

TABLE OF CONTENTS

I.	IDENTITY OF ANSWERING PARTY	1
II.	STATEMENT OF RELIEF SOUGHT	1
III.	FACTS RELEVANT TO REPLY.....	1
IV.	GROUNDS FOR RELIEF AND ARGUMENT.....	2
V.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<i>Housing Auth. V. Newbigging</i> , 105 Wn. App. 178, 184, 19 P.3d 1081 (2001).....	2, 5
<i>Hurlbert v. Gordon</i> , 64 Wn. App. 386, 400, 824 P.2d 1238 (1992).....	2
<i>In re Marriage of Akon</i> , 160 Wn. App. 48, 248 P.3d 94 (2011).....	5
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 692 P.2d 793 (1984).....	3
<i>Sherry v. Fin Indem. Co.</i> , 60 Wn.2d 611, 160 P.3d 31 (2007)	2
<i>State v. Brown</i> , 113 Wn.2d 520, 548, 782 P.2d 1013, 80 A.L.R.4TH 989 (1989).....	3
<i>State v. Copeland</i> , 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996)	3
<i>State v. Cox</i> , 109 Wn. App. 937, 38 P.3d 371 (2002).....	2, 5
<i>United States v. Hoffman</i> 154 Wn.2d 730, 735 n. 3, 116 P.3d 999 (2005).....	2

Court Rules

Fed. R. App. P. 28 (a) (7).....	3
Fed. R. App. P. 28 (c)	3
RAP 10.3.....	2
RAP 10.3 (a)(5).....	2, 3, 5

Other Authority

http://www.merriam-webster.com/dictionary/false	3
http://www.merriam-webster.com/dictionary/frivolous	3

I. IDENTITY OF ANSWERING PARTY

Petitioner, Stefanie Jean Bennett, asks for the relief designated in Part II of this Motion.

II. STATEMENT OF RELIEF SOUGHT

Petitioner asks that this Court deny Respondent's request for relief and grant Petitioner's request to strike four portions of the facts of Respondent's Answering Brief, filed on October 1, 2013.

III. FACTS RELEVANT TO REPLY

Mr. Xitco argues that the facts that Ms. Bennett argues are false and material were already in Mr. Xitco's brief at the Court of Appeals level; therefore, Ms. Bennett's motion to strike should be denied because she has waived the issue. Response brief at 3.

Counsel has not found any cases holding that a Petitioner waives arguing that the record on review [in a Petition for Review] contains false or misleading facts if not raised at the appellate court level.¹ Taken to its logical conclusion, Mr. Xitco's argument would lead to unsound results and no cases could be heard on the merits. Ms. Bennett requests this court to adopt the argument that an appellant cannot waive the issue that the Respondents statements of the record on review are not accurate or false.

¹ Mr. Xitco appears to argue that because Ms. Bennett did not object to Mr. Xitco's testimony at trial that in his own opinion the domestic violence petitions were false, she now waives the issue in a Petition for Review. Response at 3. The issue in this Court is whether the statement of facts in Mr. Xitco's response to the Petition is accurate for this Court to make a reasoned opinion on the merits.

Anything opposing that argument would be at odds with the Washington Rules for Appellate Procedure and the cases interpreting those rules.

IV. GROUNDS FOR RELIEF AND ARGUMENT

This Court strikes portions of briefs that do not comply with RAP 10.3. *United States v. Hoffman* 154 Wn.2d 730, 735 n. 3, 116 P.3d 999 (2005). *Sherry v. Fin Indem. Co.*, 60 Wn.2d 611, 160 P.3d 31 (2007) (Washington Supreme Court struck facts recited in the briefs but not supported by the record.)

Under RAP 10.3 This Court will not consider “self-serving statements that are unsupported by the record.” *Housing Auth. V. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001). Those portions of the record will be stricken by this Court. *Id.* The purpose of RAP 10.3 (a)(5) is for the Court to review the accuracy of the factual statements made by a party in its brief. *State v. Cox*, 109 Wn. App. 937, 38 P.3d 371 (2002) (citing *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992)). “Reference to the relevant parts of the record must be included for each factual statement contained in the sections of the parties' briefs.” *Hurlbert* at 399.

Mr. Xitco cites to several federal cases in other jurisdictions regarding similar appellate rules as a defense to reciting an inaccurate record. This Court has stated that “federal case law interpreting a federal rule is not binding on this court even where the rule is identical “[t]his court is the final authority insofar as interpretations of this State's rules is

concerned." *Id.* (alteration in original) (quoting *State v. Brown*, 113 Wn.2d 520, 548, 782 P.2d 1013, 80 A.L.R.4TH 989 (1989)); *see also Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984). *State v. Copeland*, 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996). Accordingly, Mr. Xitco's Answer citing federal authority for Fed. R. App. P. 28 (a) (7) and Fed. R. App. P. 28 (c) to interpret Washington Rule of Appellate Procedure 10.3(a)(5) does not bind this court in its interpretation of RAP 10.3 (a)(5). There is ample Washington State law on the issues presented in this Motion to Strike for the Court to make a reasoned ruling.

Mr. Xitco's Response to Ms. Bennett's Motion to Strike argues that his factual statements are supported by the record and are supported by the trial court's findings. Response at 6. This is not accurate.

Mr. Xitco argues that Ms. Bennett filed *false* domestic violence petitions (Respondent's Answer at p.5); however, the Court of Appeals adopted the trial court's finding that the petitions were *frivolous* not false. Court of Appeals opinion at 17, 18. Frivolous means "not deserving serious attention; silly." <http://www.merriam-webster.com/dictionary/frivolous> (last visited November 13, 2013). Conversely, false means "not true or accurate; *especially* : deliberately untrue : done or said to fool or deceive someone." <http://www.merriam-webster.com/dictionary/false> (last visited November 13, 2013) (emphasis in original). The two definitions could not be more different.

In his briefing to this Court, Mr. Xitco made the statement that Ms. Bennett filed *false* domestic violence petitions in the context to create the impression that she intended to deceive and made a deliberate false statement. Neither the trial court nor the Court of Appeals made that finding. This portion of his brief is not persuasive writing as he argues in his Answer. Response at 2. Mr. Xitco's own cases argue that disparaging language toward another party is not permitted. *Id.* That portion of his brief should be stricken.

Mr. Xitco defends his statement that Ms. Bennett "also *admitted* that she could have *cared less* that her actions were in clear violation of the parenting plan"² (emphasis mine) by arguing that "Mr. Xitco's characterization of Ms. Bennett's attitude toward her obligations under the original parenting plan is a reasonable summation of her own testimony." Response at 5. Again, this is not a permissible argument in an appellate brief or Petition for Review because it is not accurate testimony in this record on review. Ms. Bennett did not "admit" that she could have "cared less" anywhere in this record. These are false material statements and are misleading to this Court.

What is most concerning is that Mr. Xitco's Response to Petitioner's brief cites to the record for these statements and those statements are not contained therein. His defense is that this is persuasive

² Answer to Petition at 11.

writing and a reasonable summation of her testimony. Response to Motion to Strike at 2, 6.

This kind of brief writing is not what the Washington Rules of Appellate Procedure require or allow. Our rules require an accurate representation of the record—not false statements with cites to the record. *See, State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); *Housing Auth. V. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001).

Further, these statements were not findings of fact by the trial court or the appellate court. They are not verities on appeal to this Court. *See In re Marriage of Akon*, 160 Wn. App. 48, 248 P.3d 94 (2011). Mr. Xitco’s statements that Ms. Bennett “admitted” that she “could care less” about her actions under the parenting plan in the context of Ms. Bennett taking her son to obtain a correct diagnosis for his health should be stricken because the statements are false and lead this court to believe that Ms. Bennett intentionally disregards the authority of this Court or any other court. This is a self-serving statement made in Mr. Xitco’s brief to paint Ms. Bennett in an unapproachable light, which is not supported by the record and is inaccurate. *State v. Cox*, 109 Wn. App. 937, 38 P.3d 371 (2002).

Mr. Xitco did not respond to the fact that he omitted to inform this court in his statement of facts that he was aware that NX had an impacted bowel and had an intestinal infection—yet he argued to this Court that Ms. Bennett kept NX out of school for “alleged poor health.” Respondent’s

Answer at 9 (emphasis in original). This omission is material and Ms. Bennett requests that this Court take judicial notice in the Court of Appeals opinion that NX had an impacted bowel and intestinal infection (Court of Appeals Opinion at 7) and that Mr. Xitco knew this fact because he testified to it in the lower court proceeding. VRP 285.

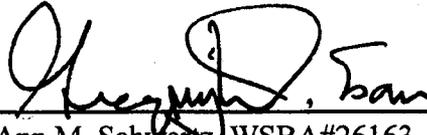
His response to the issue of stating in the record that the children missed out on moral and ethical lessons taught in Mass should be stricken for the same reasons argued in this Reply. These statements were made to create a context that they are findings from the court or that it is testimony from an expert. Instead, these are self-serving statements from Mr. Xitco. Neither the trial court nor the Appellate Court made these findings and the context in which they were made creates a false impression for this Court.

V. CONCLUSION

In conclusion, Ms. Bennett requests that this Court strike the four portions of Mr. Xitco's Response brief to her Petition for Review. They are violations of RAP 10.3 (a)(5). Those portions are identified in her Motion to Strike and she renews her request that this Court take judicial notice of the Court of Appeals opinion stating that NX had an impacted bowel and infection and Mr. Xitco knew of these facts. She requests that Mr. Xitco's request for relief be denied for the reasons stated herein.

Respectfully submitted,

DATED this 14th day of November, 2013

A handwritten signature in black ink, appearing to read "Gregory D. Esau", written over a horizontal line.

Ann M. Schwartz, WSBA#26163

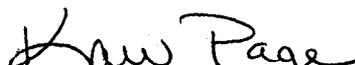
Gregory D. Esau, WSBA#22404

Attorneys for Stefanie Jean Bennett

CERTIFICATE OF SERVICE

I, Karen Page, hereby certify that on November 14, 2013, I served a copy of the Reply to Motion to Strike Portions of Respondent's Answer to Petitioner's Petition for Review on P. Craig Beetham, Attorney at Law, 1200 Wells Fargo Plaza, 1201 Pacific Avenue, Tacoma, WA 98402 via email at cbeetham@eisenhowerlaw.com.

DATED this 14th day of November, 2013.



Karen Page, Paralegal

OFFICE RECEPTIONIST, CLERK

From: Karen Page <kpage@elmlaw.com>
Sent: Thursday, November 14, 2013 2:44 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: cbeetham@eisenhowerlaw.com; anndefense45@hotmail.com; Gregory Esau
Subject: 89315-2 - Stefanie Jean Bennett v. John Michael Xitco
Attachments: Bennett Reply to Motion.pdf

Clerk:

Attached for filing is the Reply to Motion to Strike Portions of Respondent's Answer to Petitioner's Petition for Review.

Thank you.

Karen Page

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