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ORIGINAL

No. 72343-0-1

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

BYRON MCNAUGHT

Appellant,

vs.

ANGELIKA MCNAUGHT

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1. Angelika Proposes Conflicting Rules. Angelika cites *In re Marriage of Horner,* 151 Wn.2d 884, 93 P.3d 124 (2004), to argue that the presumption in the Child Relocation Act (CRA) is "an integral part of the balancing process." *Br. of Resp. at 17.* But *Horner* addressed the necessity of findings, not how the presumption is applied. *Horner*, 151 Wn.2d at 893. Angelika then contradicts herself by asserting that the CRA clearly "does not indicate which parent bears the burden of proof." *Br. of Resp. at 17.* Her arguments demonstrate the need for guidance on this issue.

Courts review *de novo* alleged errors of law to determine the correct legal standard. *In re Marriage of Wehr,* 165 Wn. App. 610, 613, 267 P.3d 1045 (2011). Contrary to Angelika's attempts to distinguish *Bank of Washington v. Hilltop Shakemill, Inc.,* 26 Wn. App. 943, 614 P.2d 1319 (1980), the case is instructive. *Hilltop Shakemill* addressed the community property presumption in RCW 26.09.030, the same title that contains the CRA. A party rebuts the presumption in RCW 26.09.030 by clear, cogent and convincing evidence, consistent with the policy that property acquired by the efforts of spouses should benefit the community. RCW 26.09.010, .030; *Beam v. Beam,* 18 Wn. App. 444, 453, 569 P.2d 719 (1977). Once a party rebuts the presumption, its purpose is satisfied. *Hilltop Shakemill,* 26 Wn. App. at 948. Thereafter, it is discarded, the evidence evaluated, and a conclusion reached. *Hilltop Shakemill,* 26 Wn. App. at 948.

In the context of the CRA, Division Two observed that both parents have a substantial right to parent their child and the applicable standard of proof must protect both of their interests. *In re Marriage of Wehr,* 165 Wn. App. 610, 614, 267 P.3d 1045 (2011). It concluded that a preponderance of the evidence standard applied. *Wehr,* 165 Wn. App at 613. To hold otherwise would improperly subordinate one parent's rights to another's. *Wehr,* 165 Wn. App. at 614.

The same Constitutional considerations apply to application of the presumption under the CRA. Once a parent has rebutted the presumption of relocation, it must be discarded. Thereafter, the evidence of both parents must be evaluated equally. To leave the presumption with one parent would violate the parties' equal Constitutional right to rear their children. *In re Custody of Smith,* 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998).

In this case, the trial court found, "The mother begins with a presumption in favor of her requested relocation . . ." *CP 539 at 11-12.* The court then effectively left its thumb on the scales of the mother to conclude that relocation must be granted. This misapplication is reversible error.

2. Evidence Rebutted Presumption. Angelika erroneously asserts that this Court is being asked to reweigh the evidence adduced at trial. The real issue is whether Byron offered sufficient evidence to rebut the presumption under the CRA. It is a proper issue before this Court. In *Sunrise Exp. Inc. v. Wa. State Dept of Licensing,* 77 Wn. App. 537, 539, 892 P.2d

1108 (1995), the sole issue on appeal was whether "Sunrise presented sufficient evidence to rebut the statutory presumption . . ." The court reviewed the evidence, concluded that the presumption was rebutted, and reversed the trial court. *Sunrise*, 77 Wn. App. at 538.

In this case, Angelika wrongly argues that Byron picked and chose specific factors to present to this Court. *Br of Resp. at 17.* But at pages 15-24 of his Amended Opening Brief, Byron carefully set forth his evidence on all of the statutory factors. The focus is on the evidence he produced; it is not yet on the competing evidence of the parties. Byron presented sufficient evidence to rebut the presumption of the move.

3. Mother Failed to Meet Burden Going Forward. Angelika concedes that the cornerstone of her intended relocation is that a) in her mind, Byron "continued to create problems;" and b) her parents decided to stay in Texas. *Br. of Resp. at 24.* At page 11 of her brief, she adds that nicer homes are available in Texas.

a) *Parental Conflict no Basis for Relocation*. Angelika argues that relocation of AJM is justified because Angelika's relationship with Byron is problematic and his mother had "made herself an enemy." *Br of Resp. at 24, 30.* While her brief is replete with criticism of Byron, often misstating/mischaracterizing the record, she offers no authority for her position. This Court should not consider her argument. *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P.3d 945 (2011) (arguments not supported by

reference to the record or citation of authority not considered).

Substantively, Chapter 26.09 RCW contradicts her position. RCW 26.09.002 charges a court with preserving the interaction between a child and her parents as much as possible. RCW 26.09.187(3)(a) requires a court to enter a residential schedule that "encourages each parent to maintain a loving . . . relationship with the child . . ." Only in the context of potential harm as a result of an abusive use of conflict, is a court permitted to impose restrictions. RCW 26.09.191(3)(g). In that event, a court does consider RCW 26.09.191 as one factor in a proposed relocation. RCW 26.09.520(4).

While Angelika is vociferous in her complaints of Byron in her brief, she fails to acknowledge that she did not seek .191 restrictions. None of her complaints rose to that level. Moreover, she overlooks her own conduct, including slapping Byron; pushing him in the chest (*RP 1068 at 16-19);* telling Byron that she should have made more serious, sexually related allegations against him regarding AJM (prompting his desire for a witness at exchanges) (*RP 1183 at 21-23);* and burgling Byron's car post-separation, taking car mats and AJM's car seat. *RP 1090 at 14; 1092 at 6-13.*

Ultimately, the conflict between the parties was addressed by Dr. Wendy Hutchins-Cook. She recommended a parenting coach. *RP 316 at 13-14.* Byron endorsed this recommendation. *RP 1199 at 9-11.* Where neither parent alleged deficits under RCW 26.09.191 and the trial court found none, (*CP 542-43),* relocation on the basis of conflict constitutes reversible error.

It would be a dangerous precedent to set that one parent can simply remove a perceived difficult other parent from a child's life by relocating far away.

b) *Proximity to Mother's Extended Family Not Supported.* Angelika argues that relocating AJM to Texas was justified because Angelika could be near her own parents to rely on them for parenting advice, babysitting, and so AJM can play with her extended family. *Br of Resp at 29.* Once again, she offers no authority for her position. Substantively, as an adult, Angelika stands in a much better position to obtain parenting advice by telephone than AJM has of preserving a long-distance relationship with her father at the age of 2.5 years. Moreover, the baby-sitting help Angelika seeks is actually a co-parenting role to be filled by Byron under RCW 26.09.187. Dr. Wendy Hutchins-Cook recommended that the parties share parenting on an increasing basis to 50/50. *RP 247 at 23-25.* To grant relocation on the basis that Angelika could prefer her parents as caretakers over Byron would impermissibly elevate her parental authority over Byron's. *In re Custody of Smith*, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998). It would also impermissibly elevate the rights of third parties over a parent's Constitutional right to rear his/her child. *See Smith,* 137 Wn.2d 1.

c) *Standard of Living Not Factor in Relocation.* Angelika has articulated no opportunities, such as remarriage, job promotion, etc. to support her relocation. Instead, she relies on RCW 26.09.520(7) for the proposition that lower priced housing/cost of living justifies relocating a

child away from another parent. *Br of Resp at 24-25.* "Quality of life," the language of the statute, is not analogous to standard of living. Quality of life is "[t]he general well-being of a person or society, defined in terms of health and happiness, rather than wealth." *Collins Dictionary, www.collins dictionary.com/dictionary/English/quality-of-life.* The language of the statute does not authorize a trial court to grant relocation based on the relative standards of living offered in various locations. To allow a parent to relocate a child away from another parent on this basis would prioritize material possessions over a child's core relationship with her parents. Such a value system is contrary to the policy of preserving parent/child relationships under RCW 26.09.002. The legislature rightly did not allow for this.

Moreover, Angelika did not offer sufficient evidence for her argument to be considered. First, she misstates the record when she claims that the overall costs in Texas were about a third less than in Washington. *Br of Resp at 25.* In fact, she testified that only ice skating classes for little girls are a third less in Texas than in Washington. *RP 463 at 9-13.*

While she claims that she intended to purchase a single family home in Texas *(Br of Resp at 25)*, her statements about her income are inconsistent. She implies to this Court that she was pre-qualified in Texas based upon a salary of $45,000. *Br of Resp at 9.* At trial, she testified she was pre-qualified in Washington, based upon a gross income of $40,000 per year. *RP 451 at 13-14, 22-24.* Yet, in objecting to sharing in hotel/car

rental costs associated with the residential schedule, she avers that her income is only $20,000 per year. *Brief at 13, 40.* Notably, this level of income would render home ownership out of reach for her.

According to the child support worksheets, Angelika has net income of $2,900 per month, exclusive of maintenance, which will terminate. *CP 574.* With $1,054 in child support, *CP 563,* she will have $3,954 per month in the long-term. But she listed her monthly expenses at $6,747 per month, not including long distance transportation costs. *Exhibit 7 at 5.* Even if she reduced her housing expense to the $1,300 mortgage payment she proposed, she would still be left with more than $1,400 per month in monthly deficit. *Exhibit 7 at 3.* Under her own numbers, her plans did not pencil out.

She also alleges that home ownership was not available to her in King County. *Br of Resp at 13.* If she could buy in Texas, she could buy in King County. Byron proposed condominiums in King County well within her budget. *Exhibit 163.* Amenities included granite countertops, multiple baths, a patio where AJM could play, etc. *Exhibit 163.* To grant relocation on the basis of housing costs was error as a matter of law.

d) *Other Factors Do Not Carry Angelika's Burden*. Angelika nevertheless argues that remand is not required because she offered substantial evidence on all of the other factors. In so doing, she misstates the record. For instance:

1) ***Strength of Relationship***. Angelika claims that AJM was more bonded to her than to Byron. *Br of Resp at 22.* But the trial court found, ". . . [T]he quality of the child's relationship to her, and to her family in Texas, is at least as strong as the child's connection with her father and paternal grandparents . . ." *CP 539 at 11-12.* Neither party has challenged this finding. It is a verity on appeal. *Magnusson v. Johannesson,* 108 Wn. App. 109, 113, 29 P.3d 1256 (2001). This factor did not favor the mother.

Substantively, Angelika conflates primary parenting with the quality of a child's bond with each parent. *Br of Resp at 20.* Being the primary parent affords Angelika the statutory presumption that she is entitled to relocate the child. RCW 26.09.520. But who performs most of the parenting tasks is not the measure of the relationship between child and parent. That measure includes the strength, quality and stability of the bond. RCW 26.09.520(1). While the relationship is also measured by the "extent of involvement," it is one aspect of the relationship. It is not a trump card.

Angelika wrongly claims with no citation to the record that Dr. Hutchins-Cook did not compare the extent of the attachment to each parent. *Br of Resp at 22.* In fact, Angelika expressly questioned Dr. Hutchins-Cook on this issue: ". . . [W]ould you say that the parties had equal strength in terms of the relationship with [AJM] or that [AJM] had a stronger relationship with the mother or the father?" *RP 387 at 9-12.* The doctor answered:

I'd say the strength of the relationship to me is the

> attachment, well-established, kind of really good with both of them. The relative amount of time providing care, that more Angelika than Byron.

RP 387 at 13-16. Dr. Hutchins-Cook distinguished the primary caretaking role from quality of attachment. The quality of attachment was the same.

Similarly, Angelika's criticisms of Byron are not probative of the child's bond with him. *Br of Resp at 21.* For instance, Angelika characterized Byron's need for alone time as proof that AJM was not as well bonded with him. *Br of Resp at 21.* She does not deny that she took her own time for yoga while the grandmother cared for AJM. *RP 856 at 10-15.* This double standard illustrates Angelika's animosity towards Byron, not a deficit in a parenting bond.

Angelika misstates the record when she claims that Byron "demanded" to be primary residential parent. *Br of Resp at 23.* What he actually stated was:

> . . . I fully believe that there is no primary and secondary parent . . . I understand that there is a legislature and there is a statement about a designation. . . .
>
> And so I believe I am the best person to have that designation, because . . . I'm the parent who is most likely going to facilitate the shared parenting arrangement that I believe is crucial. . . .

RP 1203 at 5-24.

Angelika misrepresents Dr. Hutchins-Cook's testimony regarding a text message wherein Byron acknowledged difficulty in calming AJM. *Br of Resp at 8.* Dr. Hutchins-Cook testified, "This was one event. . . ."

RP 373 at 25; 374 at 1-2. She went on to testify that a single event did not form the basis of a legitimate conclusion that Byron could not handle AJM. *RP 374 at 3-6.* Indeed, no reasonable person could conclude that a single incident of struggling to get a child to sleep is sufficient evidence of a lesser/faulty bond. Her misstatements do not support her argument.

2) ***Prior Agreements.*** Angelika offers no authority for her argument that no agreement existed not to relocate. An agreement is, "A concord of understanding and intention between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances." *Black's Law Dictionary Free On-line Dictionary*, 2d Ed., http://www.thelawdictionary.org/agreement/. In this case, Dr. Wendy Hutchins-Cook was appointed to evaluate the relocation issue. *CP 160-62.* Angelika specifically reported that she did not contemplate any move. *Exhibit 25 at 104, 108.* Because of this, Dr. Hutchins-Cook did not address the issue and Byron, relying on her statement, did not press for it. *RP 255 at 8-13.* Angelika later reneged on her agreement, or as she states, "changed her mind" (*Br of Resp at 24*), but it was nevertheless an agreement.

3) ***Disruption of Contact.*** Angelika focuses on one portion of the evidence, while not acknowledging all of it. Dr. Hutchins-Cook testified that at present, it was likely more harmful to disrupt AJM's contact with her mother than with her father. *RP 389 at 15-17.* But

farther down the road, allowing the relocation would mean that AJM would lose her father. *RP 392 at 18-19.* Either way, the mother's intent to relocate the child would cause her harm, through disruption of contact with her mother now, or through disruption/loss of her father later.

5) ***Reasons for Relocation.*** As briefed above, Angelika's reasons for relocation (conflict, parents, house) fail as a matter of law.

6) ***Age, Development, Needs of Child.*** Angelika claims that "the only harm" to AJM is "lessened contact with her father." *Br of Resp at 24.* Far from trivial, Dr. Hutchins-Cook testified that at the small age of AJM, her world consists of her family. *RP 365 at 22-23.* A parent fills a child's emotionality. *RP 294 at 7-8.* This cannot be filled by somebody else. *RP 294 at 8-9.* To say that the loss of her father is "all" AJM loses is to minimize the parent/child bond in contravention of RCW 26.09.002.

Finally, Angelika states without citation to the record that she was the better parent to help AJM adapt to new situations. Her statement is false and should be disregarded.

7) ***Quality of Life.*** As briefed above, standard of living is not quality of life. Moreover, trading one extended family in Washington for the other extended family in Texas offers no advantage to AJM.

8) ***Alternative Arrangements.*** Angelika argues without citation to authority that the CRA does not distinguish between a move to

Tacoma versus a move to Texas. *Br of Resp. at 18.* RCW 26.09.520(8) contradicts her position. A move to Tacoma allows for continued frequent and consistent residential time. A move to Texas does not. Until the relocation, AJM saw her father 17 days out of every month. *RP 494 at 3-15.* Now, her time has been limited to 12 short visits per year. *CP 542-52.* Angelika claims that Dr. Hutchins-Cook recommended the five overnight long distance plan the trial court ultimately adopted. *Br of Resp at 26-27.* She misstates the record. Angelika questioned Dr. Hutchins-Cook regarding a hypothetical: "So if you were doing five-six overnights a month in Texas, you would say it should be two or three overnights with Dad, one back with Mom, and then the rest with Dad until he flies back to Seattle?" *RP 402 at 6-10.* Dr. Hutchins-Cook answered, "Yes." She did not suggest five overnights per month. She answered several questions about how time should be alternated at AJM's developmental stage as a toddler. *RP 401 at 11-21.* She did not recommend only five overnights per month.

Angelika's assertions that Byron has income to travel and has been doing so have no citation to the record on review and should be disregarded. *Br of Resp at 27.*

8) ***Alternatives to Relocation***. Angelika states without support that she could not buy a home in King County. *Br of Resp at 27.* If home ownership is available to her in Texas, it is in Washington. *Ex 7,*

163. That her home might not be as nice as when she was married is not probative. Divorce necessarily requires the same income to be stretched between two households. Adjustment in standard of living is the consequence.

As far as Byron's ability to relocate as well, Angelika once again makes assertions without citation to the record. *Br of Resp at 27-28.* She does not deny that it took Byron nine months to find a job and that he had not earned the same income in Texas. *RP 73 at 12-14; Ex 14; RP 1160 at 25; RP 1161 at 1-13*. Relocation by Byron was not a viable option.

9) ***Financial Impact.*** Angelika offers no authority for her argument that there need be no financial impact to Byron on the basis that he need not actually exercise his residential time. *Br of Resp at 28.* Substantively, her argument frustrates the purpose of RCW 26.09.187, which is to preserve the relationship of the child with her parents. Earlier, she argued that AJM would not be harmed in her relationship with her father because Byron could fly to see her. She cannot now credibly argue that he should just forego residential time to avoid the expense of travel.

As to her assertions of financial ability, there is no evidence that Byron would save money by not having AJM residing with him. To the contrary, he must continue to maintain a residence for AJM and himself; he will continue to pay child support for her; and he will continue to pay his pro rata share of her extracurricular activities. There is no evidence

that he will have reduced costs of supporting AJM to offset travel costs.

In the end, Angelika does not deny that the trips are $1,000+ each. *Ex 19 at 2-6.* The costs of travel more than offset any savings in housing.

In sum, the unrebutted evidence shows that Angelika supported the child's relocation on bases not authorized by statute; she had no increased opportunities; and any savings in cost of living would be consumed in the costs of long-distance travel. As a matter of law, granting AJM's relocation was error and it should be reversed.

4. Findings Required. At a minimum, Angelika concedes that whether written or oral, the trial court is required to make specific findings of fact on each of the statutory factors considered for relocation. *Br of Resp at 37.* For her to then argue, without any support, that findings are not required is a blatant misstatement of the law.

5. Rebuttal/Corrections. Angelika misstates the record when she asserts that Dr. Hutchins-Cook made her 50/50 recommendation conditional and could not specify what that meantsuport. *Br of Resp at 8.* Dr. Hutchins-Cook testified to a plan that had no conditions. She stated, "I have a phased-in parenting plan, as you can see . . ." *RP 247 at 20-21.* When Angelika asked her to explain her graduated plan, Dr. Hutchins-Cook stated:

> Sure. The general recommendations in parenting evaluations for infants and toddlers is usually not away from either parent more than two, three days, and then

> gradually, the child developmentally can spend a little more time away from each parent up to four days or so. And then, depending upon the child's experience with shared parenting and their age, kind of between five and seven, then if a shared parenting schedule is appropriate, that's a time – or a more equally shared parenting schedule, that's about the time a child is able to accommodate it.

RP 248 at 12-25. Dr. Hutchins-Cook did not equivocate regarding her recommendations.

None of Angelika's brief at pages 14 and 15 should be considered because she has provided no citations to the record.

6. Mother's Statement Waived RCW 26.09.530. Angelika offers no authority for her position that she did not waive the provisions of RCW 26.09.530. Substantively, she misstates the record. Her Notice of Relocation was an exhibit offered by her and admitted at trial. *Ex 1.* Moreover, she testified that she might live with her sister temporarily ". . . if I get to move to Texas." *RP 657 at 1-2.* At another point, she testified, "In case I do not get to move . . ." *RP 687 at 2-3.* When examined on her deposition, she offered that she didn't know if she would be able to move or not. She stated that it was up to the court. *RP 643 at 16-19.* Angelika offered this testimony. The trial court could have and should have properly considered that Angelika would not move if the relocation of the child were denied.

7. Restricting Father's Autonomy Error. Angelika argues that Byron was properly forbidden from delegating his residential time. This

position was rejected in *Magnusson v. Johannesson*, 108 Wn. App. 109, 112, 29 P.3d 1256 (2001). This Court stated, "Nothing in *Troxel* or *Smith* requires a parent to obtain the permission of the other parent . . . before designating others to care for a child during that parent's residential time." *Magnusson*, 108 Wn. App. at 112. It is not constitutionally permitted.

She also argues that the "intent was to make sure Byron saw his daughter." *Br of Resp at 34.* Once again, this argument was expressly rejected in *In re Marriage of Chandola,* 180 Wn.2d 632, 655-56 327 P.3d 644 (2014). This provision of the parenting plan should be reversed.

8. Terms of Parenting Plan Unsupported. Angelika offers no authority that substantial evidence was not necessary to support the parenting plan. A trial court's findings must be supported by substantial evidence and, in turn, those findings must support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978). Her argument is similarly unsupported by the record. There was no evidence to support a 45 day advanced notice requirement. She admits that there was no substantial evidence to require the kinds of interrupted time the parenting plan imposes through the age of 18. *Br of Resp at 36.* She offers no evidence to support requiring a parent to fly to Texas for a special occasion, only to have10 hours with the child. She misleads this Court when she states that the Parenting Plan provides for FaceTime 2-3 time per week. *Br of Resp. at 2.* The plan requires Angelika to facilitate Skype/FaceTime as little

as once a week. *CP 548 at 20.* The evidence was unrebutted that contact with the child should be frequent. *See RP 409 at 20-25.*

9. Split of All Transportation Expenses Required. Angelika argues that hotel/rental car expenses associated with complying with court ordered residential time are not special expenses. RCW 26.19.080(3) does not limit what constitutes a special expense. Extra-curricular activities are special expenses under RCW 26.19.080(3), despite not being expressly delineated in the statute. *See e.g. State ex. Rel. JVG v. Van Guilder,* 137 Wn. App. 417 428, 154 P.3d 243 (2007). Once reasonable costs are determined, those costs must be shared. *In re Paternity of Hewitt*, 98 Wn. App. 85, 89-90, 988 P.2d 496 (1999).

Angelika argues that *In re Scanlon and Witrak* and *Murphy v. Miller* addressed only airfare. But in neither of those cases was hotel/car rental expenses at issue. *In re Scanlon and Witrak*, 109 Wn. App. 167, 181, 34 P.3d 877 (2001) (children traveled to father); *Murphy v. Miller*, 85 Wn. App. 345, 347, 932 P.2d 722 (1997) (no identification of specific costs). By contrast, Byron must travel to the city where Angelika resides. She does not deny that Byron is obliged to engage a car, hotel room, and eat out. This is not in lieu of living expenses in Washington. He must continue to pay for his residence, car, etc. in Washington. Hotel and car rental expenses are special expenses incurred as a direct result of the court ordered residential schedule. They must be shared by both parties.

Angelika argues that she should avoid contribution because she only earns $20,000 per year. *Br of Resp* at 40. She contradicts her earlier argument that she earns $40,000/year and plans to purchase a home. *See Br of Resp at 9.*

She misstates the testimony when she avers that Byron agreed he could afford travel costs. *Br of Resp at 40.* Byron testified how Angelika had mischaracterized his income. *RP 1253 at 25; 1254 at 1.* He said, "It's through the statements [Angelika] made specifically . . . I can afford to travel to Texas. I can afford to pay for day care. I can afford this. But if you look at my financials, I can barely afford to survive right now." *RP 1255 at 3-7.* Byron quoted Angelika; he made no admissions.

10. No Fees on Appeal. Angelika seeks an award of fees on appeal. RAP 18.1 requires a party to devote a portion of her brief to a request for fees. This requires citation to authority and argument. *Gardner v. First Heritage Bank,* 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). A cursory request for fees in a conclusion is insufficient. *Gardner,* 175 Wn. App. at 677. Angelika did not comply with RAP 18.1.

Equitably, much of her brief was unsupported by authority and misstated the record. Unraveling the most egregious misstatements required significant time and expenditure of attorney fees by Byron. Angelika's request should be denied.

II. CONCLUSION

The order granting relocation of AJM should be reversed. The parenting plan should be vacated and the matter remanded for entry of a new parenting plan consistent with the Court's opinion. Angelika's request for attorney fees on appeal should be denied.

RESPECTFULLY SUBMITTED this 18th day of December 2014.

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