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No. 52109-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Gavin L. Fazio, Respondent

v.

Brittany C. Stepper, Appellant

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

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II. STATEMENT OF THE CASE

The underlying action involves post-decree proceedings from a dissolution of marriage between the parties upon the final Parenting Plan and Final Child Support Order entered on May 5, 2017. On May 4, 2018, Ms. Stepper brought a Motion for Contempt Hearing against Mr. Fazio in Kitsap County Superior Court. The parties argued the matter to the Honorable William C. Houser, Kitsap County Superior Court Judge on May 25, 2018, from which Judge Houser took the matter under advisement. Judge Houser issued a letter ruling on May 29, 2018. On June 15,

2018, the Court issued a Contempt Hearing Order denying Ms. Stepper's motion; finding Ms. Stepper had acted in bad faith, and awarding Mr. Fazio attorney's fees under RCW 26.18.160. Ms. Stepper followed with this appeal of the Contempt Hearing Order.

Factual and Procedural Background

On May 5, 2017, a Final Parenting Plan and Final Order of Child Support was entered for the parties' two young children, G.F. and B.S.- F.. CP 11, CP 55. The Final Child Support Order set Mr. Fazio's monthly support payment at \$738.41 per month from April 2017 through June 2017, with payments adjusting to \$600 per month beginning on July 1, 2017.¹ CP 55. Additionally, Mr. Fazio was ordered to pay his proportional share of uninsured medical expenses, and his proportional share of expenses for work-related pre-school and day care. CP 17. As long as Mr. Fazio is current on his support payments, he is able to claim G.F. as a dependent on his tax return. CP 17. If Mr. Fazio is not current on his support obligations for a given year, Ms. Stepper may claim both children as dependents. CP 18.

Prior to the final support order being entered, the parties operated under temporary child and spousal support orders from

¹ This adjustment was due to the birth of Mr. Fazio's third child from another relationship. CP 55.

April 2016 through April 2017. CP 55-56. Under the temporary support orders, Mr. Fazio was directed to make payments directly to Ms. Stepper of \$1,250.00 per month for child and spousal support from April 2016 through December 2016, at which point the spousal maintenance obligation ended. CP 56-57. During this period, Mr. Fazio paid Ms. Stepper in the form of money orders. CP 56-58. Each time Mr. Fazio was paid (which was bi-weekly), he would purchase a money order in the amount of \$576.92 and remit it to Ms. Stepper. CP 56-60. Because Mr. Fazio was paying Ms. Stepper directly during this period, DCS recorded Mr. Fazio's payments based only on Ms. Stepper's later reporting to DCS. CP 34-35.

Notably, just days after Mr. Fazio purchased each money order for \$576.92, Ms. Stepper would often make an ATM deposit into her bank account in an amount ending in \$0.92. CP 56-57. Although the dollar amounts of the deposits would often total more than \$576.92, Mr. Fazio knew that Ms. Stepper used an ATM near her workplace to deposit her tips at the end of her work shift. CP 56. The ATM did not accept change. CP 56. From June 2016 through November 2016, Mr. Fazio purchased 13 money orders in

the amount of \$576.92, and Ms. Stepper made 13 ATM deposits ending in \$0.92 during that time period. CP 58.

Additionally, in February 2017 and March 2017, Ms. Stepper claimed to the Division of Child Support (DCS) that Mr. Fazio had missed support payments, but Ms. Stepper's bank produced money orders submitted by Mr. Fazio and endorsed by Ms. Stepper for the time periods in which Ms. Stepper claimed the payments were not made. CP 58. Despite Mr. Fazio's success in uncovering evidence that Ms. Stepper had received all support payments due to her, Ms. Stepper continued to misrepresent to DCS that she had not received all of the support payments due. CP 34. Relying on the misrepresentations made by Ms. Stepper, DCS credited Mr. Fazio with some payments, but not all of the payments that Mr. Fazio has made. RP 34. After DCS issued a conference board decision of Mr. Fazio's payment history, Mr. Fazio requested further review of the credits due which was pending at the time of the hearing on contempt. CP 67.

On February 3, 2017, Ms. Stepper informed Mr. Fazio that he was behind on his support payments and she would be claiming both children as dependents on her 2017 tax return under the terms of the Final Child Support Order. CP 30. Mr. Fazio responded to

Ms. Stepper on February 22, 2017, stating that he would be claiming G.F. as a dependent per the final orders. CP 31.

In addition to Ms. Stepper's claims that Mr. Fazio was in arrears on support payments, Ms. Stepper also claimed that Mr. Fazio had neglected to pay his portion of an uninsured medical cost and his portion of G.F.'s pre-school tuition. CP 18. The Final Child Support Order states that the party claiming reimbursement for uninsured medical expenses is required to send written documentation of the expense within 30 days of the date it is incurred. CP 60. Payment is to be made directly to the provider. CP 60.

In July 2017, G.F. required medical care and Ms. Stepper took him to the emergency room. CP 25. Two bills for uninsured medical costs were generated from this visit, but only one was remitted to Mr. Fazio within 30 days of the visit (which Mr. Fazio promptly paid). CP 25. More than five months later, Ms. Stepper informed Mr. Fazio of the second bill for the first time. CP 25. Although he was not required to pay his portion of this bill per the support order, Mr. Fazio attempted to pay his portion, but inadvertently paid the wrong provider. CP 25. Due to Ms. Stepper's failure to remit the bill to Mr. Fazio in a timely manner,

she was not able to recover the payment from the provider and the payment acted as a credit towards subsequent treatments. CP 25-26.

Finally, regarding G.F.'s preschool tuition, despite submitting daycare bills to Mr. Fazio through Our Family Wizard, Ms. Stepper refused to provide the preschool bills to Mr. Fazio as requested by him, and she had not allowed the pre-school to release bills or other information to Mr. Fazio. CP 61-62, CP 68-70. Ms. Stepper first indicated that the bills were sent home with G.F. in a craft "bucket," CP 24, and later indicated that the bills were available in the preschool's "sign-out" book. CP 113-114. Mr. Fazio had never seen the bills in his child's belongings. CP 62. Moreover, on February 9, 2017, Ms. Stepper explicitly instructed Mr. Fazio that no financial documents were to be transported via the children. CP 73. Mr. Fazio informed Ms. Stepper that Paul, an employee of the preschool, informed Mr. Fazio that no information could be released to him without Ms. Stepper's consent. CP 68. Ms. Stepper accused Mr. Fazio of harassing the school, and refused to provide the bills. CP 68.

On May 4, 2018, Ms. Stepper brought a Motion to Show Cause for a Contempt Hearing asserting that Mr. Fazio was in

violation of the Final Child Support Order for claiming G.F. as a dependent when he was not current on his support obligations. CP 17-18. In support of her motion, Ms. Stepper supplied the court with her own declaration with exhibits which included invoices for the medical and preschool bills discussed above, the parties' CR 2A agreement, an email exchange regarding which party would claim G.F. as a dependent, and a DCS Conference Board Decision and attached calculations dated February 16, 2018. CP 22-43. The DCS Conference Board Decision was still under administrative review when Ms. Stepper filed the motion. CP 67.

Mr. Fazio responded with a highly detailed declaration and exhibits, which set forth the facts described above. CP 55-73.

In response to Mr. Fazio's declaration, Ms. Stepper filed a declaration in reply which addressed only the issue of the pre-school payments. CP 113-114. The reply included a purported email from the Director of Noah's Ark Preschool, Karen Spellman, which stated that she had talked to Mr. Fazio one or two times, had denied Mr. Fazio information prior to his child's official enrollment, but had answered his "questions" in a subsequent call. CP 114.

On May 25, 2018, the parties appeared before the Honorable Judge William C. Houser to argue the motion for contempt of the child support order. RP Vol. 1, p. 4. In a preliminary ruling upon motion by Mr. Fazio, Judge Houser struck the email from Karen Spellman submitted by Ms. Stepper in her reply declaration on the grounds that it was hearsay and unauthenticated. RP Vol. 1, p. 5. During the hearing, Mr. Fazio's attorney specifically referenced *Fairchild v. Davis*, 148 Wn. App. 828 as the basis for her argument that Ms. Stepper had not submitted adequate evidence to support her motion to the court. RP Vol. 1, p. 12-13.

Near the close of the hearing, Mr. Fazio's attorney informed the court that he sought attorney's fees under RCW 26.18.160. RP Vol. 1, p. 26. Mr. Fazio's attorney specifically pointed out that Mr. Fazio was only entitled to an award of the mandatory prevailing party attorney fees under the statute if the court found that Ms. Stepper acted in bad faith. RP Vol. 1, p. 26. Judge Houser took the matter under advisement, and informed the parties that he would issue a ruling by June 1, 2018. RP Vol. 1, p. 27.

On May 29, 2018, Judge Houser issued his ruling denying Ms. Stepper's motion for contempt and inviting Mr. Fazio to submit his request for attorney fees. CP 117.

On June 1, 2018, Mr. Fazio's counsel filed a declaration for attorney's fees with the court. CP 119-120. On June 15, 2018, the parties reconvened before Judge Houser for issuance of his order and ruling on Mr. Fazio's request for attorney's fees. RP Vol. 2, p. 2. Mr. Fazio's attorney candidly pointed out twice that a fee award under RCW 26.18.160 required a finding of bad faith on the part of the obligee (Ms. Stepper) if the obligor (Mr. Fazio) was the prevailing party in an enforcement action. RP Vol. 2, p. 2, 9.

In arguing in favor of the court finding that Ms. Stepper acted in bad faith, Mr. Fazio's attorney drew the court's attention to the evidence in the record showing that Ms. Stepper had refused to provide necessary information regarding the medical expenses, preschool expenses, and alleged support arrearages when requested by Mr. Fazio. RP Vol. 2, p. 3-5.

At the conclusion of the hearing, Judge Houser ordered that Mr. Fazio was not in contempt, and entered a specific finding that Ms. Stepper "...acted in bad faith in bringing the proceeding

before the court without substantive evidence of a violation of the support order by...Gavin Fazio.” CP 130.

III. ARGUMENT

A. THE TRIAL COURT ACTED PROPERLY WHEN IT ENTERED A FINDING THAT MR. FAZIO DID NOT VIOLATE THE FINAL CHILD SUPPORT ORDER WHEN THE ONLY EVIDENCE SUPPLIED BY MS. STEPPER WAS A SELF-SERVING DECLARATION STATING THAT MR. FAZIO WAS NOT CURRENT ON HIS CHILD SUPPORT PAYMENTS, AND MR. FAZIO OFFERED STRONG AND CREDIBLE EVIDENCE TO REBUT HER ASSERTIONS.

Punishment for contempt of court is within the sound discretion of the trial court, and the reviewing court will not reverse the trial court’s order absent an abuse of that discretion. *In re Marriage of James*, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). In order to find abuse of discretion, the reviewing court must be convinced that no reasonable person would adopt the view of the trial court. *Gilmore v. Jefferson County Public Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018) *see also* *Trummel v. Mitchell*, 156 Wn.2d 653, 672, 131 P.3d 305 (2006) (“A finding of contempt will be upheld if the appellate court can find any proper basis for the finding.”). The reviewing court examines the trial court’s factual findings for substantial evidence,

but does not review the credibility determinations made by the trial court. *In re Marriage of Rideout*, 150 Wn.2d 337, 350-52, 77 P.3d 1174 (2003).

Contempt of court means intentional “disobedience of any lawful judgment, decree, order, or process of the court...” RCW 7.21.010(1)(b). Courts may initiate contempt actions under RCW 7.21.010 against a parent who fails to comply with child support orders. *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 693, 959 P.2d 687 (1998) *review denied* 137 Wn.2d 1017, 978 P.2d 1097(1999). To support a finding of contempt, the facts must constitute a plain violation of the order at issue. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). The party moving for contempt has the burden of establishing contempt by preponderance of the evidence and must provide evidence that the non-moving party acted in bad faith or engaged in intentional misconduct. *James*, 79 Wn. App. at 442.

A violation of a support order must be established by adequate proof. *Fairchild v. Davis*, 148 Wn. App. 828, 832, 207 P.3d 449 (2009). To be adequate, evidence must provide a reasonable basis for the assertions, and “it must not subject the trier

of fact to mere conjecture.” *Id.* An unsupported, self-serving declaration of the alleged sums owed is not adequate proof. *Id.*

In the present case, Ms. Stepper did not offer adequate proof to substantiate her assertion that Mr. Fazio was in violation of the Final Child Support Order, nor did she offer adequate proof that Mr. Fazio acted in bad faith with regard to the Order.

Ms. Stepper asserted that Mr. Fazio violated the terms of the Final Child Support Order because he claimed G.F. as a dependent on his 2017 tax returns while he was not current in his support obligations. CP 30. To support her allegations, Ms. Stepper supplied the court with her own declaration supported by exhibits which did not include any affirmative proof that Mr. Fazio was not current in his support obligations. CP 22-43.

Regarding her assertion that Mr. Fazio was in arrears on support payments, Ms. Stepper relied solely on the findings of DCS that Mr. Fazio was in arrears in child support payments. CP 23. However, DCS’s calculations do not provide any proof of an arrearage because they are based on Ms. Stepper’s own self-serving assertions made to DCS for the period of time when Mr. Fazio was paying support directly to Ms. Stepper pursuant to court order. CP 34-35. Mr. Fazio rebutted Ms. Stepper’s allegations

with a highly detailed and well-supported accounting of the payments (and over-payments) that Mr. Fazio made and Ms. Stepper received. CP 55-60. In light of the evidence submitted to the court, Ms. Stepper did not meet her burden to prove that Mr. Fazio was in arrears, nor did she meet her burden to prove that any possible arrearage was due to bad faith on Mr. Fazio's part.

Regarding the pre-school tuition payments, Ms. Stepper further failed to meet her burden to offer adequate proof of a violation of the Final Child Support Order on Mr. Fazio's part. Ms. Stepper claimed that Mr. Fazio "...receives the preschool bill directly from Noah's Ark." CP 24. Not only does Ms. Stepper lack the personal knowledge to assert this as a fact in her declaration, her theory of how the bill was relayed to Mr. Fazio changed between her initial declaration and her reply. CP 24, CP 113-114. In her reply, Ms. Stepper once again provided the court with her own self-serving declaration, which was supported only by inadmissible hearsay evidence. CP 113-114.

Given the conflicting statements offered by Ms. Stepper, and the lack of competent evidence in support of her self-serving declarations, Ms. Stepper did not meet her burden to prove that Mr. Fazio was in violation of the preschool payment agreement. Ms.

Stepper also failed to meet her burden to prove that any potential violation on the part of Mr. Fazio was done in bad faith, as the evidence shows that Mr. Fazio made repeated attempts to gain access to the preschool bills to no avail. CP 61-62.

Regarding the uninsured medical costs, Ms. Stepper once again failed to meet her burden to prove that Mr. Fazio violated the Final Child Support Order. The Final Child Support Order includes a provision that documentation for any uninsured health care expenses must be submitted to Mr. Fazio within 30 days of the expense being incurred. CP 60. The Order further instructs that payment be made directly to the provider. CP 60. As Mr. Fazio stated in his detailed declaration in response to Ms. Stepper's declaration, the medical bill in question was submitted to Mr. Fazio five months after the doctor's visit – far longer than the 30 days required by the Final Child Support Order. CP 60.

Despite not being required to do so, Mr. Fazio made his portion of the payment to the provider he believed had issued the bill. CP 60-61. Furthermore, Mr. Fazio suggested that the medical bills be sent to his address if Ms. Stepper was concerned about their timely delivery to her home. CP 61. Ms. Stepper declined the offer. CP 61. Ms. Stepper failed to provide adequate proof of a

violation of the Final Child Support Order, and provided any evidence of bad faith on the part of Mr. Fazio. If anything, the evidence demonstrates Mr. Fazio's good faith efforts to be and remain current in his obligations, despite Ms. Stepper's obstruction.

Ms. Stepper claims that Mr. Fazio took a "brazen" step by claiming G.F. as a dependent on his 2017 tax return. Pet'r.'s Br. 17. However, as set forth above, Mr. Fazio was not in violation of his support obligations. Ms. Stepper's belief that Mr. Fazio was not current in his obligations is irrelevant, and DCS cannot be considered a "neutral" party in this case because DCS has based its calculations that were still undergoing review without foundation and on the self-reported figures of Ms. Stepper. See Pet'r.'s Br. Ms. Stepper posits that she could not be misrepresenting the amount of direct payments made to her because she "...took the time to review her records and agree that [Mr. Fazio] was owed some credits...." Pet'r.'s Br. 15. This only further proves that all of DCS's calculations are based on the erroneous self-serving reports of Ms. Stepper and cannot be taken as competent evidence.

Under the "adequate proof" standard adopted in *Fairchild*, Ms. Stepper did not meet her burden to prove that Mr. Fazio was

delinquent in his support obligations and in violation of the Final Child Support Order by claiming G.F. as a dependent on his tax return. Because Ms. Stepper supplied the court with only her self-serving declaration and scant exhibits as evidence, the court's ruling was based on a credibility determination that cannot be disturbed on appeal. Relying on the competing evidence offered by each party, the trial court made a determination that was not so untenable that no reasonable person could adopt its view. Therefore, the trial court did not abuse its discretion when it denied Ms. Stepper's Motion for Contempt.

B. THE TRIAL COURT ACTED PROPERLY WHEN IT FOUND THAT MS. STEPPER ACTED IN BAD FAITH WHEN THE AFFIDAVITS AND EXHIBITS SUBMITTED TO THE COURT ESTABLISHED OBSTRUCTION, INTENTIONAL MISREPRESENTATIONS, AND IMPROPER MOTIVE ON MS. STEPPER'S PART.

When a trial court proceeding turns on credibility determinations and a factual finding of bad faith, the reviewing court applies a substantial evidence standard of review. *Rideout*, 150 Wn.2d at 351. Even when the only evidence submitted to the trial court is documentary or in the form of affidavits, the trial court is in the best position to make credibility determinations and

draw inferences from the evidence in family law matters. *Id.* at 352. Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). If the challenged findings of fact are supported by the record, the reviewing court cannot substitute its judgment for that of the trial court. *Id.* at 391.

RCW 26.18.160 does not define “bad faith,” and case law does not provide an explicit guide as to what will suffice as “bad faith” under the statute. *See In re Marriage of Cummings*, 101 Wn. App. 230, 6 P.3d 19 (2013). In looking to other areas of law, bad faith is defined in a variety of ways. Substantive bad faith at equity occurs when a party intentionally brings a frivolous claim with improper motive and for the purpose of harassment. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999). In the context of a contempt proceeding in which one parent attempts to compel another to comply with a parenting plan, a violation of the parenting plan is per se an act of bad faith. *In re Marriage of Meyers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). Finally, in an action challenging the validity of a will, the court defined bad faith as “actual or constructive fraud or a neglect

or refusal to fulfill some duty...not prompted by an honest mistake...but by some interested or sinister motive.” *In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999).

Ms. Stepper cites *In re Marriage Cummings* as support for reversal of the trial court’s finding of bad faith. Pet’r.’s Br. 20. However, *Cummings* is distinguishable from the case at bar. First, in *Cummings*, a commissioner and the trial court granted the underlying motion – a point which the reviewing court highlighted as an important consideration. 101 Wn. App. at 235. Second, there is no indication that the non-prevailing party in *Cummings* made false representations on the tax returns at issue. *Id.* at 234-35. Finally, the non-prevailing party did not obstruct the prevailing party from being able to fulfill his obligations under the support order. *Id.* at 234.

In the present case, *Cummings* is not instructive. Ms. Stepper was not successful on the merits at the trial level where determinations of credibility are made. Additionally, Ms. Stepper made misrepresentations to DCS, and then used those false calculations as evidence to support her motion, and the violations she alleged were all of her own creation through her obstructive conduct.

Ms. Stepper asserts that the trial court found that she had acted in bad faith because she did not present sufficient evidence to support her motion for contempt. Petr.'s Br. 17. However, the court had the opportunity to extensively review the evidence provided by Ms. Stepper and the comprehensive evidence offered by Mr. Fazio in response. The evidence submitted by Mr. Fazio casts clear doubt on the authenticity of Ms. Stepper's assertions, and revealed her pattern of obstruction, despite Mr. Fazio's attempts to cooperate.

Ms. Stepper's conduct supports a finding of substantive bad faith because she knowingly received and deposited support payments, and failed to report the receipt of those payments to DCS when she sought enforcement through DCS. The ATM deposits matching the support payment amounts and the endorsed, unreported money orders evidence Ms. Stepper's conduct. CP 55-60. Then, after Ms. Stepper failed to accurately report those payments, she used the erroneous DCS findings (based solely on her self-serving reporting of payments) to bring the motion for contempt. CP 32-35. The evidence submitted by Mr. Fazio suggests that it was Ms. Stepper who acted in violation of the Final Child Support Order when she did not remit medical bills within

30 days of incurring the cost and did not allow Mr. Fazio access to the school bills and records. CP 60-62.

In filing her frivolous motion, Ms. Stepper certainly did so for an improper motive. Had she been successful, Ms. Stepper would have received substantial sums of money to which she is not legally entitled. The harassing purpose is evident as well. Ms. Stepper claims that Mr. Fazio has violated the Final Child Support Order, but it is Ms. Stepper herself who has blocked Mr. Fazio's access to necessary bills and records. CP 60-62. Without these, Mr. Fazio is not in contempt of the Final Order of Child Support because he cannot make payments to the providers directly, as required by the Order. CP 60-62. Although Ms. Stepper could easily remedy this situation by providing Mr. Fazio with the necessary information in the proper manner, she chose to bring a motion for contempt instead.

A review of the evidence presented to the trial court confirms that a fair minded person could concur with the factual finding that Ms. Stepper acted in bad faith when she brought a motion based on false evidence and claims of violations which were her own creation, and when she stood to be awarded with

financial windfall if she were successful. The trial court did not err in its finding of bad faith on the part of Ms. Stepper.

C. THE TRIAL COURT ACTED PROPERLY WHEN IT GRANTED MR. FAZIO ATTORNEY'S FEES AS MANDATED BY RCW 26.18.160 UPON THE COURT'S FINDING OF BAD FAITH.

RCW 26.18.160 states

In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

Whether a statute provides for an award of fees is a question of law. *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 244, 11 P.3d 871 (2000). The court has already determined as a matter of law that an award of attorney's fees to the prevailing party in an action brought under RCW 26.18.160 is mandatory. *In re Marriage of Logg*, 74 Wn. App. 781,786, 875 P.2d 647 (1994). In order to reverse an award of attorney's fees, it must be shown that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

Because the trial court did not abuse its discretion when it found that Ms. Stepper acted in bad faith, and Mr. Fazio was a prevailing party, it follows that the trial court did not abuse its discretion when it granted Mr. Fazio attorney's fees as mandated under RCW 26.18.160.

IV. REQUEST FOR ATTORNEY'S FEES

a. Mr. Fazio is entitled to costs and attorney's fees under RCW 26.18.160

A prevailing party in an action to enforce a support order is entitled to attorney's fees incurred at the trial level and on appeal. *Matter of Paternity of M.H.*, 187 Wn.2d 1, 13, 383 P.3d 1031 (2016). An award of attorney's fees to the prevailing party are mandatory under RCW 26.18.160. *Logg*, 74 Wn. App. at 786. The party requesting fees need not show financial need under this statute. *In re Marriage of Anderson*, 49 Wn. App. 867, 873, 746 P.2d 1220 (1987).

If this court affirms the trial court's determination that Mr. Fazio is the prevailing party, the court must award reasonable attorney's fees under RCW 26.18.160.

b. Gavin is entitled to attorney's fees under RAP 18.9(a)

RAP 18.9(a) states

Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel...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.

RAP 18.9(a) allows for sanctions in the form of attorney's fees when an opposing party files a frivolous appeal. *Hanna v. Margitan*, 193 Wn. App. 596, 614, 373 P.3d 300 (2016). “[A]n appeal is frivolous if it raised no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists.” *Id.* at 615.

On the issue of whether the trial court erred in holding that Mr. Fazio was not in contempt of the Final Child Support Order, Ms. Stepper has cited no law in support of her argument. Pet'r.'s Br. 14-17. Not only would an assignment of error with no basis in law be concerning under any circumstances, it is particularly disturbing in this case because Mr. Fazio's attorney cited to *Fairchild* -- the controlling law -- twice in the May 25, 2018

hearing, RP Vol. 1, p. 13-14, 17, and again in the June 15, 2018 hearing. RP Vol. 2, p. 3.

In light of *Fairchild*, Ms. Stepper simply cannot prevail on appeal. Her supporting evidence of merely a self-serving affidavit has been squarely rejected as adequate under *Fairchild*, a case of which she was made aware on three separate occasions during the underlying litigation.

Additionally, Ms. Stepper has failed to meet virtually all of the deadlines established by the Court in regard her appeal, with letters of sanctions being issued repeatedly, and terms being ordered. Her dilatory processing of this appeal has resulted in Mr. Fazio's counsel's repeated adjustments to her own schedule and planning, and repeated and additional reviews of the file and status of the proceedings.

Upon the Court's review of Ms. Stepper's omission of dispositive controlling law, the deferential standard of review of contempt orders, and the cavalier approach to her appeal, the appropriate conclusion is that Ms. Stepper's appeal is frivolous and warrants sanctions in the form of attorney's fees under RAP 18.9(a).

CONCLUSION

For the foregoing reasons, Respondent Gavin Fazio requests that this Court:

- (1) Affirm the trial court's Contempt Hearing Order that Mr. Fazio was not in contempt of the support order;
- (2) Affirm the trial court's finding that Ms. Stepper acted in bad faith in bringing the Motion for Contempt;
- (3) Affirm the trial court's award of attorney's fees to Mr. Fazio under RCW 26.18.160;
- (4) Award Mr. Fazio reasonable attorney's fees under RCW 26.18.160 as the prevailing party to this appeal; and
- (5) Impose sanctions on Ms. Stepper under RAP 18.9(a) for bringing a frivolous appeal.

DATED this 8 day of April, 2019.

RESPECTFULLY SUBMITTED,

DAVIES PEARSON, P.C.

By:



SUSAN L. CAULKINS, WSB#15692
Of Attorneys for Respondent Gavin Fazio

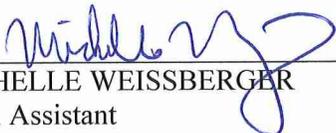
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 10th day of April, 2019, I caused a true and correct copy of this Brief of Respondent to be served on the following by email and by placing the same in the US Mail, first class postage prepaid:

Attorney for Appellant: Laura Carlsen
 Carlsen Law Offices, PLLC
 4508 Auburn Way N, Ste. A106
 Auburn WA 98002

 lcarlsen@carlsenlawoffices.com

Signed at Tacoma, WA this 10th day of April, 2019.



MICHELLE WEISSBERGER
Legal Assistant

**FILED
Court of Appeals
Division II
State of Washington
4/11/2019 9:22 AM**

NO. 52109-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GAVIN L. FAZIO

Respondent,

v.

BRITTANY C. STEPPER,

Appellant.

Appealed from Kitsap County Superior Court Case No. 17-3-00644-6

PROOF OF SERVICE

SUSAN L. CAULKINS, WSBA #15692
DAVIES PEARSON, P.C.
920 Fawcett Avenue
Tacoma, WA 98402
253-620-1500

PROOF OF SERVICE

I, Michelle Weissberger, employed by Davies Pearson, P.C. as a Legal Assistant to Susan L. Caulkins and being duly sworn on oath, states and alleges as follow:

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On April 10th, 2019, I caused to be served the following documents

- 1. Brief of Respondent

on the following persons in the manner listed below:

Laura Carlsen, WSBA #41000 Attorney for Appellant Carlsen Law Offices, PLLC 4508 Auburn Way N, Ste. A106 Auburn WA 98002	(X) U.S. First Class Mail See attached letter () U.S. Certified Mail (X) Electronically via email See attached Email () Hand Delivery () Express Delivery () Facsimile
--	---

Signed at Tacoma, WA this 11th day of April, 2019.

DAVIES PEARSON, P.C.



MICHELLE WEISSBERGER
Legal Assistant to Susan L. Caulkins

Susan L. Caulkins

253-620-1500
scaulkins@dpearson.com



April 10, 2019

Laura Carlsen
Carlsen Law Offices, PLLC
4508 Auburn Way N, Ste. A106
Auburn, WA 98002-1381

Sent via E-mail & U.S. First Class Mail

RE: *In re Gavin L. Fazio v. Brittany C. Stepper*
Court of Appeals, Division II: 52109-1-II
Our File No. 23223-2

Dear Ms. Carlsen:

Regarding the above matter, enclosed for your records please find the following documents:

1. Brief of Respondent

If you should have any questions or concerns, please do not hesitate to contact our office.
Thank you.

Sincerely,
DAVIES PEARSON, P.C.

A handwritten signature in cursive script that reads 'Michelle Weissberger'.

Michelle Weissberger
Legal Assistant to
SUSAN L. CAULKINS

/maw

Enclosures

maw / s:\2xxxx\23xxx\23223\2-post-disso issues\correspondence\letter op atty-4.10.19.doc

Michelle Weissberger

From: Laura Carlsen <lcarlsen@carlsenlawoffices.com>
Sent: Wednesday, April 10, 2019 9:21 AM
To: Michelle Weissberger
Cc: Piper Bliss; Susan L. Caulkins
Subject: RE: Fazio v. Stepper-Appeal-52109-1-II

Received. Thank you!

Laura Carlsen, Attorney at Law

CARLSEN LAW OFFICES, PLLC

(253) 215-1849 (P)

(253) 617-1351 (F)

lcarlsen@carlsenlawoffices.com



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From: Michelle Weissberger <mweissberger@dpearson.com>
Sent: Wednesday, April 10, 2019 8:52 AM
To: Laura Carlsen <lcarlsen@carlsenlawoffices.com>
Cc: Piper Bliss <pbliss@carlsenlawoffices.com>; Susan L. Caulkins <scaulkins@dpearson.com>
Subject: Fazio v. Stepper-Appeal-52109-1-II

Good morning.

Enclosed please find the Brief of Respondent filed with the Court of Appeals this morning regarding the Fazio v. Stepper matter.

Michelle Weissberger
Legal Assistant to Susan L. Caulkins
253-620-1500 - mweissberger@dpearson.com

Davies Pearson, P.C.

ATTORNEYS AT LAW

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DAVIES PEARSON, P.C.

April 11, 2019 - 9:22 AM

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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52109-1
Appellate Court Case Title: Gavin Fazio, Respondent v. Brittany Stepper, Appellant
Superior Court Case Number: 17-3-00644-6

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