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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER BROWN,

Respondent,

v.

AUTUMN MOZER,

Appellant.

BRIEF OF RESPONDENT BROWN

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A. INTRODUCTION

This case is not about punishing a mother. Appellant's br. at 1. This case is about the trial court resolving issues of fact and deciding what is in the best interest of a three-year-old girl, G.M.-B. That fact-intensive determination should not be overturned on appeal. The trial court acted within its discretion in making evidentiary decisions at trial and fashioning a parenting plan which restricted the mother, Autumn Mozer's, decision-making capacity due to her abusive use of conflict and withholding of the child from her father, Christopher Brown, without a good reason. Mozer's appeal merely seeks to revisit those discretionary determinations and relitigate the facts which the trial court fully considered. This Court should affirm.

B. STATEMENT OF THE CASE

Brown and Mozer met in August 2014. RP 151. Their initial relationship only lasted a few days before Mozer ended the relationship. *Id.* Approximately two weeks later, Mozer informed Brown that she was pregnant. RP 87. Brown and Mozer briefly tried to reconcile, but the relationship again ended very quickly. RP 154.

Due to their short romance, Brown testified "it was like having a baby with a stranger." RP 89. Mozer blocked Brown's phone number and Facebook account after their breakup, so he had no means of reaching her

during the pregnancy. RP 156. He attended at least one medical appointment early in the pregnancy, but Mozer did not invite him to any others. RP 155-56. Because Mozer had blocked his phone, Brown decided to “respect [her] space” and not push the matter of participating in the pregnancy any further. RP 155-56.

G.M.-B. was born May 21, 2015. RP 89. Approximately two months later, DNA tests confirmed that Brown was G.M.-B.’s father. RP 88-89.

Contrary to Mozer’s assertions in her brief, Brown did not initially “reject[]” his daughter. Appellant’s br. at 3.¹ Brown wanted to be involved from the beginning of the pregnancy, but Mozer blocked his lines of communication and denied him the opportunity. RP 154-56, 169-70. The parents attended the same church, and Brown would ask to see and hold his child in church, but Mozer refused. CP 95. Brown testified that this was “humiliating.” *Id.* Brown tried to work on a parenting plan with Mozer, but she was apprehensive and upset that he had started a new relationship

¹ For example, Mozer cites RP 89 for the assertion that Brown “did not seek a relationship with his daughter” during the first few months of her life. Appellant’s br. at 3. Not true. Brown actually testified in that passage that he had “no way to communicate with [Mozer]” because she blocked his number, that Mozer was “apprehensive” about letting Brown visit his child, and that she refused to work on a parenting plan with him, despite his requests. RP 89-90. Rather than harass Mozer or immediately seek costly action in court, Brown testified that he chose to exercise “patience” as he believed his religion demanded. *Id.* Mozer is wrong to try to use that patience against him to paint him as an uncaring father, and her misleading cites to the record are telling.

with a woman he eventually married. RP 89-90. He also wanted to attend his child's medical appointments, but Mozer refused to invite him to appointments or "share[] any medical records." RP 158. Despite his efforts to procure such records and establish a relationship with his child's doctors, Brown was "kept in the dark." *Id.*

Eventually, when G.M.-B. was approximately four months old, Mozer allowed Brown to visit G.M.-B. for the first time at their church. RP 87. A few months later, the parents agreed to an informal arrangement which allowed Brown residential time with his daughter, including overnight stays. RP 90; CP 96-97.

G.M.-B. is not Brown's only child. He has an eight-year-old son from a previous relationship. RP 86. He shares residential time with his son's mother, and she submitted a declaration stating that he is a loving father and that she has no issues co-parenting with Brown. CP 144-45. Additionally, Brown is now married to Brenna Brown, they have their own child together who was born after G.M.-B., and Brown acts as the stepfather to Brenna's child from a previous relationship. RP 58-59. Brenna testified that Brown is a loving and caring father to all the children in his life, including G.M.-B. RP 59-60, 65-66. She testified that Brown financially supports the children and takes care of their daily needs. RP 66-67. She

also noted that Brown had no issues with co-parenting, either with her or with his eldest child's mother. RP 61.

Despite his long history of successful parenting and co-parenting, the situation with Mozer eventually deteriorated when the parents had a dispute over G.M.-B.'s diet. Mozer took G.M.-B. to the emergency room in November 2015 – before Brown had regular residential time with the child – for a possible adverse reaction to eating rice cereal. RP 15-16. Even though gastroenterologist testing was negative, Brown was willing to work with Mozer's attempts to identify possible food allergies. RP 97-98. He attended appointments with specialists, followed all dietary restrictions Mozer imposed, and even agreed to use natural soaps, wipes, and medicines at Mozer's request. RP 101-02.

Suddenly, in June 2016, Mozer alleged that G.M.-B. returned from her visit with Brown crying from stomach pain that lasted for several days. RP 15-16. Mozer accused Brown of feeding the child prohibited foods, which he denied. RP 108. Brown had never witnessed such extreme symptoms and had followed her dietary plan while she was in his care. RP 96-98. Rather than work out their disagreement, Mozer abruptly stopped visits and withheld G.M.-B. from Brown. RP 108-09. She continued to block his phone number and Facebook, and she refused to respond to his emails pleading to see his child. RP 112-14. She continued to withhold the

child even after further testing confirmed that the child did not have food allergies. RP 31.

Cut off from contact with his child, Brown became increasingly concerned for her safety and well-being. RP 112, 170. He had always had some concerns about Mozer's parenting. For example, he testified that G.M.-B. was often dirty and unkempt after staying with Mozer, that she suffered from flea or bedbug bites in Mozer's care, and that Mozer rarely had basic items like diapers, wipes, or even a jacket for the child when transferring G.M.-B. RP 94-95. Additionally, after Mozer cut off contact, one of Mozer's close friends reached out to Brown to tell him that she called Child Protective Services because she was concerned for the child's safety and that Mozer was in a "dark place." RP 111-12; CP 121. Due to these concerns and his total lack of contact with his child, Brown asked the police to conduct a welfare check on two occasions, once when he happened to see Mozer at the store alone one day without the child. RP 92-93. He was relieved to learn the child was at daycare. RP 26.

Despite the fact that Brown had no means to contact her, never threatened her, and never attempted to physically confront her, Mozer filed two petitions for protection orders against Brown, in June and July 2016, alleging that Brown harassed and stalked her. CP 107-13, 123-29. Mozer felt that Brown "belittled" her when he explained that he did not know why

G.M.-B. appeared sick after returning from his care and that he fed her the same foods he always fed her, and that this constituted harassment. RP 28, 108. She also claimed that he stalked her by asking for a welfare check when he had legitimate concerns for his child's safety and no way to contact Mozer. CP 57-58.² Both of her petitions were summarily denied. Exs. 6, 8.

Mozer continued to withhold the child from Brown for the next year. RP 112. During that time, Brown continued to request visits through emails, which went unanswered. RP 113-15, 167, 170. He spoke with church advisors who preached patience. RP 167. He worked with court staff to attempt to file a petition for a parenting plan, and eventually saved enough to hire a lawyer to file a petition in August 2017. RP 114-15.

In his initial filings, Brown alleged that Mozer had engaged in abusive use of conflict and withholding of the child for no valid reason. CP 21-25. The trial court ordered a temporary parenting plan which reserved these issues for trial. CP 252-55. G.M.-B. began visiting with Brown again

² Mozer's allegations that Brown harassed her by asking for a welfare check when he had no means to contact Mozer or his child are particularly disingenuous where she has also argued that Brown abandoned his child or otherwise showed no interest in her well-being. *E.g.*, RP 37. Mozer cannot have it both ways. Rather, the record shows that at times Brown took appropriate steps to ensure his child's well-being, and at other times he exercised patience and tried to reach Mozer through colleagues at church and through other informal means.

and staying with him on weekends. *Id.* The child was happy to see her father again. CP 457-58.

Things went well under the temporary parenting plan for nearly six months, until March 2018, when Mozer filed a motion for immediate restraining order to once again withhold the child from Brown. Mozer alleged that the child was unhappy when transferring to the father's care and when she attempted to set up video calls. CP 456-59. While G.M.-B. did throw fits during these times of transition, which can naturally be hard for a young child, she never expressed being scared of or mistreated by her father. RP 133-34. Brown testified that he quickly picked up on positive techniques to deal with G.M.-B.'s fits during changeovers between the parents, such as giving the child her blanket or singing to her. RP 127-28. He tried to work with Mozer and asked her to promote a more positive vibe during these transitions. RP 126. But rather than work with the father, she filed her motion for restraining order to withhold the child from him completely. Mozer later admitted at trial that G.M.-B. never showed "any signs that she had been traumatized or injured in any way" while in her father's care. RP 48.

Nevertheless, out of an abundance of caution, the trial court ordered that Brown's visits be supervised so it could learn more about this issue. RP 129-30. Notes from those visitations were overwhelmingly positive.

Ex. 25; RP 132-36. The child was immediately happy to see her father, she was “very comfortable and affectionate with him,” and the two had positive visits playing in the park and sharing food together. *Id.* The court ordered that visits would resume unsupervised under the original temporary parenting plan at the end of April 2018, and the parties engaged in additional counseling. CP 164.³

The case proceeded to trial shortly after the father’s visit resumed. In accordance with Pierce County Local Rule 16(c)(2)(A), the trial court, the Honorable Edmund Murphy, held a status conference eight weeks prior to trial. CP 154-55. The trial court informed the parties at this hearing that it was inclined to hear only from the parents but would consider additional witnesses with an offer of proof. CP 155. The trial court also instructed both parties to submit “all proposed final pleadings related to the case.” CP 157.

At trial, Mozer sought to call four witnesses, three friends and her sister. RP 8-9. She submitted declarations of her potential witnesses and made an offer of proof at the outset of trial. RP 9-10. The court asked

³ There was some confusion over the terms of the order and Mozer’s justification for delaying resuming unsupervised visits. *See* CP 164 (explaining that the order resuming visits “could have been written more clearly”). This issue is not particularly relevant on appeal, rather the important point is that visit supervisors saw no issues with the father’s parenting or fear on the child’s part of her father, which was the basis for Mozer’s baseless petition for a restraining order in March 2018.

Mozer what the witnesses would testify about, and Mozer answered, “The truth.” *Id.* When pressed further Mozer elaborated:

Sarah Crump has been in the same ward, church, as me and the petitioner. Not only that, she also witnessed some behaviors of Grace since this whole thing has started where we had supervised visits start for the petitioner. So her declaration’s in there...Jennifer Cortez is my sister, so she has been around the whole time. And, again, there’s a declaration in there about things that she had witnessed from Grace’s behavior and changes...And then Kimberly Pettie, she’s been around since Grace – before Grace was born and when Grace was born. So I do believe that her testimony is going to be very important and a picture of what’s happened throughout Grace’s life, and she’s also met the petitioner.

RP 10. The court determined that Mozer could call one of her proposed witness.⁴ Mozer did not object, nor did she ask the trial court to clarify or expand on its ruling in any way. *Id.*

The court heard from the parents, the father’s new wife Brenna Brown, and Mozer’s friend, Kimberly Pettie. The parties testified to the case history above, and the father testified that because of Mozer’s abusive use of conflict and withholding of the child, he was seeking primary custody and sole decision-making authority for her education and non-emergency medical care. RP 115-19, 193-96. Contrary to Mozer’s assertions in her brief, this was not the first time Mozer heard these arguments; Brown informed Mozer that he intended to ask for these provisions weeks earlier

⁴ Likewise, the father called only one witness in addition to himself – his current wife, Brenna Brown.

when they attempted to mediate the case. CP 271-72. She did not object to his testimony or argument on these points at trial. RP 115-19, 193-96.

The trial court took the matter under advisement for nearly one month before it issued a written initial ruling. RP 163-66. The court considered the testimony and exhibits presented at trial “as well as the court file” which included many motions, declarations, and findings related to the child’s well-being. CP 163. The court ultimately awarded Brown primary custody. CP 163-66, 188-203. Due to Mozer’s history of abusive use of conflict and withholding of the child without good reason, the court determined that Brown would have authority to make educational as well as non-emergent health care decisions. *Id.* Mozer moved for reconsideration or a new trial, which the trial court denied. CP 289. This appeal follows.

C. SUMMARY OF ARGUMENT

Mozer failed to preserve for appeal the issues of whether the trial court properly limited the number of friends she could call to testify on her behalf, and whether the trial court erred in allowing the father to argue for primary custody where his initial proposed parenting plan asked for 50/50 joint custody. To the extent the Court decides to reach either issue, no error occurred as the trial court has broad discretion to admit testimony and argument, and Mozer had notice and an opportunity to respond to the

father's request for primary custody and medical as well as educational decision-making.

Mozer's additional attacks on the parenting plan are meritless. The court's findings that Mozer engaged in abusive use of conflict and withholding of the child were supported by substantial evidence and sufficient findings. That highly-fact intensive determination should not be disturbed on appeal.

D. ARGUMENT

(1) Standard of Review

Trial courts have broad discretion in adopting a parenting plan. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013). Appellate courts "are reluctant to disturb a child custody disposition because of the trial court's unique opportunity to personally observe the parties." *Murray v. Murray*, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981). The party challenging a parenting plan on appeal bears the heavy burden of showing a manifest abuse of discretion. *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555, *review denied*, 180 Wn.2d 1012 (2014).

In addition to attacking the parenting plan directly, Mozer appeals from the trial court's denial of her request for a new trial. A trial court has broad discretion in determining whether to grant a motion for a new trial.

Teter v. Deck, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). *See also*, *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 402 P.3d 907 (2017), *review denied*, 189 Wn.2d 1042 (2018) (rejecting contention that *de novo* review governed granting of new trial). This Court then reviews that decision for an abuse of discretion. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).

Here, the trial court exercised its discretion both in fashioning the parenting plan and in determining the scope of the evidence it would consider. These discretionary decisions were proper and should not be disturbed on appeal.

(2) The Trial Court Did Not Abuse Its Discretion in Limiting the Amount of Testimony It Would Consider

Mozer argues that the parenting plan should be reversed because the trial court improperly limited the number of witnesses she could present at trial. Appellant's br. at 15-17. As discussed in greater detail below, this argument fails because the trial court properly exercised its discretion to "limit the amount of testimony that it will accept" and to exclude testimony which is cumulative or otherwise not relevant. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 301, 197 P.3d 1153 (2008); *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994). However, the Court should reject

Mozer's argument at the outset because she failed to raise it in the court below. RAP 2.5(a).

(a) The Court Should Reject Mozer's Argument Raised for the First Time on Appeal

A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5(a); *In re Detention of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Appellate courts routinely decline to consider issues that were inadequately argued below. *E.g.*, *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017); *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 8, 146 P.3d 1212 (2006).

Here, after the trial court ruled that Mozer could call one of her four potential witnesses Mozer did not object, move to set aside the ruling, nor did she ask the court to clarify or expand on the ruling in any way. RP 9-11. In her motion for a new trial, Mozer was given the chance to address any "irregularity...or abuse of discretion, by which [she] was prevented from having a fair trial." CR 59(1). Again, she failed to mention the argument she now raises on appeal that her witnesses were improperly

limited. CP 229-44, 277-87. Because Mozer did not raise this argument below, this Court should decline to reach it.

Brown anticipates that Mozer will argue that because she represented herself *pro se* in the trial court, the Court should excuse her failure to raise an objection at trial. However, such deference is inappropriate where this Court has recently reiterated that “[a] trial court must hold *pro se* parties to the same standards to which it holds attorneys.” *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010), *review denied*, 170 Wn.2d 1024 (2011) (trial court may not offer improper assistance regarding the rules of evidence to *pro se* litigant during trial). Additionally, Mozer was represented by an attorney post-trial, an attorney who filed her motion for reconsideration and a new trial. CP 229-87. Yet even in her post-trial motion, Mozer failed to argue that the trial court improperly limited the number of witnesses she could present. CP 229-44, 277-87. The issue has been waived and the Court should not reach it.

Although she does not say so, Mozer attempts to resurrect this argument by conflating it with a manifest constitutional error, which may be reviewable for the first time on appeal pursuant to RAP 2.5(a)(3), by arguing that the limit on witnesses violated her right to procedural due process. Appellant’s br. at 15-17. This argument fails for several reasons.

First, the court's ruling does not implicate due process, but rather the discretionary function of the trial court as the gatekeeper of relevant evidence. *E.g., State v. Grimes*, 92 Wn. App. 973, 981, 966 P.2d 394 (1998) (“Admission or exclusion of relevant evidence is within the sound discretion of the trial court.”). As our Supreme Court recently held, a court has discretion to “limit the amount of testimony that it will accept.” *Residents*, 165 Wn.2d at 301. This power stems from a trial court's inherent discretion to measure the relevancy of proposed testimony and exclude that which would “have a tendency to mislead, distract, waste time, confuse or impede the trial, or be too remote either as to issues or in point of time.” *Id.* (quoting *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 893, 568 P.2d 764 (1977); *see also, e.g., Christensen*, 123 Wn.2d at 241 (a trial court has discretion to exclude cumulative testimony which would not be “helpful to the [fact finder's] understanding of the issues”). A court simply does not violate a party's due process rights when it exercises its discretionary authority to limit the amount of evidence it considers.

Second, Mozer fails to cite relevant authority that her due process rights were implicated by the trial court's discretionary decision. There is no real “constitutional dimension” to Brown's argument. She cites two cases which she claims stand for the proposition that a limitation on the number of witnesses violates a party's due process rights. Appellant's br.

at 16 (citing *Smith v. Fourre*, 71 Wn. App. 304, 858 P.2d 276 (1993) and *Hill v. Parker*, 12 Wn.2d 517, 122 P.2d 476 (1942)). They do not stand for such a proposition; neither case even mentions due process. The courts in *Smith* and *Hill* merely discussed the timing of a CR 50 motion to dismiss brought during trial. The courts generally found that a CR 50 motion must be brought at the close of the plaintiff's case-in-chief or after the plaintiff's rebuttal. *Smith*, 71 Wn. App. at 307; *Hill*, 12 Wn.2d at 524. Those cases have nothing to do with a pretrial ruling regarding the amount and relevancy of testimony a court is willing to accept after considering an offer of proof and determining that the testimony would not be helpful.

Third, even if the Court disagrees and finds that the trial court's ruling implicates Mozer's due process rights, any potential error is only reviewable for the first time on appeal if it is "manifest," meaning Mozer must show "actual prejudice." RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). To show actual prejudice, Mozer must show that the error had a "practical and identifiable consequences in the trial of the case." *Id.* at 935. "An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for

the error.” *State v. Eggleston*, 129 Wn. App. 418, 438, 118 P.3d 959, 968 (2005), *aff’d*, 164 Wn.2d 61 (2008).⁵

Here, Mozer makes no attempt to argue the outcome would have been different had her sister and two additional friends been allowed to testify. Appellant’s br. at 15-17. Importantly, her friend who did testify had little to offer. RP 177-84. Most of her friend’s testimony related to Brown’s reactions on the day G.M.-B. was born. The witness testified that Brown was upset when she called him from the hospital to tell him G.M.-B. was born. RP 180-81. Brown was somewhat upset because he did not understand why Mozer did not tell him she was in labor earlier. *Id.* Beyond this irrelevant testimony, the witness concluded by opining that it is in G.M.-B.’s best interest to have “a partnership between the parents” and to spend time with both of them. RP 184.

This testimony had little, if any, effect on the outcome of the case. Brown’s reactions on the day G.M.-B. was born are irrelevant to the child’s best interest three years later at trial. Presumably, this was the most important testimony Mozer had to offer, given the fact that the court gave her the option to call any one of her four proposed witnesses, yet it had little,

⁵ While the vast majority of cases regarding review of issues not raised below due to a manifest constitutional error under RAP 2.5(a)(3) deal with criminal law, the Supreme Court has made it clear that the “rule makes no distinction between civil and criminal cases.” *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

if any, bearing on the outcome of the case. The trial court did not abuse its discretion in limiting additional, unhelpful, and cumulative testimony from Mozer's other friends.

Mozer fails to show what her other witnesses would have to offer in addition to what was presented at trial. She conclusively asserts that her witnesses had relevant testimony but fails to argue or show how the outcome would have been different given their testimony. To the extent Mozer relies on her vague offer of proof or lack of a record on this point, the court must remember that "the manifest error exception is narrow." *Kirkman*, 159 Wn.2d at 936. "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted." *Id.* at 935. No manifest constitutional error occurred, and if it did, Mozer fails to show that it had any effect on the outcome of the trial. This Court should decline to reach this issue raised for the first time on appeal.

(b) Even if the Court Decides to Reach the Issue Raised for the First Time on Appeal, No Error Occurred

Even if the Court disagrees and chooses to consider Mozer's argument for the first time on appeal regarding the trial court's decision to limit witnesses, no error occurred. Again, the trial court was in the best position to determine which testimony would be helpful, and this court must

defer to trial court's determination on that issue. This is a discretionary function of the trial court and does not rise to the level of a due process violation. *Grimes, Residents, Christensen, supra.*

Moreover, Mozer was given notice and the opportunity to be heard, not only with regard to her case in chief where she testified on her own behalf, but specifically in regard to her proposed witnesses. The court notified the parents weeks before trial that it was "inclined to hear only from the parties, but will consider other witnesses after an offer of proof." CP 155. Mozer had the opportunity to submit declarations and make an offer of proof to explain the testimony of her proposed witnesses, and the trial court deemed that her cumulative witnesses (three friends and her sister) would not be helpful to its ultimate decision. That was not an abuse of discretion where the trial court had ample evidence and testimony upon which to make its decision.

The parties had litigated the case for approximately one year and the trial court reviewed a significant case file with a year's worth of motions, declarations from interested parties, professional visitation notes, doctors' notes, and other exhibits. CP 163. It heard from the most important witnesses, the parents, and crafted a parenting plan that was well within its discretion and dedicated to the child's best interest. The court took its time, taking the matter under advisement for nearly one month so it could

carefully parse through the voluminous materials it used to make its decision. RP 205; CP 163.⁶ Mozer had an opportunity to be heard, and the court had ample information to evaluate the best interest of the child and make its decision. Mozer is simply wrong to argue otherwise. Appellant's br. at 17. A new trial is unwarranted, and the parenting plan should not be disturbed on appeal.

(3) There Was No Error Where Brown Notified Mozer That He Was Seeking Primary Custody Before Trial, and Mozer Failed to Preserve This Error with a Timely Objection Below

Mozer argues that the trial court erred by allowing Brown to argue for primary custody and sole decision-making with regard to G.M.-B.'s educational and non-emergency medical care at trial, where his initial proposed parenting plan, filed at the outset of the case, only sought joint custody. Appellant's br. at 17-21. She argues that she was denied notice and an opportunity to prepare for this new argument. *Id.* The Court should reject this argument; it is unsupported in fact, unsupported in law, and Mozer failed to preserve this argument with a timely objection below. The parenting plan should not be overturned.

⁶ The court explained that it had more than enough material to make its decision:

You've given me a lot of materials here to consider. I don't like to make decisions on the spur-of-the-moment without having a chance to read all the stuff that you want me to look at and also to consider it, so I'm going to take this under advisement.

RP 205.

(a) Mozer Failed to Preserve the Alleged Error

As with her first assigned error discussed above, this Court should reject Mozer's argument because she failed to preserve it with a timely objection below. "[F]ailure to raise a timely...objection precludes [a party] from moving for a new trial on that basis" or arguing the issue on appeal. *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 584, 187 P.3d 291 (2008). Courts take a "strict approach" because the failure to object at trial "robs the court of the opportunity to correct the error and avoid a retrial." *State v. Fenwick*, 164 Wn. App. 392, 399, 264 P.3d 284 (2011), *review denied*, 173 Wn.2d 1021 (2012). A litigant cannot "wait and gamble on a favorable verdict and then, for the first time, when the verdict was adverse,...claim[] error." *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958).

Here, Mozer failed to preserve the issue in the court below. Brown informed Mozer that he was seeking primary custody *weeks* before trial, and he presented proposed final orders on the day of trial asking for primary custody. RP 115-19; CP 247-48, 270-75. Mozer did not ask for a continuance, move to exclude this argument, object at trial either during Brown's testimony or during closing when he asked for primary custody, or otherwise raise the issue to the trial court until after she received the court's ruling. *See* RP 115-19 (Brown testifying without objection regarding his

latest proposed parenting plan which had “evolved” due to Mozer’s continued abusive use of conflict and withholding of the child); RP 193-96 (same during Brown’s closing argument). By failing to raise the issue in a timely manner, Mozer did not preserve the issue for appeal and this Court should decline to consider it. *Stalkup, Fenwick, Martinson, supra*.

Again, Brown anticipates that Mozer will argue that she should be treated more leniently because she appeared *pro se*. That is not the standard for *pro se* litigants pursuant to *Edwards*, as discussed above. But even assuming *arguendo* that Mozer was entitled to some leeway with regard to the specificity, form, or timing of her objection, she still had to make *some record* of the alleged error at trial. As commentators have noted:

The broad, general rule is that counsel must request *some* relief from the court at the time the misconduct or irregularity occurs. Counsel must immediately ask the court to do something—whether it is to exclude inadmissible evidence, to give a cautionary instruction, to grant a mistrial, or some other remedy—rather than waiting for the verdict and then deciding what to do.

15 *Wash. Prac., Civil Procedure* § 38:5 (3d ed.) (emphasis added).

Here, Mozer took *no* steps to address the issue at trial. In fact, she allowed Brown to argue for primary custody throughout the hearing and did not complain in any way that his request for primary custody was a “bombshell revelation,” as she alleged for the first time after the court issued its verdict. CP 231.

Moreover, Mozer waived this argument where she also argued for a parenting plan that was different from the one that she formally filed at the outset of the case. Waiver is an “equitable doctrine” which applies when a party’s conduct shows that he or she relinquished a known right. *McLain v. Kent Sch. Dist., No. 415*, 178 Wn. App. 366, 379, 314 P.3d 435 (2013), *review denied*, 180 Wn.2d 1018 (2014). Here, it would be inequitable to permit Mozer to assert this error where she abandoned her initial proposed parenting plan and argued in closing for a “new” parenting plan that had “changed...from the very beginning.” RP 199.⁷ Clearly, Mozer understood that parenting plans evolve over the life of a case and must be flexible to adapt to the ever-changing needs of an infant child. This Court should decline to consider this waived argument. But, as discussed below, even if the Court decides to reach the issue, no error occurred.

(b) Mozer Had Notice of the Father’s Position Long Before Trial

Mozer’s argument that she had no notice of Brown’s position fails because it is simply not true. At the outset of the case, Brown informed Mozer through a sworn declaration that he believed she had engaged in abusive use of conflict and had withheld his daughter from him without

⁷ According to Mozer, this plan actually would have allowed more time for the father than her parenting plans proposed earlier in the case. RP 199. This was consistent with her position at closing that Brown is “not a bad father at all.” RP 197.

good cause. CP 21-25. The court's initial temporary parenting plan specifically reserved for trial the issue of whether there was a reason to place limitations on either parent, including whether Mozer had engaged in abusive use of conflict. CP 252-55. The court entered that order with reserved findings on parental limitations, such as medical and educational decision-making, approximately nine months prior to trial. *Id.* Mozer *knew* that these issues would be relevant at trial and had ample time to prepare her response.

Moreover, Brown informed Mozer weeks before the trial that he sought primary custody of his child when the parties attempted to mediate the case. CP 270-72. He also submitted an updated parenting plan seeking primary custody at trial, which was precisely what the trial court instructed him to do in its pretrial order requiring both parties to submit "all proposed final pleadings related to the case." RP 115-19; CP 247-48, 275. Mozer never objected. The trial court properly rejected her request for a new trial where she had notice and time to respond to Brown's arguments.

Brown anticipates that Mozer will argue, as she did below, the evidence of Brown's position at the settlement conference is inadmissible under ER 408 because it was made in the context of settlement negotiations. CP 281-82 (citing ER 408). This argument fails, as the trial court properly determined.

First, ER 408 is not a categorical ban on every statement made in connection to settlement negotiations in every context. Rather, it merely prevents a party from offering such evidence “to prove liability for or invalidity of [a] claim or its amount.” ER 408. Here, Brown did not offer any evidence of settlement discussions to “prove liability.” He merely offered a letter showing that he formally informed Mozer, weeks before trial, that he would be seeking primary custody. That was proper even under the rule. ER 408 specifically states that it “does not require exclusion when the evidence is offered for another purpose” separate from proving liability. Courts have specifically held that a party may introduce evidence from settlement negotiations to show that the opposing party received notice of the party’s position in the litigation. *See, e.g., United States v. Austin*, 54 F.3d 394, 400 (7th Cir. 1995) (consent decree was admissible to show that defendant was on “notice” of the government’s position); *Meade v. Nelson*, 174 Wn. App. 740, 744, 300 P.3d 828, *review denied*, 178 Wn.2d 1025 (2013) (ER 408 settlement demand offered to show that opposing party knew defendant had appeared in the matter entitling defendant to notice of default hearing).

Second, Brown notified Mozer not only at the settlement conference, but also at the outset of trial when he presented his proposed final order as the trial court directed in its pretrial order. Again, Mozer did

not object or ask for a continuance so she could have more time to respond to Brown's argument. And she argued for her own "new" parenting plan in her closing statement, showing that both parties had the opportunity to present their case based on the most recent events and circumstances. The trial court did not err in permitting the parties to argue as such, especially absent a timely objection from either party.

Ultimately, the trial court had the discretion to fashion a parenting plan that it saw fit and it did not abuse that broad discretionary authority. Mozer fails to show how the outcome would have been any different had she been allowed more time to respond to Brown's request for primary custody. The parenting plan should be upheld.

(c) The Law Does Not Forbid a Parent from Arguing for Primary Custody at Trial

Even if the Court considers this issue which Mozer failed to preserve for appeal and accepts as true her factual misstatement that she had no notice of the father's position prior to trial, still there was no error in allowing the father to argue for primary custody. Mozer cites no caselaw to support her argument that a trial court abuses its discretion if it permits a party to argue for a different parenting plan at trial than one submitted in the initial pleadings a year prior. There is none.

Rather, parenting plans must be based on the latest information regarding the child's best interest, and not the outdated initial requests of the parties. See *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 493, 899 P.2d 803 (1995) (permitting the court to take new testimony on remand after overturning a parenting plan because "[t]he children's present needs may differ from those the trial court perceived months ago."). No court is bound by the initial pleadings of the parties when fashioning a parenting plan, rather "[t]he 'best interests of the child' control when determining who will parent a child daily." *In re Parentage of J.H.*, 112 Wn. App. 486, 493, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003).

Here, the trial court considered voluminous information regarding the child's current best interest and the circumstances of the parents. It considered the parents' testimony as well as the testimony of visitation experts, friends, and family. As in *J.H.*, where this Court upheld a well-reasoned residential placement decision, "[t]his is not a case where the court made its decision without considering the testimony or the law." *Id.* Absent such failures, this Court must defer to the trial court's factual determination of what is best for the child based on all the information before it. *Id.*

Lacking case law to support her argument, Mozer merely points to the general pleading requirements set out in the Parenting Act, but she fails to cite any authority for the proposition that a defect in pleading procedures

can invalidate a well-reasoned parenting plan. To the contrary, Washington law recognizes that pleadings are “liberally construed” to avoid technical defects. *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149, 156 (1987). RCW 4.36.240 states: “The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.” RCW 4.36.240.

Here, to the extent there was any technical error in failing to file an updated parenting plan earlier than the time ordered in the court’s pretrial order, it did not affect the outcome of the case or preclude the trial court from issuing a parenting plan within its broad discretion. The parenting plan should not be overturned for this reason, especially where Mozer waived this argument and argued her own “new” parenting plan at trial as discussed above. The Court should uphold the trial court’s plan.

(4) The Trial Court Did Not Abuse Its Discretion in Entering the Parenting Plan

(a) The Trial Court’s Findings That Mozer Engaged in Abusive Use of Conflict and Withholding of the Child Are Supported by Substantial Evidence and Substantial Findings

Mozer challenges the parenting plan directly, arguing that the trial court findings that she engaged in abusive use of conflict and withholding of the child are unsupported by substantial evidence and proper findings.

Appellant's br. at 21-33. This Court should affirm the trial court's decision on Mozer's conduct.

As stated above, a parenting plan is a matter within the trial court's discretion which an appellate court affords great deference. *Katara*, 175 Wn.2d at 35. "An appellate court may not substitute its findings for those of the trial court where there is ample evidence in the record to support the trial court's determination." *In re Marriage of Kovacs*, 121 Wn.2d 795, 810, 854 P.2d 629, 637 (1993). "So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it." *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003). "This is because credibility determinations are left to the trier of fact and are not subject to review." *Id.*

Mozer is flatly wrong that the trial court did not make proper findings in this case. The trial court issued a detailed ruling, making all necessary findings under the Parenting Act, and it issued an explanatory letter elaborating on its decision. CP 163-66, 188-203. It restricted Mozer's authority with regard to medical and educational decisions, due to her long history of abusive use of conflict and withholding of the child without a good reason. *Id.* The trial court specifically found that Mozer uses conflict in a way that "endangers or damages the psychological development of the child" and withheld the child from the father "without a good reason." CP

189-90. It had discretion to make these findings and place limitations on Mozer pursuant to RCW 26.09.191(3)(e) and (f).

These findings were supported by substantial evidence. Brown testified extensively regarding Mozer's abusive use of conflict and withholding of the child. *E.g.*, RP 115-19. Mozer withheld the child from the father from the very beginning, blocked the channels of communication, and refused to respond to his repeated requests to see and form a relationship with his daughter. Brown *repeatedly* tried to work things out with Mozer, address her concerns when disputes arose, or otherwise create a positive co-parenting relationship like he has with the mothers of his other children, yet Mozer repeatedly responded by seeking protection or restraining orders to restrict Brown's access to his child, based on unsubstantiated allegations. RP 101-02, 126.

The danger to the child's psychological well-being is evident where the father has been completely cut out of the child's life on several occasions. She has not been allowed to establish a routine with her father, and this has caused stress as evidenced by her fits during transition times. RP 127-34. This evidence is more than sufficient to support the trial court's findings. *See, e.g., Burrill*, 113 Wn. App. at 872 (“[S]evere impairment of parent/child contact...constitutes sufficient evidence from which the trial

court could conclude that [a parent] created a danger of serious psychological damage to the children.”⁸

Mozer’s arguments to the contrary boil down to a dispute over conflicting testimony which is not enough to vacate a parenting plan on appeal. *Kovacs, Burrill, supra*. For example, she asks this Court to essentially revisit the trial court’s decision – to make a “closer inspection” of the facts. She largely blames Brown for acquiescing to her withholding of the child by not filing his petition for a parenting plan sooner. Appellant’s br. at 24-25. The trial court heard Mozer’s argument, as well as the testimony that Brown never gave up on a relationship with his daughter. He repeatedly requested visits, both after the child was born and during the year after Mozer ended his visits, through emails which Mozer ignored. RP 112-14. She blocked his phone number and Facebook, and rather than confront or harass her, he chose to exercise patience preached by his religion, until he had enough money to hire a lawyer. And after he filed his petition for a parenting plan, she unilaterally terminated visits and moved for a restraining order, rather than working through the understandable stress of a shared custody arrangement.

⁸ The *Burrill* court also noted that “evidence of actual [psychological] damage is not required. Rather, the required showing is that a danger of psychological damage exists.” 113 Wn. App. at 872. Here the psychological danger of abusive conflict and complete removal of the father from the child’s life is evident in the record.

The trial court's limitation on medical decision-making is particularly apt based on the evidence in this case. Mozer had a long history of denying Brown access to the child's medical records and refusing to tell him about medical appointments. RP 121, 158.⁹ She continued to do so, even after the court ordered that the parents make non-emergent medical decisions jointly in its temporary parenting plan. RP 121. Brown testified that rather than work out disagreements regarding G.M.-B.'s medical care, Mozer simply "removes me from the equation." RP 117. That is inappropriate and creates a danger to the child where one parent is completely "kept in the dark" regarding his child's medical care. RP 158.

In sum, the trial court's findings are supported by substantial evidence. The trial court acted within its wide discretion in awarding primary custody to Brown and placing limitations on Mozer. The Court should reject Mozer's attempt to relitigate the facts and affirm the parenting plan.

(b) The Trial Court Did Not Rely on the Friendly Parent Doctrine

Lastly, Mozer attempts to inject the "friendly parent doctrine" into a case where it does not exist. Specifically, she argues that the trial court's "lecture" post-trial regarding the importance of working together, showed

⁹ Mozer even refused to tell Brown the child's social security number, and she refused to disclose her current address when asked at trial. CP 64; RP 12-13.

that it applied this concept, which Washington courts have rejected. Appellant's br. at 32. Mozer is wrong.

The trial court's "lecture" occurred immediately after a trial where both parents testified and Mozer represented herself *pro se*. To ease hostility and temper expectations of the parties in the wake of the trial, the court remarked that it was clear the parents had trouble communicating and co-parenting, but they were going to have to accept the court's decision and move forward for the next 15 years of the child's life. RP 207-09. Such comments and words of wisdom from an experienced trial judge are not improper. *Rossmiller v. Rossmiller*, 112 Wn. App. 304, 311, 48 P.3d 377, 380 (2002) (holding that a trial court does not violate the friendly parent doctrine where it merely remarks on a "couple's inability to cooperate"). Nor is this evidence that the trial court relied on the friendly parent doctrine which appears nowhere in its writing ruling. Rather, the court issued detailed findings approximately one month after its closing remarks concluding the trial. The court made all necessary findings based on its evaluation of the evidence and the child's best interest. This Court should not fall for Mozer's attempt to create error where none exists.

(5) The Court Should Award Brown Attorney Fees on Appeal

RCW 26.09.140 provides that "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of

maintaining the appeal and attorneys' fees in addition to statutory costs." An appellate court must consider the parties' relative ability to pay as well as "the arguable merit of the issues raised on appeal." *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *review denied*, 137 Wn.2d 1003 (1999).

While historically Brown has had a higher income than Mozer, both parents are of modest means with obligations to support several children. *See, e.g.*, CP 66-70 (financial worksheet).¹⁰ But rather than preserving the parties' financial resources, Mozer chose to hire an attorney and file this appeal which lacks any merit. Her appeal consists of several new arguments which she failed to preserve below, and her plea that this court take a "closer inspection" of contested facts, which is not proper on appellate review. Brown has been forced to expend his own limited resources to respond to Mozer's meritless arguments, not to mention his expenses for responding to Mozer's other abusive uses of conflict since G.M.-B. was born.

As this court has said, fees are appropriate where "one spouse's intransigence caused the spouse seeking the award to require additional legal services" regardless of the prevailing spouse's financial resources. *In*

¹⁰ Pursuant to RAP 18.1(c), the parties' relative ability to pay will be evaluated shortly before argument. Mozer started a new job by the time trial started in June 2018, RP 186-88, so it is possible she will be in a better position to pay over a year later when argument occurs.

re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Brown has consistently tried to work with Mozer to craft an agreed parenting plan long before he ever filed his petition. But this meritless appeal is just the latest in a long line Mozer's intransigence and use of conflict which has cost him significant time and expense. He will never recover the time he lost with his daughter, but at least some of the expense he can. Fees on appeal are appropriate.

E. CONCLUSION

For the foregoing reasons this Court should affirm the highly discretionary decisions of the trial court to craft a parenting plan which is in G.M.-B.'s best interest. This appeal is not a proper avenue to relitigate the disputed issues of fact below. The Court should award Brown his fees and costs on appeal.

DATED this 9th day of September, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

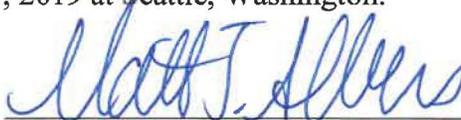
On said day below, I electronically served a true and accurate copy of the ***Brief of Respondent*** in Court of Appeals, Division II Cause No. 52742-1-II to the following parties:

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Original E-filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 9, 2019 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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