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Court of Appeals
Division II
State of Washington
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No. 51305-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL C. CODEKAS,

Appellant,

v.

CAMERON CORNELL,

Respondent.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion when it made domestic violence findings that were substantially supported by the evidence?
2. Did the trial court abuse its discretion when it imputed father's income when father's income was unknown?
3. Was the trial court's attorney fees award supported by the law, adequate findings and substantial evidence?
4. Should the mother receive her fees on appeal?

II. RESTATEMENT OF THE CASE

Cameron Cornell entered into a relationship with Michael Codekas in 2006. Ex. 2 at 8. Throughout the relationship Cornell suffered domestic violence (Ex. 37 at 3-10), rape (Ex. 2 at 3, Ex. 19 at 70), abusive behavior (Ex. 37 at 3-10) and infidelity (Ex. 37 at 4, 8) at the hands of Codekas. CP 32. The police report from March 2010 that was entered into evidence without objection, noted that there was a prior documented history of domestic violence by Codekas against Cornell. Ex. 37, CP 341.

The prior documented history of domestic violence occurred when Cornell was pregnant (between January 2009 and September 2009) and Codekas locked her out of the apartment and the apartment manager had to let her back in and the police were called. Ex. 3 at 10.

Another time, Codekas “cracked her head” against the glass door in her apartment in Northeast Tacoma. Ex. 3 at 10.

In regards to the incident in March 2010 referenced in Exhibit 31, Codekas: 1) threatened to hit her, 2) grabbed her and told her to get away from the vehicle, 3) grabbed her car keys, driver’s license phone and threw them in his car, 4) shoved her out of the car causing her to fall and land on the concrete, spraining her left wrist and injuring her hand, 5) placed his feet on her stomach and 6) shoved her backwards with his feet, causing her to strike the ground again. Cornell had to use a stranger’s phone to call 9-1-1 because Codekas had taken her phone away. The police officer who responded to the 9-1-1 call photographed Cornell’s swollen left hand. Ex. 37 at 4. Officer Kelly noted that Cornell’s hand was red and swollen. Ex. 37 at 8. This incident occurred in March 2010 when the child at issue was six months old. Ex. 37.

The charges were always dropped because Cornell was too afraid of him to pursue the matter. Ex. 37 at 6.

Ultimately, Cornell and Codekas separated households in June 2011. Ex. 2 at 3. They entered into a final agreed parenting plan, which provided for a shared 50/50 residential schedule on March 26, 2014. CP 57-69. That final parenting plan states, in part, “the child shall be enrolled in Kindergarten in the Tacoma School District at an elementary school in

Tacoma's North End (as opposed to Northeast Tacoma), such elementary school being selected by the parties as a joint decision under this Parenting Plan." CP 610.

In the Summer of 2015, Cornell enrolled the child at Lowell Elementary in North End Tacoma using her work address as opposed to her home address because Lowell was one block from her place of employment. RP 66-68, 108. Lowell Elementary was also substantially closer to Codekas' residence. RP 111.

Codekas objected to the child's enrollment in Lowell so Cornell disenrolled the child from Lowell and enrolled the child in Point Defiance Elementary, which was associated with her physical address at Salmon Beach in North Tacoma. RP 27. This was during the same timeframe that Codekas unilaterally enrolled the child in Life Christian Academy (a private school not located in North Tacoma), but the child never ended up attending. RP 37. The child was told he was going to attend Life Christian Academy by Codekas even though Cornell had not agreed for the child to attend. RP 37. On November 17, 2015, the child even drew a picture when he was being forensically interviewed pursuant to the false sexual abuse allegations made by Codekas against Cornell's long-term partner, Sasha Conlen wherein the child wrote, "I ♥ Lif Crishtin". Ex. 3 / CP 357, 358, 364.

On Saturday, November 14, 2015, Codekas falsely alleged that Cornell's long-term partner sexually abused the child at issue. RP 359. Ex. 2 at 10.

On Monday, November 16, 2015, Cornell filed a petition for major modification of the parenting plan alleging detrimental environment by Codekas. CP 119-125. When CPS came back unfounded on Codekas' false sexual abuse allegation against Conlen, Codekas filed a complaint against the CPS worker. Ex. 2 at 10, RP 413. In fact, Codekas alleged that the detective who investigated the allegation as well as the CPS worker were biased. RP 413.

In addition to the false sex abuse allegations, Cornell relied upon Codekas constantly telling the child that Cornell and her partner, Conlen were dirty people. RP 21-22, 141-142. She also relied upon Codekas forcing the child to take showers and change his clothes after each visitation exchange reinforcing that Cornell and her partner are dirty people. RP 21-22, 141-142. Further, Codekas and his wife would routinely tell the child that Cornell and her partner were going to eternally burn in hell. RP 53, 141-142, Ex. 2 at 13.

Codekas and his wife routinely and falsely alleged to anyone who would listen that Cornell suffered from borderline personality disorder. This was also stated to the parenting evaluator. Ex. 1 at 5, RP 131-133.

Because Codekas was not happy with investigation of the detective and CPS, Codekas hired his own private forensic psychiatrist, Dr. Stanfill to interview the child. RP 366-367. Dr. Stanfill was a referral from Codekas' wife's father who is an MD, JD psychiatrist, Dr. Kelly. RP 413.

Codekas petitioned for a sexual assault protection order against Conlen on November 18, 2015 based upon his false sexual abuse allegations against Conlen. Ex. 25.

On December 14, 2015, Codekas filed a response to the petition alleging that adequate cause did not exist and that Cornell's petition should be dismissed. CP 175-177.

On December 17, 2015 during an attempt to serve the petition and order for protection on Conlen, Codekas and his mother, Shirley Low engaged in a low-speed chase of Cornell and Conlen through north Tacoma. Ex. 24, CP 703. Cornell was driving with Conlen as a passenger. CP 703. Low was directly behind Cornell's vehicle, and Codekas was behind her. CP 703. Codekas tried to box Cornell's vehicle in by crossing the center line and swerving. CP 703. When this was unsuccessful, Low caused a collision with Cornell's vehicle. CP 703. The collision occurred in front of third-party eye witnesses. CP 703. After the collision, Low got out and handed papers to Conlen. Codekas said, "We got you!" CP 703. The collision caused injury to both Conlen and

Cornell, and resulted in criminal charges being brought against Shirley and Codekas. CP 703.

Codekas and Low were arrested on the scene and immediately taken to jail. RP 160.

On July 13, 2016, Codekas filed a retaliatory cross-petition to modify the parenting plan alleging a detrimental environment in Cornell's household, asking for primary custody of the child. CP 561-565.

However, on the day of trial, Codekas stated that he was now asking the trial court to retain the 50/50 residential schedule, effectively dismissing his retaliatory cross-petition. RP 395.

Codekas' sudden change of heart on the first day of trial asking the trial court to retain the 50/50 shared residential schedule instead of granting him primary care of the child despite Codekas' statements in his declaration dated July 13, 2016:

1. "As Commissioner Johnson correctly noted, the conflict has grown between us to a point that a 50/50 plan is no longer in Cannon's best interest." Ex. 9 at 2.
2. "Cameron neglects Cannon's basic hygiene when he is in her care. He is returned to me weekly with crusted dirt under his fingernails and toenails. He smells of urine, so I know he has not been bathed. He often has a rash on his buttocks from extended exposure to urine. I believe this is because Cannon has to wake Cameron and Sasha on school mornings, as they do not get him up in time to allow Cannon time to bathe appropriately to clean himself from any bed-wetting accidents he may have." Ex. 9 at 4.
3. "It is obvious that a 50/50 parenting plan will not work for us

anymore." Ex. 9 at 6.

Codekas called Dr. Landon Poppleton, who critiqued Hutchins-Cook's conclusions about Codekas, was forced to acknowledge that false sex abuse allegations can be devastating to a child and disruptive. RP 247.

Child support was put at issue by Cornell when she filed her petition to modify and requested that the trial court modify the support if the court grants the petition to modify the parenting plan. CP 120.

Notwithstanding, Codekas strategically decided to not engage in any discovery whatsoever on the child support, not submit a financial declaration into evidence and not submit a single pay stub into evidence. Codekas offered zero testimony as to his income. It should be noted that Codekas' opening brief improperly cites to evidence not admitted at trial. App. Brief 28. The few pay stubs of Codekas were never offered nor admitted into evidence.

In contrast, Cornell submitted her financial declaration and proposed child support worksheets into evidence during trial. Ex. 15, 16. Cornell provided detailed testimony as to how she arrived at her proposed income figures. RP 287-290.

III. ARGUMENT

A. THE STANDARD OF REVIEW

In this appeal, Codekas challenges modifications to a parenting plan's residential schedule made in light of Codekas' history of domestic violence, false allegations of child sexual abuse and abusive use of conflict. This Court reviews trial court rulings dealing with provisions of a parenting plan for whether an abuse of discretion occurred, meaning the trial court's decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940, P.2d 1362 (1997) (internal citation omitted).

A trial court exercises broad discretion in modification of the child support provisions of a divorce decree. *In re Marriage of Blickenstaff*, 71 Wash.App. 489, 498, 859 P.2d 646 (1993). We review a trial court's decision regarding child support for abuse of discretion, recognizing that such decisions are seldom disturbed on appeal. *In re Marriage of Griffin*, 114 Wash.2d 772, 776, 791 P.2d 519 (1990).

Codekas also challenges the partial award of attorney fees to Cornell based on RCW 26.09.260(13) and CR 11. Decisions on whether to award attorney fees, and what amount to award, are likewise left to the discretion of the trial court, which this Court reviews for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). As explained by one commentator, "the central idea of discretion is choice: the court has discretion in the sense that there are no

‘officially wrong’ answers to the questions posed.” *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990) (internal citation omitted).

In this case, the court did not abuse its discretion at all.

B. THE TRIAL COURT DID NOT ERR BY ENTERING DOMESTIC VIOLENCE AND OTHER FINDINGS THAT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

As noted in the restatement of the case above, there is substantial evidence of numerous instances of domestic violence by Codekas against Cornell.

Trial courts are given broad discretion in matters dealing with the welfare of children. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wash.2d 325, 327-28, 330, 669 P.2d 886 (1983).

Codekas’ argument that there was no full and fair adjudication of any domestic violence allegations because there were none made as part of Cornell’s case in chief is misplaced. Cornell and Codekas each petitioned for Domestic Violence or Sexual Assault Protection Orders against each other during the pendency of this case. Ex. 25, RP 52. The phrase “domestic violence” is found more than 50 times throughout the Report of Proceedings.

The Court entered an “Order Re Scope of GAL/Parenting Investigator Evaluation” on February 5, 2016. CP 455. This scope order

included “The following issues and allegations shall be addressed by the court appointed GAL/Parenting Investigator: domestic violence by mother and father.” CP 455.

Further, the Guardian ad Litem Suzanne Dircks testified in Cornell’s case in chief. RP 424-479. As part of her testimony, her report was admitted into evidence, which discussed Codekas’ domestic violence against Cornell. Ex. 1 at 4.

Similarly, Dr. Hutchins-Cook testified in Cornell’s case in chief wherein her report was admitted into evidence. Ex. 2. Codekas is quoted in Dr. Hutchins-Cook’s report stating, “This was shortly after I supposedly raped her [Cornell], beat her [Cornell], and smashed her [Cornell] head.” Ex. 2 at 3.

The domestic violence is well documented by the record before the trial court. Specifically, Cornell offered the police reports from the domestic violence instances in 2010 to be admitted into evidence and there was no objection by Codekas. Ex. 37 and RP 575.

Codekas’ own expert, Dr. Poppleton testified, “You've got allegations of domestic violence against father [Codekas] that just was not fleshed out.” RP 228.

There was further evidence of domestic violence and sexual assault of Cornell by Codekas contained in Cornell’s deposition testimony.

Codekas argues that his counsel “published” the deposition of Cornell “only for purposes of impeachment”. App. Brief 20. This is simply wrong. See the following cross-examination excerpt of Cornell by Codekas’ attorney Bolan:

Q. So did he ask you if his dad went to Hawaii without him?

A. He didn't ask much about them.

MS. BOLAN: Your Honor, I move to publish the deposition of Cameron Cornell.

MR. BENJAMIN: No objection.

THE COURT: Yes, we will publish the deposition transcript.

B Y M S . B O L A N:

Q. I'll have you turn to page 102 in that transcript, please. On line 17, you said that Cannon asked where his dad was and you told him that he went on vacation; is that right?

A. Yes.

Q. And he knew that they were in Hawaii?

A. I would imagine that he knew.

Q. And he was upset that they left without him?

A. That's probably what he said to me.

RP 330.

Q. That's what you recalled at the time your deposition was taken anyway.

A. Yes.

Q. So I asked you, "He thinks they chose to go on vacation without him?" And your response was, "No, I just said that, you know, the situation changed and, you know, they had those tickets so they, you know, left, but they didn't want to leave him behind"; is that how you described it to him?

A. Probably.

Q. With regard to the low-speed chase through Tacoma, did Michael's vehicle ever touch yours?

A. No.

Q. Did he go over the speed limit?

A. I'm sure there was a few points where we all went over the speed limit.

Q. By how much?

A. Five or ten miles.

Q. Did Michael ever come within an unsafe distance of your vehicle?

A. Both of the vehicles did, yes.

Q. And during your deposition, you testified that Michael got out of his truck, said, "We got you," and got back in his truck; is that right?

A. I believe so.

RP 331.

Q. And isn't it true at that time in April of 2015 you had already met at Tully's, I believe, to talk about schools?

A. Yes, and I'm not sure what the timeline is of this and that meeting.

Q. But you did already admit during your deposition that at the time you submitted this, you specifically knew that Michael didn't agree to Lowell, didn't you?

A. Yes.

Q. But you did it anyway?

A. I knew he didn't agree to anything other than Life Christian; it wasn't Lowell in general. It was only that he would let us admit him to Life Christian.

Q. And no other public school?

A. He didn't elude to the fact that he wanted him in public school. He really wanted him in a private school education and this was the closest thing I could find to a private school education in north Tacoma being highly ranked. I was doing everything I could to try and come to the middle. And yes, it was probably not good of me to cross his name

out or cross that out and then add Sasha as the third contact, but that was not my intention to be spiteful or shady about this.

RP 316.

Q. Do you know that Ms. Cornell testified during her deposition that Cannon may have been mad at you at that point in time because he had been disciplined earlier that week?

A. I don't know.

RP 74.

Codekas' argument that "publishing" Cornell's deposition did not make it available as substantive evidence for the trial court to consider is not supported by the case law. In fact, when Attorney Bolan published the deposition of Cornell, she handed a full, unredacted, un-excerpted copy to the trial court.

Codekas attempts to rely on *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 540 n. 3, 114 P.3d 1182 (2005), which relies upon *Augustine v. First Federal Sav. and Loan Ass'n of Gary*, 270 Ind. 238, 384 N.E.2d 1018 (1979). *Augustine* is attached as **Appendix A** for the Court's ease of reference.

In regards to "publishing" a deposition *Augustine* states in part:

The courts in Indiana have applied and utilized this rule through the years in various situations. See *Mitten v. Kitt* (1888) 118 Ind. 145, 20 N.E. 724; *Stamets v. Wilson* (1928) 89 Ind.App. 403, 164 N.E. 300. The most recent case addressing the issue of publication of depositions was *Swartzell v. Herrin* (1969) 144 Ind.App. 611, 248 N.E.2d 38. In that case, the trial court had granted the defendants' motion for summary judgment. The motion itself referred to the depositions of the plaintiffs and the trial court purportedly took these

into consideration. However, the depositions were never published. The Appellate Court, after quoting from the statute, correctly held: ****1020** “In order for a conditional examination to become part of the record or to be before the court for its use, the conditional examination must be published. This is done by order of the court upon motion of any person or party interested.

Publication means the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court.

In this case no order of publication was made. The conditional examinations were not published, as evidenced by the fact that they remained sealed in their envelopes. **Thus, they clearly could not have been a part of the record before the court on the motion for summary judgment.**

144 Ind.App. at 617-8, 248 N.E.2d at 42.

...

We disagree with this conclusion. We hereby hold that publication of a deposition is still required **in order to place the deposition before the court.** Until the deposition is published, by order of the court upon a motion of either party, the deposition cannot be taken into account by the court in ruling on any motions of the parties.

There is a sound and practical reason for requiring publication. Under our rules, at the time a deposition is taken, a party need not object to questions on the basis of inadmissibility. Rather, TR. 32(B) permits a party to wait and make his objection at the trial or hearing when the deposition is read into evidence or otherwise used. **Were we to dispense *242 with the publication requirement, the very essence of TR. 32(B) could not be implemented. Trial judges could examine depositions at will without regard to the possibility that they might contain objectionable matter.**

Moreover, IC s 34-1-16-1, 2 (Burns 1973) (formerly Burns ss 2-1527 & 2-1528) have been continued in the present code in their original form as enacted in 1881. These statutes recognize the publication requirement and tax the costs of publication to the moving party. It may be inferred from these two statutes that the

General Assembly did not purposely eliminate the publication requirement in its 1969 enactment. Indeed, the language of IC s 34-1-16-1 that a deposition “may, at any time . . . be published by order of the court” is identical to portions of Burns s 2-1520 heretofore quoted. **We, therefore, hold that before a trial court can consider testimony in depositions either in ruling on motions or at the trial the depositions must be published.**

****1021** ¹⁴ In the case at bar, the depositions were not properly published. No motions to publish were ever filed; no stipulation of the content of the depositions by contesting parties was ever filed; and none of the depositions or their content were verified to the trial court by affidavit. In oral argument before this Court, counsel for South Shore indicated that there were affidavits in the record which verified the depositions. However, we have diligently searched the record and no such affidavits appear. We must presume counsel was mistaken and was referring to the affidavit which verifies only the limited agency agreement. In fact, the only materials relating to the depositions that were before the trial court were the briefs and memoranda in support of and in opposition to the various motions for summary judgment. No affidavits accompanied these documents. Hence, the Court of Appeals erred in breaking the seals on these depositions, and the trial court did not err in failing to open, examine, and utilize their content in ruling on the motions for summary judgment.

Emphasis added, notes omitted.

Based upon the foregoing analysis, the trial court properly relied upon Cornell’s deposition, a copy of which was handed directly to it by Codekas’ attorney.

Considering the above, there is no bias by the trial court and there is no further argument necessary on this point by Cornell.

Codekas mistakenly argues to this Court that the trial court made findings for which no evidence had been presented and provides the following examples:

1. “that Codekas called the police to investigate the molestation allegations, when everyone, including Cornell, testified that his mother called the police.” App. Brief 25. Codekas’ petition for sexual assault protection order states, “I [Codekas] told her to call the police and an officer came to get a statement from Shirley Low.” Ex. 25 at 4.
2. “Dr. Poppleton conceded that he did not have any problems with Hutchins-Cook’s findings and conclusions.” App. Brief 25. In fact, Dr. Poppleton testified in response to cross-examination that he cannot legally nor ethically opine as to whether or not Dr. Hutchins-Cook’s ultimate recommendations were correct or incorrect. RP 244.
3. “Nor did both parties testify they believed that the current parenting plan was unworkable as the court further found.” App. Brief 25. Codekas states in his declaration of July 13, 2016, “It is obvious that a 50/50 parenting plan will not work for us anymore. Cameron has consistently shown that she does not have Canon’s best interests in mind.” Ex. 9 at 6.

4. “Codekas persisted with claims of sexual abuse.” App. Brief 25. Codekas testified on direct examination at trial that the child disclosed sexual molestation to Michael Stanfill, Ph.D., licensed psychologist and clinical assistant professor at the University of Washington. Codekas also unsuccessfully attempted to admit into evidence at trial, Dr. Stanfill’s report wherein he opines that Conlen potentially engaged in inappropriate physical contact with the child. Ex. 20 at 3. This is substantial evidence that Codekas persisted with claims of sexual abuse against Conlen at the time of trial.

Based upon the foregoing, substantial evidence supports the trial court’s above mentioned findings and there is no appearance of bias of the trial court. No further analysis will be done on this issue.

C. THE TRIAL COURT’S CHILD SUPPORT ORDER IS BASED UPON THE EVIDENCE.

Codekas argues the trial court improperly found his income was unknown and thus improperly imputed income to him. App. Brief 27. Codekas then states his income was established by paystubs. App. Brief 27. As previously mentioned herein, Codekas’ improperly cites to evidence not admitted at trial. App. Brief 28. Not a single pay stub was offered or admitted into evidence.

Codekas' income was, in fact, unknown. Codekas failed to testify about his income, failed to offer proposed child support worksheets, failed to offer his financial declaration and failed to produce a single pay stub or tax return. In determining child support, imputing obligor's undeterminable income according to statutory guidelines, rather than according to low estimated hourly wage, is not abuse of discretion, where obligor's income is unknown and unverified. *In re Marriage of Dodd*, 120 Wn.App. 638, 643, 86 P.3d 801 (Div III, 2004). This situation is therefore analogous to voluntary unemployment or voluntary underemployment under statute. *Id.* RCW 26.19.071(6). Codekas was in sole control of whether or not was going to allow the trial court to "know" his actual income. He chose to not.

Child support was put at issue by Cornell when she filed her petition to modify and requested that the trial court modify the support if the court grants the petition to modify the parenting plan. CP 120.

In contrast, Cornell submitted her financial declaration and proposed child support worksheets into evidence during trial. Ex. 15, 16. Cornell provided detailed testimony as to how she arrived at her proposed income figures. RP 287-290. Cornell testified that her income as stated in her financial declaration and proposed worksheets were consistent with her tax returns and her filings with the department of revenue. RP 287-

288.

Codekas has waived his opportunity to examine Cornell's tax returns or department of revenue's filings. For whatever strategic reason, Codekas chose not to view or request copies of Cornell's tax returns or department of revenue filings. Further Codekas' attorney chose not to cross-examine Cornell, nor engage in any discovery on the child support issue despite the fact this request relief is stated in her petition to modify the parenting plan. CP 119-125.

The trial court did not err in imputing income at the median income table based upon his income being unknown. Child support is proper.

D. THE TRIAL COURT'S AWARD OF ATTORNEY FEES WAS SUPPORTED BY THE RECORD AND ADEQUATE FINDINGS.

Attorney fee awards under chapter 26 RCW rest in the discretion of the trial court, and this court will not interfere with the award unless the trial court abuses that discretion by basing its decision on unreasonable or untenable grounds. *In re Marriage of Sanborn*, 55 Wn.App. 124, 130, 777 P.2d 4 (1989).

Here, the trial court made a finding that Codekas' moved to modify the parenting plan in bad faith. RP 416. Specifically, the trial court stated in its oral ruling, "And considering that all of the investigating agencies

had already concluded their work and had essentially found the allegations to be without merit, I am going to find that there was CR 11 bad faith litigation on the father's part.” RP 416.

The trial court awarded only \$5,000 in attorney fees of the \$10,000 in attorney fees paid by Cornell.

E. MOTION FOR ATTORNEY FEES

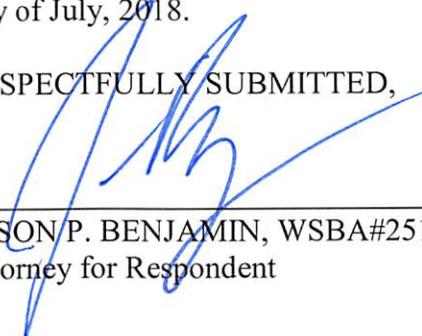
Cornell requests her fees on the authority of RAP 18.1 and RCW 26.09.140 and that his appeal is frivolous.

IV. CONCLUSION

For the foregoing reasons, this court should affirm the trial court’s entry of the final parenting plan, final order of child support and the award of attorney fees to Cornell. Cornell also requests her fees on appeal.

Dated this 25th day of July, 2018.

RESPECTFULLY SUBMITTED,



JASON P. BENJAMIN, WSBA#25133
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CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2018, I caused a true and correct copy of this Respondent's Opening Brief to be served on the following in the manner indicated below:

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APPENDIX

A

270 Ind. 238
Supreme Court of Indiana.

R. A. AUGUSTINE d/b/a South Shore Insurance, South Shore Building and Mortgage Company and South Shore Securities Corporation, and Thirteen Hundred Broadway Corporation, an Indiana Corporation, and Frank L. Korpita and Mary Agnes Korpita, husband and wife, Hobart Country Club Development Corporation, an Indiana Corporation, Title Corporation, and Norman Levenberg and Levenberg, his wife, whose true Christian name is unknown, Appellants,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF GARY, and Buckeye Union Insurance Company, and Eichel Lovelace and Patricia Lovelace, Appellees.

No. 179S10.

|

Jan. 15, 1979.

Synopsis

Purchasers of property, which was destroyed by fire one week after expiration of fire policy, brought action to recover against vendor, mortgagee, insurance company and insurance agent. Mortgagee counterclaimed for foreclosure on mortgage. After dismissal of complaint against company, agent filed third-party complaint against company and mortgagee. The Superior Court, Porter County, Bruce W. Douglas, J., granted summary judgment in favor of company and mortgagee on third-party complaint and granted summary judgment in favor of mortgagee on counterclaim, and appeal was taken. The Court of Appeals, Staton, P. J., 373 N.E.2d 181, reversed, and company petitioned for transfer of the cause. The Supreme Court, Givan, C. J., held that: (1) before a trial court can consider testimony in depositions either in ruling on motions or at the trial, the depositions must be published; (2) content of depositions could not be utilized in ruling on motions for summary judgment, and (3) insurance agent was not entitled to indemnity from insurance company, in view of fact that company had not had any duty to notify purchasers that policy was going to terminate, that if there was any duty to procure insurance for purchasers, it was a duty on part of agent and that notification of termination of policy and procurement of other insurance were outside scope of insurance company's and agent's agency relationship.

Ordered accordingly.

DeBrueler, J., concurred in result.

West Headnotes (6)

^[1] **Courts**

👉 Power to Regulate Procedure

Supreme Court has authority to adopt rules of procedure governing conduct of litigation in state's judicial system.

[6 Cases that cite this headnote](#)

^[2] **Courts**

👉 Operation and Effect of Rules

Courts

👉 Highest Appellate Court

Procedural rules and cases decided by Supreme Court take precedence over any conflicting statutes. IC 34-5-2-1 (1976 Ed.).

[13 Cases that cite this headnote](#)

^[3] **Pretrial Procedure**

👉 Admissibility in Evidence

Before trial court can consider testimony in depositions either in ruling on motions or at trial, the depositions must be published. IC 34-1-16-1, 34-1-16-2 (1976 Ed.).

[21 Cases that cite this headnote](#)

^[4] **Judgment**

👉 Documentary Evidence or Official Record

Where no motions to publish depositions were filed, no stipulation as to content of depositions was filed and none of the depositions or their content were verified to trial court by affidavit, content of depositions could not be utilized in ruling on motions for summary judgment. [IC 34-1-16-1, 34-1-16-2 \(1976 Ed.\)](#).

[18 Cases that cite this headnote](#)

[5]

Principal and Agent

🔑 Indemnity to Agent from Liability to Third Persons

Insurance agent was not entitled to indemnity from insurance company in regard to agent's liability to purchasers of property which was destroyed by fire after expiration of fire policy, in view of fact that company had not had any duty to notify purchasers that policy was going to terminate, that if there was any duty to procure insurance for purchasers, it was not the duty of company but a duty on part of such agent, which wrote policies for various insurance companies and, which, thus, was an agent of purchasers, and that notification of termination of policy and procurement of other insurance were outside scope of insurance company's and agent's agency relationship. [IC 27-1-15-1\(d\) \(1976 Ed.\)](#).

[2 Cases that cite this headnote](#)

[6]

Principal and Agent

🔑 Indemnity to Agent from Liability to Third Persons

Agent is entitled to indemnity from its principal only when agent's actions are within scope and authority of agency relationship.

[Cases that cite this headnote](#)

Attorneys and Law Firms

***239 **1019** Albert C. Hand and Michael L. Muenich, Hand, Muenich & Rodovich, Hammond, for appellants.

Peter G. Koransky, of Spangler, Jennings, Spangler & Dougherty, Gary, for appellee.

GIVAN, Chief Justice.

OPINION ON PETITION TO TRANSFER

In May, 1959, Eichel and Patricia Lovelace purchased real estate from Thirteen Hundred Broadway Corporation under a conditional sales contract. The property had previously been mortgaged to First Federal Savings and Loan Association of Gary. The building on the land was insured with Buckeye Union Insurance Company by R. A. Augustine, an insurance agent, doing business as South Shore Insurance, South Shore Building & Mortgage Company, and South Shore Securities Corporation. The insurance policy expired on December 5, 1971, and seven days later the building was destroyed by fire.

The Lovelaces brought an action against Thirteen Hundred Broadway Corporation, First Federal Savings and Loan Association, R. A. Augustine (d/b/a South Shore Insurance), and Buckeye Union Insurance Company in January, 1972. Plaintiffs dismissed with prejudice their complaint against Buckeye in October, 1972. Then, in January, 1974, defendant South Shore filed a third party complaint against Buckeye and First Federal. The trial court granted summary judgment in favor of Buckeye and First Federal on the third party complaint and also granted a summary judgment in favor of First Federal on a counterclaim against Thirteen Hundred for foreclosure on the mortgage. The Court of Appeals reversed all three summary judgments on the ground that the depositions taken in the case manifested genuine issues of material fact. [Augustine v. First Federal Savings & Loan Association of Gary \(1978\) Ind.App., 373 N.E.2d 181](#). The Court of Appeals noted that the trial court had not opened these depositions and thus erred in not considering all of the available evidence. Only Buckeye had petitioned this ***240** Court to transfer the cause and, therefore, we consider only the summary judgment motion that relates to Buckeye.

Initially, we must consider a procedural question not addressed by the Court of Appeals, except by Judge

Garrard in his dissenting opinion: That is, whether publication of the depositions was required to place them properly before the court for consideration in ruling on the motions.

In 1881, the legislature enacted the following statute: "Publication, when had. Depositions, after being filed, may be published by the clerk, at the request of either party, after giving the other, his agent or attorney, reasonable notice of the time of publication, or they may be published by order of the court, on the motion of either party."

Burns 2-1520.

The courts in Indiana have applied and utilized this rule through the years in various situations. See *Mitten v. Kitt* (1888) 118 Ind. 145, 20 N.E. 724; *Stamets v. Wilson* (1928) 89 Ind.App. 403, 164 N.E. 300. The most recent case addressing the issue of publication of depositions was *Swartzell v. Herrin* (1969) 144 Ind.App. 611, 248 N.E.2d 38. In that case, the trial court had granted the defendants' motion for summary judgment. The motion itself referred to the depositions of the plaintiffs and the trial court purportedly took these into consideration. However, the depositions were never published. The Appellate Court, after quoting from the statute, correctly held:

****1020** "In order for a conditional examination to become part of the record or to be before the court for its use, the conditional examination must be published. This is done by order of the court upon motion of any person or party interested.

Publication means the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court.

In this case no order of publication was made. The conditional examinations were not published, as evidenced by the fact that they remained sealed in their envelopes. Thus, they clearly could not have been a part of the record before the court on the motion for summary judgment."

144 Ind.App. at 617-8, 248 N.E.2d at 42.

In 1969, nonetheless, the legislature removed this statute from the ***241** books when the new rules of civil procedure were enacted. The precise reasons for this deletion are unclear.

^[1] ^[2] Nevertheless, this Court has authority to adopt rules of procedure governing the conduct of litigation in our judicial system. *State ex rel Blood v. Gibson* Cir. Ct. (1959) 239 Ind. 394, 157 N.E.2d 475. The procedural rules and cases decided by this Court take precedence over any conflicting statutes. *IC s 34-5-2-1* (Burns 1973); *Matter of Public Law No. 305 and Public Law No. 309* (1975) 263 Ind. 506, 334 N.E.2d 659.

^[3] In the case at bar, the majority of the Court of Appeals did not address the question of whether publication of the depositions was required. That court broke the seals on the depositions that had been filed, read them, and determined that contained therein was testimony which raised a genuine issue of material fact between Buckeye and South Shore regarding the apparent authority of South Shore, the reliance of the Lovelaces upon Buckeye, and the delegation of the duty to notify. 373 N.E.2d at 183 n.1. Accordingly, the Court of Appeals reversed the trial court's sustaining of the motions for summary judgment. Judge Garrard, however, in his dissenting opinion, states that the new rules of civil procedure fail to make publication of depositions a significant event and states, "Moreover, I can perceive no valid reason outside the rules for maintaining 'publication' . . . It is rather an anachronism and should be dispensed with." *Augustine v. First Federal Savings & Loan Association of Gary* (1978) Ind.App., 373 N.E.2d 181, 184 (Garrard, J., dissenting).

We disagree with this conclusion. We hereby hold that publication of a deposition is still required in order to place the deposition before the court. Until the deposition is published, by order of the court upon a motion of either party, the deposition cannot be taken into account by the court in ruling on any motions of the parties.

There is a sound and practical reason for requiring publication. Under our rules, at the time a deposition is taken, a party need not object to questions on the basis of inadmissibility. Rather, TR. 32(B) permits a party to wait and make his objection at the trial or hearing when the deposition is read into evidence or otherwise used. Were we to dispense ***242** with the publication requirement, the very essence of TR. 32(B) could not be implemented. Trial judges could examine depositions at will without regard to the possibility that they might contain objectionable matter.

Moreover, *IC s 34-1-16-1, 2* (Burns 1973) (formerly Burns ss 2-1527 & 2-1528) have been continued in the present code in their original form as enacted in 1881. These statutes recognize the publication requirement and tax the costs of publication to the moving party. It may be inferred from these two statutes that the General

Assembly did not purposely eliminate the publication requirement in its 1969 enactment. Indeed, the language of [IC s 34-1-16-1](#) that a deposition “may, at any time . . . be published by order of the court” is identical to portions of [Burns s 2-1520](#) heretofore quoted. We, therefore, hold that before a trial court can consider testimony in depositions either in ruling on motions or at the trial the depositions must be published.

****1021** ^[4] In the case at bar, the depositions were not properly published. No motions to publish were ever filed; no stipulation of the content of the depositions by contesting parties was ever filed; and none of the depositions or their content were verified to the trial court by affidavit. In oral argument before this Court, counsel for South Shore indicated that there were affidavits in the record which verified the depositions. However, we have diligently searched the record and no such affidavits appear. We must presume counsel was mistaken and was referring to the affidavit which verifies only the limited agency agreement. In fact, the only materials relating to the depositions that were before the trial court were the briefs and memoranda in support of and in opposition to the various motions for summary judgment. No affidavits accompanied these documents. Hence, the Court of Appeals erred in breaking the seals on these depositions, and the trial court did not err in failing to open, examine, and utilize their content in ruling on the motions for summary judgment.

^[5] We must determine, then, from the pleadings of Buckeye and South Shore and their limited agency agreement (which was verified by affidavit and attached to Buckeye’s motion for summary judgment), whether Buckeye was entitled to summary judgment as a matter of law. The facts to be considered are not in dispute.

***243** In December, 1968, R. A. Augustine, doing business as South Shore Securities Corporation, issued a policy of insurance on the real estate. The insurer was Buckeye Union Insurance Company. By its own terms, the policy expired December 5, 1971. On April 1, 1969, Buckeye executed a limited agency agreement with South Shore which provided for a run-off of the agency’s business with Buckeye. Under this agreement, the agent South Shore was limited to collecting premiums on policies already issued and making indorsement changes in those policies. The agency was given no authority to issue new policies for Buckeye and the agency relationship was to terminate automatically upon the expiration of all insurance contracts issued through Buckeye by South Shore before the cancellation of the general agency agreement.

The third party complaint of South Shore against Buckeye was premised on (1) the failure of Buckeye to notify the insureds that the policy would terminate on December 5, 1971, and (2) the failure of Buckeye to procure other insurance for the insureds. The trial court granted summary judgment for Buckeye. The Court of Appeals reversed. In our view, Judge Garrard, in his dissenting opinion, correctly analyzed this aspect of the case and concluded that South Shore was not entitled to indemnity from Buckeye.

First, Buckeye was not required to notify the Lovelaces that the policy was to terminate. Under the terms of the policy, the coverage expired on December 5, 1971. The policy had no renewal provision and furthermore South Shore had no authority under the limited agency agreement to renew the policy. Clearly, if any duty to notify the Lovelaces existed, it fell upon South Shore, not Buckeye. And any breach of this duty cannot be imputed to Buckeye. [Automobile Underwriters, Inc. v. Hitch \(1976\) Ind.App., 349 N.E.2d 271.](#)

Second, with regard to the failure of Buckeye to procure other insurance for the Lovelaces, the third party complaint shows that South Shore wrote insurance policies for various insurance companies, including Buckeye. South Shore, therefore, was a broker under [IC s 27-1-15-1\(d\)](#) (Burns 1975):

“(d) The word ‘broker,’ as used in this article (27-1-15-1 27-1-15-9), shall mean an individual, copartnership, or a corporation authorized by its charter or by law to do an insurance agency ***244** business, resident in any state, and not an officer or agent of the company interested, who or which for compensation acts or aids in any manner in obtaining insurance for a person other than himself, themselves or itself . . .

An insurance broker is hereby declared to be the agent of the insured for all purposes in connection with such insurance. ****1022** The interchange of business between agents shall not be interpreted to require the agent to qualify as a broker.” (Emphasis supplied.)

Hence, South Shore was the agent of the Lovelaces and if there was any duty to procure other insurance for them, that duty would again fall upon South Shore, not Buckeye. A breach of such a duty cannot be imputed to Buckeye. [Automobile Underwriters, Inc. v. Hitch, supra.](#)

^[6] Furthermore, an agent is entitled to indemnity from his principal only when the actions of the agent are within the scope and authority of the agency relationship. [Avery Co. v. Herriot-Carithers Co. \(1924\) 81 Ind.App. 348, 143 N.E. 304.](#) Here, the terms of the limited agency agreement

restricted the agency to collecting premiums and making indorsement changes on existing policies. It is clear that the failure to notify regarding termination of the policy and the failure to procure other insurance were outside the scope of the agency relationship. If anything, the duties to notify and procure other insurance were devolved upon the agent, not the principal. Under such circumstances, South Shore is not entitled to indemnity from Buckeye.

We have not opened or examined the depositions in this case, and we, therefore, express no opinion as to whether South Shore would be entitled to indemnity had the depositions been properly published. We hold only that the Court of Appeals should not have considered the depositions in reviewing the judgment of the trial court, and that considering only the pleadings and the affidavit attached to Buckeye's motion for summary judgment, the trial court did not err in granting the motion.

Accordingly, we grant transfer, vacate the opinion of the Court of Appeals as it relates to Buckeye's motion for summary judgment, and affirm that portion of the trial court's decree.

HUNTER and PRENTICE, JJ., concur.

*245 DeBRULER, J., concurs in result without opinion.

PIVARNIK, J., not participating.

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