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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re:

MARINA NICOLE TURNER, Respondent,

vs.

RANDOM ERIK VAUGHN, Appellant

Pierce County Superior Court

Cause Nos. 16-3-00665-4

The Honorable Judge Kitty-Ann van Doorninck

Appellant's Reply Brief

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INTRODUCTION

This is in response to the respondent's introduction. RAP 10.3 (a) (3) states "*Introduction.* A concise introduction. This section is optional. This introduction need not contain citations to the record or authority."

In the introductory statement the respondent includes a list of "bad acts" of Mr. Vaughn. (Respondent's Brief p. 1-2) Five things are listed which are irrelevant to the appeal and never mentioned in the statement of facts nor anywhere else in the remainder of the brief. Citations to the record, although not required for an introduction, are either not provided, or are provided in part, but not completely. There are also argumentative conclusions included within them. They appear to have no purpose other than to cast Mr. Vaughn in a bad light in an attempt to improperly prejudice him in the eyes of the Court with material both distracting and irrelevant to this appeal. (Irrelevant mudslinging at an appellate level.)

As noted above, this is supposed to be a concise introduction presumably to the issues of the matter on appeal. It is not supposed to be the statement of facts, nor the argument.

Whereas there are certainly two sides to these issues and we could respond, however, this material is completely irrelevant to the issues of the appeal. Were we to attempt a proper response to these it would consume and exceed the page limits for a reply brief. As a result, unless the Court directs otherwise, there will not be any response provided to this list and it will be assumed that the Court has not considered the introduction as substantive facts or argument to be included in the rendering of a decision in this matter.

STATEMENT OF FACTS

In the Respondent's Brief the statement of the facts became somewhat merged with the argument. To some degree this may have been because the court did not make any written findings of facts, but rather simply gave her oral ruling on March 9, 2017. (RP 654-658) As a result, there are some issues from this section that will need to be clarified here that deal with issues for argument.

Throughout the statement of facts in the Respondent's Brief it lists factors and identifies them as the factors from, *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) (Respondent's Brief p. 3, 5, 6) Although the trial court did lump the factors together to a degree, the exact statement

from the court was: “And I will talk about the factors that Connell and the other cases talk about.” (RP 655) The list of factors was fully set forth by the state Supreme Court in *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000).

On page 3 of the Respondent’s Brief it states that “the parties opened a joint bank account through Chase ending in 5526, which remained open through April 2016. RP 33, 590”. That is correct, the parties only opened one bank account. Again, on page 6 in the brief it states “the court found there was no question that there was a joint bank account” (RP 657) Again, the court noted that there was “a joint bank account” (RP 657), not multiple bank accounts. However, in the Respondent’s Brief on page 7 in conclusion it states there were “shared bank accounts”. In his closing, counsel for Ms. Turner also argued that “They had shared bank accounts.” (RP 595) This is a misstatement of the facts that is nowhere supported or substantiated in the record. Only that the parties had one joint bank account that was used to pay household bills and expenses and was later used as a pass-through account for the credit card money from Square for Pacific Green Collective. (RP 33, 59, 83)

The Respondent’s Brief on pages 4-5 states that “The parties traveled to Thailand in May 2013 where the(y) engaged in a private wedding ceremony on the beach and exchanged wedding rings. RP 102”

There was no finding by the court that there was a “private wedding ceremony”. In regards to the parties’ actions in Thailand the following is what is stated at page 102 of the transcript (the record citation provided in Respondent’s Brief), this was during Ms. Turner’s cross examination:

Q. That, basically, you wanted to get married, but he did not, correct?

A. It was my understanding, when he gave me an engagement ring, that we were planning to get married, and we exchanged vows in Thailand.

Q. So, why didn't you get married in Thailand if you were going to get married? Wasn't it because he needed \$3,000 to pay for someone to officiate that ceremony?

A. Yes. (RP 102)

It is clear from the transcript that there was no “wedding ceremony”. At best, the court noted that in some photos “it appears that Mr. Vaughn is wearing a wedding ring” (RP 657)

On page 6 of Respondent’s Brief Exhibit 53, Google voice transcripts, are quoted. Exhibit 53 was specifically excluded by the court as a result of our objection. In regard to that the court stated prior to issuing her ruling on March 9, 2017:

So, preliminarily, I just wanted to rule on Exhibit 53. I am going to find that it does violate RCW 9.73.050, which indicates that, "Any information obtained in violation of RCW 9.73.030 shall be inadmissible," and .030 defines a private communication in a pretty broad way. I have no idea how Ms. Turner obtained this information, but regardless, it is not admitted, and I did not consider it in my consideration. (RP 654)

The citation to this exhibit was improper and that material should not be considered by this Court because it was not considered by the court below and Ms. Turner has not sought review of that ruling.

ARGUMENT

1. FOR THE POOLING OF RESOURCES REQUIREMENT TO BE SUFFICIENT FOR THE COURT TO DIVIDE PROPERTY, THE PERSON REQUESTING AN EQUITABLE DIVISION OF PROPERTY MUST SHOW THAT THEY HAVE INVESTED THEIR TIME, EFFORTS, AND FINANCIAL RESOURCES TO A SPECIFIC ASSET.

One of the central points from the analysis in the case of *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) is that in addition to simply pooling resources, there must be a showing that the parties invested their time, efforts, and financial resources to a specific asset. This was laid out in our opening brief. This issue was never discussed anywhere in Respondent's Brief.

It is undisputed that Ms. Turner resided in California pursuing her own career while Mr. Vaughn was doing the work to develop Pacific Green Collective with others in Washington state. (RP 109, 114, 242-247, 206) Ms. Turner was never a member of Your Own Garden. (242) The only thing that she did was allow their joint bank account to be used as a pass-through account for the credit card funds that came in from Square for Pacific Green Collective. (RP 59, 547-548) From that account she

began helping herself to on average \$9140 a month. (RP 84) She invested no time, efforts, or financial resources into Pacific Green Collective, what she did was take money from a nonprofit corporation. There is no equitable reason for her to receive any interest in the proceeds of a nonprofit corporation. Without that interest, there should be no finding of a committed intimate relationship as the purpose of that finding is only to avoid unjust enrichment on the part of one of the parties. The only alleged asset is the proceeds of Pacific Green Collective, therefore it was error on the part of the court to determine that there was a committed intimate relationship. As a result, the trial court must be reversed.

2. A NEW TRIAL SHOULD BE GRANTED BASED UPON CR 59(a)(1) and (2).

Ms. Turner takes the position that there is no basis for a new trial because the trial court did not make any findings based upon Ms. Turner's declaration. (Respondent's Brief p. 10) However, that is simply not the case. At the hearing itself, in response to Mr. Vaughn's attorney's request as to whether or not the court considered the declaration in making her decision, the court stated "Well, I did change things a little bit, yes." (RP 667) The decision that the trial court was making at the time was whether or not there was a committed intimate relationship and issues regarding

the parenting plan. This was the decision from a four-day trial. This was not a temporary motions hearing.

The fact that the court was influenced by and concerned about the declaration was further made clear in her comment that she had allowed Mr. Vaughn to have unsupervised contact and that from her reading of the declaration her prior ruling had “really backfired”. (RP 668)

The fact that judge had set a hearing to take further evidence regarding the issue and for her to perhaps reconsider some of her parenting plan decisions, is also not significant. The judge was clearly upset by what she read and influenced to the point of changing her decision. It is completely unknown the extent of the prejudice that this ex parte declaration engendered in the court and to what extent she altered all of her decisions as a result of it.

There is also no question that Mr. Benjamin intended for the judge to be influenced by the declaration filed or what would have been the point of his filing it the day before she was to issue her ruling and making sure that she had a working copy of it? The intent was clearly to influence the judge negatively against Mr. Vaughn and to obtain a more favorable ruling as a result of the declaration. It is disingenuous for him to now say that this had no influence. It clearly did and it was clearly intended to.

This was clearly misconduct by the prevailing party under CR 59 (a) (2) by the attorney as well as an irregularity in the proceedings of the court under CR 59 (a) (1) which prevented Mr. Vaughn from having a fair trial. There is most certainly a basis for a new trial.

Ms. Turner next alleges that there was no ex parte communication because there was a copy of the declaration given to counsel for Mr. Vaughn. What makes this an ex parte communication is not whether or not a copy of the declaration was provided to opposing counsel, but the fact that there was no notice provided as to the intended use of the declaration.

In the ethics opinion quoted in the Respondent's Brief (a copy of which was supposed to have been attached as Exhibit 2, but was not) it states in regard to an ex parte communication that:

Courts generally apply the term to mean communications made by or to a judge, during a proceeding, regarding that proceeding without notice to a party. See *State v. Watson*, 155 Wn.2d 574, 578-80, 122 P.3d 903 (2005).

Notice, or the lack of notice, is what made this an ex parte communication.

In this case, the court did not request that the parties provide any declarations, memorandum of authorities, or provide any additional evidence in preparation for the court to deliver her decision. Counsel for Ms. Turner did not file a motion to reopen the case or to allow the taking of new evidence for the court to consider. There was no notice provided to

counsel for Mr. Vaughn that the declaration that was filed was intended to be used as new evidence for consideration by the court for her decision from the trial. There is no lawful basis for the court to take additional evidence sua sponte without notice to all parties and no law that would allow one party on their own to submit new evidence for the court's consideration. There was no notice in this case to counsel for Mr. Vaughn that counsel for Ms. Turner intended to submit the new declaration for the court's consideration the next day. He had filed no motion to allow him to do so, and had he filed a motion he would have been required to provide any declaration at the time of filing the motion which would have been at least 5 days prior to the hearing. Simply providing a copy of the declaration by itself did not provide notice of its intended use and that made it an ex parte communication.

Since there was no notice to counsel for Mr. Vaughn of the intended use of the declaration, and no lawful authority for counsel for Ms. Turner to submit new evidence to the court, the providing of a working copy of the declaration to the court was nothing short of an ex parte communication.

Likewise, there was irregularity on the part of the court in reading the declaration because she also knew, or should have known, that she is not allowed to take additional evidence once the parties have rested and

she has heard closing argument. She is not allowed on her own to seek out or take additional evidence between closing argument and issuing her ruling. She should have not read the declaration. Reading the declaration was a violation of CJC 2.9(A)(1) as she was not to consider ex parte communications.

If the court wanted to read the declaration, she should have advised counsel for Mr. Vaughn that she had received the declaration and she should have given counsel an opportunity to review it and make appropriate objections prior to her reading it at the very least. Had that been done counsel for Mr. Vaughn could have at least objected to the court reviewing it due to the hearsay nature of its contents. However, once she read the document and took new evidence after the parties rested without notice to counsel for Mr. Vaughn, there was a clear irregularity in the proceedings and a new trial should have been ordered.

3. A JUDGE MUST RECUSE HERSELF FROM A CASE BASED UPON A VIOLATION OF CJC 2.9 FOR EX PARTE COMMUNICATION WHEN THERE IS EVEN A MERE SUSPICION OF PARTIALITY.

Ms. Turner takes the position that for a judge to be required to recuse themselves we must prove a lack of impartiality by the court. The case of *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355, (1995), as amended on denial of reconsideration (Jan. 31, 1996), amended, (Wash.

Jan. 31, 1996), makes it very clear that the recusal does not require actual prejudice. The court there stated:

However, in deciding recusal matters, **actual prejudice is not the standard**. The CJC recognizes that where a trial **judge's decisions are tainted by even a mere suspicion of partiality**, the effect on the public's confidence in our judicial system can be debilitating. (At 205 emphasis added)

Even the mere suspicion of partiality is sufficient to require recusal.

CJC 2.11 **Disqualification**, in section (A)(1) states:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

A judge must disqualify themselves or recuse themselves from a case if impartiality might reasonably be questioned if there is prejudice or if the party has personal knowledge of facts that are in dispute. Having received and read ex parte information in violation of CJC 2.9(A)(1) placed the trial judge in a position where she now had personal information from reading a declaration that she knew was not properly before the court. That fact alone mandates disqualification and recusal from the case.

The judge knew that she was going to issue her decision in this case the next day. She was aware that the parties had rested, provided

closing argument, and that they had not been requested to provide her with any additional information. Knowing that, she still chose to read a declaration provided by one of the parties the day before she was to issue her decision. The moment she read that her partiality reasonably came into question. She now had information, given to her that day before she was to issue her decision, that she admittedly allowed to influence her decision. A document that contained clear hearsay statements (CP 70) which the court knew or should have known were not admissible even if the document itself had been admissible. The court furthermore stated that she felt this showed that her actions in allowing unsupervised visitation had “really backfired” (RP 668) Here the court is essentially taking negative ownership of her prior ruling based upon the declaration. Furthermore, it is crystal clear that the declaration did influence her as she admitted changing her decision based upon it. (RP 667) There is certainly a reasonable question regarding the judge’s partiality under CJC 2.11(A).

Ms. Turner in her brief attempts to portray the declaration as only impacting the court’s decision regarding the parenting plan issues. However, on page 16 they cite the following in regard to the committed intimate relationship issue: “Mr. Vaughn, apparently denies any kind of relationship, and I will make a specific finding that I do not find him credible.” (RP 655) This shows an oversimplification by the judge of the

facts upon which a credibility decision was made. The record clearly reflects that Mr. Vaughn did not deny any relationship, just a committed intimate relationship that would entitle Ms. Turner to an interest in the proceeds of funds in the nonprofit corporation Pacific Green Collective. The fact that the trial court would so grossly oversimplified the testimony of Mr. Vaughn would appear to indicate a bias or prejudice at this point in the proceedings as to all issues.

Ms. Turner also requests that the court independently review opinions from Lee Ripley and Peter Jarvis. This is an improper motion filed within a brief. RAP 10.4 (d) reads as follows:

(d) Motion in Brief. A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. The answer to a motion within a brief may be made within the brief of the answering party in the time allowed for filing the brief.

In this case, the motion to independently review opinions from Lee Ripley and Peter Jarvis, is not a motion which if granted would preclude hearing the case on the merits. As a result, it is an improper motion brought within the brief. As such, the motion should be denied.

Also, the clerk's papers cited for the request are 50 pages. In the case of *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011), as amended (July 11, 2011) the court stated:

We do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b). *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wash.App. 791, 801 n. 5, 65 P.3d 16 (2003). review denied, 151 Wash.2d 1037, 95 P.3d 351 (2004). (At 890-891)

This is not specifically a request to incorporate this material by reference, but it is the equivalent of that by allowing Ms. Turner to supplement her 19 page brief with 50 pages of additional briefing. As a result, that would cause this brief to exceed the 50 page limit to become 69 pages. This motion must be denied.

- 4. THIS COURT SHOULD NOT AWARD ATTORNEY FEES TO TURNER AS THIS APPEAL IS NOT FRIVOLOUS PURSUANT TO RAP 18.9, BUT SHOULD AWARD FEES TO MR. VAUGHN BASED UPON THE NOTED VIOLATIONS OF THE RULES BY MS. TURNER, CITING AN EXHIBIT THAT WAS EXCLUDED BY THE TRIAL COURT, NOTING A MOTION WITHIN A BRIEF, AND ATTEMPTING TO SUBMIT AN OVERSIZED BRIEF WITHOUT A PROPER MOTION TO REQUEST IT, AND CITING IRRELEVANT MATERIAL IN THE INTRODUCTION WITHOUT ANY FURTHER CITATION IN EITHER THE STATEMENT OF FACTS OR THE ARGUMENT WITH A CLEAR PURPOSE TO DO NOTHING MORE THAN CAST MR. VAUGHN IN A NEGATIVE LIGHT.**

RAP 18.9 (a) reads as follows:

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply

with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

In the case of *Kinney v. Cook*, 150 Wn. App. 187, 208 P.3d 1

(2009) in discussing the above court rule stated:

RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” RAP 18.9(a). “Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wash.App. 680, 696, 181 P.3d 849 (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wash.App. 332, 342, 798 P.2d 1155 (1990)), review denied, 164 Wash.2d 1037, 197 P.3d 1186 (2008). “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wash.App. 899, 906, 151 P.3d 219 (2007), review denied, 162 Wash.2d 1009, 175 P.3d 1092 (2008). Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Id.*

While we have rejected the Kinneys' arguments, their appeal is not frivolous, as the term is defined above. “An appeal that is affirmed merely because the arguments are

rejected is not frivolous.” *Halvorsen v. Ferguson*, 46 Wash.App. 708, 723, 735 P.2d 675 (1986). Accordingly, we reject Mr. Cook's request for sanctions. (at 195–196)

In this case, there are certainly debatable issues. However, even as noted above, in the event that the court were to rule against Mr. Vaughn, that in and of itself is still not a basis for determination that an appeal was frivolous. There is no basis for an award of attorney fees in this case based upon a frivolous appeal.

However, as noted in the court rule above, fees can also be awarded in the event that a party fails to comply with the rules. As noted above, the motion to consider the opinions of Lee Ripley and Peter Jarvis was improperly brought within this brief and we were required to reply to it. Also, this brief has cited an exhibit to this court that was excluded at the trial court level and was therefore not evidence that was to be considered by this court. Lastly, the Introduction was improper as presenting irrelevant material for which there was nothing provided in either the Statement of Facts or the Argument. Its only intent was clearly to cast Mr. Vaughn in a negative light and attempt to improperly prejudice him in the eyes of this Court with matters that were completely irrelevant to the issues to be decided (and which would have required a

response well in excess of the pages limits had we attempted to do so). We have had to spend time in this brief responding to these items and it would seem appropriate that Mr. Vaughn be reimbursed for the attorney fees expended in so doing.

CONCLUSION

In light of the fact that there was no analysis and no response to the argument that the primary issue in deciding the equitable remedy of a committed intimate relationship, in addition to pooling resources, is that the parties invested time, efforts, and financial resources to a specific asset; this Court must reverse the finding of the trial court that there was a committed intimate relationship because Ms. Turner did not invest time, efforts, or financial resources to the nonprofit corporation Pacific Green Collective.

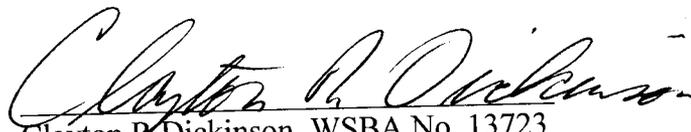
A new trial must be granted based upon CR 59 (a) (1) and (2) because counsel for Ms. Turner submitted an ex parte declaration to the court without notice to counsel for Mr. Vaughn of the intended purpose and use of the declaration and because the trial court read the declaration and considered it in making her decision.

The trial court must be recused from hearing the new trial due to a violation of CJC 2.94 for reviewing an ex parte declaration the day before she was to issue her ruling, which admittedly influenced her decision.

Lastly, Ms. Turner's request for attorney fees must be denied as this is not a frivolous appeal. However, Mr. Vaughn should be awarded attorney fees due to multiple rules violations in Ms. Turner's brief.

For all these reasons the trial court must be reversed.

Respectfully submitted on October 12, 2017.


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CERTIFICATE OF MAILING

I certify that I emailed a copy of Appellant's Reply Brief to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Fircrest, Washington on October 12, 2017.


Clayton R. Dickinson, WSBA No. 13723
Attorney for Appellant