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STATE OF WASHINGTON
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NO. 89315-2

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SUPREME COURT OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT
Petitioner,
v.
JOHN MICHAEL XITCO
Respondent.

REPLY TO PETITION FOR DISCRETIONARY REVIEW

Attorneys for Petitioner

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I. INTRODUCTION

Mr. Xitco argues that the Court of Appeals properly upheld the trial court's decision finding that Ms. Bennett provided a detrimental environment for CX and NX. Ms. Bennett argues that Mr. Xitco did not address the report of proceedings which presents that there was no social, academic, or psychological detriment to either CX or NX for the 2010-2011 school year. See Petitioner's brief at p. 4 and 5. Both Principal Jordan and GAL Ron Cathcart testified to that proposition and that the tardies and absences had been resolved during that school year. *Id.* Mr. Xitco did not address this quoted report of proceedings that was the material basis for Ms. Bennett's argument that there was no detriment at the time of trial. Because Mr. Xitco failed to respond to that claim in his Answer he concedes the points. *See State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) *See*, RAP 13.4 (e) and 10.3 (b).¹

Mr. Xitco also argues that this court should not hear Ms. Bennett's claim that she was being punished by the trial court and Court of Appeals by changing custody for her passive aggressive behavior. Mr. Xitco's argument should be denied because Ms. Bennett is asking this Court to order supplemental briefing on

¹ This proposition in *Ward* was stated in the context of a criminal case. Ms. Bennett asks this court to extend the principal to her case because Mr. Xitco's Answer was supposed to respond to her Petition and there was no response to the testimony of Ms. Jordan and Mr. Cathcart who both testified the children were doing well and the tardies and absences had been resolved in the 2010-2011 school year.

this issue because the Court of Appeals opinion violates Washington Supreme Court precedent and neither party will be prejudiced with supplemental briefing and the case can be heard on the merits

II. ARGUMENT

A. THIS COURT SHOULD ORDER SUPPLEMENTAL BRIEFING ON THE ISSUE OF WHETHER OR NOT THE TRIAL COURT AND THE COURT OF APPEALS PENALIZED MS. BENNETT BY CHANGING CUSTODY FOR HER PASSIVE AGGRESSIVE BEHAVIOR BECAUSE SUPPLEMENTAL BRIEFING WILL NOT PREJUDICE MR. XITCO OR MS. BENNETT AND THIS IS THE ONLY REMEDY WHICH ALLOWS THIS CASE TO BE HEARD ON THE MERITS.

Mr. Xitco raised a new issue in his Answer, which is the issue of prejudice. Answer at 19. He argues that allowing this Court to consider whether or not Ms. Bennett was punished by the trial and appellate court for her bad behavior prejudices him because he cannot respond to that claim.

However, Ms. Bennett is asking this Court to order supplemental briefing² on the issue of whether the decision of both the trial court and Court of Appeals wrongfully penalized her for purported passive aggressive behavior and “silently protesting” her dislike of the children’s school. Bennett Slip OP. at 14.

²Either by remand or retaining this case in this Court.

Mr. Xitco will not be prejudiced by this action because he will have an opportunity to respond and Ms. Bennett will have no prejudice to her because she will be able to present her case on the merits.

B. THIS COURT IS NOT PROHIBITED FROM INVOKING RAP 1.2 AND 18.8 (a) IN ORDERING SUPPLEMENTAL BRIEFING BECAUSE THERE IS NO PREJUDICE TO EITHER PARTY AND THE ENDS OF JUSTICE WILL BE SERVED AND MS. BENNETT DID RAISE THE ISSUE AT THE APPELLATE COURT LEVEL.

Mr. Xitco argues that this Court cannot invoke RAP 1.2 to hear this case, Answer at 18, but his argument is based upon claimed prejudice to him but that argument fails because he will have a chance to respond and Ms. Bennett did raise the issue of punishment at the appellate court level. *State v. Olson*, 126 Wn.2d 315, 321 P.2d 629 (1995). A liberal construction of RAPs 1.2, and 18.8 (a) give this Court the authority to order supplemental briefing on this issue because the Court of Appeals result in Ms. Bennett's case violated Washington Supreme Court precedent³ and the Court of Appeals failure to order supplemental briefing violates RAP 1.2 because it prevents Ms. Bennett's case from being heard on the merits. To deny Ms. Bennett the opportunity to present her case on the merits does not promote or serve the ends of justice. Finally, the outcome in this case

³ *Johnson v. Johnson*, 72 Wn.2d 415, 419 (1967); *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963); *Malfait v. Malfait*, 54 Wn.2d 413, 341 P.2d 154 (1959); *Annest v. Annest*, 49 Wn.2d 62, 298 P.2d 483 (1956); *Norman v. Norman*, 27 Wn.2d 25, 176 P.2d 349 (1947).

involves an issue of substantial public interest in preventing trial courts and appellate courts from improperly using a change in custody to punish a parent for bad behavior.

C. MS. BENNETT REQUESTS THAT MR. XITCO'S REQUEST FOR ATTORNEY'S FEES BE DENIED.

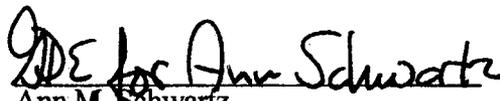
Ms. Bennett has more need for attorney's fees than Mr. Xitco and his request should be denied.

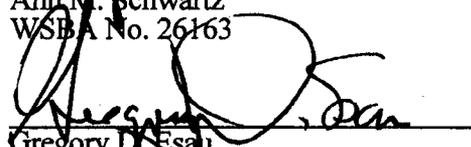
III. CONCLUSION

Ms. Bennett respectfully requests that this Court accept her Petition for review and clarify the standard of detriment as well as order supplemental briefing on the issue of whether the trial court and Court of Appeals penalized her for purported passive aggressive behavior and "silently protesting" her dislike of the children's school.

DATED this 16th day of October, 2013.

Respectfully submitted,


Ann M. Schwartz
WSBA No. 26163

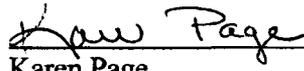

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, KAREN PAGE, hereby certify that on October 16, 2013 I served a copy of the Reply to Petition for Discretionary Review and the 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, Washington 98402 electronically via email at cbeetham@eisenhowerlaw.com.

DATED this 16th day of October, 2013.

Respectfully Submitted:



Karen Page
Paralegal to Gregory D. Esau

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

Thank you.

Karen Page

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