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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 313654

**COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON**

Jamie Stillman, Respondent

v.

Doug Lee, Appellant

OPENING BRIEF OF APPELLANT

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ORIGINAL

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Assignment of Error #2: The trial court erred on 10/24/12 in refusing to allow Doug Leeto deduct his state and local income taxes in calculating child support, and this action against Mr. Lee was a penalty for Mr. Lee filing his pay stubs, but not his income taxes (which had not yet been prepared), when by discovery settlement agreement his pay stubs were agreed to be sufficient to calculate his income for child support purposes.

Assignment of Error #3: The trial court erred on 10/24/12 in refusing to allow Doug Lee his income tax deductions in calculating net income for child support determination as a penalty for Mr. Lee filing his pay stubs, but not his income taxes (which had not yet been prepared), when there was no prejudice to Ms. Stillman in using Mr. Lee's pay stubs to calculate child support.

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Issue #1: Is it intransigence for Jamie Stillman, Respondent, to have re-filed a parenting plan (replacing her earlier cooperative proposal), riven with false allegations, supported by false declarations, to try to prevent visitation with Mr. Lee? Answer: Yes. (Assignment of Error #1)

Issue #2: Is it intransigence for Jamie Stillman to have defied the court commissioner's orders, which ordered visitation to begin, such that Mr. Lee had to return to court three times to procure the ordered visits? Answer: Yes. (Assignment of Error #1)

Issue #3: Should the intransigence of Jamie Stillman have precluded an award of attorney’s fees to Jamie Stillman?
 Answer: Yes. (Assignment of Error #1)

Issue #4: Should the court have enforced the settlement agreement between counsel in which the counsel for Jamie Stillman averred that Mr. Lee’s pay stubs would be sufficient evidence upon which to calculate child support, given that Mr. Lee’s tax returns were not yet available? Answer: Yes.
 (Assignment of Error #2)

Issue #5: Should the court have allowed Mr. Lee’s income tax deductions for purposes of calculating child support when there was no prejudice to Jamie Stillman in having to rely upon pay stubs for this calculation, even though the tax returns were unavailable? Answer: Yes. (Assignment of Error #2)

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Court Rules:

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CR 26(i):

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(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsels certification that the conference requirements of this rule have been met.

Spokane County LCR 37:

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(a) Motion for Order Compelling Discovery. Motions to compel discovery shall be noted for hearing on Motion for Hearing Ex Parte Issue of Law before the ex parte commissioner (if the case is not pre-assigned to a judicial department) on any court day during regular business hours. If the case is pre-assigned to a judicial department, the motion shall be noted for hearing on the motion calendar for that department. The ex parte commissioner, in his or her discretion, may refer the motion to the presiding judge, if the case is not pre-assigned. The presiding judge may assign the case to a judge if it has not already been pre-assigned, or may return the motion to the ex parte commissioner. In the absence of emergency, no motion or objection with respect to CR 30, 31, 33, 34, or 35 will be heard unless it affirmatively appears that before the hearing counsel have conferred and attempted to resolve the issue(s). If any party has refused to confer, terms will be assessed against that party. The notice requirements of LCR 40(b)(10) apply to motions governed by this rule.

I. INTRODUCTION

Doug Lee, Appellant, seeks review of the trial court ordering him to pay the Respondent's attorney's fees, despite the intransigence of the Respondent, Jamie Stillman, and he seeks review of the court's decision to disallow Mr. Lee's state and federal income tax deductions from the child support worksheet calculations, despite a settlement agreement between counsel that his pay stubs were sufficient evidence upon which to calculate child support, and despite the Respondent's attorney (Ellen Hendrick) conceding there was no prejudice from her having to use Mr. Lee's pay stubs, without his tax returns, to calculate his income.

Re-stated in slight more detail, Mr. Lee seeks review of the court's (a) failure to find intransigence on the part of Jamie Stillman for making unfounded allegations which needlessly increased the cost of litigation at the outset of the action, and (b) failure to find intransigence for Ms. Stillman's defiance of court-ordered visitation after her unfounded allegations were rejected by the court, which again needlessly increased the costs of litigation, and, finally (c) failure to find intransigence for Ms. Stillman's refusal to participate in pre-trial preparations.

Doug Lee did not request attorney's fees for this intransigence, in a spirit of amity, but he did request the remedy that he not be required to pay any legal fees for Ms. Stillman, given her intransigence. This relief was denied by the trial court, and such relief is requested in this appeal.

Additionally, Doug Lee asks that he not suffer the prejudice of the court refusing to calculate his state and federal income taxes in setting his net income for child support purposes. The exclusion of Mr. Lee's income taxes were for not submitting his (not-yet-available) income taxes. This was error: (a) given that Mr. Lee had a settlement agreement on discovery matters with Ms. Stillman's counsel, to the purpose that his pay stubs were sufficient to calculate child support, and (b) given that Mr. Lee believes that agreement should preclude such an omission of his income taxes, and (c) for stronger reasons still, when Ms. Stillman was not prejudiced, by the admission of her own counsel, in calculating child support based upon Mr. Lee's complete pay stubs. Relief from the trial court's decision to exclude Mr. Lee's income taxes is also requested on this appeal.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Assignment of Error #1: The trial court erred on 10/24/12, in not finding Jamie Stillman intransigent, and in not finding that such intransigence precluded an award of attorney's fees.

Assignment of Error #2: The trial court erred on 10/24/12 in refusing to allow him to deduct his state and local income taxes in calculating child support, and this action against Mr. Lee was a penalty for Mr. Lee filing his pay stubs, but not his income taxes (which had not yet been prepared),

when by discovery settlement agreement his pay stubs were agreed to be sufficient to calculate his income.

Assignment of Error #3: The trial court erred on 10/24/12 in refusing to allow Doug Lee his income tax deductions in calculating net income for child support determination as a penalty for Mr. Lee filing his pay stubs, but not his income taxes (which had not yet been prepared), when there was no prejudice to Ms. Stillman in using Mr. Lee's pay stubs to calculate child support.

B. Issues on Appeal

Issue #1: Is it intransigence for Jamie Stillman, Respondent, to have re-filed a parenting plan (replacing her earlier cooperative proposal), riven with false allegations, supported by false declarations, to try to prevent visitation with Mr. Lee? Answer: Yes. (Assignment of Error #1)

Issue #2: Is it intransigence for Jamie Stillman to have defied the court commissioner's orders, which ordered visitation to begin, such that Mr. Lee had to return to court three times to procure the ordered visits?

Answer: Yes. (Assignment of Error #1)

Issue #3: Should the intransigence of Jamie Stillman have precluded an award of attorney's fees to Jamie Stillman? Answer: Yes. (Assignment of Error #1)

Issue #4: Should the court have enforced the settlement agreement

between counsel in which the counsel for Jamie Stillman averred that Mr.

Lee's pay stubs would be sufficient evidence upon which to calculate child support, given that Mr. Lee's tax returns were not yet available?

Answer: Yes. (Assignment of Error #2)

Issue #5: Should the court have allowed Mr. Lee's income tax deductions for purposes of calculating child support when there was no prejudice to Jamie Stillman in having to rely upon pay stubs for this calculation, even though the tax returns were unavailable? Answer: Yes. (Assignment of Error #2)

Issue #6: Did the trial court err to penalize Mr. Lee by excluding his state and federal income tax deductions in the calculation of child support?

Answer: Yes. (Assignment of Error #2.)

III. STATEMENT OF THE CASE

A. Facts and Procedural History of Jamie Stillman's Intransigence

On 12/10/10, Jamie Stillman, petitioner in the case below, filed her first proposed parenting plan, without scurrilous allegations against Doug Lee, and allowing for agreed visitation. CP: 10-19. Ms. Stillman then, on 2/7/11 proposed a restricted parenting plan, laden with scurrilous allegations against Mr. Lee. CP: 25-31. This new proposed parenting plan alleged, without evidence, Sec. 2.1 and 2.2 factors of domestic violence, drug and alcohol abuse, and abusive use of conflict, and trying to severely restrict or deny visitation. Id. Jamie Stillman was shown to have

perjured herself in her filings. See, e.g., the declaration of Doug Lee, filed 4/4/11, whose exhibits included proof of funds he had given Ms. Stillman. CP: 34-43. (See *Ex.A* to CP: 34-43, which verify that Doug had paid Jamie \$4050, which she had denied having received.)

Mr. Lee proposed a good faith visitation plan on 4/4/11, in which Doug Lee proposed his visits be Wednesdays from 4:30 to 7:30pm, and Sundays from 2 to 5pm to reintroduce him to his son, after his absence during Mr. Lee's electrical union apprenticeship. CP: 44-51. This parenting plan accompanied Doug Lee's request to restore visitation with his son. CP: 52-53.

This proposed parenting plan of Doug Lee's was eventually adopted by Commissioner Grovdahl, with slight pre-requisites, on 4/27/11. CP: 74-76.

Prior to the order of Commissioner Grovdahl of 4/27/11, Jamie Stillman filed a responsive declaration, on 4/22/11, which repeated the unfounded and scurrilous allegations from her parenting plan. CP: 56-57. Additionally, she filed the declaration of Renee Stillman (Jamie's mother), also on 4/22/11, which called Mr. Lee evil, and made more unfounded and insulting allegations. CP: 60-61.

Doug Lee replied to these unfounded allegations on 4/25/11. CP: 66-73. At hearing on 4/27/11, Commissioner Grovdahl found the abusive

allegations made against Doug Lee to be without foundation, and simply established a few pre-requisites to adopting Mr. Lee's proposed parenting plan, given Doug's time away from Little Doug. These preconditions were two visits between Doug and Little Doug at a counselor (ultimately Carol Thomas) and then two visits at Fulcrum, and thereafter Doug Lee's Proposed Parenting Plan of 4/4/11 was to become the effective temporary parenting plan. CP: 74-76 & CP 132-39.

Jamie Stillman immediately announced her refusal to cooperate in setting up the visits with Carol Thomas, and so Mr. Lee had to spend the fees to try to compel the visits, and to shorten time to have the matter heard on 4/28/11. CP: 77-87. Commissioner Grovdahl dismissed the request to shorten time "without prejudice." Commissioner Grovdahl indicated that he was sure Doug Lee had misunderstood Jamie's willingness to disobey the court order, and that while a motion was premature, he would entertain one later if needed; this is presented as an offer of proof, it can be rationally inferred from the following records. See CP: 88-112.

On 5/3/11, Doug Lee once again had to return to court to compel Jamie Stillman's conformity with the court order, and Commissioner Grovdahl ordered that Jamie Stillman comply with the order that visits with Carol Thomas, Doug Lee, and his son, promptly occur. CP: 88-112.

On 5/9/11, Jamie Stillman filed an inappropriate Motion for Revision. CP: 114-116. See also Doug Lee's Motion to Strike the Revision, filed 5/18/11. CP: 140-45.

The Carol Thomas visits went well. CP: 128-31 & 146-48, which then meant that after two supervised visits at Fulcrum, Doug Lee's parenting plan would take effect. CP: 74-76 & CP 132-39.

So Jamie Stillman tried to prevent the two Fulcrum visits. Therefore, on 5/11/11: Doug Lee again had to file a motion to compel the visits at Fulcrum! CP: 118-25. On the day of the hearing, Ms. Stillman finally agreed to obey the court order to send Little Doug to visit with Doug at Fulcrum, and an agreed order was entered. CP: 126-27. This hearing was fully briefed and prepared, with all concomitant costs, even though it settled just before the hearing. Id.

Ms. Stillman next noted another inappropriate motion for revision on 5/19/11. CP: 149-50. On 5/24/11, Mr. Lee again had to move to strike the inapt and re-noted motion. CP: 151-52. Doug Lee prevailed, and Ms. Stillman's revision was struck by Judge Triplet. CP: 161. It is self-evident that large and excessive legal costs and personal costs were suffered by Mr. Lee due to Ms. Stillman's intransigence.

As matters moved toward trial on child support, Ms. Stillman also refused to participate in pre-trial preparations. CP: 484-97.

B. Facts and Procedural History of Discovery Agreement &

Income Tax Controversy

The initial narrative summary, below, is drawn from CP: 498-519.

Shortly before Ms. Hendrick presented her notice of appearance of August 30, 2012, Mr. Mason's office learned Ms. Hendrick was coming onto the case and so Mr. Mason's office sent Ms. Hendrick financial filings available to to-date. *Ex. A in CP: 498-519.*

Doug Lee had been working on getting tax returns and pay stubs in time for trial, but there was no stated need for them prior to trial, as Ms. Stillman had refused to cooperate in pre-trial preparation. CP: 484-97. (And Ms. Hendrick had not appeared in the case to work with.)

Doug Lee had been pressuring his accountant to get his tax returns done. *Ex. B in CP: 498-519.* However, Mr. Lee relaxed this pressure, but still sought the returns, once Ellen Hendrick (Jamie Stillman's counsel) agreed that she would be able to calculate net pay for child support purposes from the pay stubs alone. *Ex. D in CP: 498-519.*

Ms. Hendrick had filed a motion to compel without a proper CR 26(i) conference, which also violated the local rule, LCR 37. CP: 280-89. *See Ms. Hendrick's motion at CP: 250-70, and her inapt CR 26(i) certification on CP: 255.*

The matter was then settled, as Mr. Lee agreed to strike his motion to sanction Ms. Hendrick for violating CR 26(i) and the case scheduling order, and Ms. Hendrick agreed that she could calculate gross and net pay from the submitted pay stubs. CP: 498-519, *esp. Ex D*. This was the exchange of consideration creating the discovery settlement agreement.

Mr. Lee had no warning that this agreement would be breached at trial, nor did Doug Lee have any notice that the court would allow this agreement to be breached at trial. CP: 498-519 & 406-420 & 363-65.

And nowhere has Ms. Stillman shown that she was prejudiced by the need to rely upon the complete pay stubs of Mr. Lee. And Mr. Lee concedes that the gross income used by the court was appropriate – the issue is the trial court excluding the deductions for state and federal income taxes as a discovery sanction against him.

The only issues on appeal for Mr. Lee regarding the court's exclusion of his income tax deductions are that: (a) Ms. Stillman, through her counsel, agreed that she had the information to calculate gross and net pay, and this agreement was a settlement contract for which Ms. Stillman received the consideration that Mr. Lee's motion for sanctions was foregone, and (b) there was no prejudice to Ms. Stillman in having to rely upon Mr. Lee's pay stubs without tax his returns (by the admission of Ellen Hedrick at the time of the settlement at issue).

The findings of fact and conclusions of law, and the final orders excluding Mr. Lee's income tax deductions can be found at CP: 442-68.

There were post-trial motions on this matter and on Mr. Lee submitting his tax returns, given (a) their availability, and (b) the breach of the settlement agreement. The court refused to enforce the settlement agreement, or to admit the tax returns.

This appeal followed.

IV. ARGUMENT

A. Intransigence of Jamie Stillman

Mr. Lee asked the trial court to find that Jamie Stillman had been intransigent, and Doug Lee was seeking this finding to avoid paying Ms. Stillman's fees. In the spirit of amity, Mr. Lee was not requesting that Jamie pay his attorney's fees. However, the applicable case law remains the same, whether Mr. Lee had been seeking his fees to be paid for Jamie's intransigence, or, as here, where Doug is simply seeking to avoid fees.

As is argued, below, this is a matter of legal interpretation and de novo review, but even if the standard of review is different, it was an abuse of discretion for the trial court not to grant Doug Lee's reasonable request, as Jamie Stillman's expensive and repeated contempts of court

essentially amount to intransigence as a matter of law upon a review of the irrefutable evidence of the orders in the court record.

A court may award attorney fees for “intransigence” if one party's intransigent conduct caused the other party to incur additional legal fees.

In re Marriage of Bobbitt, 135 Wn.App. 8, 30, 144 P.3d 306 (2006).

Intransigence includes obstruction and foot-dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly.

Bobbitt, 135 Wn.App. at 30. An award of fees for intransigence must be supported by findings. *Bobbitt*, 135 Wn.App. at 30.

It is undeniable that Jamie Stillman again and again forced Doug Lee back to court to prevent Jamie from stopping the counselor visits, the supervised visits, and then the visitation. (See Record cited in Statement of the Case.) Combined with her outrageous allegations at the outset, and her refusal to participate in pre-trial matters, the entire court file is permeated with Ms. Stillman’s intransigence. *Burrill v. Burrill*, 113 Wash.App. 863, 56 P.3d 993 (2002) (when the matter is permeated by the intransigence of a party, legal fees need not be segregated, but may all be attributed to the intransigent party, at 873).

The *Burrill* court stated:

A trial court may also award attorney fees if one spouse's intransigence increased the legal fees of the other party.^{FN10} In that event, the financial resources of the parties are irrelevant.^{FN11}

Where a party's bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not.^{FN12}

Burrill v. Burrill, 113 Wash.App. 863, 873, 56 P.3d 993 (2002) (footnotes omitted).

Applying *Burrill* to the present case: (a) Jamie Stillman, with egregious defiance of court orders, increased Mr. Lee's legal fees; (b) because of her bad behavior, Ms. Stillman's financial resources are not relevant; and (c) Ms. Stillman's since bad faith permeated the proceedings, Mr. Lee's request for reasonable relief should be granted. (This relief is de minimus in that Doug Lee only requests that he not pay Ms. Stillman's fees, and he does not request that she be required to pay his large fees from trial court level activity. However, Doug is requesting fees on the appeal, infra.)

The appellate court can "find" intransigence from the record, even if the trial court did not, to quote the *Crosetto* court (emphasis added):

The court may also consider the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services. *564 *In re Marriage of Morrow*, 53 Wash.App. 579, 590, 770 P.2d 197 (1989). If intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. *Morrow*, 53 Wash.App. at 590, 770 P.2d 197. James Crosetto asserts that the trial court "found" intransigence on Laurel Crosetto's part. He cites to the trial court's comments, and states that "[n]o other word is available to characterize the conduct described by the trial court." We agree. Although the trial court did not make a finding of intransigence, a review of the

record discloses a continual pattern of obstruction on Laurel Crosetto's part.^{FN5}

FN5. These obstructionist tactics include: refusal to cooperate with the GAL, refusal to allow visitation, and interference with court ordered visits between Mary Alice and James Crosetto, resulting in James bringing several contempt motions; attempts to avoid service; and threatening to take administrative action against Dr. Stuart Greenberg, (a psychologist ordered to conduct psychological examinations of the parties) if he did not testify favorably to her position. In addition, during one of James Crosetto's motions, a court commissioner acknowledged the obstructionist nature of Laurel Crosetto's conduct and stated, "there is a course of conduct engaged in by the mother in which if she is not outright flaunting court orders, she is doing indirectly what she cannot do directly," and noted that two previous commissioners had warned her regarding sanctions that would be imposed for further violations of court orders.

Matter of Marriage of Crosetto, 82 Wash.App. 545, 918 P.2d 954 (1996).

Jamie Stillman's behavior tracks *Crosetto's* facts closely, and a finding of intransigence is requested.

The *Morrow* court, cited above, makes clear that there is a long history of case law in Washington which precludes and limits awards of attorney's fees to the party who increases the costs of litigation:

An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require additional legal services. See *In re Marriage of Harshman*, 18 Wash.App. 116, 128, 567 P.2d 667 (1977); *Eide v. Eide*, 1 Wash.App. 440, 445, 462 P.2d 562 (1969).

In re Marriage of Morrow, 53 Wash.App. 579, 590, 770 P.2d 197 (1989).

Applying the foregoing authorities, it is clear that Jamie Stillman was intransigent in: (a) the scurrilous allegations which accompanied her second parenting plan; (b) in defying court orders on visitation; and (c) in refusing to participate in pre-trial case preparation. Mr. Lee requests that the court review this as a matter of law.

Mr. Lee requests that all awards of attorney's fees in favor of Ms. Stillman be reversed, and that he be granted attorney's fees on this appeal on the same bases.

B. Income Tax Deduction in Calculating Child Support

Next, Mr. Lee appeals the trial court's denial of his state and federal income tax deductions in calculating his net income in child support calculations. Procedurally, this appears to be a discovery sanction, without a showing of prejudice to Ms. Stillman, and it is a sanction which contravenes the discovery settlement agreement reached between Mr. Mason (Doug's counsel) and Ms. Hendrick (Jamie's counsel) prior to trial. (See Statement of the Case, *supra*.)

The settlement agreement at issue should have been binding on the parties, and therefore, as a matter of contract law, as well as a matter of fact, there was no prejudice to Jamie Stillman to proceed to trial based upon Mr. Lee's pay stubs. *Magana v. Hyundai Motor America*, 167

Wash.2d 570, 220 P.3d 191 (2009) (prejudice must be shown for non-compliance with discovery before a discovery sanction may issue). Ms. Stillman suffered no prejudice from trial proceeding in terms of the settlement agreement to rely upon pay stubs, alone.

1. Settlement Agreement Should Have Been Enforced

Mr. Lee was caught by surprise at trial that Ms. Stillman was renegeing on the settlement agreement. Jamie Stillman's counsel, Ellen Hendrick, had agreed that gross and net income could be calculated based upon Doug Lee's complete pay stubs. *Ex.D* in CP: 498-519.

In exchange for Ms. Hendrick's offer to rely on pay stubs alone, Mr. Lee accepted and dropped his motion to sanction Ms. Hendrick for refusing to comply with CR 26(i) and with the case scheduling order. *Id.* Contract law governs settlement agreements. *Lavigne v. Green*, 106 Wash.App. 12, 23 P.3d 515 (2001). In this instance, there was an offer, an acceptance, and an exchange of consideration.

For the court's convenience the Statement of the Case is re-stated, in part, from page 8, *supra*:

Doug Lee had been pressuring his accountant to get his tax returns done. *Ex.B* in CP: 498-519. However, Mr. Lee relaxed this pressure, but still sought the returns, once Ellen Hendrick, Jamie's counsel, agreed that she would be able to calculate net pay for child support purposes from the pay stubs alone. *Ex.D* in CP: 498-519.

Ms. Hendrick had filed a motion to compel without a proper CR 26(i) conference, which also violated LCR 37. CP: 280-89. See Ms. Hendrick's motion at CP: 250-70, and her inapt CR 26(i) certification on CP: 255.

The matter was then settled, as Mr. Lee agreed to strike his motion to sanction Ms. Hendrick for violating CR 26(i) and the case scheduling order, and Ms. Hendrick agreed that she could calculate gross and net pay from the submitted pay stubs. CP: 498-519, *esp. Ex D*.

Mr. Lee had no warning that this agreement would be breached at trial, nor any notice that the court would allow this agreement to be breached. CP: 498-519 & 406-420 & 363-65.

When the agreement is viewed in the light of the circumstances, it is clear that a settlement had been reached.

Mr. Lee had brought a motion for sanctions against Ms. Hendrick (Jamie's counsel) for Ms. Hendrick's failure to follow CR 26(i), LCR 37, and the case scheduling order. For her part, Ms. Stillman had brought a motion to continue the trial and for discovery sanctions.

Both parties gave up their motions against the other, as consideration for the agreement to proceed to trial on the pay stubs. Ms. Hendrick's emails in the agreement show that she was (correctly) certain that she had complete pay stubs suitable for calculating Mr. Lee's gross and net pay. This settlement contract should have been respected by the trial court. As the *Stottlemyre* court wrote:

Since releases and compromise and settlement agreements are considered to be contracts, their construction is governed by the legal principles applicable to contracts and they are subject to judicial interpretation in light of the language used and the

circumstances surrounding their making. *Riley Pleas, Inc. v. State*, 88 Wash.2d 933, 937-38, 568 P.2d 780 (1977); *Maxwell's Elec., Inc. v. Hegeman-Harris Co. of Canada, Ltd.*, 18 Wash.App. 358, 567 P.2d 1149 (1977).

Stottlemyre v. Reed, 35 Wash.App. 169, 665 P.2d 1383 (1983). The circumstances and facts show: (a) offer, acceptance, and consideration, and (b) that the agreement did not prejudice Jamie Stillman.

The trial court should have enforced this settlement agreement, and it certainly should not have penalized Mr. Lee without a showing of prejudice to Ms. Stillman (see next section). Reversal of the trial court's sanction of omitting Mr. Lee's income taxes is requested.

2. There Was No Prejudice to Jamie Stillman

A discovery sanction must be predicated upon some showing of prejudice. *See, e.g., Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 933 P.2d 1036 (1997). Further, the harsh result of precluding evidence should not be imposed unless lesser sanctions have been considered. *Burnet*, 131 Wash.2d at 494. The most minimal effective sanction should be applied. *Id.* at 494-96.

Applying *Burnet* to the current case, first, there was no prejudice to Jamie Stillman as a matter of law --as a matter of consensual settlement agreement -- in that her own attorney agreed that she could calculate Mr. Lee's gross and net pay from the pay stubs of Doug Lee, and Ms. Stillman

abandoned any motion to compel as Mr. Lee abandoned his motion for sanctions for CR 26(i) violations. Second, there was no prejudice to Ms. Stillman as a matter of fact, as child support calculations could be made on the provided pay stubs of Doug Lee. Third, there was no warning to Mr. Lee that the court would impose a discovery sanction, as he reasonably relied upon the settlement agreement between counsel, and he reasonably relied upon the matter of fact that child support could be fully and fairly calculated from his pay stubs. Doug had good faith, and he had no notice such a draconian penalty.

The trial court abused its discretion to blindsides Mr. Lee with the exclusion of his state and local income tax deductions, and reversal of this sanction is requested.

Alternatively, Mr. Lee did supply his tax returns to the court as soon as they were available, and they were not considered on reconsideration, and reversal of not admitting the tax returns on reconsideration is an alternate basis for the relief requested.

C. Standard of Review: De Novo

The construction of a contract is a legal question subject to de novo review. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978). The fact of the settlement agreement at issue is to be reviewed as a matter of law before this court. *Id.*

Likewise, as the facts in the record were not challenged by Ms. Stillman, the only question which remains is a legal question as to whether or not Jamie's behavior was intransigent in: (a) Jamie's scurrilous and false opening claims against Mr. Lee, requiring extensive litigation; (b) Jamie disobeying court orders, requiring even more litigation costs to enforce the ordered visits; and (c) Jamie refusing to participate in pre-trial preparations. This review of Ms. Stillman's intransigence should also be de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

The facts are unchallenged that Ms. Stillman's counsel (Ms. Hendrick) was correct that Ms. Stillman could accurately calculate Mr. Lee's gross and net pay for child support purposes, based upon his pay stubs, and his tax returns were not necessary. Since there is no factual issue that there was no prejudice to Jamie Stillman from Doug Lee not having his tax returns, the resolution of this issue is also a matter of law.

V. RELIEF REQUESTED

Doug Lee asks this court to reverse the trial court's award of attorney's fees to Jamie Stillman on the basis that Ms. Stillman's intransigence precludes such an award.

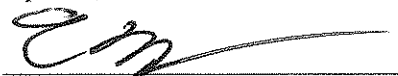
Doug Lee asks this court to recalculate child support with an allowance for his state and federal income tax deductions, and to reverse

the trial court's exclusion of these deductions as a sanction. The bases for this request include: (a) there was no prejudice to Ms. Stillman to have to rely upon Mr. Lee's pay stubs for calculating child support, and (b) there was a settlement agreement that Doug's pay stubs were sufficient for calculating child support, and (c) this sanction is unnecessarily severe under the case law cited.

Finally, attorney's fees and costs are requested under RAP 18.1(a) under the cited authorities on intransigence, *supra*, as "applicable law" under the rule. Although financial documents are available in the child support file, financial need under RAP 18.1(c) is not appropriate to consider on an award sought by Doug Lee for the intransigence of Jamie Stillman. *Mattson v. Mattson*, 95 Wash.App. 592, 604-606, 976 P.2d 157 (1999) (intransigence in the trial court may support an award of fees on appeal at 605). Mr. Lee requests costs and attorney's fees on appeal.

This relief is respectfully requested,

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