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DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 352072

Spokane County Superior Court Case no. 14-3-01703-9
The Honorable Marian Moreno
Superior Court Judge

REPLY BRIEF

In Re:

CATHRINE ROE, FKA MARCHESSEAU, APPELLANT/PETITIONER

And

CHAD MARCHESSEAU, RESPONDENT

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ORIGINAL

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I. Facts Important to this Reply

The parties went to a trial about their parenting plan. CP 234-278. A GAL was appointed, however, the GAL was dismissed from her duties at the time of trial due to a conflict of interest and the court was left with only their children's counselor Joan Chase to provide input about a proper parenting plan. CP 258. During the course of the case, and unknown to the mother (the Appellant), the father and his counsel had orchestrated a plan to influence the counselor to see them in a more positive light than she viewed the mother. The mother learned of this plan after accidentally stumbling across the father's emails between he and his attorney that came to her by way of a Kindle left for their children, which was formerly used by the father for emails in his daily life. CP 1069-1156 & 1240-1342.

The emails described a series of plans to both negatively influence the counselor against the mother and positively impact her view of the father. *Id.* Because of the nature and content of these "seemingly clandestine" emails the mother filed a CR60 motion to set aside the parenting plan because of this intentional scheme. *Id.* (See Opening Brief fact section as well).

The judge heard the argument by the mother in an initial hearing and found that the emails were no longer privileged because the father had turned his entire hard drive over to a third party computer specialist, and had cc'd many, if not all the emails to the father's mother (Kathryn Marchesseault). CP 385-498. This finding was placed in an order that was

not challenged, and then, after this finding was entered the judge heard more argument on the issue and flipped on this issue and found that these emails were privileged, struck the emails and sanctioned the mother monetarily for having used them in court. CP 2196-2199 & 2328-2329. It is that order, and the court's concomitant denial of the CR 60 motion that the mother appealed.

In response to the mother's brief in this case father's counsel argued the following issues:

1. That the mother failed to show that the judge abused her discretion in her CR60 ruling;
2. That the judge had the right to deny the mother's motion based on the fact that the alleged misconduct had no effect on the case;
3. That it did not matter whether Joan Chase was affected by the father's plan to influence her, her testimony and position at trial had no bearing on the judge's decision;
4. That, as to the emails, although not having any proof the father concluded in his brief that the mother hacked his email account to get the information used for her CR60 motion;
5. That the mother did not challenge the court's findings of fact so they became a verity on appeal;
6. That the mother's counsel's brief was not written well;

7. That the father and his counsel did not violate ethical rules or even witness tampering statutes in carrying out their plan to influence the children's counselor in his favor.
8. That the mother is using this appeal as a platform for her motion instead of directly attacking the judge's ruling;

Additionally, the mother indicates that the father did not deal with the important issues in this matter such as the waiver of the attorney-client privilege, and the issue of whether the mother had a right to question the objectivity of Ms. Chase in these proceedings given the facts she alleged. The mother feels that the issues of this case are very important since they strike at the heart of family law litigation over children, and the need to require objectivity in experts appointed by the court to provide evidence to the court about the best interests of children in a custody case.

II. Argument

- A. The concept that the mother is using this appeal to replace her CR60 motion is neither appropriate nor sustained by the argument of the father's counsel.

The father's responsive brief states that the mother did not use the standard of a "manifest abuse of discretion" to analyze the judge's ruling in this matter. This statement is self-serving and wrong. The mother's brief at section E. indicates clearly that the "Judge used the wrong standard in analyzing the wife's CR60(b)(4) motion to vacate . . .". She cited the case of *Taylor v. Cessna Aircraft Co. Inc.*, at 39 Wn.App. 828, 696 P.2d 28 (1985).

The *Cessna* case supra, indicated that the trial abused its discretion in its denial of the CR60 motion based on the plaintiff's misconduct, and cited the abuse of discretion as the basis. It could not have been clearer that the mother, in this case filed her motion based on substantial misconduct by the father and her counsel in orchestrating an intense plan to influence an important witness on the parenting plan issues. In fact, the *Cessna* case starts its analysis off with the "abuse of discretion" rule. The mother did not need to type out the words "abuse of discretion" to make that the focus of this appeal when a case on that issue is cited and used. To suggest such an argument is both superficial and inappropriate.

B. The mother did not have to show that the father's misconduct would have had no effect on the trial to require a new trial under CR60(b)(4).

Counsel said more than once that the judge stated that regardless of any misconduct by the father it would not have had an effect on the outcome of the case, as a basis to deny this appeal. However, that is not the rule under CR60(b)(4). The *Cessna* case said it clearly. "A new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial. CR 60(b)(4). See *Rozier v. Ford Motor Co.*, supra (interpreting identical federal rule)."

In this case the mother claims that his counsel clearly violated RPC rules and general rules of fairness at trial, by attempting to persuade the children's counselor in favor of the father. Such an attempt in and of itself is enough to call for a new trial according to *Cessna*. In addition, the GAL,

who had a GAL report ready for trial was dismissed at the last minute in this case because the mother's counsel had represented her in her divorce, clearly suggesting a lack of objectivity. CP 258, 1471-1512, 2030-2033, 2176-2191. Why then would the court not want to dismiss the counselor for the same kind of lack of objectivity? Such misconduct from the father and his counsel by itself calls for a new trial regardless of its potential effect on the court's decision.

This kind of conduct also strikes at the heart of why it is important for all professionals who provide evidence about a proper parenting plan should not be affected by the influence of either parent on their opinion. As they said in *Bobbitt* at 144 P.3d 306, 135 Wn.App. 8 (2006), about the role of professional custody evaluators such as a GAL:

It has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior courts about the best interests of the children, do their important work fairly and impartially. Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interactions of courts and GALs and our Supreme Court adopted the GALR. These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues. *In re Marriage of Bobbitt*,

Although the court in *Bobbitt* was not overruled and it was with regard to the GAL, in this case the court used Ms. Chase in the same manner as if she was a GAL. Also, the *Bobbitt* case did not have the egregious facts of

this case before it, and the GAL had enough time to remedy its bias. In this case, nothing can solace the mother's concerns that the children's counselor was heavily persuaded by the influence of the father's plan to affect her testimony about what kind of plan would be appropriate. As the *Bobbitt* case made clear, it is how the public views the bias, and the law on a CR60 misconduct allegation indicates that the outcome is irrelevant. The mother in fact used the proper standard in this case.

C. The father and his counsel's conclusion that the mother hacked his email to get this privileged information was not support by anything other than supposition.

The father and his counsel concluded in their responsive brief that since the mother had her own "investigatory business" that she must have ipso facto hacked his account to get this information. However, the father also says nothing about his carelessness in handling his emails, nor does he deal with the fact that he included his mother in on these emails and gave them to a third party computer specialist. CP 646. He also does not show any proof that these emails were hacked. He offered no expert opinion to support this conclusion, only supposition. Bare allegations that are unsupported by references to the record, or persuasive reasoning cannot sustain a burden of proof. *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 699-700, 9 P.3d 206 (2000). In this case, the father has no proof that the mother hacked his computer, and there was no evidence that the Kindle could have been hacked.

D. The mother specifically challenged the court's findings and conclusions without using the words "Findings of Fact" or "Conclusions of Law".

The father and his counsel suggest that the mother did not challenge the court's findings in this matter. However, it must be remembered that the court entered a letter ruling first which was incorporated into the order. The findings of fact were therefore not itemized as findings or conclusions of law, they were simply a discussion of the case. However, the mother did challenge the court's findings as to the newness of this evidence, and that the judge failed to apply the law properly.

There were no clear findings that were not intermingled with the court's written discussion, therefore, the appellant's description of the court's suggestions and conclusions offered more than a simple statement that the judge's findings were made in error. Additionally, this case was mostly a case of interpretation of the law and its application to what the emails revealed. As such this court had the ability and right to look at the court's application of the law from a *de novo* point of view. As they said in *Carneh*, the appeals court may look at "a trial court's conclusions of law in an order pertaining to suppression of evidence *de novo*." See e.g. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004) (emphasis added).

The Appellant's description of the errors seems sufficient.

E. Clearly, if the emails between the father and his counsel are available for evidence, they show misconduct of a substantial level as to the presentation of their case and their attempts to influence an important parenting witness.

The father spent a substantial amount of time trying to show that the mother and her attorney failed to follow the rules of an appeal and that it was proper to sanction them. However, that response did not deal with important issues in the case such as the confidentiality waiver the judge indicated had occurred by him providing his hard drive to a third party nor that he cc'd the same emails to his mother. This is a pivotal issue since if he did waive their confidentiality then their admission would have proven misconduct under CR60. This also speaks to the issues related to the discussion in the mother's brief about the "law of the case".

The father's counsel almost sarcastically chastises the mother's counsel for misuse of the term "Law of the Case". He indicates that this term only has reference to appeal case law citing a few cases. However, this argument is both inappropriate and wrong. The concept of "Law of the Case" has many meanings. In this quote it shows that "Law of the Case" is related to the concept of Res Judicata where all concerned parties in a case can count on previously resolved rulings, so that there is some predictability for the litigants, and applies to prior case rulings that may be relied upon by all parties. As follows:

The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues." Grynberg Exploration Corp. v. Puckett, 2004 S.D. 77, ¶ 21, 682 N.W.2d 317, 322. This doctrine has many policy considerations: " (1) to protect settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." In re Estate of Jetter, 1999 S.D. 33, ¶ 20, 590 N.W.2d 254, 258. We have cautioned, however, that " the 'law of the case'

[doctrine] should not be used to perpetuate an erroneous decision[.]" Grynberg, 682 N.W.2d at 322. Indeed, the doctrine " is not a rigid rule, and will not be invoked on a second appeal if the prior decision is palpably erroneous and if it is competent for the court to correct it on the second appeal." Siebrasse, 722 N.W.2d at 91. Furthermore, " a court may reopen a previously resolved question if the evidence on remand is substantially different or if a manifest injustice would otherwise result. *Lodis v. Corbis Holdings, Inc.*, 192 Wn.App. 30, 366 P.3d 1246, (1 2015)

As can be seen, the Law of the Case doctrine affords some consistency and predictability in a case, and is not just for appeal rulings. In this case, the judge already ruled that the father waived his right to confidentiality of the emails in question because he had given his hard-drive and computer to a third party along with involving his mother in the plans to influence the counselor. The ruling regarding waiver was never appealed and the mother and her counsel had a right to rely on that decision in their use of the father's emails to show his untoward plans. At the very least the mother should not have been sanctioned, but most importantly there should have been misconduct found as to these plans and efforts.

The actions of the mother in this case are focused on insuring the kind of outcome in a case that the *Bobbitt* case talked about. This appeal is not intended to supplant her motion to vacate; it is intended to set that ruling aside and if necessary get another judge to hear the case who has not been tainted by the father's actions. The mother asks that the order denying her CR60 motion be set aside.

- F. The mother's appeal is not frivolous and attorney's fees should not be granted.

The father and his counsel have asked for their fees based on the notion that the mother's appeal is frivolous. However, this is all based on their view of the case. The issue of the frivolousness of an appeal is for this court to decide, and case law suggests that an appeal is not frivolous if it has any merit whatsoever. In order to receive attorney fees on appeal a party must also devote a section of the brief to the request. RAP 18.1(b). "A bald request for attorney fees on appeal is inadequate." *Thweatt v. Hommel*, 67 Wn.App. 135, 148, 834 P.2d 1058 (1992). Argument and citation to authority are required under the rule. *Austin v. U.S. Bank of Wash.*, 73 Wn.App. 293, 313, 869 P.2d 404 (1994). Additionally, the requester must show that the appeal is without merit. RAP 18.9(a) also permits an award of fees as when the opposing party files a frivolous appeal. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearing's Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). An appeal is frivolous if, considering the entire record, we are convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Any doubts as to "whether the appeal is frivolous are resolved in favor of the appellant". *Tiffany Family Trust*, 155 Wn.2d at 241.

This appeal is far from being meritless. There are important ethical issues, misconduct issues, inconsistency of rulings issues, parenting plans

issues to consider, as well as issues related to the duty of an attorney to insure that important witnesses are not improperly influenced along with insuring candor to the tribunal, and the judge actually ruled that the emails were available for evidence but then changed that ruling. An appeal on these issues is not frivolous. No matter what occurs in this appeal the mother should not have to pay fees for this appeal.

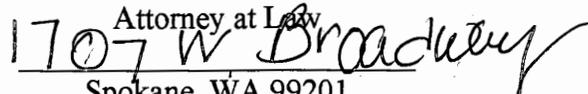
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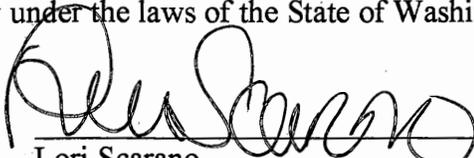
Declaration of Mailing

I Lori Scarano state that on the date of April 16, 2018 I did place a true and correct copy of this Reply Brief with the US Postal service addressed to:

Craig Mason
Attorney at Law


Spokane, WA 99201

I sign this under penalty of perjury under the laws of the State of Washington on this 16th day of April 2018 at Spokane.



Lori Scarano