

NO. 89315-2

E CRF
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SUPREME COURT OF THE STATE
OF WASHINGTON

STEPHANIE JEAN BENNETT,

Petitioner,

vs.

JOHN MICHAEL XITCO,

Respondent.

RESPONDENT'S ANSWER
TO MOTION TO STRIKE
PORTIONS OF
RESPONDENT'S ANSWER
TO PETITIONER'S PETITION
FOR DISCRETIONARY
REVIEW

1. IDENTITY OF RESPONDING PARTY

John Michael Xitco respectfully requests that this Court grant him the relief requested in Part 2.

2. RELIEF REQUESTED

Mr. Xitco requests that this Court deny Petitioner Stephanie Jean Bennett the relief she requests in Part 2 of her Motion to Strike Portions of Respondent's Answer to Petitioner's Petition for Discretionary Review ("Motion to Strike").

3. ARGUMENT

Ms. Bennett fails to demonstrate any violation of RAP 10.3(a)(5), let alone a violation egregious enough to warrant striking portions of Mr. Xitco's *Answer*. Her Motion to Strike is just another example of Ms. Bennett's litigious conduct designed to do nothing more than drive up the

costs of this litigation. Mr. Xitco's recitation of facts is fairly based on the testimony and evidence presented to the trial court, as well as the trial court's findings. Interestingly, all of the facts Ms. Bennett complains of were included in Mr. Xitco's Respondent's Brief to the Court of Appeals and Ms. Bennett did not object. *See Respondent's Brief* at 7 – 17. This Court should deny her Motion to Strike.

The petitioner's and respondent's briefs should contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). A party does not violate RAP 10.3(a)(5) by presenting the facts in the light most favorable to that party's position. *See Mitchell v. Rogers*, 37 Wn.2d 630, 637 – 38, 225 P.2d 1074 (1950). Rather, an error in the recitation of facts that is flagrant or exceptional is required. *Id.* Federal courts have similarly held that persuasive brief writing does not violate similar federal appellate rules,¹ but a violation can be found if a party includes argumentative or disparaging commentary. *Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 435 (7th Cir. 2002) (A party violates Fed. R. App. P. 28(c) when his or her statement of facts is filled with disparaging language toward the opposing side); *Hayes v. Invesco, Inc.*, 907 F.2d 853, 854 (8th Cir. 1990) ("While facts can be so written as to be persuasive in favor of one's client, argumentative language is not acceptable"); *Markowitz & Co.*

¹ The Local Federal Rules on Appeal for the Seventh Circuit state, "The statement of the facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment." Seventh Cir. Fed. R. App. P. 28(c).

v. Toledo Metro. Hous. Auth., 608 F.2d 699, 704 (6th Cir. 1979) (“where issues of historical fact are bitterly contested, the parties are free to explain their version of events to the Court...[but] argumentative language [such] as stating that the trial court’s findings are “astonishing,” and “extraordinary,” or describing an opponent’s position as “ludicrous” is not acceptable.”).

Here, Mr. Xitco’s statement that Ms. Bennett filed false domestic violence petitions is based on a fair reading of the evidence presented below and the trial court’s findings. Mr. Xitco testified:

Q We discussed earlier about the domestic violence. You testified that there weren’t – you testified that you never committed any domestic violence....In 2009, did any of those allegations – were any of them true in your mind?

A No, not at all.

I VRP at 98 – 99. Mr. Xitco testified that the allegations were false and his facts section appropriately reflects his testimony. Ms. Bennett did not object to Mr. Xitco’s testimony at trial and has waived any objection on appeal. RAP 2.5(a). Although Ms. Bennett may dispute Mr. Xitco’s beliefs, he is not required to adopt her vision of the facts in this case, particularly in light of the fact that Mr. Xitco prevailed. *See Avitia v. Metro. Club of Chicago*, 49 F.3d 1219, 1224 (7th Cir. 1995) (A party’s recitation of facts is inappropriate if it treats contested testimony of a losing party’s witnesses as facts). Finally, the trial court adopted Mr. Xitco’s characterization of the domestic violence petitions, finding that

Ms. Bennett “fil[ed] *frivolous* petitions for protective orders against” Mr. Bennett. CP at 158 (emphasis added). Mr. Xitco did not violate RAP 10.3(a)(5).

Additionally, Mr. Xitco’s testimony provides a fair basis on which to state that the Xitco children “missed out on moral and ethical lessons taught at Mass.” *Answer to Pet. for Rev.* at 7. Mr. Xitco testified about the importance of the children attending Mass and explained the harm in missing Mass: “[they] miss[] the moral and ethics that are taught in – really in any religion.” 1 CP at 137. There is no requirement that such testimony come from an expert. ER 701 – 702. Mr. Xitco testified based on his beliefs formed by his rational perception, and not based on any scientific, technical or specialized knowledge. *See* ER 701. Ms. Bennett did not object to the testimony at the time and has no basis now to object to its inclusion in Mr. Xitco’s recitation of facts. RAP 2.5(a). Moreover, there is no implication in Mr. Xitco’s *Answer* that the testimony came from a professional or the guardian ad litem. In fact, Respondent’s *Answer* includes a separate factual recitation of the guardian ad litem’s preliminary and final reports. *Answer to Pet. for Rev.* at 13 – 14. Mr. Xitco’s discussion of the importance of Mass does not violate RAP 10.3(a)(5).

Mr. Xitco also correctly calls into question whether Ms. Bennett kept N.X. out of school because of his health. Although Ms. Bennett claims that N.X.’s many absences under her watch were due to N.X.’s poor health, his sister C.X. had nearly the same number of missed school

days even though she had no health problems. Ex. 30. Under Mr. Xitco's care, the children, N.X. included, did not have attendance issues that rose to the level that occurred during Ms. Bennett's custodial time. Ex. 30. In fact, when N.X. tried to convince Mr. Xitco's mother that he needed to leave school because he was ill, N.X. opted to remain in school when told that he would not be allowed to watch television if he went home sick. 2 VRP at 333. The children's principal also stated that during the time that Mr. Xitco had sole custody of the children, they were "wonderful, *healthy*, on time and a real pleasure to have at school." Ex. 30; 1 VRP at 112 (emphasis added). Mr. Xitco's statements do not violate RAP 10.3(a)(5).

Finally, 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. Ms. Bennett testified that she knew that the parenting plan required joint decision-making for all of the children's non-emergent health issues and that the children would see a specific doctor. Ms. Bennett testified that she intentionally took both children to see medical providers other than Dr. Larson without notifying Mr. Xitco because she knew that he would disagree. Ms. Bennett went so far as to admit that she "really didn't see a reason to tell [Mr. Xitco] that" Ms. Bennett was taking C.X. to a therapy session in violation of the parenting plan. 4 VRP at 557. Ms. Bennett demonstrated a complete disregard for the parenting plan and Mr. Xitco's characterization of her attitude is fair given her own testimony. In fact, Mr. Xitco's characterization of Ms. Bennett's attitude toward the prior parenting plan is far more tempered

than the trial court's characterization, which found that Ms. Bennett exhibited "[c]ontempt of joint decisionmaking with respect to removing children from counseling and taking to alternative doctors without notice." CP at 158. Ms. Bennett has not demonstrated any violation of RAP 10.3(a)(5).

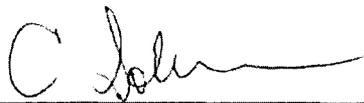
Each of the factual statements that Ms. Bennett cites to are in fact properly supported by testimony or evidence presented at trial. They are also consistent with the trial court's findings. Mr. Xitco's recitation of the relevant facts are not argumentative or derogatory and do not go beyond persuasive brief writing. Mr. Xitco respectfully requests that this Court deny Ms. Bennett's Motion to Strike.

4. CONCLUSION

For the foregoing reasons, Mr. Xitco respectfully requests that this Court deny Ms. Bennett's Motion to Strike.

DATED this 31st day of October, 2013.

EISENHOWER CARLSON, PLLC

By: 

P. Craig Beetham, WSBA #20139
Chrystina R. Solum, WSBA #41108
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 31st day of October 2013 at Tacoma, Washington.


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Petition for Discretionary Review

Bennett v. Xitco - No. 89315-2

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My apologies that the attachment was not included in my first email.

Thank you,

Cindy C. Rochelle, Legal Assistant to Robert G. Casey, Garry G. Fujita and Chrystina R. Solum

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