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Cause No. 74643-0-I
King County Superior Court No. 13-3-11851-7

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

In Re the Marriage of:

Michaela Osborne NKA Fellows,
Petitioner

And

Charles Fellows,
Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

The Honorable Victoria Galvan, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The appellate court may review this appeal *de novo* as all the evidence presented to the trial court, written evidence, photos, declarations, police reports, is now before the appellate court, so the court may determine whether the evidence meets the substantial evidence standard. The trial court's decision was an abuse of discretion because it was manifestly unreasonable and the decision was based on untenable evidence. The inadmissible hearsay evidence supporting the trial court's findings of fact is reviewable for the first time on appeal because the appellate court has discretionary power to review errors that fail to establish facts upon which relief may be granted. Lastly, Ms. Osborne, not Mr. Fellows, should be awarded attorneys' fees on appeal pursuant to RAP 18.1.

STANDARD OF REVIEW

This court should conduct a *de novo* review of the record because the trial court abused its discretion in holding Ms. Osborne in contempt. A trial court abuses its discretion where their decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)); *In re Estate of Black*, 153 Wn.2d 152, 172 (2004). Where the trial court has not seen or heard testimony requiring it to assess the credibility or competency of the witnesses, the Court of Appeals may conduct a *de novo* review of the record made at trial, from the same position and on the same facts, and such review is appropriate. *Smith v. Skagit County*, 75 Wn.2d at 718. The term "may" grants the court the discretionary ability to review new issues on appeal. *State v. Ford*, 137 Wash.2d 472, 477, 484-85, 973

P.2d 452 (1999); *Roberson v. Perez*, 123 P. 3d 844, 156 Wn. 2d 33, 39 (Wash. 2005).

The Appellate court is purposed with deciding whether or not there is substantial evidence to support the facts as found. *Westmark Development Corp. v. City of Burien*, 166 P.3d 813, 140 Wn. App. 540, 563, (2007), citing *Bland v. Mentor*, 63 Wash. 2d 150, 154, 385 P.2d 727 (1963).

ARGUMENT

- 1. The appellate court's *de novo* review is appropriate here where the trial court's order was based on written submissions, and all the submissions are provided to the Appellate court.**

Where, as here, there was no live testimony at the trial court level, this court should review the submitted evidence *de novo* because the contempt order was based entirely on written submissions, and the identical submissions were provided to the appellate court record. *State ex rel. Pac. Fruit & Produce Co. v. Superior Court*, 22 Wash.2d 327, 155 P.2d 1005 (1945); *In re Black*, 47 Wash.2d 42, 287 P.2d 96 (1955); *Nygaard v. Department of Labor & Indus.*, 51 Wash.2d 659, 321 P.2d 257 (1958); *v. Department of Labor & Indus.*, 72 Wash.Dec.2d 591, 434 P.2d 720 (1967). In such cases, the Court properly applies the substantial evidence rule. The substantial evidence rule provides for an exception to the general rule that the Appellate Court cannot simply reweigh the facts of the case, because where there was no testimony taken at trial and all submissions were written, the appellate court may review all the evidence and declarations submitted to the trial court. *Smith*, 75 Wash.2d at 718-19, 453 P.2d 832; *In re Marriage of Rideout*, 77 P.3d 1174, 150 Wn.2d 337, 351 (Wash. 2003)

Where the trial court has not assessed the credibility or competency of the witnesses based on testimony taken at trial, the appeal court can review from the same position and on the same facts as the trial court, then an independent *de novo* review of the record is appropriate. *Smith v. Skagit County*, 75 Wn.2d at 718. The court is entitled to examine the records “presented and determine the merits of the contentions going to the issue of arbitrary, capricious, and unreasonable legislative action.” *Id.* at 718-719.

In the instant case, a *de novo* review is appropriate because the trial court’s decision was based entirely on the declarations of the parties, the police report and repair cost estimates, all of which is before the appellate court for review. No live testimony was given, and the credibility of the witnesses was based on the written submissions. The issue of the case is whether the evidence admitted raises to the level of the substantial evidence standard for a finding of intentional violation of a court order. The appellate court is in the best position to assess whether the evidence submitted raises to the substantial evidence.

2. The trial court’s abuse of discretion in holding Osborne in contempt was manifestly unreasonable and not based on substantial evidence

- A. The contempt order was manifestly unreasonable as the public and private interests of the parties are clearly disproportionately impacted by the decision and decision was exercised on untenable grounds for untenable reasons

The trial court abused its discretion in this case as the contempt finding was manifestly unreasonable, none of the circumstantial evidence presented illustrated any intentional acts by Ms. Osborne, and there was a marked dearth of substantial evidence. A trial court abuses its discretion where its decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79

Wash.2d 12, 26, 482 P.2d 775 (1971)); *In re Estate of Black*, 153 Wn.2d 152, 172 (2004).

The reasonable standard is determined by a “comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.” *State ex rel. Carroll v. Junker*, 482 P.2d 775, 79 Wn. 12, 26 (Wash. 1971).

The contempt finding against Ms. Osborne was decided after a seven minute hearing where the trial court made an assessment about over \$75,000 dollars of property damage in a highly contested dissolution case, based on a hearsay statement by a neighbor, a disputed police report and no live testimony to assess the credibility of the parties. The trial court’s decision was manifestly unreasonable because the evidence does not substantiate the claim that Ms. Osborne intentionally damaged the property. Instead the decision was based on the untenable reason of punishing Ms. Osborne’s “tantrum.” VRP at 14. While the damage was seemingly intentional, the circumstantial evidence provided does not support the claim that Ms. Osborne herself caused the damage, or that the damage was done to the house following the trial court’s order. It was manifestly unreasonable for the court to conclude that Ms. Osborne herself intentionally damaged property when there was no showing of an act by a particular person. Indeed, even the Respondent’s brief admits that someone, not specifically Ms. Osborne, damaged house. *See* Br. Of Respondent 5-6. The Respondent’s claim that Ms. Osborne’s ‘opportunity’ to damage the house provides the substantial evidence that she intentionally *did* damage the house is manifestly unreasonable. Br. of Respondent 15.

When weighing the trial court’s contempt finding with the public and private interests of those affected and the comparative weight of the reasons for the decision, it is

clear that the decision was unreasonable. *State ex rel. Carroll v. Junker*, 79 Wn. at 26. Ms. Osborne’s public and private interests as a survivor of domestic violence and her financial security are severely and directly impacted by this ruling. The contempt hearing acts as a proxy for domestic violence, and Ms. Osborne is financially burdened by the requirement that she must pay Mr. Fellows the entire amount that she received in the dissolution settlement. Additionally, Ms. Osborne is protected by a 99 year Domestic Violence Protection Order restraining Mr. Fellows from contacting her. Thus, the trial court’s assumption that Ms. Osborne would want to continue her involvement with Mr. Fellows by damaging the house, and jeopardize her financial security is manifestly unreasonable. CP at 446. In contrast, Mr. Fellow’s public and private interests are vindicated as he is portrayed as the victim of the dissolution, and Ms. Osborne’s “tantrum” and he is financially reimbursed for the dissolution settlement paid to Ms. Osborne of \$75,000. VRP at 14.

The heavily skewed interests of each party combined with the trial court’s ruling that Ms. Osborne threw a “tantrum, an expensive one at that”, based on Mr. Fellow’s declaration, a hearsay statement by the neighbor, and pictures of the damage renders the trial court’s decision manifestly unreasonable, and based on untenable reasons. VRP 14; *State ex rel. Carroll v. Junker*, 482 P.2d 775, 79 Wn. 12, 26 (Wash. 1971).

- B. This court can determine whether Mr. Fellow’s declaration, the hearsay declaration of Mr. Elvidge, and the factually inaccurate police report falls short of the substantial evidence standard required to support the trial court’s factual determination

The foundational role of the Appellate Court is to review whether the proffered evidence sufficiently supports a trial court’s factual determination. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710 (2009) at 717. The Appellate Court is purposed with

deciding whether or not there is substantial evidence to support the facts as found. *Westmark Development Corp. v. City of Buiren*, 140 Wn. App. at 563 citing *Bland v. Mentor*, 63 Wash. 2d 150, 154, 385 P.2d 727 (1963). “Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 713, 732 P.2d 974 (1987). While circumstantial evidence is weighted as heavily as direct evidence, the interpretations derived from circumstantial evidence must still be reasonable. *State v. Gosby*, 85 Wash.2d 758, 766-67, 539 P.2d 680 (1975); *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d, 391 at 391 (2004).

The trial court’s decision was not based on substantial evidence, but rather based on Mr. Fellow’s declaration, photographic evidence of damage to the house, and a hearsay declaration contained in a report by an investigator given over the phone by a neighbor, Mr. Elvidge, who was reluctant to get involved in the case. CP at 422. While the overwhelming photographic documentation of damage to the house does effectively cause concern for any arbiter of this case, it fails to rise to the level of substantial evidence of Ms. Osborne’s *intentional* violation of a court order. Both parties claim to have arrived at the house on separate dates to find the house trashed. This objective fact could lead to several reasonable interpretations, such as that put forth by Ms. Osborne, namely that Mr. Fellows accessed the house after she vacated it, but before the date specified by the court order, and damaged the house himself in an act of further abuse and control. However, alone the photographic evidence does not amount to substantial evidence supporting the finding that Ms. Osborne intentionally violated the court order. In fact, Ms. Osborne readily admitted to the writing on the wall while the parties were

still together. However, Respondent and the trial court attempt to posit this admission as a larger admission that she must have done all the damage in the house, which does not reasonably support the findings that Ms. Osborne caused the substantive damage to the property Br. Of Respondent 5 - 6; CP 426.

While there are several reasonable interpretations of the evidence in this case, the evidence does not rise to the level of substantial evidence that Ms. Osborne intentionally damaged the house in violation of the court order.

3. The appellate court may on first review decide whether the hearsay evidence submitted is inadmissible and whether the remaining evidence, absent the hearsay evidence, amounts to substantial evidence.

The Appellate Court may review issues not raised in trial court, particularly where the issues may impact the ability to sustain the action. RAP 2.5(a)(2); *In re Parentage of M.S.*, 115 P.3d 405, 128 Wn. App. 408, 412 (2005). The term “may” grants the court the discretionary ability to review new issues on appeal. *State v. Ford*, 137 Wash.2d 472, 477, 484-85, 973 P.2d 452 (1999); *Roberson v. Perez*, 123 P. 3d 844, 156 Wn. 2d 33, 39 (Wash. 2005). A party can raise an issue for the first time on appeal under RAP 2.5(a)(2) where the issue involves sufficiency of the evidence. *In re Adoption of T.A.W.*, 354 P.3d 46, 188 Wn. App. 799, 803 (2015) (Referring to the efforts taken to find suitable Native placement for native children prior to adoption). A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2). *Batten v. Abrams*, 626 P.2d 984, 28 Wn. App. 737, 742 (1981); *Gross v. City of Lynnwood*, 583 P.2d 1197, 90 Wn. 2d 395, 400 (Wash. 1978). This is appropriate where there is a factual inquiry into the sufficiency of evidence is before the court. *Hertog v. City of Seattle*, 138 Wash.2d 265, 273, 979 P.2d 400 (1999).

The hearsay declaration of Mr. Elvidge submitted by the Respondent directly undermines the sufficiency of the evidence submitted, and under RAP 2.5(a)(2), this issue may be raised for the first time on appeal. The hearsay declaration by Mr. Elvidge was cited in the Judge's decision as a reason that she ruled against Ms. Osborne. VRP at 15. The Judge stated, "there's admissions to neighbors," which is only causal evidence that Ms. Osborne caused any of the damage to the property. CP at 422; VRP at 15. As described in the Petitioner's Opening Brief this declaration includes contrarian statements, inconsistencies and statements by a readily available but unwilling declarant. Pet. Opening Brief at 15-16. The trial court's reliance on this statement for Ms. Osborne's intent to damage the property was unreasonable because without this statement it is only Mr. Fellow's statement that he found the property damaged, inaccurate hearsay police reports, and the voluminous estimates to repair the damage that implicate Ms. Osborne in this damage. Once the hearsay evidence is excluded the evidence submitted by Mr. Fellows falls far below the standard of substantial evidence.

4. Ms. Osborne, not Mr. Fellows, should be awarded her reasonable attorney's fees

Mr. Fellow's request for attorneys' fees should be denied because Ms. Osborne does not have the means to pay these fees, and Mr. Fellow's does not have the need to have his fees awarded. Ms. Osborne requests reasonable attorneys' fees pursuant to RAP 18.1.

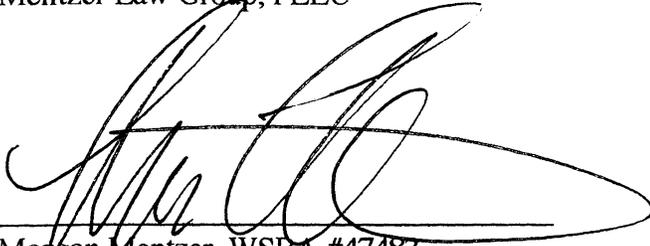
CONCLUSION

The appellate court may review this case *de novo* as all the submitted evidence before the trial court is in written and photographic form and before the appellate court for review. Upon *de novo* review this court may determine whether Mr. Fellow's declaration, photographic evidence and hearsay declaration meets the substantial

evidence standard required for a factual finding by the trial court. Lastly, the court may review for the first time the trial court's reliance on hearsay evidence because this error impacts the cause of action from which relief can be granted.

Respectfully submitted on June 20, 2016

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Certificate of Service

I declare under penalty of perjury of the laws of the State of Washington that on June 20, 2016, I emailed a true and correct copy of the foregoing document, including this certificate of service, to the Respondent's attorneys at the emails listed below, and I mailed a copy to the following address.

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