

No. 33883-1-II

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

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Gregory Howe, Appellant/Cross-Respondent

vs.

Mia Frye, Respondent/Cross-Appellant

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MR. HOWE'S REPLY BRIEF  
CROSS-MS. FRYE'S RESPONSE BRIEF

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**A. MR. HOWE’S RE-STATEMENT OF ISSUES**

**Issue One**

“Does RCW 26.09.160 state that if one parent in bad faith hinders the performance by the other parent of duties provided in the parenting plan or hinders the other parent in performance 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 after Ms. Frye was found in contempt for denial of such residential time?” Yes.

**Issue Three**

“Does RCW 26.09.160 compel the trial court to order Ms. Frye (the contemnor) to pay the attorney fees of the aggrieved party Mr. Howe?” Yes.

**Issue Four**

“Does the doctrine of law of the case apply in regard to the previous rulings of the trial court on interpretation of the parenting plan?” Yes.

**Summary of Issues Presented by Mr. Howe.**

This appeal has four straight-forward issues, relating to this straight-forward contempt action. Those issues, while distinct as a matter

of law, can be summed up in a single query: Is the trial court empowered to add to, subtract from, and/or create the law?

The answer is always no, regardless of the perspective one takes or the lens used to gain such perspective.

## **B. REBUTTAL ARGUMENT IN REPLY**

### **Point One – “Restatement of the Issues”**

Ms. Frye posits seven points euphemistically entitled “Restatements.” Actually, these are seven points fabricated by Ms. Frye out of whole cloth in an effort to change the court’s perspective of Ms. Frye and place her, the contemnor, in a victim’s role.

Mr. Howe has reprinted here the text of the issues presented on review so that there can be no misunderstanding as to what is at stake. Mr. Howe is aggrieved by certain actions and/or failures by the trial court, and those are specified in the Assignments of Error, which in turn are described as legal errors in the text of the Issues Presented for Review.

Ms. Frye’s rewriting the facts and mislabeling the results as Issues Presented for Review cannot be designed to assist this Court in reviewing the case.

It is important for this Court to not lose sight of the nature of the case as presented. This is a statutory contempt action, not an action to

modify a parenting plan. All efforts by Ms. Frye/Cross Mr. Howe to inject equitable considerations into this process are both misleading and improper.

**Point Two – “Restatement of the Case”**

Ms. Frye states, on page 3 of her brief, that this appeal is largely factual. This is misleading as it invites this court to perceive that errors in the trial court’s exercise of discretion form the basis of most of Mr. Howe’s challenges of error.

It is Mr. Howe’s primary contention on appeal that the trial court exercised discretion in areas where the court was not empowered to do so and no proper discretion should/could be exercised and that it abused its discretion where empowered to do so in other areas. The trial court’s manufacturing of a proportional award of attorney fees in a contempt proceeding is the clearest example of the trial court exceeding its discretionary authority under circumstances where no lawful authority existed for the trial court to do so.

Overall, Ms. Frye’s “Restatement of the Case” is written with a bent toward misdirecting the court’s impression.<sup>1</sup>

**Point Three – Contempt standards of *In re Humphreys***

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<sup>1</sup> It should be clearly noted that the term “primary residential parent” (used by Ms. Frye on page 4 of her brief) is not found in the Parenting Act statutes.

On page 18 of Ms. Frye's brief, Ms. Frye cites the court to **In re Humphreys, 79 Wn. App. 596, 903 P.2d 1012 (1995)** as authority to argue that court orders are strictly construed when determining if a parenting plan contempt occurred.

The application of **Humphreys** as authority in the instant appeal is inappropriate. **Humphreys**, is factually distinguished as it pertained to the removal of a specific provision of the parenting plan which was removed in a modification proceeding yet the mother persisted in filing a contempt action against the father as if the provision remained a part of the Parenting Plan.:

The Superior Court Commissioner found Mr. Humphreys was not in contempt, noting: "Had Judge Kristianson not changed his order it would have been very clear that he had violated the order. Judge Kristianson changed his order and removed that very specific provision preventing Mr. Humphreys from taking his daughter to church without permission of the mother." Ms. Olson moved for revision of the Commissioner's order. The motion was heard by Judge Donohue, who determined the order was not violated and found Mr. Humphreys had complied with the parenting plan.

**Humphreys, supra, at 598.**

Arguably, the mother in **Humphreys** had filed a frivolous appeal yet she was saved from such a finding as the court did not find that her contempt action was brought without a reasonable basis. **Humphreys, at 599.** Neither party was awarded appellate attorney fees.

The facts in Humphreys are clearly different than the facts herein.

**Point Four – Standard of Review**

On page 19 of her brief, Ms. Frye claims that Mr. Howe misunderstands the “substantial evidence standard of review.” She refers to the Opening Brief to support her statement.

Actually, it is Ms. Frye who misunderstands the nature of the review standard. It is true that, on review, Mr. Howe bears the burden that the “findings he challenges are not supported by substantial evidence.”

Many of Mr. Howe’s challenges are to negative findings; that is, Mr. Howe is claiming that he was entitled to various findings that he did not receive. Since it is a matter of settled law that a finding that is not supported by evidence is error, Mr. Howe must first show that substantial evidence favorable to him was presented at trial and then he must show that there was not substantial evidence to support the negative findings he now challenges.

As a hypothetical example, let us suppose that both sides failed to produce evidence of sufficient quanta to prove their respective claims. A negative finding would be deemed to exist based on which party had the burden of proof on a particular issue of fact.

This common law rule [on negative findings] must be selectively applied. It should not be determinative on a material issue where

the record shows, as it does in this case, that there is ample evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the specific finding was not intentional.

It is common practice for the attorney for the prevailing party to prepare findings of fact, conclusions of law and a form of judgment and to present them to the trial court for approval and signature. The trial court often signs findings of fact and conclusions of law several weeks after the termination of the trial. If a material finding is not made, it may be due to inadvertence by the lawyer preparing the findings. In the absence of some indication in the record that the failure to make a specific finding was intentional, it is unrealistic to treat the absence of a finding as the equivalent of a negative finding on the issue. For example in Smith v. King, supra at 451, the Supreme Court, in applying the rule, noted that the court's review of the record demonstrates that no evidence was presented on the issue involved. Under such circumstances, a negative finding is appropriate. [Explanatory words added]

**Douglas Northwest v. O'Brien & Sons, 64 Wn. App. 661, 682, 828 P.2d 565, (1992).**

From this opinion's holding, it is obvious that a party complaining of a trial court's failure to make favorable findings has a burden to show that evidence was presented in sufficient quanta to properly make the missing findings. At that point, Mr. Howe has a second burden – to show that there is no substantial evidence to support the negative finding.

There is no escaping the dual burdens of Mr. Howe and it is misleading to state that Mr. Howe misunderstands the nature of the inquiry simply because the inquiry standards were not fully spelled out *en toto*.

Additionally, Ms. Frye makes a second attempt to misstate the scope of RCW 26.09.160, the contempt statute upon which all of the contempt allegations were based. Ms. Frye states that “any contempt

[Howe] alleges is a 'plain violation' of the Parenting Plan." This statement is simply not true.

RCW 26.09.160 does indeed cover the terms of a parenting plan. However, it also covers a myriad of other acts which are not specified in parenting plans, such as negotiations and settlement discussions.

For Ms. Frye to repeatedly assert the limited scope of **Humphreys** as if it was the standard for all other statutory contempt actions is egregiously misleading. Given the facts of the instant case, it is also wrong to use its law holdings herein.

**Point Five – Argument section B (Resp. Brf. page 20)**

Ms. Frye states, "The evidence supports the trial court's findings that Frye was not in contempt on 99% of Howe's allegations, and the trial court was well within its broad discretion in so finding." The exact opposite is true.

Ms. Frye's statement assumes that all the evidence presented was of equal quality and quantity. The record shows that this is not so.

The trial court specifically found that Ms. Frye was "untruthful" in Finding 2.5, in regard to the functionality of her vehicle. In point of fact, Ms. Frye filed an initial declaration with the court which stated that her car was in the shop at the time of the exchange on May 28<sup>th</sup> when in reality the car had been returned to her a week earlier and was indeed functional on the 28<sup>th</sup>. This particular finding was one of many in this litigation. She misrepresented the redactions which she made with whiteout to the parenting plan which she presented to the day care. She presented partial

Parenting Plans to the elementary school and to the health care provider. The word of truth did not exist in Ms. Frye. Ms. Frye cannot seriously assert that once she has been weighed, measured and found without credibility that she can resurrect herself to be without suspicion.

In any event, the meaning of the words is plain: findings supported by substantial relevant evidence will not be disturbed on appeal.

Since 1938, “substantial evidence” has been defined as follows:

Chief Justice Hughes, in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938), said:

*Substantial evidence* is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Italics ours.)

**Farm Supply v Transp. Comm'n, 8 Wn. App. 448, 452, 506 P.2d 1306 (1973).**

Only *relevant* evidence is admissible and therefore only admissible evidence can form the basis for findings. It defies logic to suggest that since Ms. Frye has been found without credibility that she is capable of uttering forth credible substantial evidence. Substantial evidence cannot be evidence from a witness who has been specifically found to be untruthful.

Ms. Frye’s assertions to the contrary are not only misleading, they are also totally wrong. Ms. Frye cannot argue that her own untruthful testimony can be used to legally support any findings, either negative or affirmative.

**Point Six – Partial parenting plan copies are a violation of the law if done with the intent to deceive or mislead (Resp. Brf. page 20)**

Contrary to Ms. Frye's assertions, Mr. Howe never claimed that providing partial copies of the parenting plan was a *per se* violation of the contempt statute. He alleged that this was done to hinder his performance of parental functions.

In order to prove that Ms. Frye intended to hinder Mr. Howe in the performance of his parental functions, he exposed the scheme devised by Ms. Frye which was effective in hindering him in the performance of his parental functions. How can Mr. Howe satisfy his obligation to participate in providing and maintaining a loving, stable, consistent and nurturing relationship with his child if the mother is allowed to place hindrances in his way? Is it in the best interests of the child to suggest that providing a parenting plan to a provider involved in the child's life which affects the other parent's interaction with that provider was not designed to hinder?

Tamara Bjorhus the director/administrator of Little Christian Daycare provided a copy of the Parenting Plan which was presented to her by Ms. Frye. VRP 125.

The parenting plan was demonstrated to have been redacted with white out and the particular redacted clauses dealt exclusively with Mr. Howe's parenting rights.

A further example of Ms. Frye's concerted efforts to thwart Mr. Howe's exercise of his parenting rights was displayed in her repeated use of the medical exception to preclude residential time (visitation). In one instance (June 10, 2004 Visitation, VRP vol. 2, pg 223-225) Ms. Frye represented she had a doctor's slip, when no such slip existed nor was the child too ill to exercise visitation, the chart note simply indicated to "Limit activities this weekend. No swimming". Yet, Ms. Frye represented to Mr. Howe that the child was required to have several days of rest.

Further the representative of the Child and Adolescent Clinic appeared in court with the complete clinical file, as part of that file presented a partial parenting plan consisting of only three pages of the Parenting Plan in her original medical chart/file.

The following testimony is exemplary of the pattern of behavior Mr. Howe faced with the medical exception to visitation and the technique used by Ms. Frye to thwart Mr. Howe's visitation (it references an August of 2002 visit):

Q. {By Mr. Smith) And can you describe for the Court how it is you came to the ultimate ability to experience that residential time?

A. Well, I'm in Seattle; and I'm told that, hey, I've got a doctor's note; and again, it's a voice mail; so I've submitted it for evidence to listen to the tone of the voice and the statement that he is too sick and cannot come, and there's a doctor's note. I called the doctor, and if -- had I not taken the onus to call the doctor, to verify that he was or was not sick, or there was even any note, I would

have not had my visitation. I wouldn't have come; but even then, the ability to verify with the doctor that there wasn't even anything wrong with him and for me to come down and get my visit, I didn't know when I was going to show up here, if he was going to show up or not; so I showed up blindly because it's important.

**VRP, vol 2, pg 236.**

It is absurd to suggest that providing a mechanism to Mr. Howe for him to communicate with the third party doctor is fair if Ms. Frye has previously provided selective information to that third party without notice to Mr. Howe. How could he know whether the doctor is reading from an altered plan? How could the doctor know what was missing even if it was apparent that some parts were missing? The redacted plan given to the child's providers, be it day care, educator or health care can be done for only one purpose which is to hinder the father in his efforts to parent his child. How could such an effort be of any benefit to the child?

This testimony by Mr. Howe, if believed by the trier of fact, is sufficient to prove that at least a single violation of RCW 26.09.160(1) has occurred. Despite the denials of bad faith by Ms. Frye, her credibility has been eradicated by her own actions relative to redactions of the plan as well as her testimony and former declaration which caused the court to express concerns over her credibility. Once Ms Frye has been found without credibility it should follow that her denials have no weight and

should not sustain any findings.

Most importantly, using a redacted and less-than-complete parenting plan as a tool to hinder Mr. Howe's parenting is the controlling factor for finding contempt under subsection (1) of the statute. RCW 26.09.160(1) does not require that the alleged contemnor actually succeed in her bad faith schemes – under the statute the efforts to scheme are contemptuous.

Once again, Ms. Frye cites Humphreys as the standard for finding contempt but it is not relevant to a subsection (1) violation.

Ms. Frye also makes an effort to impugn Mr. Howe by describing his performance or non-performance in providing complete copies of the parenting plan to third parties. Ms. Frye is attempting to deflect primary fault onto Mr. Howe for not providing a complete plan to the providers, a tactic which averts the question of why she would present redacted plans to begin with. Mr. Howe was not “on trial” here – Ms. Frye was. She was tasked with proving that her actions were not contemptuous according to the elements of the contempt statute. Inferring bad behavior by Mr. Howe does not, and cannot, meet her burden.

Additionally, the bad faith of Ms. Frye has been found to exist by the trial court. Mr. Howe is not required to reprove it here.

**Point Seven – Renegotiation of the Parenting Plan (Resp. Brf. page 21)**

Ms. Frye's brief states that changing a parenting plan for one day is no different than renegotiation of the parenting plan. It describes this as "a difference without a distinction."

Actually, setting up the premise like Ms. Frye has done is misleading. Under subsection (1), Mr. Howe has alleged that Ms. Frye has engaged in a systematic bad-faith scheme of hindering his performance of parenting duties as described in the parenting plan. His burden of proof necessarily requires that sufficient relevant evidence be put before the court.

While Ms. Frye may well believe that her testimony was of sufficient quality to "counter" Mr. Howe's testimony, the reality is that the trial court finding that she was untruthful under oath precludes any use of her testimony to meet her affirmative defense burden of proof of her claim of innocent misunderstanding.

The first mention of any kind that she was experiencing car trouble was in her initially filed responsive declaration. When this testimony was scrutinized it was determined that her car was not in the shop at that time and work on the car had been completed the previous week. Ms Frye lost credibility with the court and the court's comments reflect this diminished

credibility.

Ms. Frye's brief asserts that "undisputed testimony established that Frye had car trouble immediately preceding the May 28 incident." This mischaracterizes the evidence which clearly showed that Ms. Frye did not have car trouble on the 28<sup>th</sup> but the troubles were over the week before when the evidence showed she picked her car up from the car repairman. It may be convenient to forget what is in the record but the truth is that this is the exact transaction which caused the trial court to determine that her testimony was untruthful. For Ms. Frye's brief to state the opposite is a serious breach of decorum.

It is impossible to reconcile the trial court finding that Ms. Frye lied about the date the vehicle was disabled with her brief which essentially claims that her lies were part of a renegotiation. Even if this were accurate, the finding that she lied prevents her from claiming on appeal that she acted in good faith.

In short, she can repeat her story as loud and as long as she wishes but it will never gain the credibility she has been found to be lacking. Mr. Howe has met his burden of proof that in any instance where cooperation was needed was an instance used by Ms. Frye to further conflict and most importantly, to hinder him in the performance of his duties. Presenting

untruthful testimony is but another tactic in a long line of tactics, with the goal of creating conflicts that hinder Mr. Howe, to the detriment of the minor child.

It should also be noted that “negotiation” is generally seen to be an activity which is not done under duress or force of compulsion as in withholding the child out of sight and refusing to turn over the child at a scheduled exchange. At this exchange the child was being withheld out of sight unless Mr. Howe agreed to sign an agreement which changed a provision of the parenting plan. The fact of this event clearly was accomplished in an effort to hinder Mr. Howe. If this was simply an effort to negotiate why did it become necessary to have law enforcement mediate the negotiations?

**Point Eight – Doctor’s recommendation (Resp. Brf. page 22)**

Ms. Frye states, on page 23 of the Response Brief, “The finding is based on a provision of the Parenting Plan permitting Frye to deny visitation after consulting with G’s doctor when G is too sick for visitation.” This is not quite accurate. The provision actually states:

6.7 If the child is too sick to exercise visitation pursuant to doctor recommendations, the father shall be allowed to contact the doctor to verify this information. There shall be no makeup visitation for missed visitations due to child’s illness.

**CP 11**

Mother is not allowed to deny visitation. The triggering factor is that the child must be too sick to exercise visitation. The focus is on the child, not the parents.

While the wording is clumsy, it is clear that it is not the mother's decision alone to make. The plain meaning of the provision's language is that the missed visitation must be pursuant to doctor's recommendation.

Mr. Howe alleged that he had missed visitations and also that Ms. Frye had attempted to cause him to miss visitations. The trial court ignored the subsection (1) aspects of the efforts to cause visitations to be missed and focused on the outcome – did he miss any time. The gist of the trial court findings was a no-harm-no-foul philosophy. This is an incorrect view of the law as well as an alteration of the burden of proof for Ms. Frye to “show cause.”

Again, the applicable text of the contempt statute reads in pertinent part:

. . . An attempt by a parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court . . .

#### **RCW 26.09.160**

When Mr. Howe succeeded in getting his visitation in the face of

an initial “doctor’s orders” refusal by Ms. Frye, a subsection (1) contempt occurred. **VRP 397-405**. Success of a parental effort to hinder the other parent is not required to find contempt. Ms. Frye’s attempt to hinder Mr. Howe in the performance of his parental duties as provided in the parenting plan compelled the trial court to find bad faith.

Ms. Frye’s argument regarding doctor’s recommendations and withholding visitation is simply not well-taken.

On page 24 of Ms. Frye’s Brief, she states:

But it is Howe's burden to make out a claim of contempt, not Frye's burden to prove that no contempt occurred.

*Meyers*, [sic] 123 Wn. App. at 893.

Mr. Howe *did* make out a claim of contempt – otherwise a show cause order would not have issued. After the order to show cause was signed by the court, it became Ms. Frye’s burden to prove that no contempt occurred. Ms. Frye’s citation to **Marriage of Myers** is no help since the holding of **Myers** is that once contempt is found, all statutory penalties and awards are mandatory in favor of the prevailing party.

Ms. Frye’s Brief states at page 25:

Nothing contradicts the note, Frye’s testimony about the occasion, or the fact that the police were satisfied about the note, Parenting Plan, and G asleep in bed.

Ms. Frye compounded the problem in two ways: she did not timely advise Mr. Howe of the child's condition, she made disclosure as Mr. Howe had made the long trip to the exchange location in Kelso from Seattle, and she knew he would not be able to contact the clinic as it was closed by the time Mr. Howe arrived to pick up the child. The fact that she demonstrated a pattern of behavior of failed efforts to use the illness provision of the plan apparently had no impact on the trial court analysis of this event.

It is improper to re-argue the facts of the case as if this court is empowered to restore her credibility, it is also improper to argue as if the trial required Mr. Howe to repeat the ex parte show cause proceeding. In any event, Mr. Howe laid out a claim that Ms. Frye misused the medical exemption provision of the parenting plan to hinder visitation and to interfere with his visitation.

There is no support in the law for the absurd premise that Ms. Frye can visit all sorts of mischief upon Mr. Howe to help him miss his meager parenting time but there is no contempt as long as he has an opportunity to call a doctor to see if the child is really ill. Ignore the fact that the doctor's office was closed at the time the opportunity arose. VRP 410.

On page 26 of her brief, Ms. Frye states:

If Howe felt otherwise, he was more than capable of clarifying with the doctor whether G could have visitation. RP 233. He elected not to do so. That was his choice.

The interesting aspect of this quoted portion is the audacity in it. Where Ms. Frye gets the idea that the law allows her to put an additional burden on the Father's visitation (residential time) is unknown. In any event, the issue is not whether Mr. Howe has to check with a doctor to verify Ms. Frye's efforts to deny him access to his son. The real issue is whether Ms. Frye is making any efforts at all to hinder Father's access to his son.

Residential time is a parental right and a duty as specified in **In re James**, 79 Wn. App. 436 (1995); it is not just a privilege given at the whim of Ms. Frye. This was discussed in the Opening Brief. Ms. Frye's statement that Father "elected" not to exercise visitation is simply wrong on the facts and law. Should father "elect" to not exercise visitation he subjects himself to contempt proceedings. Yet father does not elect not to exercise visitation in this matter in any event.

It is also wrong on the facts. The reference to VRP 233 in Ms. Frye's Brief is only the beginning. VRP 219-241 illuminates the complications experienced and tells the rest of the story, and the last

question and answer on this point is illuminating:

Q. Have you experienced cooperation with regard to exchange of information as it pertains to Grant's [medical] care?

A. No. That's one of the reasons why my situation with the Child and Adolescent Clinic is a little strained as it is.

**VRP 241, line 10-15.**

Mr. Howe testifies that on repeated occasions, no cooperation is forthcoming from Ms. Frye. There is no credible testimony disputing this, only the self-serving testimony of the alleged contemnor.

Mr. Howe has proved that Ms. Frye's use of doctor's notes is a subsection (1) violation. He is entitled to a finding of contempt.

**Point Nine – Ms. Frye is ‘capable’ of compliance with the parenting plan. (Resp. Brf. page 28)**

Ms. Frye's heading for this portion of her argument is falsely stated. The trial court finding states:

Petitioner Mia Frye has the present ability and willingness to comply with the order as follows:

Petitioner Mia Frye has cellular service as her only contact method (she does not maintain a land line). Under the terms of the Parenting Plan the Petitioner is obligated to make her son Grant available for telephonic contact with the Respondent father on Tuesdays between the hours of 7:30 p.m. and 8:30 p.m. The Petitioner mother has stated she is now willing to comply with the Parenting Plan by making her son available for telephonic contact on Tuesdays between the hours of 7:30 p.m. and 8:30 p.m.

**CP365.**

Implicit in the court finding that Ms. Frye is now capable of complying with the parenting plan is a finding that Ms. Frye had been incapable of complying with the Parenting Plan. Since the finding in question (2.13) is being challenged by Mr. Howe for a lack of evidentiary support for the “willingness” of Ms. Frye to comply, Ms. Frye’s brief is misleading as well as inaccurate.

Ms. Frye has tried to misdirect the court’s attention. The court is intelligent enough to refuse to be misdirected.

Interestingly, taking this section of Ms. Frye’s brief at face value necessarily implies that Ms. Frye was in contempt by not making certain that telephone contact was possible even though this was a duty imposed on both parents by the parenting plan.

Mr. Howe’s argument on this point in his Opening Brief has not been meaningfully rebutted, and certainly has not been overcome.

**Point Ten – Phone calls are not residential time. (Resp. Brf. page 29)**

Ms. Frye’s argument on this point was made to the trial court at presentation and she lost. The actual record states:

MS. MCLEAN: Okay. And are you making a finding that the violation, the noncompliance with the -- and are we qualifying this as a residential provision? It's telephone contact.

THE COURT: It's a visitation provision.

MS. MCLEAN: So change the residential to visitation?

THE COURT: Do you have any objection to that, to striking residential, Mr. Smith?

MR. SMITH: I'll only comment, briefly.

THE COURT: Go ahead.

MR. SMITH: Basically, the GAL recommended daily visitation; and Ms. McLean asserted on her client's behalf that that was so onerous that it shouldn't occur, and so it was dropped to one day and one hour of opportunity, and it is in lieu of the norm; and again, we've got an atypical here where Father resides at a remote location by Mother's choice, not his choice. She was a resident of King County; and thus, it is in lieu of that residential time and visitation with that son that integrals that relationship, so –

THE COURT: All right. I'll leave it. [Emphasis added]

**VRP, vol 5, page 700-701.**

Since the trial court ruled that the missed time was residential time, any grievance on this can only be as an issue for Ms. Frye's cross-appeal.<sup>2</sup> The sole issue here is whether Mr. Howe is entitled to make-up time for the missed residential time. According to Marriage of Myers, he is entitled to an award of make-up time equal to the time that he missed. The statute does not require him to request the make-up time – it is the obligation of the trial court to provide it as an integral part of the contempt

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<sup>2</sup> The ruling is not challenged in the Cross-Appeal.

proceedings once contempt is found.

Ms. Frye's argument implies that she believes that she "gets away" with anything that Mr. Howe's counsel does not directly address regardless of the mandatory nature of the awards in a statutory contempt action. Mr. Howe is unaware of any authority for such a view. Mr. Howe did seek make-up time and as such included a provision for make-up time in the various proposed orders presented to the court subsequent to the hearing on contempt.

This court should give no consideration to Ms. Frye's argument on this issue.

**Point Eleven – The court was within its discretion to make a single contempt finding instead of three findings (Resp. Brf. page 30)**

Ms. Frye's brief on page 30 states:

Assuming *arguendo* that Frye's behavior was contemptuous at all, there is nothing untenable or unreasonable in finding that the three missed calls constitute a pattern of behavior that is contemptuous, thus, one contempt – as opposed to three separate contempt findings, one for each missed call.

It is shocking to read this. Ms. Frye was found in contempt and the trial court found that there were three calls that were missed. There is nothing that is "assuming arguendo" here – Ms. Frye is in contempt. To phrase it in this manner as if it is a hypothetical is outrageous.

However, Mr. Howe is grateful that Ms. Frye has done so. After

reading that quoted passage in Ms. Frye's brief, there can be no dispute that Ms. Frye has admitted that the trial court erred when it failed to consider subsection (1) patterns of violations as contempt.

As far as the scope of the trial court's discretion is concerned, that is specifically defined by subsection (1) of the statute which Ms. Frye has already admitted. Whether the three violations of the specific residential parenting times should be counted as three separate contempt findings is indisputable -- they should be so counted.

If there was any reason to lump them together, then there would be no reason to provide one-for-one makeup time. If Mr. Howe is entitled to three separate phone calls to makeup for his three missed phone calls, where is there any logic in making a single contempt finding for those three? Would Ms. Frye make the same argument if it was 30 missed calls? How about 300?

The statutory language is unambiguous and therefore the answer is contained within the plain language. RCW 26.09.160 does not say that a parent who has been denied residential time pursuant to a court ordered parenting plan must bring a separate contempt action for each violation.

Obviously, an issue of excessive costs is created if a one-violation-per-motion procedural rule were to be operating. This would disregard CR

1 which inter alia requires construing the rules “to secure the just, speedy, and inexpensive determination of every action.” This necessarily includes making the most economical use of pleadings. To take Ms. Frye’s position is to require a separate pleading for each act of contempt in order that each contemptuous action receives its just consequences.

While such a view might gladden the hearts (and wallets) of many attorneys, it most certainly would not be in the spirit of CR 1.

Ms. Frye’s brief states, on page 32:

But while the trial court listed nine alleged dates, it rejected the majority of Howe’s claims:

The Court is not persuaded that this happened every time, and some of the allegations are very stale.

CP 364, F/F 2.8.

To say that the finding that Ms. Frye quotes is a rejection of Mr. Howe’s claims is the height of wishful thinking. First of all, “very stale” has no meaning or value within the contempt statutory language. There is no specific statute of limitations on parenting plan contempt actions, with the possible exception of the emancipation of the children.

At best, this is a vague reference to an equitable defense of laches. Since the trial court would not properly be raising affirmative defenses for one of the parties, reliance on the trial court comment as having some

partisan value supporting Ms. Frye's argument would be grossly improper.

Secondly, the language "not persuaded that this happened every time" cannot be stretched to mean "didn't happen." While the trial court may have specifically found three phone calls were missed out of nine alleged missed phone calls, the "not persuaded language" actually supports Mr. Howe's position – that there is substantial evidence to support finding additional phone calls were missed. After all, if no substantial evidence had been presented to support the other calls being missed, the court would have specifically said so rather than equivocating.

### **C. CONCLUSION ON APPEAL**

Ms. Frye's Brief does not respond to Mr. Howe's arguments regarding the trial court award of reasonable attorney fees. While some discussion of attorney fees is included in the Cross-Appeal, it is not properly before this Court on review because Mr. Howe cannot claim to be RAP 3.1 aggrieved when no authority for the trial court award of attorney fees even exists in either statute or case law precedent. As a last point, there is no record of a CR 11 motion nor any record of a claim of intransigence by either party prior to the conclusion of trial. Intransigence is simply not within the scope of the pleadings or the evidence.

This Court has a duty to grant the relief requested by Mr. Howe in

his Opening Brief because the trial court abused its discretion when it financially rewarded Ms. Frye for committing repeated contempt of court by ignoring RCW 26.09.160 sanctions language. A pattern of behavior of Ms. Frye was established at trial and the court chose to dissect each of the acts instead of looking at the whole picture.

**D. CROSS-MS. FRYE'S INTRODUCTION**

The Cross-Appeal is devoid of merit. Ms Frye posits 6 Assignments of Error relating to a single Issue Presented for Review plus 3 unnecessary pages of a third Statement of the Case.

Ms. Frye's argument following below is in the nature of a Motion on the Merits to Affirm. To the extent that all of the relief sought by Ms. Frye is dependent on whether the contempt finding itself will stand, Mr. Howe will not argue against the remaining arguments or assignments of error that Ms. Frye has put forth.

Ms. Frye's arguments on pages 41-45 do not relate to any issues by an aggrieved party under the cross-appeal and therefore must be ignored by this Court. Since Ms. Frye lacks standing under RAP 3.1, her arguments regarding attorney fees are brought forth in bad faith.

Mr. Howe requests an award of reasonable attorney fees pursuant to RAP 18.9 because the Cross-Appeal is frivolous.

**E. ARGUMENT ON CROSS-APPEAL**

Ms Frye repeats her erroneous use of In re Humphreys as if it is controlling authority for the instant action. Mr. Howe has already clearly demonstrated in his Reply Brief why the facts of Humphreys render it totally unsuitable for use herein, and he sees no need to repeat those arguments here.

Ms. Frye argues that the single contempt finding is untenable simply because one witness could not testify with specificity regarding the date or dates on which interference with telephone visitation happened. Not only does this argument use the wrong standard of review, but it implies that the only factual basis for bringing the contempt was a problem with court-ordered telephone calls.

The proper standard of review is whether substantial evidence supports the trial court's finding:

The law is well established that factual issues will not be retried on appeal. The court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record.

**Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).**

This is not a criminal action, where a specific set of factual allegations must be pled and proved in order to conform with the specific language of a criminal statute. The issue is whether an interference with

residential time telephone calls happened, in bad faith, not whether a witness can remember exact dates or not.

Ms. Frye is presenting evidence in the appellate court - seeking a different finding. This is not permitted pursuant to **Thomas** and Mr. Howe noted this point in his Opening Brief on page 29.

The weight to be given to evidence is within the sound discretion of the trial court and is not subject to challenge. An example of untenable exercise of discretion in the instant case is when the trial court found that Ms. Frye was “untruthful” and yet it repeatedly relied on her tainted testimony as if the “untruthful” finding did not exist.

No reasonable person would do this and therefore the exercise of discretion in those instances was not “sound” or tenable. Another way of phrasing this would be that the trial court exercised unsound discretion.

According to the record on review, neither party challenged Mr. Cook’s testimony or moved to strike it. The trial court specifically found Cook’s testimony credible despite his lack of photographic memory to a degree of specificity found only in TV crime dramas. The trial court had authority to determine that Mr. Cook’s testimony was credible and also to determine that his testimony corroborated Mr. Howe’s testimony.

Unless this court is prepared to disregard Supreme Court precedent

of Thorndike v Hesperian Orchards, Ms. Frye's argument about reassessing witness credibility on appeal must fail.

While Mr. Howe declines to address those arguments put forth by a non-aggrieved party, he requests that this Court take note that Ms. Frye's request for appellate attorney fees based on alleged intransigence of Mr. Howe is within an appeal that was taken by Ms. Frye, Cross-Appeal Brf. page 47-48.

Notwithstanding the complete lack of merit of the cross-appeal, it is nonsensical and impossible to blame the cross-appeal (and any costs incurred due to it) on Mr. Howe. The argument, like all the others in the cross-appeal, is frivolous.

A frivolous appeal is defined as follows:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil Appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the Appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. [Cite omitted].

In applying these criteria, we find that the appeal is frivolous and was brought for the purpose of delay. We have carefully reviewed the record as a whole and have resolved all doubts in Appellants' favor. However, the assignments of error challenge findings of fact

that are amply supported by substantial evidence as well as the conclusions of law which are clearly supported by the findings. It is well established that we are constitutionally prohibited from substituting our judgment for that of the trial court in factual matters. [Emphasis added]

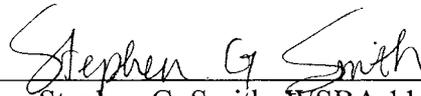
**Streater v. White, 26 Wn. App. 430, 434-435, 613 P.2d 187 (1980).**

This Court is clearly competent to make this determination and the record is sufficiently developed for that purpose.

**F. CONCLUSION ON CROSS-APPEAL**

The cross-appeal is frivolous. It was taken in a desperate bad faith effort to obfuscate the true errors committed by the trial court. This Court should affirm the contempt finding and impose sanctions for the frivolous filing of the cross-appeal.

Respectfully submitted this 14th day of November 2006.



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BY YN  
JURY

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

In re the Parentage of:

GRANT ALEXANDER HOWE,

Child,

MIA K. FRYE,  
Respondent/Cross-  
Appellant,

and

GREGORY M. HOWE,  
Appellant/Cross-  
Respondent.

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 November 14, 2006, I forwarded a true and correct copy of MR. HOWE'S REPLY BRIEF CROSS-MS. FRYE'S RESPONSE BRIEF and a copy of MOTION FOR EXTENSION OF TIME FOR FILING MR. HOWE'S REPLY BRIEF CROSS-MS. FRYE'S RESPONSE BRIEF by first class mail to:

Kenneth W. Masters  
Wiggins & Masters  
241 Madison Avenue North  
Bainbridge Island, WA 98110

Noelle A. McLean  
P O Box 757  
Kelso, WA 98626

DATED this 14 day of November 2006.

A handwritten signature in cursive script, appearing to read "Susan Thompson", is written over a horizontal line.

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