get dragged into the middle of it no matter how hard I

try to stay out.” **Rideout, at 343.**

The Supreme Court found this to be sufficient to support a finding of contempt. It further stated:

In reaching the decision it did, the trial court noted a pattern of behavior by Sara that demonstrated an unwillingness on her part to assume responsibility for making reasonable efforts to comply with the provisions of the orders establishing residential time for Christopher.

Rideout at 356.

Thus, the essence of **Rideout** is that even a reluctant child is not an affirmative defense for failure to comply with the parenting plan.

Rideout also dealt with the sanctions awarded as a result of the contempt. ¹Mr. Rideout obtained a partial award of his incurred attorney fees as relief from the trial court. Dissatisfied, he cross-appealed but Division Two affirmed the trial court attorney fee award while awarding him his reasonable attorney fees for the appeal. Regarding attorney fee awards on appeal of a contempt action, the Supreme Court stated:

Although the statutes do not speak directly to attorney fees on appeal, we agree with the reasoning of the Court of Appeals in *In re Parentage of Schroeder*, 106 Wn. App. 343, 353-54, 22 P.3d 1280 (2001), that a party is entitled to an award of attorney fees on appeal to the extent the fees

¹ There is no indication in the **Rideout** opinion whether make-up residential time was sought or ordered.

relate to the issue of contempt.

As we have observed above, Sara acted in bad faith in not complying with the court order establishing residential provisions for Caroline. She must, therefore, pay Christopher's attorney fees and costs for his appeal to the Court of Appeals, in accordance with RCW 26.09.160(1), (2)(b)(ii).

...

Due to Sara's bad faith in complying with the parenting plan, she must also pay Christopher's attorney fees and costs for his appeal to this court, in accordance with RCW 26.09.160(1), (2)(b)(ii). In light of that conclusion, we deny Sara's request for attorney fees.

Rideout at 359.

It seems clear from this language in interpreting RCW 26.09.160 that a prevailing party has a statutory right to payment of their attorney fees incurred by the contemnor in pursuit of the contempt action.

There is no discretion. Once contempt is found and upheld, reasonable appellate attorney fees must be awarded against the contemnor.

Analysis of Marriage of Myers, 123 Wn. App. 889 (2004)

Myers dealt with RCW 26.09.160(2)(b)(i) and (ii). A contempt brought by Mr. Myers pursuant to RCW 26.09.160 for approximately two years of missed residential parenting time under the explicit terms of the parenting plan. Initially, the trial court commissioner found contempt but

ordered no make-up days or attorney fees. At a subsequent hearing, the trial court awarded only 68 make-up days residential time pursuant to RCW 26.09.160(2)(b)(i) but did not award attorney fees and costs or impose any other sanctions. **Myers, at 892**. Mr. Myers appealed to Division Two. In a very short opinion, the panel held that a finding of contempt makes statutory sanctions mandatory and it reversed and remanded the matter. **Myers, at 893**.

Perhaps the most important aspect of the **Myers** opinion is found on the last page, where it states:

The decision to order no attorney fees or penalties was contrary to the language of RCW 26.09.160. Therefore, we reverse and remand back to the trial court to order attorney fees and penalties in accordance with this decision.

Myers at 894.

Myers makes clear that once contempt is found, sanctions must be imposed exactly in accordance with the statute. Thus, a finding of contempt means that the trial court must order day-for-day make-up residential time, payment of all court costs and reasonable attorney fees associated with the contempt, payment of any reasonable expenses incurred in locating or returning a child, and payment of a civil penalty to the moving party of no less than \$100.00.

CONTEMPT ORDER OF 9-12-05

In an RCW 26.09.160 contempt action, the burden of proof is on the moving party to state a prima facie claim. Once stated, the burden of proof shifts to the other party who must show legitimate reasons for committing prohibited acts.

In the **James** case, the mother asserted as one of her claims of trial court error that contempt must be proved by clear cogent and convincing evidence. Division One disagreed, and held as follows:

We hold that the moving party has the burden of proving contempt by a preponderance of the evidence. This showing must include evidence from which the trial court can find that the offending party has acted in bad faith or engaged in intentional misconduct or that prior sanctions have not secured compliance with the plan. Once the moving party has established a prima facie case, the responding parent must rebut that showing with evidence of legitimate reasons for failing to comply with the parenting plan.

James at 442.

Thus, in the instant appeal, Mr. Howe had the burden of producing a preponderance of the evidence to prove the following:

. . . If the court finds there is reasonable cause to believe the parent has not complied with the order, . . .

RCW 26.09.160(2)(a).

In the matter at hand, Mr. Howe of a necessity must have provided “reasonable cause” because the court signed an ex parte order to show cause. Under the statute, “reasonable cause” is a prerequisite to ordering a

party to “show cause why not.”

The only possible question which remains after an order to show cause is issued is the issue of whether reasonable cause alone is always sufficient to find contempt.

In the instant case, Ms. Frye did not make a motion to dismiss for failure to state a claim prior to contesting the accuracy of the allegations. In fact, Ms. Frye agreed that some of the allegations happened but she disagreed about whether she was legally required to do things differently than she had done them.

She was successful in some of these defenses because the trial court, in setting the matter for trial, ruled that there were ambiguities in certain language of the parenting plan and as a matter of law contempt could not be found due to those ambiguities. **[CP 151]**.

What issue(s) was before the court for trial?

Mundane as it may sound, the truth is that the question is forced by the results presented herein. The results of the lower court activities are too far from the ordinary course and routine to allow the question to remain unasked and unanswered.

Pursuant to the facts of this case and the language of the statute,

only one ultimate “issue” is to be tried: is the accused party in contempt or not? In the instant case, the initial pleadings showed that Ms. Frye was in contempt, and an order to show cause was issued. [CP 55-71]. Prior to the return hearing, Ms. Frye filed a declaration disputing the accuracy of Mr. Howe’s allegations and alternatively arguing that even if true, she simply misunderstood or was a victim of circumstances. [CP 107-115].

By the time the hearing was held on August 20, 2004, additional declarations had been filed. At the hearing, the court decided a trial was necessary.² The language of the order is quite illuminating:

2. The court is unable to make a determination of contempt due to the conflicting nature of the declarations and feels it is imperative to provide for testimony regarding the issues of contempt.

What does “conflicting nature of the declarations” mean?³ Considering that this is a contempt action, it obviously means that the court requires live testimony and cross-examination in order to properly assess the credibility of the declarants.

The next paragraph of the order limits the scope of the trial:

3. The court finds as a matter of law Mia Frye did not violate the parenting plan paragraph 3.5 when she denied Greg Howe the weekend visitation that would allow for 17 straight days. The court finds the language is ambiguous at

² The order was not presented and entered until October 7, 2004.

³ Obviously, “feels” should read “finds” or “concludes.”

best, and therefore Mia Frye cannot be held in contempt for the violations claimed by Greg Howe regarding paragraph 3.5 of the parenting plan.

CP 151.

Thus, the only two issues before the court at the commencement of the contempt trial were whether Ms. Frye had (1) willfully failed to provide telephone visitation time to Mr. Howe and that she did so in bad faith, and (2) that Ms. Frye had attempted to hinder the performance by Mr. Howe of his duties expressed by the parenting plan. [CP 350-351].

Did Ms. Frye fail to comply with telephone time specified in the parenting plan, and did she do so in bad faith?

The answer is yes, and the trial court made that finding. [CP 364]. The only question before this reviewing court on this issue is whether there should be a separate contempt finding for every proved act of disobedience or whether there should be a single contempt finding regardless of the quantity of proven acts of disobedience.

We begin by noting that bad faith has been found by the court based on all the evidence taken and considered. Mr. Howe agrees with this finding but argues here that it did not go far enough, based on the evidence. It is anticipated that the Notice of Cross-Appeal taken by Ms. Frye will be a challenge to the finding of contempt, though it is a mystery

where any evidence is located in the record which could show that the finding is the result of a trial court abuse of discretion.

Why should this court rule that each separate incident that violates the terms of the parenting plan be a separate contempt finding?

The most important reason to make a separate finding for each contemptuous act is because it is the truth. The record should *always* speak the truth, as far as it is possible to do so. It is beyond dispute that the entire judicial process is designed and directed toward seeking truth.

That said, cross examination is a time honored technique for determining the truth of disputed facts going as far back as 3,000 years:

The first to state his case seems right until the other one comes and cross examines.

Book of Proverbs, 18:17; Complete Jewish Bible, translation by David Stern, 1998.

Normally, it is jury that determines the facts. In jury trials, those fact determinations inure in the verdict:

An appellate court may overturn a jury's verdict only if the verdict is "clearly unsupported by substantial evidence." [Cite omitted]. The court may not substitute its judgment for that of the jury when there is evidence that, if believed, would support the verdict rendered.

John Doe v. Gonzaga University, 143 Wn.2d 687, 700, 24 P.3d 390 (2001).

For 47 years, the same standard has applied to written findings:

The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its findings for that of the trial court. The judgment must be affirmed.

Thorndike v. Hesperian Orchards, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

In the instant case, the trial court specifically ordered a trial to determine credibility of the witnesses. After several days of trial, the court found that the alleged contemnor, Ms. Frye, had violated RCW 26.09.160 and that she had acted in bad faith.

Only two witnesses were called to testify by the Ms. Frye: Beverly Bangs and herself. Ms. Bangs primarily testified to the quality of her interactions with Mr. Howe. Her testimony overall favored neither parent and was generally unremarkable, although she did testify that she perceived Mr. Howe to be “a high-pressure salesman.” [VRP 287-310]. This leaves Ms. Frye’s own testimony which was clearly not credible to the trial court, yet the court excused her contemptuous actions by improperly applying the law of RCW 26.09.160 to the evidence.

RCW 26.09.160(1) prohibits several types of behaviors by parents, including but not limited to violation of the residential provisions of the parenting plan. The statute declares that the doing of any of these acts is

“bad faith” and that the parent shall be punished by being held in contempt of court. By including the term “bad faith” in the language of the statute, the following applies:

Bad faith is defined as "actual or constructive fraud" or a "neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary 127 (5th ed. 1979).

State v. Sizemore, 48 Wn. App. 835, 837, 741 P.2d 572 (1987).

When the trial court found Ms. Frye in contempt of court, it also found that she committed a fraud or a neglect of a duty or a refusal to fulfill a duty which was not because of an honest mistake. Also, the trial court contempt finding contains an implicit element of an “interested or sinister motive” of Ms. Frye.⁴

While the definitional language is unambiguous, it can be simplified in the instant case to read “Ms. Frye is not a credible witness.” This can be amply demonstrated to be true by the witness’ own testimony, on both direct examination and cross-examination.

However, all the testimony taken is consistent with the original allegations by Mr. Howe against Ms. Frye. Other than Ms. Frye herself, no

⁴ It is also notable that Finding 2.5 clearly found that Ms. Frye was untruthful under oath. This means she lied under oath. Her testimony is not credible.

witness testimony supported any of her proffered excuses for her actions.

An examination of each finding that is assigned as an error in the order entered on September 12, 2005 shows that each one is, to some degree, unsupported by any credible evidence.

Finding 2.2

This finding consists of three paragraphs. The first paragraph is supported by substantial evidence in the form of testimony and exhibits. The second paragraph, while irrelevant, is also supported by substantial evidence. The third paragraph is essentially immaterial except for the final clause of the last sentence which is actually a legal conclusion: “but it is not contempt of court.”

A trial court commits legal error if it misunderstands the law as written. Here, Finding 2.2 must be a misunderstanding of the law as written because it states that the parenting plan contains no provision that requires a full and complete copy of the parenting plan be provided to Little Christian Daycare.

Nothing in the statute addresses how to properly conduct oneself in general daily life. RCW 26.09.160(1) lists specific behaviors which parents are prohibited from doing when living under the terms of a parenting plan. In regard to Finding 2.2, it is obvious that Ms. Frye delivered an incomplete and therefore inaccurate copy of the parenting

plan to Little Christian Daycare.

The redacted portions of the abbreviated copy that she provided were the pages that directly specified Mr. Howe's "duties provided in the parenting plan." This is clearly an effort to hinder Mr. Howe in his performance of his parental functions and parenting plan "duties" and her actions are a contempt of court, despite the language of Finding 2.2 to the contrary. Thus, the closing clause of Finding 2.2 is reversible error because substantial evidence supports the remainder of Finding 2.2 and the statute is mandatory.

Finding 2.3

This finding also contains three paragraphs, quite similar to Finding 2.2. The first paragraph is supported by substantial evidence. The second paragraph is also supported by substantial evidence, and clearly notes the direct causal connection between the missing portions and Mr. Howe's parental duties under the parenting plan. The third paragraph, like its counterpart in Finding 2.2, again falsely states that the law requires a written provision in order to find contempt. This is also reversible error, as in Finding 2.2. Sadly the mother within a short period of time of being ordered to show cause why she should not be held in contempt for her actions of providing a redacted parenting plan to the Little Christian Day

Care did the very same thing to Castle Rock Elementary School. The mother, Mia Frye, provided a redacted copy of the parenting plan to the elementary school in an effort to hinder the father's exercise of his parental functions.

Finding 2.4

This finding suffers an identical misapplication of the law as 2.2 and 2.3 do. It also is reversible error on that basis. In this instance the mother provided a redacted parenting plan to the health care provider with the very same goal in mind that of hindering the father in the exercise of his parental functions.

These three errors of law, if corrected, are three additional contempt's of court pursuant to RCW 26.09.160. This court should remand with instructions to the trial court to enter the findings.

Finding 2.5

This finding consists of six paragraphs. The court found in the first paragraph that Ms. Frye was attempting to "renegotiate the parenting plan" when she endeavored to suggest that her car was in the shop (a misstatement) and incapable to being driven to Seattle. Nothing in her testimony suggests she was negotiating in any way. Ms Frye testified that she was trying to get Mr. Howe to work with her on this one occasion

[VRP 556]. She does not testify that she was trying to “renegotiate the parenting plan.

Paragraph number two of this finding continues forth with the renegotiation theme interjected by the trial court into this litigation. In reality, the email referenced was sent at a time by Ms. Frye at 8:11 a.m. when she knew it was useless to send as Mr. Howe was already en route from Bellevue to the 10:00 a.m. exchange site in Cowlitz County. Given the commute times for them it was not feasible for him to receive this email and be in Kelso by 10:00 a.m. to pick up his son. Ms. Frye did not try any cellular communication. **[VRP 565]**.

Paragraph number three accurately sets forth the evidence which demonstrated Ms. Frye misstated the facts in her initial declaration to the trial court regarding her car being in the shop.

Paragraph number four is an accurate statement of the facts as they pertain to Ms. Frye’s statements on May 28, 2004 wherein she continued in her endeavors to hinder Mr. Howe from exercising his scheduled time with his son.

Paragraph number five of this finding discusses the coerced signature on an email by Mr. Howe wherein the child was withheld by the mother until he endorsed a promise to return the child to the Cowlitz

County Courthouse. The court offers a finding that Mr. Howe's interpretation of the plan is literal but unrealistic. The court had previously ruled favorably to Ms. Frye in the dismissal of one of the contempt actions brought by Mr. Howe. In that ruling the court opined that Ms. Frye was seeking a strict and literal interpretation of the plan. The "strict interpretation" Mr. Howe ascribed to the Parenting Plan is now twisted to a negative reflection upon Mr. Howe. Again, no testimony came forth regarding an effort to renegotiate the plan particularly as it pertained to Friday day visits. All Ms. Frye sought was a change for this particular Friday on May 26, 2004, not renegotiating the plan. This finding is in error.

Finding 2.6

This finding contains four paragraphs. The first three paragraphs are supported by substantial evidence, with the possible exception of the date of June 29, 2001 where Mr. Howe's testimony was somewhat murky. He first testified that he had to go to the doctor and get a re-written note in order to travel with his son [VRP 231-232] and then he testified that he was uncertain whether he actually got visitation with his son. [VRP 233]

The first sentence of the fourth paragraph is not a finding of fact - rather it is a legal conclusion. In any event, its hypothesis is not supported

by substantial evidence. There is no substantial credible evidence provided by Ms. Frye to show that visitation actually occurred on dates when Mr. Howe testified that he was denied visitation.

Finding 2.7

This finding consists of three paragraphs. Paragraph number one accurately sets forth the allegation of Mr. Howe. These negative comments were designed to hinder Mr. Howe in the performance of his parental functions as they pertain to his child. They were efforts or attempts to obstruct him from interaction with his son vis a vis these providers.

Paragraph number two suggests that disparaging comments to the daycare provider did not hinder Mr. Howe's interaction with the daycare provider. The evidence of Mr. Howe's interactions with the daycare suggests a compromised relationship. It became compromised from the moment Ms. Frye presented a redacted plan which effectively communicated Mr. Howe was not part of his son's life. Additionally Ms. Frye stated to the day care that Mr. Howe had previously been a problem [VRP 146]. The court, upon consideration of this fact coupled with disparaging comments should be left with one logical conclusion: the father was indeed hindered by the mother in performing his duties to the child as they relate to the daycare provider.

Paragraph number three suggests that since any disparaging comments to the medical provider were not made in front of the child then the parenting plan has not been violated. Unfortunately when a redacted parenting plan and disparaging comments are made to providers, such as the medical provider, they typically lead to a compromise of the relationship between the provider and the other parent - in this instance it was a deterioration of Mr. Howe's relationship the provider which Ms. Frye sought to hinder, all to the detriment of the child. This finding is in error.

Finding 2.8

This finding consists of four paragraphs. The first paragraph lists nine separate dates that the trial court found Ms. Frye had interfered with Mr. Howe's access to his son via telephone despite the express language in the parenting plan.

There is nothing in the statute which grants authority to a trial court to ignore eight of these contemptuous acts by making a single finding of contempt [Finding of Fact #2.8] to "cover" all of them. Each one, standing alone, is a contemptuous act according to the statute. Accordingly, there should be a separate finding for each one.

Finding 2.13

This finding has two paragraphs. The first paragraph is a single sentence which mirrors the last sentence of the second paragraph. These two sentences are totally contradicted by the contemnor's own testimony on direct examination:

Q. {By Ms. McLean} Do you believe that you have acted under the Parenting Plan in bad faith?

A. No.

Q. When you have had issues that have come about, have you referred back to your Parenting Plan?

A. Yes. A lot.

Q. What for?

A. I want to do it right.

Q. Okay. Do you believe you should be found in contempt?

A. No.

VRP at 489-490.

Ms. Frye testified under oath that she refers to the parenting plan when issues have come about so that she can "do it right." Other than the portions of the parenting plan that were ruled to be ambiguous in the order dated October 7, 2004, the parenting plan language is plain.

If the parenting plan is plain and unambiguous, and Ms. Frye refers to it to get it right, only two possibilities exist regarding why she gets it wrong: (1) she doesn't comprehend plain meaning, or (2) she comprehends plain meaning and ignores it.

Based on her testimony under cross-examination, Ms. Frye is deceptive about the meaning of things she has stated under oath. Additionally, she has self-serving memory lapses about her contradictory statements and how those contradictions came about.

Most importantly, there is nothing in the 700+ pages of verbatim transcript where Ms. Frye ever accepts responsibility for doing wrong nor is there any place in those 700+ pages where she promises to follow the parenting plan properly in the future. Although it could not be known for certain at the time of the court's oral ruling whether she would follow the plan in the future or not.

The trial court finding (on 5/6/05) that she is presently willing to follow the parenting plan is simply without support in the evidence, and is reversible error.

Finding 2.16

This finding that the attorney fees incurred by Ms. Frye are reasonable is unsupported by any evidence. Bare representations of fees by an attorney are insufficient to demonstrate reasonableness:

RCW 4.84.020 provides that, "in all other cases in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem *reasonable . . .*" (Italics ours.) [Cites omitted]. The reasonableness of an award is subject to appellate review. [Cite omitted]. However, the trial court's determination of

what constitutes a reasonable award will not be reversed absent an abuse of discretion. [Cites omitted]. "*A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.*" [Cite omitted]. *Also, "[a]n abuse of discretion exists only where no reasonable person would take the position adopted by the trial court."* [Cites omitted]. [Emphasis added].

Allard v. First Interstate Bank, 112 Wn.2d 145, 148-149, 768 P.2d 998, 773 P.2d 420 (1989).

Since RCW 26.09.160 clearly does not authorize an award of attorney fees to a contemnor, any award of attorney fees to a contemnor in an action brought pursuant to this statute is per se unreasonable.

Order 3.3

Pursuant to RCW 26.09.160, missed residential time must be compensated day-for-day. While the telephonic "visitation" is not strictly residential time as that term is commonly used, here the parties understood it as such and treated it as such. Mr. Howe was given mid-week telephonic time in lieu of residential time given the distance from Seattle to Castle Rock where the child was residing.

The "does not apply" selection of ¶3.3 of the contempt order is not supported by the evidence and is contrary to mandatory statutory language.

Order 3.6

This paragraph of the contempt order is completely illogical and is

an abuse of discretion because no reasonable person would do this. To illustrate just how arbitrary and capricious this paragraph is, one need only look at the first two sentences: “By paying a sanction of \$500.00.” The paragraph goes on to state: “Satisfaction of this sanction is acknowledged as fully and completely satisfied upon entry of this order with the court.”

A sanction is defined as:

...

3. something that gives binding force to a law, as the penalty for breaking it, or a reward for carrying it out; a provision of law that secures obedience.

...

Webster’s New 20th Century Dictionary, 2ed. (1983).

The second sentence states that the signing of the order imposing the sanction immediately satisfies the obligation imposed by the order. What part of this design “penalizes?” What part of this design does the contemnor “carry out?” What part of this design “secures obedience?”

At best, this \$500.00 “sanction” is really just a setoff. Objectively, it is nothing more than an accounting technique which affects nothing. It does, however, take up five lines of type on a page while pretending that something was accomplished.

Common sense should be sufficient authority to recognize that a sanction that does not cause pain or discomfort is not a sanction at all nor

can it fulfill the purposes of a sanction. To call this a “sanction” is degrading to the best interests of the child, if the purpose of the Parenting Act Statute is to be given any effect. RCW 26.09.002 sets forth the purpose of the parenting act and the dominant feature of this statute is the best interests of the child as demonstrated in the exercise of parental functions by both parents.

Order 3.7

Section 3.7 of the Order re Contempt may well be the most outrageous abuse of discretion. The trial court created its own law out of thin air, brought its own motion under that law, filled in its own blanks to support that motion, and issued an order based on its own law. All of this can only have one purpose - to punish Appellant Greg Howe.

While every error will be addressed in the following argument, it is critically important to first state that this entire Assignment of Error is controlled by **Marriage of Myers**. What is even more egregious than the trial court’s deliberate disregard of that controlling precedent is the complete lack of any evidentiary support for the Section 3.7 fees. Nowhere in the record on review or in the trial court files is there any evidence of attorney fees incurred by either side nor is there any record of any reasonableness analysis. This total vacuum of evidence plus the

controlling precedent of Myers equals reversal. There is no other option.

The following quote provides this reviewing court with the clearest illustration of the extent of the trial court's departure from reality:

THE COURT: . . . This is the essence of the award of attorney's fees. The scope of the litigation is inappropriate, and it seems to reflect Mr. Howe's desire to control the situation. That's why the litigation was so expensive. That's why it was. That's why the award of attorney's fees on the basis of income seems to me to be appropriate, not just on need; but essentially, Mr. Howe made this litigation expensive; and he's going to bear the brunt of that. The fact that Ms. Frye was involved in behavior that was found to be a violation of the parenting order means she's also going to be involved in paying the costs; so ultimately, everybody's paying. I don't think that the findings that are proposed by Ms. McLean are necessary.

. . .

MS. MCLEAN: And just so that you're aware and Mr. Smith is aware that I am objecting to . . . the last language that suggests that my client is going to owe Mr. Howe a judgment.

THE COURT: That seems highly unlikely. [Emphasis added]

VRP at 717-718.

Not only does the statute command that Ms. Frye bear all the brunt due to her improper activities, but the trial court itself is the entity that made this litigation expensive. In its pre-trial order dated October 7, 2004 [CP 150-152] the trial court both orders a trial and limits the scope of the

trial. After both parties do exactly what the trial court ordered them to do, one of the parties (Mr. Howe) is blamed for following the court order and is punished for it without notice to him that he was exposed to that jeopardy:

MS. MCLEAN: . . . Ultimately, what we're asking for is that the Court deny Mr. Howe's request for contempt findings, that the Court sanction Mr. Howe for his bad faith filings, that the Court award Ms. Frye reimbursement of her attorney's fees which at this point are in excess of \$15,000, and –

THE COURT: For the contempt?

MS. MCLEAN: Actually, I would submit that -- and I have not broken it down. You did hear a motion for adequate cause. That adequate cause motion was denied, and you have reserved the issue of attorney's fees on that. I have not broken that down out of that because you've reserved that issue of attorney's fees. I can do that between now and tomorrow.

THE COURT: Fifteen thousand dollars is for attorney's fees relating to contempt issues?

MS. MCLEAN: Contempt and for the initial adequate cause that you denied.

THE COURT: Okay. Okay. But since that time, since the entry of the Parenting Plan?

MS. MCLEAN: Yes.

THE COURT: All right.

MS. MCLEAN: Yes. And that does not include our trial time; so ultimately, she's asking for full reimbursement

because we believe that the evidence will show that Ms. Frye is basically living off of the child support of \$1,250 per month with her son and that Mr. Howe earns in excess, depending upon which year, in excess of \$200,000 a year which funds all of this, what we believe to be, frivolous litigation.

VRP, at 30-32.

Because he was sitting in the courtroom listening to this opening statement by Ms. Frye's attorney, Mr. Howe was aware that he was in jeopardy of paying Ms. Frye's attorney fees if he did not prevail. He also knew that fees unrelated to the contempt were not part of his risk exposure. He also knew, due to the wording of the statute, that Ms. Frye would have to pay all of his attorney fees if she was found in contempt.

Most of all, Mr. Howe knew he could not be ordered to pay for Ms. Frye's trial costs since it was the court itself that ordered the trial. Because he put sufficient evidence in his pleadings that the trial court could find her in contempt, he knew the action could not later be ruled to be frivolous. Mr. Howe's actions were not found to be frivolous. In many instances the court found the evidence supported Mr. Howe; as in regard to the redacted Parenting Plan's Ms. Frye presented to educators and health care providers. It was clear to the court that she indeed did this the court erroneously found that these actions did not violate the Parenting Plan which contrary to statutory language to that effect ignored any

hindering effect such actions may have had upon the performance of parental functions.

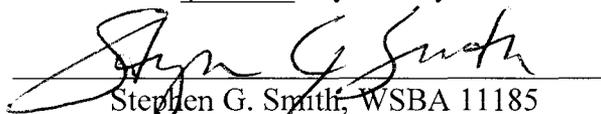
The decision by the trial court ignored the statute and controlling precedent. The trial court punished Mr. Howe by fining him for accessing the system to preserve his rights. Worst of all is that the trial court rewarded a person who violated the law.

E. CONCLUSION

Mr. Howe would ask this court to issue an order of remand consistent with his argument herein and that such order compel the lower court to make him whole regarding fees incurred in pursuit of the contempt action below and make-up time with his son for residential time lost and for Ms. Frye to be found in contempt for her multiple actions which violate the letter and the spirit of their parenting plan.

Finally, Mr. Howe would ask that such remand include directives for full payment of his appellate attorney fees incurred in pursuit of redress due to the contemptuous acts of Ms. Frye.

Respectfully submitted this 15th day of May 2006.



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FILED
COURT OF APPEALS

05 MAY 15 2006
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BY ST
CITY

In re the Parentage of:

GRANT ALEXANDER HOWE,

Child,

MIA K. FRYE,

Respondent/Cross-Appellant,

and

GREGORY M. HOWE,

Appellant.

No. 33883-1-II

(Consolidated with 34163-8-II)

PROOF OF SERVICE

I, Susan Thompson, declare under penalty of perjury under the laws of the State of Washington that on May 15, 2006, I forwarded a true and correct copy of APPELLANT'S OPENING BRIEF, APPELLANT'S MOTION FOR EXTENSION OF TIME FOR FILING OPENING BRIEF, and APPELLANT'S MOTION TO DECONSOLIDATE and DISMISS SECOND APPEAL by first class mail to:

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