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Case Number 628585

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

THOMAS F. MCCANN, Appellant

v.

CATHERINE M. PALMER, Respondent

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred by granting an award of attorney fees against McCann under RCW 26.09.160(7).

Assignment of Error No. 2

The trial court erred in denying McCann's motion for contempt under RCW 26.09.160(2).

Assignment of Error No. 3

The trial court erred in failing to enter an award of attorney fees to McCann in bringing the September 09, 2008 motion for contempt for failure to comply with the provisions of the parenting plan.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Issues Pertaining to Assignment of Error No 1

- a. Whether the trial court abused its discretion in its award for attorney fees.
- b. Whether the trial court's decision to award attorney fees are untenable or manifestly unreasonable.
- c. Whether the trial court failed to consider and make proper findings on whether "the motion was brought without reasonable basis" as required by RCW 26.09.160(7)

- d. Whether the trial court's failure to make findings on all ultimate facts and material issues requires reversal.

Issue Pertaining to Assignment of Error No 2

- a. Whether the trial court abused its discretion in denying a motion for contempt for failure to keep McCann informed of the outcome of the son's medical appointments.
- b. Whether the trial court abused its discretion in denying a motion for contempt for Palmer's violation of the parenting plan by scheduling the daughters medical appointments.
- c. Whether the trial court abused its discretion in denying a motion for contempt for Palmer's failure to ensure the children are regularly taking their medication in conformity with the parenting plan.
- d. Whether the trial court abused its discretion in denying a motion for contempt for Palmer's failure to follow the dispute resolution process.
- e. Whether the trial court abused its discretion in denying a motion for contempt for Palmer's failure to comply with the scheduled residential pick up times.

- f. Whether the trial court abused its discretion in denying a motion for contempt where McCann provided substantial evidence to prove the petitioner acted in bad faith.

Issues Pertaining to Assignment of Error No 3

Whether the trial court erred when it found that the Palmer had not acted in bad faith in refusing to comply with the parenting plan.

B. STATEMENT OF THE CASE

McCann is the respondent in the dissolution action under King County Superior Court Case Number 98-3-00242-9. Catherine Palmer is the Respondent in this action and the Petitioner in the King County Action. The parties entered a modified and corrected parenting plan on March 20, 2008. **(CP 76-87)**. Throughout April of 2008, McCann made three separate requests to use the dispute resolution process **(CP 33-35)** as outlined in Section 5.2 of the parenting plan. **(CP 81-82)**. Palmer's refusal to comply with the dispute resolution process led McCann to file a motion for contempt on September 09, 2008 for contempt for violations of the provisions of the Parenting Plan entered March 20, 2008. **(CP 76-87)**. McCann moved for contempt on five separate issues. Those being; 1. Failure to keep the father informed of the outcome of the son's medical

appointments; 2. Violating the parenting plan by scheduling the daughter's medical appointments, 3. Failure to ensure the children are regularly taking their medication in conformity with the parenting plan; 4. Failure to follow the dispute resolution process; and 5. Failure to comply with the scheduled residential pick up times.

i. The September 25, 2008 Hearing on Contempt.

The parties appeared before Commissioner Jacqueline Jeske on September 25, 2008 who denied McCann's motion for contempt finding that the Palmer had not acted in "*bad faith*". Despite substantial evidence to prove that the Palmer had violated the provisions of the parenting plan, commissioner Jeske found that the McCann had brought the motion for contempt in bad faith and entered an award for attorney's fees in the amount of \$1,451.00. (CP 1-7)

ii. The October 28, 2008 Hearing on Revision.

McCann filed a motion for revision on October 3, 2008 with Judge Laura Middaugh. (CP 8-9). On October 28, 2008 the parties appeared before Judge Middaugh who ruled that the respondent had "*technically violated*" the provisions of the parenting plan but failed to find the respondent in contempt. Judge Middaugh reversed

Commissioner Jeske's award for attorney fees and denied McCann's request for attorney fees.

Judge Middaugh went on to say that " *the next time this appears in front of me one party will be hit with substantial attorney's fees.*"

Judge Middaugh retained jurisdiction on the case so that all future motions would come before her Court. (CP 59-60.)

iii. Judge Middaugh's December 12, 2008 ruling on Palmer's Motion for Reconsideration.

On November 7, 2008 Palmer filed a motion for reconsideration of Judge Middaugh's October 28, 2008 ruling. Judge Middaugh denied the motion for reconsideration and despite previously finding that Palmer had technically violated the provisions of the parenting plan, Judge Middaugh reversed her October 25, 2008 ruling and awarded Palmer attorney fees totaling \$3,321.50.

Judge Middaugh's order stated that the award included " judgment for attorney's fees awarded by the Court Commissioner and additional \$1,920.50 for the revision and the motion for reconsideration."

Judge Middaugh went on to state " *The Court was not provided with a copy of the 10/28/2008 order and the file is not available online.*

The Court recalls that it retained jurisdiction for all further hearings

and re-affirms this. Because the file is not available on line as yet, parties must provide the Court with copies of any prior pleadings necessary in all other motions.” CP (61-62).

C. SUMMARY OF ARGUMENT

This appeal presents questions of law regarding the statutory requirements for an award of attorney fees on a motion for contempt proceeding under RCW Chap. 26.09.160 and the trial Courts abuse of discretion in denying McCann’s motion for contempt.

D. ARGUMENT

Despite the Court finding that there were violations of the provisions of the parenting plan, the Court erred in denying McCann’s Motion for contempt. A parent is “deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence.

Rideout v. Rideout 110 Wash.App. 370, 40 P.3d 1192 Wash.App. Div. 2,2002.

Though Judge Middaugh reversed the Commissioners award for attorney fees to Palmer on October 28, 2008, (CP 59-60) she then reversed the October 28, 2008 order by re-instating the Commissioners order and ordering additional attorney fees for the motion for revision and the Motion for Reconsideration. (CP-61-62)

This adds an additional element of confusion as Palmer moved the Court with the Motion for Reconsideration and not McCann. McCann argues that the Court abused its discretion in denying the Motion for Contempt and awarding attorney fees to Palmer. Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court exercised its discretion in a way that was 'clearly untenable or manifestly unreasonable. Knight, 75 Wn.App. at 729.

i. The trial Court erred when it found that the McCann had acted in bad faith in bringing the motion for contempt.

The role of the Court is to address issues brought to it by its citizens. In this matter the parties entered into a modified parenting plan related to their two children. After attempts to resolve the issues via email where McCann requested that the parties use the alternative dispute resolution process as explained in the parenting plan. RCW 26.09.184 governs parenting plans. It requires that all parenting plans contain a provision regarding alternate dispute resolution. After Palmer's refusal to participate in the Alternative Dispute Resolution process, McCann's only means to remedy the issues was to file a motion for contempt with the Court. Palmer's willful violations

of the provisions of the parenting plan were in bad faith and McCann's motion for contempt should have been granted.

On March 19, 2008 the parties entered into a modified parenting plan for their two children. Section V. of the parenting plan called for a three step dispute resolution process. Section 5.2 (CP 81-82) called for the parties to attempt to negotiate the issue via email without third parties. Section 5.3 (CP 82) called for the parties to submit to family counseling. The parenting plan stated that " in order to resolve issues not resolved by the process in paragraph 5.2 and prior to advancing to level three, the parents shall utilize the services of (1) Microsoft Family Counseling (if then available to either parent), (2) Bellevue Parent Child-Mediation Program (if available to ether parent) or (3) employment of a parenting coach. The parent identifying the issue shall choose the process, subject to the availability of the service at that time and in a time responsive manner."

This is the crux of the McCann's motion for contempt. RCW 26.09.160 governs motions for contempt for failure to follow the parenting plan. Mr. McCann provided three separate emails requesting to use the Alternative Dispute Resolution Process to Ms. Palmer. (CP 33-35) Because Ms. Palmer refused to comply with the

provisions of the parenting plan, Mr. McCann's only course of action was to move for relief through the Court.

At the October 28, 2008 hearing before Judge Middaugh, the Court found that Palmer had technically violated the parenting plan, but refused to enter a finding of contempt against her. (CP 59-60). The Court also denied the McCann's request for attorney fees stating that: "The father doesn't get attorneys fees because he is not in compliance with the parenting plan either." (RP page 31 line 20.)

The Court offered no explanation as to how McCann failed to comply with the provisions of the parenting plan. McCann argues that the Court abused its discretion in failing to hold Palmer in contempt and failing to award attorney fees. Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court exercised its discretion in a way that was 'clearly untenable or manifestly unreasonable. Knight, 75 Wn.App. at 729.

On November 7, 2008 the Palmer filed a motion for reconsiderations of Judge Middaugh's October 25, 2008 ruling reversing Commissioner Jeske's award for attorney fees to Palmer. On December 12, 2008 Judge Middaugh entered an order reversing her

October 25, 2008 ruling. (CP 61-62). The Court ordered McCann to pay a total of \$3,321.50 for attorney fees. An award for attorney fees in defending a motion for contempt can only be awarded if the Court finds that McCann filed his motion for contempt in bad faith.

Bad faith is dishonesty of belief or purpose{.}' Black's Law Dictionary at 134 (7th Ed.1999). Good faith is the 'absence of intent to defraud or to seek unconscionable advantage.' Black's at 701. In parenting plan enforcement actions, the court can award attorney fees against a party who has acted in bad faith. RCW 26.18.160. But the statute does not define bad faith. Nor do the cases define bad faith in family law or parenting plan enforcement actions. Thus, understanding bad faith as it applies equitably is helpful.

We have outlined three different types of bad faith: prelitigation misconduct, procedural bad faith, and substantive bad faith.

Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn.App. 918, 927, 982 P.2d 131 (1999), review denied, 140 Wn.2d 1010 (2000).

Substantive bad faith, the only type that potentially applies here, occurs 'when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive.' Hiller Corp., 96 Wn.App. at 929. Bringing a frivolous claim is not enough, there must be evidence of an intentionally frivolous claim brought for the

purpose of harassment. In re Pearsall-Stipek, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998). And the trial court must make a finding that the party acted in bad faith; failure to do so means a sanctioning attorney fee award must be reversed for abuse of discretion.

Pearsall-Stipek, 136 Wn.2d at 267. See also State v. S.H., 102 Wn.App. 468, 479, 8 P.3d 1058 (2000) (absent express finding of bad faith, appellate court will not assume bad faith, even where record supports it).

In Pearsall-Stipek, a petitioner's 'repeated and wholly meritless efforts to recall Ms. Pearsall-Stipek,' when the claims were barred by res judicata and insufficient evidence, may have been bad faith.

Pearsall-Stipek, 136 Wn.2d at 267. But the trial court did not make a bad faith finding, so the fee award was reversed on appeal.

Pearsall-Stipek, 136 Wn.2d at 267. In Hiller Corp., a 'hard fought' issue of ownership, where resolution relied on credibility determinations, was not sufficient to show bad faith. Hiller Corp., 96

Wn.App. at 930. In Marriage of Cummings, one party agreed to provide tax information before modifying child support, but she later sought retroactive modification after providing no information and taking no action for 12 years. In re Marriage of Cummings, 101 Wn.App. 230, 231, 6 P.3d 19, review denied, 11 P.3d 825 (2000).

But while the motion was ‘not well-advised,’ there was no evidence of bad faith. Cummings, 101 Wn. App at 235. And at least one case has suggested that where the party presented ‘debatable issues upon which reasonable minds might differ and {the appeal} was not so totally devoid of merit that there was no reasonable possibility of reversal,’ the court cannot find bad faith. Casa Del Rey v. Hart, 46 Wn.App. 809, 816, 732 P.2d 1025 (1987). We review the trial court’s decision on bad faith for abuse of discretion. Pearsall-Stipek, 136 Wn.2d at 267. The trial court abuses its discretion if its decision is ‘manifestly unreasonable or based on untenable grounds or untenable reasons.’ In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 136 (1997).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Littlefield, 133 Wn.2d at 47.

The trial Court did not set forth the facts underlying these general conclusions or state why the facts showed that McCann’s dishonesty of belief or purpose, or his intent to use the motion to harass Palmer.

Here, the trial court did not find that McCann brought the contempt motion in bad faith. The December 12, 2008 order by Judge Middaugh sites no such finding of bad faith. **(CP 61-62)**. However, the Court went on to deny Palmer's motion to reconsider, but awarded Palmer attorney fees in the amount of \$3,321.50 for responding to McCann's motion for contempt, for responding to McCann's motion for revision, and for Palmer's motion to reconsider. Though McCann did not bring the motion to reconsider, he was ordered to pay attorney fees for the motion. It is hypothesized that the Court may have become confused as to the history of the action. Judge Middaugh states "*The Court was not provided with a copy of the 10/28/2008 order and the file is not available online. The Court recalls that it retained jurisdiction for all further hearings and re-affirms this. Because the file is not available on line as yet, parties must provide the Court with copies of any prior pleadings necessary in all other motions.*" **(CP-61-62)**

Here, it is clear that the Court was not presented with all of the facts prior to making entering the December 12, 2008 order awarding attorney fees to Palmer. Where a trial court fails to make findings on all ultimate facts and material issues, the trial court's decision must be reversed. State v. Mewes, 84 Wn. App. 620, 622-23, 929 P.2d

505 (1997). “It is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented.” Wold v. WoldMewes. In this case, the trial court’s failure to make proper findings on the requirement of an award for attorney’s fees under RCW 26.09.160(7) precludes appellate review. This Court simply must reverse the trial court’s decisions.

ii. The Trial Court Erred in Denying McCann’s Motion for Contempt under RCW 26.09.160(2).

On September 9, 2008 McCann filed a motion for contempt based on the following five separate violations of the parenting plan: 1. Failure to keep the father informed of the outcome of the Son’s medical appointments; 2. Violation of the parenting plan by scheduling medical appointments for the daughter; 3. Failure to ensure that the children are regularly taking their medication in conformity with the parenting plan; 4. Failure to follow the dispute resolution process; and 5. Failure to comply with the scheduled residential pick up times. The parties appeared before Family Law Commissioner Jacqueline Jeske on September 25, 2008. Commissioner Jeske denied McCann’s motion finding that Palmer had not acted in bad faith in her violations of the provision of the parenting plan. Despite the evidence supporting McCann’s argument that the Palmer had in fact violated

the provision of the parenting plan, Commissioner Jeske awarded attorney fees in the amount of \$1,600.00. Order attached as **(CP 1-7)**

On October 3, 2008 McCann filed his motion for revision of Commissioner Jeske's ruling. The parties appeared before Judge Middaugh on October 25, 2008 for oral argument. Judge Middaugh found that Palmer had violated the parenting plan but refused to enter a finding of contempt. Judge Middaugh reversed the award for attorney fees to Palmer and held that she would retain jurisdiction on all future motions. **(CP 59-60)**.

- a. The trial court abused its discretion in denying the motion for contempt for failure to keep the father informed of the outcome of the son's medical appointments.**

Section 4.2.2 Scheduling of Routine health Care Matters. In order to reduce the significant conflict has arisen over these issues in the past, which have had an abusive effect on the other and the children. Each parent shall schedule healthcare appointments that they are responsible for to occur during their residential time. When the children have a health care appointment, the other parent shall receive notice thereof at the time the appointment is made and whether the scheduling parent shall receive notice thereof at the time the appointment is made and whether the scheduling parent will be

attending; and immediately afterward be notified of the outcome of the appointment, including the diagnosis, treatment plan and doctors name and phone number. (CP 79)

McCann's son was seen by a physician on May 19, 2008. Palmer failed to notify the McCann as to the outcome of the exam or any progress on his son's treatment.

During the September 25, 2008 hearing before Commissioner Jaqueline Jeske, the court denied McCann's motion for contempt finding that McCann was "equally able to ascertain that information."
(RP Volume I, page 15, line 15.)

"A parent' failure to comply with parenting plan provisions may justify a contempt finding. RCW 26.09.184(6). "An attempt by a parent to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court[.]" RCW 26.09.160(1). In re Marriage of Farr 87 Wash.App. 177, 940 P.2d 679 Wash.App. Div. 1,1997.

The May 19, 2008 physical therapy appointment was during the time that Palmer had her residential time with the child. The parenting plan is quite clear in stating that Palmer was to notify McCann as to

the diagnosis, treatment plan and doctors name and phone number. Palmer failed to do so. This is a violation of the provisions the parenting plan and is a contemptible action.

“A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith. RCW 26.09.160(1). If bad faith per se is shown, the contemnor parent must, to avoid a contempt order, establish an excuse by a preponderance of the evidence. See RCW 26.09.160(4). A parent is “deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence.” RCW 26.09.160(4). And a parent must “establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.” RCW 26.09.160(4). *Rideout v. Rideout* 110 Wash.App. 370, 40 P.3d 1192 Wash.App. Div. 2,2002.

At the September 25, 2008 hearing, Commissioner Jeske stated that “physical therapy appointments was treatment. He was equally able to ascertain that information.” (**RP Vol. I. Page 15, line 14.**) The physical therapy appointments are covered under section 4.2.2 of the parenting plan as routine health care matters. The physical therapy is health care and is directly related to the child’s injuries. In

addition, it is irrelevant whether Palmer attended the physical therapy appointment. Palmer's duties under the parenting plan were to inform McCann of the treatment plan and the doctor's name and number.

Here Palmer knew of the appointment, knew of the outcome and the prognosis, knew that under the parenting plan she was to inform McCann as to the status of the appointment, yet failed to do so.

b. Whether the trial court abused its discretion in denying a motion for contempt for Palmer's violation of the parenting plan by scheduling the daughter's medical appointments.

Section 4.2 of the parenting plan clearly states that McCann has sole decision making for routine health care until the child reaches the age of 17. **(CP 79)** The parenting plan also states that "each parent shall schedule healthcare appointments that they are responsible for to occur during their residential time." Palmer scheduled a dentist appointment on April 23, 2008 and took the child without McCann's consent.

At the September 25, 2008 hearing before Commissioner Jeske, the Court found that Palmer was not in contempt stating that the parenting plan had not been entered yet. **(RP. Vol. I, page 15, line 20.)** On the October 28, 2008 hearing before Judge Middaugh, the

Court also ruled that the parenting plan was not in effect yet. This is irrelevant. As soon as the parenting plan was signed it became effective. Though the appointment had already been scheduled, Palmer had not received McCann's consent to take her to the dentist. The purpose of the parenting plan was to reduce the conflict and resolve these exact issues. Palmer knew that the parenting plan called for McCann to hold sole decision making for the daughters routine health care matters, but scheduled and took the daughter to the dentist without McCann's consent. This is a willful violation of the parenting plan and Palmer should have been held in contempt.

c. The trial court abused its discretion in denying a motion for contempt for Palmer's failure to ensure the children are regularly taking their medication in conformity with the parenting plan.

McCann's daughter is required to take daily medication for her hyperthyroidism. McCann gave substantial evidence that Palmer had a history of failing give the child her medication. During the Childs residential time with Palmer, she failed to ensure that the child had taken her medication on a daily basis.

Palmer was aware of the provision yet failed to comply with the parenting plan. Palmer should have been found in contempt on this basis.

d. The trial court abused its discretion in denying a motion for contempt for Palmer's failure to follow the dispute resolution process.

Here, the parties entered into a modified parenting plan on March 20, 2008. **(CP 76-87)** Section V. of the parenting plan called for a three step dispute resolution process. Section 5.2 (level one) called for the parties to attempt to negotiate the issue via email without third parties. Section 5.3 (level two) called for the parties to submit to family counseling. The parenting plan stated that “ in order to resolve issues not resolved by the process in paragraph 5.2 and prior to advancing to level three, the parents shall utilize the services of (1) Microsoft Family Counseling (if then available to either parent), (2) Bellevue Parent Child-Mediation Program (if available to ether parent) or (3) employment of a parenting coach. The parent identifying the issue shall choose the process, subject to the availability of the service at that time and in a time responsive manner.”

On March 29, 2008 McCann sent a request via email to Palmer requesting counseling to resolve issues pertaining to the parenting plan. (Section 5.3, level two.) Palmer replied on April 5, 2008 refusing to comply with the dispute resolution process.

On April 7, 2008 McCann sent an additional email requesting counseling in accordance with the dispute resolution process.

Palmer replied on April 7, 2008 again refusing to comply with the dispute resolution process.

On April 13, 2008 McCann made a third and final request to use the dispute resolution process outlined in section 5.3 of the parenting plan. **(CP 33-35)**

A parent who refuses to comply with duties imposed by a parenting plan is considered to have acted in bad faith, as required for contempt finding. West's RCWA 26.09.160(1). In re Marriage of Davisson 131 Wash.App. 220, 126 P.3d 76 Wash.App. Div. 3,2006. Failure to comply with a provision of a parenting plan subjects a parent to a finding of contempt of court. The contempt order in this case was based on RCW 26.09.160(2)(b), which provides that a court shall find a party in contempt if, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child. But before entering a contempt order under this provision, the trial court must first make a specific finding that the parent has acted in bad faith or committed intentional misconduct, such as disobeying a prior court order or using custodial time in a

manner calculated to manipulate the other party into changing a parenting plan. A trial court may also find a party in contempt when it has first tried to resolve parenting plan violations with lesser sanctions which did not achieve the requisite compliance with the plan. In re Marriage of James, 79 Wn.App. 436, 441, 903 P.2d 470 (1995).

Other than sending a parent to jail, punishment for contempt to compel parent to comply with parenting plan is mandatory, not discretionary. West's RCWA 26.09.160(2)(b)(i-iii). *Rideout v. Rideout* 110 Wash.App. 370, 40 P.3d 1192 Wash.App. Div. 2,2002.

We review a superior court's factual findings for substantial evidence and then determine whether the findings support conclusions of law. A parent seeking a contempt order to compel another parent to comply with a parenting plan must establish the contemnor's bad faith by a preponderance of the evidence. In re James, 79 Wn.App. at 442. If the superior court finds that a parent has, in bad faith, failed to comply with the parenting plan, "the court *shall* order" the contemnor (1) to provide additional visitation time to make up for the missed time, (2) pay the other parents attorney fees and costs, and (3) pay the other parent a penalty of at least one hundred dollars. RCW 26.09.160(2)(b)(i)-(iii) (emphasis added). At its discretion,

“[t]he court *may* also order the parent to be imprisoned.” RCW 26.09.160(2)(b) (emphasis added). Other than sending a parent to jail, punishment for contempt in this context is mandatory, not discretionary. *In re Marriage of Myers*, 123 Wn.App. 889, 893, 99 P.3d 398 (2004).

Here McCann made three separate attempts to participate in the dispute resolution process. Palmer had the means to comply with McCann’s request for dispute resolution, yet refused to do so. Both parties executed the March 20, 2008 parenting plan which spelled out the dispute resolution process. Palmer having full knowledge of the provisions set forth in the parenting plan outlining the dispute resolution process, refused to comply with McCann’s repeated request. But for Palmer’s refusal to comply with the dispute resolution process, McCann would have had no need to bring an action for contempt. Here it is clear that Palmer acted in bad faith when she refused to comply with the dispute resolution process.

e. The trial court abused its discretion in denying a motion for contempt for the Palmer’s failure to comply with the scheduled residential pick up times.

Section 3.2 of the parenting plan (CP 77) states “the transfer time for the children shall be on Mondays, after school when school is in session or otherwise at 5:30 pm.”

On March 24, 2008 Palmer was to pick up the daughter from McCann's home by 5:30 pm yet failed to do so. McCann sent an email at 2:45 pm on March 24, 2008 reminding Palmer of the pickup time. **(CP 48)** Palmer did not reply and the next communication McCann had was at 7:30 pm that night.

At the September 25, 2008 hearing before Commissioner Jacqueline Jeske found that Palmer had not acted in bad faith and denied to find Ms. Palmer in contempt on this basis. Order attached as **(CP 1-7)**.

A parent who refuses to comply with duties imposed by a parenting plan is considered to have acted in bad faith, as required for contempt finding. West's RCWA 26.09.160(1). In re Marriage of Davisson 131 Wash.App. 220, 126 P.3d 76 Wash.App. Div. 3,2006.

At the October 28, 2008 hearing before Judge Middaugh found that Palmer did violate the parenting plan by not picking the daughter up at 5:30 pm **(RP, page 38 line 15)** but refused to enter a finding of contempt and award attorney fees, " because the other things I don't find were violations." **(RP, page 38, line 21.)**

"Trial court finding that father committed one act of contempt when he violated the parties' parenting plan, rather than multiple acts of contempt as argued by mother, was not an abuse of discretion."

West's RCWA 26.09.160(2)(b). In re Marriage of Eklund 143

Wash.App. 207, 177 P.3d 189 Wash.App. Div. 2,2008. February 20, 2008

“After the trial court found father had violated the parenting plan in bad faith, it was required to impose make-up residential time, civil penalties, and attorney fees; penalties, make up time, and attorney fees were mandatory under statute”. West's RCWA 26.09.160(2)(b).

In re Marriage of Eklund 143 Wash.App. 207, 177 P.3d 189

Wash.App. Div. 2,2008. February 20, 2008

It is well within the trial court's discretion to hold that, when an initial petition alleges separate violations of a single court order, the incidents constitute a pattern of conduct that merges into a single finding of contempt when these acts are simultaneously declared to violate the order. *See, e.g., Rideout, 150 Wash.2d at 348, 77 P.3d 1174.*

Here Judge Middaugh found Palmer in violation of the provisions of the parenting plan by failing to pick up the daughter as spelled out in the parenting plan. Whether the Court found that the remaining issues were not violations of the provisions of the parenting plan are irrelevant. The Court found that Palmer had violated the provisions of the parenting plan and should have held Palmer in Contempt and imposed an award of attorney fees and costs.

iii. The Trial Court Abused its Discretion in Awarding Attorney Fees to Palmer and in Denying McCann's Motion for Contempt.

"A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons". James, 79 Wash.App. at 440, 903 P.2d 470.

Here the Court found that Palmer had technically violated the provisions of the parenting plan, but failed to enter a finding of contempt and an award of attorney fees. Judge Middaugh found Palmer in violation of the provisions of the parenting plan by failing to pick up the daughter as spelled out in the parenting plan. The Court should have held Palmer in Contempt and imposed an award of attorney fees and costs.

"A court's decision is based on untenable reasons, and thus, constitutes abuse of discretion, if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard". Ryan v. State 112 Wash.App. 896, 51 P.3d 175 Wash.App. Div. 1, 2002.

"A trial court abuses its discretion, warranting reversal on appeal, when it exercises its discretion in a manifestly unreasonable manner

or bases its decision on untenable grounds or reasons”. State v. Jordan 146 Wash.App. 395, 190 P.3d 516 Wash.App. Div. 2,2008.

On November 7, 2008 Palmer filed a motion for reconsiderations of Judge Middaugh’s October 25, 2008 ruling reversing Commissioner Jeske’s award for attorney fees to the Palmer. On December 12, 2008 Judge Middaugh entered an order reversing her October 25, 2008 ruling. **(CP 61-62)** The Court ordered McCann to pay a total of \$3,321.50 for attorney fees. An award for attorney fees in defending a motion for contempt can only be awarded if the Court finds that McCann filed his motion for contempt in bad faith.

“A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons”. State v. Berty, 136 Wash.App. 74, 83-84, 147 P.3d 1004 (2006) (citing State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)).

“A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons; untenable reasons include errors of law”. Council House, Inc. v. Hawk 136 Wash.App. 153, 147 P.3d 1305 Wash.App. Div. 1,2006.

In this matter, the trial Court cited no authority, nor any explanation of

it's award of attorney fees in the December 12, 2008 order. In addition, the Court seemed confused about the history of the action and stated that: *"The Court was not provided with a copy of the 10/28/2008 order and the file is not available online. The Court recalls that it retained jurisdiction for all further hearings and re-affirms this. Because the file is not available on line as yet, parties must provide the Court with copies of any prior pleadings necessary in all other motions."* **(CP 62, Section 3.)**

The Court denied Palmer's motion for reconsideration, but awarded Palmer attorney fees for McCann's motion for contempt, McCann's motion to reconsider and Palmer's motion for reconsideration. In addition at the October 25, 2008 hearing before Judge Middaugh, the Court stated: *" the next time this appears in front of me one party will be hit with substantial attorney's fees. (RP, page 32, line 1.)*

Here Judge Middaugh essentially states that if the parties appear before her again, regardless of the reason, "one party will be hit with substantial attorney fees." Unfortunately, the party that was hit with attorney fees was the wrong party. The Court found that Palmer had violated the provisions of the parenting plan and should have entered a finding of contempt.

Palmer, not McCann filed the motion for reconsideration and the Courts decision to award attorney fees to Palmer based on a motion Palmer filed is not support by the facts and is manifestly unreasonable.

A court's decision is based on untenable reasons, and thus, constitutes abuse of discretion, if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Ryan v. State112 Wash.App. 896, 51 P.3d 175 Wash.App. Div. 1,2002.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. A decision based on a misapplication of law rests on untenable grounds. Ryan v. State112 Wash.App. 896, 51 P.3d 175 Wash.App. Div. 1,2002.

iv. McCannShould be Awarded Attorney Fees Pursuant to RAP 18.1.

Under RAP 18.1(a), a party is entitled to reasonable fees and costs if

an applicable law grants that right. McCann requests attorney fees and costs on appeal under 'Rideout.

RCW 26.09.160(1) provides as follows:

An attempt by a parent to refuse to perform the duties provided in the parenting plan shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by *awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.*

In addition, RCW 26.09.160(2)(b)(ii) provides:

If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, *has not complied with the order establishing residential provisions for the child*, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

(ii) The parent to pay, to the moving party, *all court costs and reasonable attorneys' fees incurred as a result of the noncompliance*, and any reasonable expenses incurred in locating or returning a child....

These statutes have application to these circumstances. We say that because all of the proceedings before the Court of Appeals focused on the respondents noncompliance with the residential provisions of

the parenting plan relating to the parties children. Although the statutes do not speak directly to attorney fees on appeal, we agree with the reasoning of the Court of Appeals, In re Parentage of Schroeder, 106 Wash.App. 343, 353-54, 22 P.3d 1280 (2001), that a party is entitled to an award of attorney fees on appeal to the extent the fees relate to the issue of contempt.

In Rideout, our Supreme Court held that these subsections of RCW 26.09.160 applied equally to appeals addressing contempt issues. Rideout, 150 Wn.2d at 358-59 (citing In re Parentage of Schroeder, 106 Wn.App. 343, 353-54, 22 P.3d 1280 (2001))

The respondent acted in bad faith in not complying with the Parenting Plan. She must, therefore, pay McCann's attorney fees and costs for his appeal to the Court of Appeals, in accordance with RCW 26.09.160(1), (2)(b)(i)

E. CONCLUSION

The issues raised in this brief are not novel, each assignment of error is entirely based on existing law. McCann's motion for contempt was not made in bad faith and the statutory elements of RCW 26.09 160 require that Palmer be found in Contempt for violations of the provision of the parenting plan.

Palmer, not McCann, filed the motion to reconsider the October 28, 2008 order of Judge Middaugh. The Courts December 12, 2008 order requiring McCann to pay fees and costs were based on untellable grounds and for untellable reasons.

McCann should be awarded fees and costs under RCW 26.09.160 and RAP 18.

While it is not necessary to reach all of the legal issues raised by McCann, at a minimum this Court must fully reverse and vacate the decisions of the trial Court.

F. APPENDICES

Copies of all of the related pleadings are attached to this brief.

RESPECTFULLY SUBMITTED this 31 day of October, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

Via personal Delivery to:

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DATED this 1 day of November, 2009

By: _____

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