

No. 47037-3-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re the Parenting and Support of:

K.J.W., Child,

GLENDRA RAE TOMES, Respondent,

and

DONALD RANDY WALLACE, Appellant.

APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY
Cause No. 12-3-00305-1

OPENING BRIEF OF APPELLANT

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Table of Contents

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
IV. STATEMENT OF THE CASE.....	4
A. Procedural History.....	4
B. Facts.....	5
V. ARGUMENT.....	7
VI. CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<u>Biggs v. Vail</u> , 124 Wn.2d 193, 201, 876 P.2d 448 (1994)	15
<u>Eller v. E. Sprague Motors & R.V.'s Inc.</u> , 159 Wn.App. 180, 191, 244 P.3d 447 (2010)	15
<u>Manteufel v. Safeco Ins. Co. of Am.</u> , 117 Wn.App. 168, 177, 68 P.3d 1093 (2003)	15, 16
<u>Miller v. Badgley</u> , 51 Wn.App. 285, 753 P.2d 530 (1988)	15
<u>Mitchell v. Wash. St. Inst. of Publ. Policy</u> , 153 Wn.App. 803, 825, 225 P.3d 280 (2009)	8
<u>Olpinski v. Clement</u> , 73 Wn.2d 944, 442 P.2d 260 (1968)	7
<u>Roberson v. Perez</u> , 123 Wn.App. 320, 336, 96 P.3d 420 (2004)	8
<u>Suburban Janitorial Servs. v. Clarke Am.</u> , 72 Wn.App. 302, 307, 863 P.2d 1377 (1993)	8

Statutes

RCW 26.19.035	10
RCW 26.26	8
RCW 26.26.021	8
RCW 26.26.031	8
RCW 26.26.375	4, 8

Rules

CR 11	15, 16
CR 60	5, 7, 8, 10, 11, 13, 15, 16

I. INTRODUCTION

Following trial to determine child custody and support, petitioner herein, Mr. Donald Wallace filed a CR 60(b) motion for new trial. The motion was denied and he (as well as his attorney) was assessed \$1500.00 in attorney's fees.

It is respectfully requested that this Court recognize the numerous reversible issues associated with the trial court's orders, grant Mr. Wallace a new trial and reverse the sanctions imposed on him and his attorney.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Wallace's CR 60(b) motion.
2. The trial court erred when it relied on incorrect or improperly submitted evidence.
3. The trial court erred when it imposed sanctions against Mr. Wallace and his attorney.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Wallace's CR 60(b) Motion? (Assignments of Error #1)

2. Whether the trial court erred when it relied on incorrect or improperly submitted evidence? (Assignments of Error #1)

3. Whether the trial court erred when it imposed sanctions against Mr. Wallace and his attorney? (Assignments of Error #3)

IV. STATEMENT OF THE CASE

A. Procedural History

On August 22, 2012, a Petition for Residential Schedule/Parenting Plan/Child Support was filed in Washington County regarding KJW¹. CP 1. Glenda Rae Tomes, KJW's mother, was the petitioner, and Donald Randy Wallace, KJW's father and petitioner herein, was the respondent. Id. The action was brought by Ms. Tomes "pursuant to RCW 26.26.375."² Id. On the first page of the petition was the following statement: "Both parents signed the Acknowledgment of Paternity, which was filed with the Washington State Registrar of Vital Statistics on July 23, 2001." Id.

On January 31, 2014, a motion to adopt the recommendations of the Guardian ad Litem Report and a Guardian ad Litem Report on Behalf of a Minor Child was filed by Mr. Wallace. CP 5, 20. The Guardian ad Litem, Betty J. Kitchen, PhD, had recommended that Mr. Wallace be named the primary custodial parent. CP 13-14. Dr. Kitchen's report referenced that KJW had been convicted of a felony sex offense and that residing with his father was in his best interests. Id.

In response, Ms. Tomes filed a Declaration signed by Sue Batson. CP 44-47. Ms. Batson served as KJW's therapist while he received sex offender treatment following his conviction and SSODA sentence. Id. Ms. Batson stated in

¹ For privacy purposes, the minor child will be referred to as, "KJW."

² RCW 26.26 is the Uniform Parentage Act.

her declaration, “It is not up to me to determine where KJW resides, only to assess the risk associated with his residency” before recommending that Ms. Tomes be named the primary custodial parent. CP 47.

Trial commenced on May 14, 2014. RP 3. Ms. Tomes sought primary custody, while Mr. Wallace sought a split schedule or joint custody with joint decision-making. RP 439, 481. KJW’s opinion was that he preferred to live with Mr. Wallace. CP 154. Upon conclusion of trial, the court entered Findings of Fact and Conclusions of Law granting Ms. Tomes primary custody and child support on June 6, 2014. CP 152-190. Finding of Fact 2.10(7) erroneously stated “Both parties desire KJW to reside with them.” CP 154. Additionally, as it related to the opinions of Ms. Batson versus Dr. Kitchen, the trial court declared: “the report of the Guardian ad Litem deserves no consideration.” CP 55.

On September 19, 2014 Mr. Wallace filed a motion under CR 60(b) seeking to vacate, dismiss and void the orders that had been entered on June 6, 2014. CP 191-205. Specifically, Mr. Wallace sought to reverse the trial court’s Order Establishing Residential Schedule/Parenting Plan and Child Support that had been entered following a trial on numerous grounds. *Id.* The trial court denied the motion on December 5, 2014 and sanctioned Mr. Wallace and his attorney in the amount of \$1500. CP 212-213. Mr. Wallace timely filed his Notice of Appeal on December 24, 2014. CP 214-215.

B. Facts

Donald Wallace is KJW’s biological father. RP (5/16/2014) 429. KJW was the product of an affair between Mr. Wallace and Ms. Tomes while they were

both married to other partners. RP 430. Mr. Wallace and Ms. Tomes never married nor combined their households; rather they shared custody of KJW. RP 431, 432. After turning about 1 ½, KJW would stay the night with Mr. Wallace, and when KJW was around 3 or 4 years old, Mr. Wallace and Ms. Tomes exercised a joint custody schedule. RP 431. When KJW was staying with him, Mr. Wallace would attend KJW's sporting events, fish and swim with him, etc. RP 434.

As it related to the relationship between KJW's parents, the relationship began when Ms. Tomes worked for Mr. Wallace's company. RP 437. That situation was beneficial to all because Mr. Wallace, as Ms. Tomes' boss, would allow her to miss work to be involved with KJW's extra-curricular activities. Ms. Tomes was able to frequently volunteer in KJW's classroom and go on field trips while Mr. Wallace worked at his company. RP 437. In addition to being Ms. Tomes' boss, Mr. Wallace provided Ms. Tomes housing and a car. RP 436.

As KJW got older, Mr. Wallace and Ms. Tomes moved closer to one another. RP 437. This allowed KJW to freely go back and forth between his parents' houses. RP 438. While at his dad's house, KJW would ride horses and shoot skeet; ride the tractor and run the brush hog. RP 441. Mr. Wallace has a 35 acre pond on his property stocked with bass, steelhead and trout. RP 446. He and KJW would do a lot of fishing in the pond. Id. KJW would also hunt with his dad and brothers, but had to stop upon entry of the SSODA. RP 446-47. KJW enjoys sports and Mr. Wallace supported that, even sponsoring several of KJW's teams. RP 444. Mr. Wallace would drive KJW to his appointments with counselors as

part of the SSODA – as well as to probation appointments and to do community service. RP 477. In other words, Mr. Wallace has always been available to KJW. RP 479.

Mr. Wallace’s availability and the father-son bond have made KJW and his dad very close. RP 480. KJW is also very close with Mr. Wallace’s other children; he enjoys spending time with them joking around. *Id.* When KJW spent 28 days in detention he received letters from each of Mr. Wallace’s other children. RP 449. KJW loves working on Mr. Wallace’s farm. He drives the tractor and bales hay – that type of work brings him enjoyment and makes him feel good. RP 458. Mr. Wallace hopes to one day have KJW work with him, as his other kids do. RP 459. He has already given KJW 20 acres of land. RP 460. As noted above, it was KJW’s preference to reside with his father. CP 154.

V. ARGUMENT

- A. ***It was an abuse of discretion for Mr. Wallace’s CR 60(b) motion to be denied. Mr. Wallace’s right to a fair trial was denied where Ms. Tomes misrepresented several issues, and the trial court evidenced bias towards Mr. Wallace and ultimately relied on incorrect or improperly submitted evidence. Such irregularities within the proceeding provided ample grounds for relief under CR 60(b) and it was error for the trial court to deny the motion.***

Whether a civil or criminal trial, the litigants are entitled to a fair trial. See Olpinski v. Clement, 73 Wn.2d 944, 442 P.2d 260 (1968). If denied a fair trial, a litigant may seek relief under CR 60(b). That rule allows a court to relieve a party from a final order or judgment because of mistakes, irregularity, fraud, misrepresentation or other misconduct of an adverse party, and for any other reason justifying relief from the judgment. Suburban Janitorial Servs. v. Clarke

Am., 72 Wn.App. 302, 307, 863 P.2d 1377 (1993); CR 60(b). The moving party must prove the mistake, irregularity, fraud, misconduct, etc. by clear and convincing evidence. Mitchell v. Wash. St. Inst. of Publ. Policy, 153 Wn.App. 803, 825, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). Where it is determined that a party committed misconduct, a new trial should be granted regardless of whether the moving party can show that the misconduct materially affected the first trial's outcome. Roberson v. Perez, 123 Wn.App. 320, 336, 96 P.3d 420 (2004)(*citing Taylor v. Cessna Aircraft Co.*, 39 Wn.App. 828, 836, 696 P.2d 28 (1985) (“a litigant who has engaged in misconduct is not entitled to ‘the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent’”). A trial court's decision on a CR 60(b) motion is reviewed for abuse of discretion. Mitchell, 153 Wn.App. at 821.

1. Ms. Tomes misrepresented several issues to the trial court.

First, as set forth within the procedural history, this case was commenced under RCW 26.26 – which was the wrong statute. RCW 26.26 is known as the Uniform Parentage Act. RCW 26.26.021 outlines the scope of the act, stating: “This Chapter applies to determination of parentage in this state.” RCW 26.26.031 states: “the superior courts of this state are authorized to adjudicate parentage under this chapter.” See RCW 26.26.031.

In her Petition for Residential schedule/Parenting Plan/Support, filed on August 22, 2012, Ms. Tomes stated:

This action is brought pursuant to RCW 26.26.375 by Glenda Rae Tomes, petitioner, for a residential schedule/parenting plan and child support for KJW Jean Wallace, age 13, residing with Glenda

Rae Tomes in Toledo, Lewis County,
Washington.

CP 1.

Respectfully, parentage was never at issue in this case. To recognize this, this Court need look no further than the second paragraph of Ms. Tomes' Petition where she admitted parentage was not at issue and that an Acknowledgment of Paternity had been filed with the Washington State Registrar of Vital Statistics on July 23, 2001. CP 1. The significance of filing her petition under the wrong statute cannot be understated – as it amounted to the first of several misrepresentations to the trial court. The misrepresentation led to this action being adjudicated under the wrong statutory scheme which caused the trial court to try a case without appropriate jurisdiction and ultimately rule incorrectly.

Second, Ms. Tomes stated in her Petition for Residential Schedule/Parenting Plan/Child support filing – dated August 21, 2012 – that she had not been involved in any other proceeding concerning the child and that she did not know of any other legal proceedings concerning the child, etc. CP 3. These statements were signed under penalty of perjury by Ms. Tomes and her attorney in August of 2012 despite the fact that, at that time, KJW was involved in the criminal action in Lewis County Juvenile Court, Case #12-8-00013-1 (filed January 27, 2012). Ms. Tomes was involved and fully aware of the criminal case. See RP 164-166. These statements amounted to another instance of misrepresentation to the tribunal.

Third, Ms. Tomes submitted incomplete Washington State Child Support Schedule Worksheets that did not comply with the requirements of RCW

26.19.035(3) – yet her attorney signed the documents under penalty of perjury as being “... complete, true and correct.” CP 185-189. The trial court relied on these incomplete worksheets, stating in its findings that “the child support worksheets were incorporated by reference.” CP 176.

RCW 26.19.035(3) states: “The court shall not accept incomplete worksheets that vary from the worksheets developed by the administrative office of the courts.” RCW 26.19.035(3). In his CR 60(b) motion, Mr. Wallace pointed out each instance where the child support worksheets were incorrect or incomplete. Specifically, he pointed out the following:

1. Part I, Section 2(h): The worksheet is incomplete in that there is no entry for deductions under “father.” This is incorrect because all of Mr. Wallace’s income comes from business income and capital gains. RP 511-520.
2. Part III, Section 14: The worksheet is incorrect in that it states the father is obligated to pay \$105.06 and the mother is obligated to pay \$25.94 in health care expenses. These two dollar amounts are then added to each party’s Gross Child Support Obligation in Part IV, but then in Part V, Child Support Credits, the mother is given \$131.00 in monthly health care expenses credit. The father is thereby obligated to pay \$105.06 – which increases his gross support obligation – but then not allowed to deduct this amount as a credit. Furthermore, the \$131.00 amount was not supported by the evidence, as the petitioner testified the amount was \$113.00. RP 149-150.
3. Part VIII, Section 20(a): That section lists no Real Estate holdings for Ms. Tomes despite her trial testimony that she owns a house on 4.7 acres at 113 Drews Prairie Road in Toledo, WA – for which she paid \$195,500 on September 28, 2012³.

³ Mr. Wallace attached an Exhibit to the CR 60(b) motion, described as an “Enclosure 1” which showed Ms. Tomes as the owner of the parcel. CP 199-201.

4. Part VIII, Section 20(c): The worksheet is false or incomplete where Ms. Tomes lists no ownership of vehicles or boats despite her testimony that she owns two vehicles (a 2008 Honda Fit and 2005 Dodge Caravan). RP _____. Further, Ms. Tomes omitted ownership of a 2005 Sea-Doo and trailer which she received pursuant to her dissolution under Lewis County Superior Court Cause Number 11-3-00407-6.
5. Part VIII, Section 20(d): This section is incomplete because it was left blank despite testimony from both parties that they held bank accounts. RP 488-489, 510.
6. Part VIII, Section 20(f): This section is incomplete because it is blank. Ms. Tomes received \$42,000 on March 11, 2014 in Satisfaction of Judgment.⁴ CP 202-203
7. Part VII, Section 22(b): This section is incomplete because it is blank even though Ms. Tomes testified she had two adult working sons living at home.
8. Part VIII, Section 24: This section is incomplete because Ms. Tomes omitted that her ex-spouse owed her \$20,335.46 in back child support plus ongoing monthly child support.⁵

Respectfully, where Ms. Tomes filed misleading child support worksheets that omitted significant financial information and had her attorney represent that they were complete was more than sufficient grounds for the trial court to grant Mr. Wallace's CR 60(b) motion. This is especially true considering the trial court relied on and incorporated those incomplete worksheets into its final order in this case. Respectfully, this Court should reverse the trial court's denial of Mr.

Wallace's motion because of the misrepresentations on the part of Ms. Tomes.

The cases set forth above hold that it is the misrepresentations themselves, not

⁴ Mr. Wallace attached the satisfaction of judgment and cited it as "Enclosure 2." CP 202-203.

⁵ Mr. Wallace cited the Judgment Summary in Order on Show Cause re Contempt/Judgment Review in In re the Marriage of: Glenda Rae Holbrook (n/k/a tomes), Petitioner, and Jesse C. Holbrook, Respondent, Lewis County Superior Court Cause Number 99-3-00023-6, filed August 28, 2012.

their effect on the proceedings that control whether relief should be granted. Here, in light of the multiple misrepresentations, Mr. Wallace's right to a fair trial was severely compromised.

2. The numerous irregularities at trial clearly hindered Mr. Wallace's right to a fair trial.

First, following trial, the court concluded that, for purposes of determining the amount of child support Mr. Wallace would be ordered to pay, his income was \$12,000 per month. CP 176. It made that determination based on summaries put together by Ms. Tomes (Exhibits 42, 43, and 44) that were never admitted into evidence.⁶ RP 320-327. For example, during direct examination, Ms. Tomes' attorney asked her the following:

Q. Are these the figures plus child support plus real property taxes that you're asking the court to use in calculating child support –

A. Yes.

Q. – for Mr. Wallace's income?

A. Yes.

RP 320-327.

Even though the documents were not admitted into evidence, there was no doubt the purpose of presenting the documents was to assist the court in determining Mr. Wallace's income. Review of the trial court's oral decision reveals it relied on the documents in calculating Mr. Wallace's income where it stated:

After I added those back in, I could easily find that – by adding in all that depreciation, I could

⁶ The documents were admitted "for illustrative purposes only."

easily find I was over \$15,000 a month. I'm not going to do that. I'm going to set his income at \$12,000 a month gross for child support purposes. I find those funds are reasonably available to him.

RP 661.

Despite relying on Ms. Tomes' unadmitted evidence, the trial court unfairly rejected similar evidence proposed by Mr. Wallace when it stated:

First, I never considered the guardian ad Litem's report or the addendum. It was neither offered nor admitted into evidence, neither of them were. There was testimony about them, I got the gist of it. But those were not admitted into evidence.

RP 661.

Respectfully, the trial court exhibited clear bias and extreme irregularities where it rejected evidence from Mr. Wallace because the evidence was not admitted, and then relied on unadmitted evidence advanced by Ms. Tomes. Because there is no doubt the trial court relied on those documents in reaching its decision, this Court should reverse the trial court's denial of Mr. Wallace's CR 60(b) motion.

Second, this Court should find an irregularity where the Court concluded that Ms. Tomes' actual monthly income was \$3,390 per year. This was in spite of clear testimony from Ms. Tomes that on an average year she prepares an additional 40-45 personal tax returns – which she acknowledged was a side business. Trial page 301. There was no basis in fact for the trial court to reach that number and the court's decision to not consider the income from 40-45 additional tax returns from Ms. Tomes' side-business reflects clear bias.

Third, this Court should find an irregularity in the trial court's determination of the cost of health care for the child. Specifically, its findings, the trial court found that "Insurance coverage for the child is available and accessible to this parent at \$131.00 cost (children's portion of the premium only)." CP 180.

Respectfully, this finding was inconsistent with Ms. Tomes' trial testimony relating to healthcare:

Q. Is KJW covered by medical insurance?

A. Yes.

Q. Who provides the medical insurance?

A. I do.

Q. Do you know what it costs you per month for KJW's medical insurance?

A. Maybe \$130.

Q. Would 113 sound about right?

A. Yeah.

Trial page 149.

Fourth, the trial court's decision to ignore KJW's preference to live with his father was not supported by the evidence. As noted above, the trial court ruled against KJW's wishes: after all, KJW wanted his dad to have custody. CP 154. The trial court made the finding that KJW wanted to live with Mr. Wallace but then found that KJW - at age 14 - was not mentally mature enough to express a reasoned and independent preference. The trial testimony in this case by Sue Batson, that the trial court clearly relied upon, was specific to KJW's criminal

trial and felony convictions when he was 12 years old. RP 18-106. In other words, the trial court saw KJW as 12 rather than 14.

B. The trial court abused its authority when it imposed sanctions against Mr. Wallace and his attorney.

CR 11 permits a trial court to impose sanctions pursuant to a finding that a claim was filed for an improper purpose or that it is not grounded in law or fact and the attorney or party failed to conduct a reasonable inquiry into the law or facts. Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); Eller v. E. Sprague Motors & R.V.'s Inc., 159 Wn.App. 180, 191, 244 P.3d 447 (2010). The party seeking sanctions must specifically identify what fees were incurred in responding to the allegedly improper allegations. See Manteufel v. Safeco Ins. Co. of Am., 117 Wn.App. 168, 177, 68 P.3d 1093 (2003)(after determining that sanctions are appropriate, trial court must limit attorney fees to the amount reasonably expended in response to the sanctionable claims). Imposition of sanctions under CR 11 is reviewed for an abuse of discretion. Miller v. Badgley, 51 Wn.App. 285, 753 P.2d 530 (1988).

Here, this Court need look no further than the numerous issues set forth within this appeal to recognize that there were serious irregularities during this trial. Those issues alone certainly show that the filing of the CR 60(b) motion was not for any “improper purpose” but rather to allow the trial court to address the issues and errors. It is ironic and frankly unfair that Mr. Wallace and his counsel were assessed terms under CR 11 when it was Ms. Tomes and her counsel that made several misrepresentations – as set forth above.

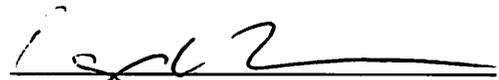
Secondly, a review of the clerk's papers reveals that Ms. Tomes' response to the CR 60(b) motion amounts to nothing more than a declaration from Ms. Tomes. CP 206-210. The declaration did not provide any specific evidence or analysis as to why Mr. Wallace's motion was for an improper purpose, nor any explanation as to why \$1500 was an appropriate amount for terms. In fact, the declaration never even cites CR 11 or any cases or analysis associated with an award of attorney's fees. Where the party seeking sanctions must specifically identify what fees were incurred in responding to the allegedly improper allegations (Manteufel, 117 Wn.App. at 177), the imposition of the fees was reversible error.

VI. CONCLUSION

For the above cited reasons it is respectfully requested that this Court reverse the trial court's denial of Mr. Wallace's CR 60(b) motion and additionally reverse the imposition of CR 11 sanctions on Mr. Wallace and his counsel.

RESPECTFULLY SUBMITTED this 24th day of July, 2015.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 24th day of July, 2015.



LEE ANN MATHEWS

HESTER LAW OFFICES

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