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

DEBORAH K. FALK-ROVANG,

Respondent

v.

W. DAVID ROVANG,

Appellant.

**APPELLANT'S REPLY
AND
RESPONSE TO CROSS-APPEAL**

Appeal from the Superior Court of Mason County,
Cause No. 05-2-01012-0
Hon. Richard C. Adamson, Court Commissioner

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ORIGINAL

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A. INTRODUCTION

Appellant W. David Rovang submits this brief in reply and response to the Brief of Deborah K. Falk-Rovang, respondent and cross-appellant.

B. REPLY

- 1. The evidence before the trial court did not support a finding that domestic violence had been committed by Mr. Rovang.**

RCW 26.50.030 authorizes an action “known as a petition for an order for protection in cases of domestic violence.” The petition for relief

shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

RCW 26.50.030(1).

RCW 26.50.010(1) defines “domestic violence” as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

In this case, Ms. Falk-Rovang filed a Petition for Order for Protection that originally included the following statements:

My daughter reported something to CPS – Kelly Boyle. . . She said my daughters needed to be in my custody as their

protective parent while investigation goes on. I am worried & concerned about my daughters' safety.

CP 214.

After the court commissioner spoke with Ms. Boyle and Ms. Boyle spoke with Ms. Falk-Rovang, Ms. Falk-Rovang added the following sentence to the Petition:

Kelly said that Sunia disclosed sexual abuse to her, by her father.

Id.

Ms. Falk-Rovang did not state in the Petition that the minor children had been physically harmed or put in fear of physical harm (RCW 26.50.010(a)) or that Mr. Rovang had stalked the children (RCW 26.50.010(c)): Ms. Falk-Rovang's allegation of domestic violence must therefore rest on RCW 26.50.010(1)(b), "sexual assault." There is no definition of "sexual assault" found in Chapter 26.50 RCW.

Ms. Falk-Rovang's reliance on RCW 9A.44.010 for definitions of "sexual contact" and "consent" at page 12 of her Brief are inappropriate: those definitions apply to those terms "as used in this chapter." RCW 9A.44.010. They are irrelevant in this case.

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a. *Ms. Falk-Rovang misconstrues Mr. Rovang's argument regarding unlawful touching.*

At page 12 of her Brief, Ms. Falk-Rovang misconstrues Mr. Rovang's argument regarding unlawful touching, which is one definition of "assault." *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999), *review denied*, 140 Wn.2d 1020, 5 P.3d 10 (2000). Mr. Rovang did not argue in his opening brief that the alleged touching of Sunia was unlawful "because of lack of consent," as stated by Ms. Falk-Rovang.

Rather, Mr. Rovang quoted *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978): "[a] touching may be unlawful because it was neither legally consented to **nor otherwise privileged**, and was either harmful or offensive." Brief of Appellant, pages 16-17 (emphasis added).

Mr. Rovang then stated the obvious: a father is privileged to touch his child's body, and touching one's daughter's vaginal area does not necessarily constitute "sexual assault," the only definition of domestic violence that applies in this case. *See* Brief of Appellant, pages 20-23.

Ms. Falk-Rovang also mischaracterizes Mr. Rovang's argument as one "that the finding of domestic violence was not support[ed] by the evidence because there were only allegations of sexual touching, not sexual assault." Brief of Respondent/Cross-Appellant, page 16. Mr.

Rovang argued no such thing. What Mr. Rovang argued is that a father's touching of his daughter's vaginal area does not necessarily constitute sexual assault. There was absolutely no evidence presented by Ms. Falk-Rovang that the alleged touch of Sunia's "pee pee" constituted sexual assault.

(b) *A father may appropriately and lawfully touch his daughter's body.*

The court's error in entering an Order of Protection based on Sunia's disclosure to Dr. Trause is the same error made by Ms. Falk-Rovang at page 16 of her Brief where she states, "Suni had disclosed to Dr. Trause **inappropriate** touching by David Rovang." *Id.* (emphasis added). What Sunia had "disclosed" was that her father had touched her "pee pee with his finger," which a father is privileged to do. Sunia also told Dr. Trause that at the time of this touch, she was wearing "nothing." CP 48. Sunia "disclosed" a touch – not an "inappropriate" touch.

Even assuming, *arguendo*, that Suni's disclosure was "credible," such disclosure does not support the conclusion that any such touching was "inappropriate." A father may appropriately and lawfully touch his daughter's body – even her "pee pee." There is absolutely no evidence in the record that any such touching, if any such touching took place, was "inappropriate" or constituted sexual assault.

(c) *Sunia's "disclosure" did not establish that Mr. Rovang committed domestic violence by a preponderance of the evidence.*

At page 17 of her Brief, Ms. Falk-Rovang states that "David Rovang has never specifically denied touching Suni's vaginal area in an inappropriate way," and citing CP 76-81, states that he "has never denied any of the specific allegations set forth in Maryann Trause's report."

The document found at CP 76-81 is Mr. Rovang's Declaration, signed by him on October 25, 2005. CP 79. As stated in the Declaration, at the time of its writing, Mr. Rovang had no idea whatsoever as to the nature of the allegations of sexual abuse made against him. *See* CP 76-77 ("I still do not know what the nature of allegations are that justified taking my daughter Season out of my home. . . ."). Dr. Trause's report was not even written until October 30, 2005. It is not surprising that Mr. Rovang did not deny "any of the specific allegations set forth in Maryann Trause's report."

However, Mr. Rovang did state unequivocally, "I have not sexually abused my children or any child, ever." This sworn statement is neither "clever" nor "subjective," contrary to Ms. Falk-Rovang's statement at page 17 of her Brief. This Declaration was before the commissioner and was considered in reaching his decision to enter an Order of Protection. RP 2. This Declaration alone rebuts any

unsubstantiated allegation that Mr. Rovang perpetrated domestic violence against his daughter.

In addition to Mr. Rovang's Declaration, the commissioner also considered the declarations of Suzanne Dircks, Julia Richards, Kathy McGuire, Andrew Becker, and Donna R. Fisher, Pamela C. Gohrich, John Murfitt, and Linley Corniuk, as well as the psychological evaluations of David Rovang and Deborah Falk-Rovang and the parenting plan entered in the parties' dissolution proceeding. RP 2-3. The commissioner heard live testimony of Ms. Falk-Rovang, Ms. Kelly, and Dr. Fry, Ms. Falk-Rovang's therapist.

The commissioner did not enter any separate written findings, but on the second page of the form Order for Protection it is stated, "The court further finds that the respondent committed domestic violence as defined in RCW 26.50.010" CP 22. The oral ruling indicates that the commissioner "focus[ed] on Dr. Trause's report, and particularly the paragraph that I just read on page two." RP 129. The paragraph on page two of Dr. Trause's report includes Sunia's "disclosure" that "Daddy touched my pee pee with his finger. . . ." RP 129; CP 48.

This Court will review a trial court's decision to grant a protection order for abuse of discretion. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). An abuse of discretion occurs "when the trial court's

decision is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). The Court’s review of a decision to enter an Order of Protection involves two steps: a determination of whether the trial court’s findings are supported by substantial evidence in the record, and if so, (2) a determination of whether those findings support the conclusions of law. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707-708, 64 P.3d 1 (2003) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)). “Substantial evidence” is that sufficient to persuade a fair-minded person of the truth of the asserted premise. *Pilcher v. Dep’t. of Revenue*, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), *review denied*, 149 Wn.2d 1004, 67 P.3d 1086 (2003).

A protection order is a civil remedy. *City of Tacoma v. State*, 117 Wn.2d 348, 351-352, 816 P.2d 7 (1991). Civil cases require proof of the statutory elements by a preponderance of the evidence. *Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995).

There was not “substantial” evidence in the record to support a finding that Mr. Rovang committed domestic violence, nor did Ms. Falk-Rovang establish by a “preponderance” of evidence that Mr. Rovang committed domestic violence. In fact, the overwhelming weight of the

evidence is to the contrary. The “disclosure” by Sunia that Mr. Rovang had “touched [her] pee pee with his finger” does not constitute evidence that Mr. Rovang had committed domestic violence, i.e., had sexually assaulted his daughter.

The commissioner abused his discretion in entering the Order of Protection because a father may appropriately and lawfully touch his daughter’s “pee pee,” and there was no evidence whatsoever before the commissioner that Mr. Rovang sexually assaulted Sunia, i.e., had committed domestic violence. The overwhelming weight of the evidence before the commissioner was that Mr. Rovang did not sexually assault his daughter, even if, assuming *arguendo*, that he did touch her “pee pee.”

This Court should vacate the Order of Protection and dismiss the Petition for lack of sufficient evidence that domestic violence was committed by David Rovang.

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2. The trial court abused its discretion in refusing to consider Mr. Rovang’s polygraph results.

The commissioner heard live testimony of three persons, none of whom presented any evidence that Mr. Rovang had sexually assaulted his

daughter. The commissioner also had sworn declarations to consider, none of which support the allegation that Mr. Rovang had sexually assaulted his daughter. The commissioner stated that he “focus[ed] on Dr. Trause’s report, and particularly” on the second paragraph of page two of Dr. Trause’s report. Dr. Trause’s report was hearsay containing hearsay statements of six-year old Sunia.

Ms. Falk-Rovang testified that “middle or end of September” of 2005, after reading a book titled “The Right Touch” to Sunia, the child told her that “her dad had touched her with his fingers.” RP 90. Sunia also told Dr. Trause that it makes her mommy happy when she “tells her things my dad does to me.” CP 48. There was no disclosure by Sunia of when this alleged touching took place. In September of 2005, Sunia was six years old.

In a criminal proceeding, statements made by a child under the age of 10 describing any act of sexual contact performed with or on the child by another is admissible only if the court finds “that the time, content, and circumstances of the statement provide sufficient indicia of reliability” and the child either testifies at the proceedings or, if the child is unavailable as a witness, there is corroborative evidence of the act. RCW 9A.44.120. These safeguards have been created because the statements made by a child under the age of 10 are not necessarily reliable and surrounding

circumstances must be carefully considered before “child hearsay” is admissible. *See, e.g., State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

In the proceeding below, which was a civil proceeding, none of these safeguards were considered or applied. “Child hearsay” statements of a child who did not testify was the evidence upon which the commissioner focused in deciding to enter the Order of Protection. There was no corroborative evidence that the reported touching did, in fact, take place.

Sunia was reported by Dr. Trause to “know[] the difference between what is true and not true,” and stated her opinion that “Suni’s disclosures seem credible.” CP 50. The commissioner allowed Ms. Boyle to testify about hearsay statements of Ms. Rovang. RP 56. Under the rules of evidence, no witness is permitted to vouch for the credibility of another witness. Karl B. Tegland, 5D WASHINGTON PRACTICE, *Courtroom Handbook on Washington Evidence* (2006), page 302 (“The Washington courts have made it clear that the credibility of a witness is for the trier of fact alone to decide, and opinions on credibility – direct or indirect – are inadmissible.”). Hearsay is not admissible. ER 802. Yet both Dr.

Trause's opinion on Sunia's credibility and hearsay was admitted and considered by the commissioner because of the nature of the proceedings.

The polygraph results affirming Mr. Rovang's denial of sexual abuse were without doubt relevant to the issue before the commissioner, and Washington courts have recognized that polygraph results "have probative value." *State v. Cherry*, 61 Wn. App. 301, 305, 810 P.2d 940, review denied, 117 Wn.2d 1018, 1099 (1991). Nevertheless, the commissioner stated:

Although neither counsel has argued it, we all know that the *Fry* [sic.] standard is applicable in this State in terms of admission of evidence. And I am not aware of any case which has shown that polygraph results meet the *Fry* [sic.] standard.

And given the nature of this case, given the extremely restrictive basis for use of polygraphs in this State, I'm going to deny the request of the Respondent to consider the polygraph.

RP 112.

In Washington, "expert testimony concerning novel scientific evidence must both satisfy *Frye* [*v. United States*, 293 F.1013, 1014 (D.C.Cir.1923)] and ER 702." *Ruff v. Department of Labor and Industries of State of Wash.*, 107 Wn.App. 289, 299-300, 28 P.3d 1 (2001).

However, the rules of evidence "need not be applied" in protection order proceedings under RCW 26.50. ER 1101(c)(4). The

commissioner's decision to exclude Mr. Rovang's polygraph results, based on *Frye* and his perception of an "extremely restrictive basis for use of polygraphs in this State," was an abuse of discretion.

First, evidence considered in the protection order proceedings did not need to "meet the *Fry[e]* standard." See ER 1101(c)(4) (rules of evidence need not be applied to protector order proceedings under RCW 26.50). A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996) (citing Washington State Bar Association, WASHINGTON APPELLATE PRACTICE DESKBOOK (2nd ed. 1993), § 18.5))).

Second, there is not an "extremely restrictive basis for use of polygraphs in this State." In fact, polygraph evidence has been admissible in this State for over 30 years – even in full-blown criminal trials – if the parties stipulate to admission of the results at trial. *State v. Ross*, 7 Wn. App. 62, 69, 497 P.2d 1343, *review denied*, 81 Wn.2d 1003 (1972).

Third, it was fundamentally unfair for the commissioner to consider and "focus" on the hearsay statement of a 6-year old child who did not testify and where there was no corroborative evidence of the

alleged “sexual assault,” to consider Dr. Trause’s opinion that Sunia was “credible,” and to consider other hearsay evidence, but refuse to consider the polygraph results that supported Mr. Rovang’s denial of sexual assault.

Since the commissioner considered what would otherwise be inadmissible evidence of Sunia’s statement and Dr. Trause’s opinion that Sunia’s statement was “credible,” it was fundamentally unfair to refuse to consider what would otherwise be inadmissible evidence supporting Mr. Rovang’s denial of sexual assault.

Contrary to Ms. Falk-Rovang’s argument at pages 20-24 of her Brief, the commissioner did not base his decision to exclude the polygraph results on lack of “reliability” of such evidence. As the commissioner stated, he based his decision on his belief that no Washington court had found that polygraph evidence meets the “*Frye* standard” and that in Washington, the basis for admission of polygraph evidence is “extremely restrictive.”

In light of the nature of the proceedings and the fact that the commissioner had considered otherwise inadmissible evidence presented by Ms. Falk-Rovang, the commissioner abused his discretion in refusing to consider the polygraph evidence proffered by Mr. Rovang.

3. The trial court abused its discretion in denying the motion to reconsider entry of the Order of Protection.

On November 30, 2005, Mr. Rovang filed the Division of Children & Family Services disposition letter regarding the “disclosure” made by Sunia. CP 4-5. CPS rendered a decision that “[t]he allegation of sexual abuse is inconclusive.” CP 5. “Inconclusive means that, based on the information available to CPS, it cannot be determined whether child abuse or neglect occurred.” *Id.* This disposition of the allegation that Mr. Rovang had sexually assaulted Sunia followed completion of the CPS investigation into the allegation. *Id.*

Nevertheless, on December 14, 2005, the commissioner denied Mr. Rovang’s Motion to Reconsider entry of the Order of Protection. In fact, the commissioner “ma[de his] decision again, based upon the evidence which was presented at the hearing, not what might be concluded by any CPS or law enforcement investigation.” RP 148. That evidence, again, consisted of Sunia’s “disclosure” and Dr. Trause’s opinion that Sunia was a “credible reporter.” *Id.*

Commissioner Adamson’s denial of the motion to reconsider was an abuse of discretion because it was “outside the range of acceptable choices, given the facts and the applicable legal standard” and because “the facts do not meet the requirements of the correct standard.” *Littlefield*, 133 Wn.2d at 47, 940 P.2d 1362.

The petitioner for an Order of Protection, which is a civil remedy (*City of Tacoma v. State*, 117 Wn.2d at 351-352, 816 P.2d 7), must establish that domestic violence was perpetrated by the respondent by a preponderance of the evidence. *Reese*, 128 Wn.2d at 312, 907 P.2d 282. The commissioner abused his discretion in initially entering the Order of Protection because there was insufficient evidence to support a finding that Mr. Rovang had committed domestic violence, i.e., had sexually assaulted his daughter.

Subsequent to entry of the Order, the commissioner received the disposition letter of CPS, which even further weighted the evidence against entry of the Order. Given the facts and the applicable legal standard, denial of the motion to reconsider was “outside the range of acceptable choices.” This Court should rule that the trial court abused its discretion in denying the motion to reconsider.

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C. *RESPONSE TO CROSS-APPEAL*

- 1. The trial court did not commit error in denying an award of attorney’s fees to Ms. Falk-Rovang.**

RCW 26.50.060(1)(g) provides that a court “may” require a respondent to pay costs and fees to a petitioner who obtains an Order of Protection. “It is well established that the use of ‘may’ in a statute indicates that the provision is permissive and not binding, while the use of ‘shall’ indicates a mandatory obligation.” *Parkland Light Water Co. v. Tacoma-Pierce*, 151 Wn.2d 428, 437, 90 P.3d 37 (2004).

The commissioner was not required to award attorney’s fees to Ms. Rovang even though he entered an Order of Protection. *See In re Gourley*, 124 Wn. App. 52, 59, 98 P.3d 816 (2004), *review denied*, 154 Wn.2d 1012, 113 P.3d 1039 (2005) (“parties who have obtained protection orders **may** be awarded fees under RCW 26.50.060(1)(g).”) (Emphasis added.)

Ms. Falk-Rovang quotes dictum from *Hecker v. Cortinas*, 110 Wn. App. 865, 870-871, 43 P.3d 50 (2002) that RCW 26.50.060(1)(g) “requires” the respondent to pay costs and fees incurred by the petitioner in bringing a protection order action.

However, courts look to the statute’s plain language when construing a statute (*Lacey Nursing Ctr., Inc. v. Dep’t. of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995): the *Hecker* Court was not required to construe RCW 26.50.060(1)(g) in rendering its decision in that case. It’s statement regarding the statute is merely dictum, and the dictum is not binding. *See, e.g., Hildahl v. Bringolf*, 101 Wn. App. 634, 650-651, 5

P.3d 38 (2000), *review denied*, 142 Wn.2d 1020, 16 P.3d 1263 (2001) (dicta not binding). Further, under the plain language of RCW 25.50.060(1)(g), the dictum is an incorrect statement of the law.

Ms. Falk-Rovang's quotation from *Hecker* was specifically addressed by the trial court in its Memorandum Opinion, filed on January 31, 2006, stating,

The discussion of this statute in *Heckner* [sic.] v. *Cortinas*, 110 Wn. App. 865, 871, (2002), which reads "(the statute) requires the respondent to pay administrative court costs and services [sic.] fees . . . including reasonable attorney (sic) fees" is in error. The clear language of the statute makes such an award discretionary rather than mandatory.

CP 227.¹

Ms. Falk-Rovang's argument at page 29 of her Brief that "Commissioner Adamson abused his discretion by essentially offsetting Mr. Rovang's fees against those of Ms. Rovang's" is factually baseless, as is made clear by the Court's Memorandum Opinion:

The court's decision herein is guided by the outcome of the litigation. The Petitioner originally asked for a domestic violence protection order as to both of the parties' daughters. The court denied her request as to one daughter and granted it as to the other. **Accordingly, the court will require that each party bear their respective fees and costs.**

CP 228² (emphasis added).

¹ A Supplemental Designation of Clerk's Papers designating the Court's Memorandum Opinion was previously filed. The next page to be assigned by the Clerk is 227.

² *Ibid.*

There was no “offsetting.” Ms. Falk-Rovang’s argument that the commissioner improperly “offset” Mr. Rovang’s fees against Ms. Falk-Rovang’s fees appears to be loosely based on *Hecker*. In *Hecker*, Ms. Cortinas argued that a respondent in a domestic violence protection order action should be entitled to fees and costs for defending such an action as the converse of RCW 26.50.060(1)(g). *Hecker*, 110 Wn. App. at 870-871, 43 P.3d 50. This court wrote, “Cortinas cites no authority for ignoring the plain language of the statute and extending its reimbursement provision to a respondent such as herself.” *Hecker*, 110 Wn. App. at 871, 3 P.3d 50.

The commissioner neither awarded fees to Mr. Rovang nor “offset” his fees against Ms. Falk-Rovang’s fees. The argument is baseless and is, in fact, contrary to what the commissioner plainly and clearly stated in his Memorandum Opinion.

2. Ms. Falk-Rovang’s cross-appeal is frivolous.

“[A]n 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.” *In re Marriage of Penry*, 119 Wn. App. 799, 804 n.2, 82 P.3d 1231 (2004).

The sole issue raised in Ms. Falk-Rovang’s cross-appeal is the commissioner’s denial of her request for attorney’s fees. Ms. Falk-

Rovang argued that Commissioner Adamson abused his discretion in denying attorney's fees pursuant to RCW 26.50.060(1)(g), which states that a court "may" award costs and fees to a petitioner seeking a domestic violence protection order.

It is "well established that the use of 'may' in a statute indicates that the provision is permissive and not binding[.]" *Parkland Light Water Co.*, 151 Wn.2d at 437, 90 P.3d 37.

Ms. Falk-Rovang also argued that the commissioner improperly "effectively" offset Mr. Rovang's fees against Ms. Falk-Rovang's fees in spite of the fact that the commissioner stated in a Memorandum Opinion that each party would their own costs. The argument was factually baseless, and Ms. Falk-Rovang suggested no other reason that the denial of her request for attorney's fees was an abuse of discretion.

This Court should rule that Ms. Falk-Rovang's cross-appeal is frivolous.

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3. Mr. Rovang requests compensatory damages for having to respond to the frivolous cross-appeal.

RAP 18.9(a) provides that this Court may order a party who files a frivolous appeal to pay terms or compensatory damages to a party who has been harmed.

Mr. Rovang requests that the Court award him damages for the time and attorney fees he was required to spend responding to Ms. Falk-Rovang's frivolous appeal pursuant to RAP 18.9(a).

D. CONCLUSION

The trial court abused its discretion in entering an Order for Protection because Ms. Falk-Rovang did not establish that Mr. Rovang committed domestic violence by a preponderance of the evidence. Even if Sunia was "credible," her statement that her father "touched [her] pee pee with his finger" did not constitute evidence of sexual assault because a father is privileged to touch the body of his child. There was no evidence whatsoever before the commissioner that, assuming arguendo, Mr. Rovang did touch his daughter's vaginal area, such a touch constituted domestic violence, i.e., sexual assault.

The trial court abused its discretion in excluding Mr. Rovang's polygraph results on the basis of *Frye* and its perceived "restrictive basis for use of polygraphs in this State" because Ms. Falk-Rovang's otherwise inadmissible evidence was considered and there was no reason not to consider the polygraph results in the context of the protection order proceeding. Further, the polygraph results were relevant and probative on the issue before the commissioner, i.e., whether Mr. Rovang committed domestic violence against his daughter.

The trial court abused its discretion in denying Mr. Rovang's motion for reconsideration because the commissioner simply adhered to his original decision based on the same evidence he "focused" on at the hearing on the Petition for Order of Protection, which was insufficient to support a finding of domestic violence. Further, the commissioner refused to take into consideration the "inconclusive" finding by CPS, which weighted the evidence before the court even more heavily in favor of denying entry of an order for protection.

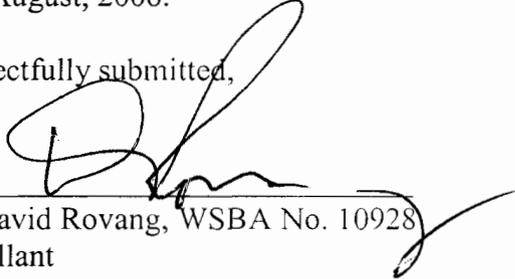
The trial court did not abuse its discretion in denying Ms. Falk-Rovang's request for attorney's fees, since such an award is discretionary under RCW 26.50.060(1)(g) and not mandatory, and Ms. Falk-Rovang's argument that the commissioner improperly "offset" Mr. Rovang's fees against Ms. Falk-Rovang's fees was contrary to the language of the

commissioner's Memorandum Opinion. Ms. Falk-Rovang did not present any other reason why the commissioner's decision was an abuse of discretion. Ms. Falk-Rovang's cross-appeal is frivolous.

This Court should vacate the Order of Protection and dismiss the Petition for Order of Protection. The Court should dismiss Ms. Falk-Rovang's frivolous cross-appeal and award damages to Mr. Rovang for having to spend his professional time responding thereto.

DATED this 21 day of August, 2006.

Respectfully submitted,



W. David Rovang, WSBA No. 10928
Appellant

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DEBORAH K. FALK-ROVANG,)
)
Petitioner,)
)
v.)
)
W. DAVID ROVANG,)
)
Defendant.)

Appeal No. 32428-1-II
Superior Court No. 05-2-01012-0

AFFIDAVIT OF MAILING

The undersigned, being first duly sworn, under oath, states: That on the 22nd day of August, 2006,
affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Appellant's Reply and Response to Cross-Appeal, and to

Ms. Shelly Brandt
Attorney at Law
Cordes Brandt, PLLC
2625 B. Parkmont Lane SW
Olympia, WA 98502

a true copy of the Appellant's Reply and Response to Cross-Appeal.

Ann Blankenship
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 22nd day of August, 2006.

Meredith Nora Orpila
MEREDITH NORA ORPILA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard
My commission expires 9-11-06

AFFIDAVIT OF MAILING - 1

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