

NO. 62858-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

CATHERINE M. McCANN, n/k/a
CATHERINE M. PALMER,

Respondent,

v.

THOMAS F. McCANN,

Appellant.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

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FILED
COURT OF APPEALS, DIVISION I
2009 DEC -11 PM 3:15

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I. RESPONDENT'S STATEMENT OF THE CASE

A. Introduction

This appeal is the fourth chapter in the saga of Appellant Thomas McCann's ("McCann") attempt to hold Respondent Catherine Palmer ("Palmer") in contempt of the parties' parenting plan regarding their two children. Two superior court tribunals have considered and rejected his arguments. The record amply supports the findings and conclusions of the superior court commissioner, the first to consider them. Those findings and conclusions as to all but one of McCann's charges became those of the superior court judge who considered them on his motion to revise. Although the court initially revised one of the commissioner's findings, it later properly reconsidered that single issue, and denied McCann's revision motion in its entirety. McCann fails to present any evidence or persuasive argument to the contrary. Accordingly, Palmer respectfully requests this Court to affirm the superior court's order granting her motion for reconsideration and denying McCann's motion for revision of the commissioner's order denying McCann's motion for contempt.

B. Issues Presented

- 1. Whether the superior court abused its discretion when it granted Palmer's motion for reconsideration.**

2. **Whether the superior court erred when it denied McCann's motion for revision.**
3. **Whether either party is entitled to attorney's fees on appeal.**

C. Facts

1. Background

The marriage of Palmer and McCann was dissolved, and a parenting plan regarding their two children, Tommy (dob 12.06.1990) and Kelly (dob 9.01.1992), was entered, in 1998. Clerk's Papers ("CP") 136. Ten years later, through an extensive arbitration process, the parties modified the parenting plan. *Id.* The parties signed and filed the parenting plan with the court, and the court adopted it as the court's order, on March 20, 2008. CP 86-87.

The residential schedule of the March 2008 parenting plan provides, in relevant part, that the "transfer time for the children shall be on Mondays, after school when school is in session or otherwise at 5:30pm." CP 77. As for transporting the children to and from their extracurricular activities, the plan states "the parent with whom a child is residing shall make arrangement[s] for the child to attend a scheduled appointment or activity occurring during that parent's residential time[.]" CP 79. It also says "the parent beginning residential time with the children will arrange to pick them up from school, the other parent's

home, or activities/lessons which the children are attending at the transition time.” CP 78.

As for the children’s health needs, the plan provides that

When the children have a health care appointment, the other parent shall receive notice thereof at the time the appointment is made and whether the scheduling parent will be attending; and immediately afterward be notified of the outcome of the appointment, including the diagnosis, prognosis, treatment plan, and doctor’s name and phone number.

CP 79. Both parents are “responsible to ensure and monitor that the children are taking their medication as prescribed during their residential time.” *Id.* The plan also calls for McCann to make major decisions as to Kelly’s routine health care until she turned the age of 17. *Id.*

The March 2008 parenting plan also contains extensive provisions for problem solving and dispute resolution between the parents. The provisions describe a three-step process calling first for the parents to communicate with each other about the disputed issue and possible solutions. CP 81-82. If the identified issue is not resolved, the second step directs the parents to utilize family counseling services in one of three ways: 1) using the Microsoft Family Counseling program, 2) using the Bellevue Parent-Child Mediation program, or 3) employing a parenting coach. CP 82. The plan specifies that the “parent identifying the issue shall choose the [counseling] process[.]” *Id.* If the family counseling

process is not successful, the final step is to submit the disputed issue to arbitration or to the superior court. *Id.*

2. The Contempt Motion

a. *McCann's motion and declaration*

On August 19, 2008, McCann filed a motion for contempt, alleging that Palmer had not complied with the March 2008 parenting plan by: 1) failing to keep McCann informed of the outcome of Tommy's medical treatments; 2) scheduling a medical appointment for Kelly; 3) failing to ensure the children regularly took their prescribed medication; 4) failing to follow the dispute resolution process; and 5) failing to comply with the scheduled residential pick-up times. CP 89.

McCann also expounded upon Palmer's alleged violations in a declaration. CP 10-55. Specifically, as to her purported failure to inform him of the outcome of Tommy's medical appointments, McCann stated that Tommy's doctor recommended physical therapy to treat an injury, that Palmer scheduled an appointment, that he knew about the appointment, that he knew Tommy continued to receive physical therapy treatments, but that he had not "received any details on [Tommy's] progress" as was required under the plan. CP 14.

Next, regarding Palmer's scheduling a medical appointment for Kelly, McCann said, despite the provision in the parenting plan that

McCann would be solely responsible for Kelly's routine health care, Palmer scheduled and took their daughter to a dentist appointment in April 2008. CP 12. McCann also generally alleged that Palmer had not been administering Kelly's prescribed medications to her, but he supplied no evidence to support his claim. CP 12-13, 40-43.

As to the fourth ground for contempt, Palmer's purported failure to follow the dispute resolution process, McCann pointed to a string of emails between the parties in which he raised several issues to discuss. CP 11. The emails illustrate that Palmer did not respond as he would have liked, and McCann, invoking the family counseling options under the second step of the process, demanded the names of three counselors under the Microsoft Family Counseling program. CP 33-35. When Palmer did not provide the names, McCann charged her with contempt.

Finally, regarding Palmer's alleged failure to abide by the residential pick-up times scheduled in the parenting plan, McCann described an incident in which Palmer allegedly "refused" to pick Kelly up at McCann's home at the time specified in the plan. CP 14-15.¹

¹ McCann's declaration, and Palmer's responsive declaration, also refers to an incident that occurred over the course of Christmas Eve and Christmas Day 2007. CP 15, 148-150. The superior court commissioner found that this incident occurred before the March 2008 parenting plan was entered, that Palmer did not act in bad faith, and that she was not in contempt. CP 7. Those findings were not disturbed on revision. CP 59-60. Although McCann generally assigns error to the court's failure to find Palmer in contempt regarding the scheduled residential pick-up times, he entirely fails to address the Christmas 2007 incident in his appellate brief. *See* Br. of Appellant 5-6.

b. *Palmer's responsive declaration*

In response, Palmer told the rest of the story regarding each of McCann's allegations in her declaration. CP 136-223. First, as to Tommy's physical therapy appointments, Palmer noted that McCann attended the doctor's appointment at which the physical therapy was recommended, and explained that, because Tommy was nearly 18 years old at the time, she did not attend his physical therapy treatments. CP 138. Rather, Tommy took himself to the appointments. *Id.* Because she did not attend the sessions, Palmer did not have any information to provide McCann about them. *Id.* Instead, McCann could have obtained any information about the sessions from Tommy himself or the physical therapist, or asked Palmer to obtain the information he wanted. CP 139. He pursued none of these options. *Id.*

Next, as to the dentist appointment for Kelly, Palmer explained she had scheduled the April 2008 appointment at Kelly's previous dentist visit, approximately six months earlier. *Id.* Thus, the appointment had been scheduled about five months before the parenting plan that gave McCann the sole responsibility for Kelly's routine health care became an order of the court in March 2008. *Id.* After the parenting plan was drafted, but before it was filed with the court, Palmer began asking McCann how he wanted to handle the appointment. *Id.* His only

immediate responses were variations of the cryptic statement “follow the parenting plan.” CP 139-40. Having received no helpful response from McCann, Palmer took Kelly to the appointment, and notified him of the outcome immediately afterward. CP 140, 39. Then, months after the appointment, McCann sought to hold Palmer in contempt for her actions.

Third, Palmer contested McCann’s general, unsupported assertions that she failed to give Kelly her prescribed medication by providing doctors’ notes contradicting McCann’s allegations. CP 140-41, 168-73. Fourth, as to the dispute resolution process, Palmer disputed that the parenting plan required her to use the Microsoft Family Counseling program available to her as a benefit of her employment, particularly when the plan also provided alternatives for family counseling, one of which was free to the parties. CP 144-46.

Finally, as to Palmer’s “refusal” to pick Kelly up, Palmer noted that, because Kelly was residing with McCann at the time of her extra-curricular activity, water polo practice, under the terms of the parenting plan, it was actually *McCann’s* responsibility to transport Kelly to practice. CP 146-48. She also explained her good faith efforts to coordinate Kelly’s transportation to practice in light of the fact that both parties had forgotten there was no school on the date in question, and both had made plans conflicting with the practice’s start time. *Id.*

c. *The contempt ruling*

On September 25, 2008, Commissioner Jeske heard McCann's contempt motion. The court noted a finding of contempt under RCW 26.09.160 requires "not just a failure to comply with an [o]rder[,] ... but also bad faith." Report of Proceedings ("RP") Part I, Sept. 25, 2008, at 13-14. It also noted "many" of McCann's allegations arose "less than one month" after the March 2008 parenting plan was filed. *Id.* at 14. The court then orally ruled on each contempt allegation, in relevant part, as follows:

The first allegation is that [McCann] was not advised of the outcome of Tommy's medical appointment or appointments. I'm going to deny that request for relief. [Palmer] says that he attended the first appointment in question and heard the diagnosis. ...

... [T]he only basis for his not being aware of what the outcome of the appointments would be ... based on the physical therapy. Physical therapy was treatment. [McCann] was equally able to ascertain that information. She did not attend the appointments and *I don't find that she had any reasonable obligation under the way their plan is crafted to do so.*

With regard to the scheduling of Kelly's appointments this arose before the plan was actually entered. *There is no bad faith here.* Each is responsible for the healthcare appointments ... for the respective child in their respective time. She scheduled the dental appointment and e-mailed him on January 29th of 2008 of the situation.

... [I]n order to find contempt I have to find the violation of a clear order. This order was not entered prior to the

original correspondence and in fact, *I have to find that she actually tried to address the situation if I look at the record before me and give him the option of what to do with it. I don't find that that's bad faith.*

Id. at 15-16 (emphasis added).

Regarding McCann's allegation that Palmer failed to ensure Kelly took her prescribed medications, the court noted one of the emails McCann submitted to support his allegations was dated before the March 2008 parenting plan was entered. *Id.* at 18. The court then orally ruled on the merits of the allegations as follows:

... [N]or do I find when I look at the substance of the allegations ... that she is intentionally demonstrated bad faith ... in failing to give or failing to remind her 16 year old daughter to take medication. I just don't see that.

Id. (emphasis added).

As to the allegations regarding the dispute resolution process described in the parenting plan, the court orally ruled, in relevant part, as follows:

I will not find contempt on that basis as I don't know the basis of what happened on the other issues [listed in the series of emails between the parties]. I cannot tell from the record before me. ...

Id. at 19 (emphasis added).

Regarding McCann's allegations that Palmer refused to pick Kelly up, the court orally ruled, in relevant part, as follows:

[O]n March the 24th this comes a mere four days after the amended plan was entered. [McCann] states that she refused and that this is a chronic problem.

Well, *I don't have evidence that it's a chronic problem before me.* The record before me reflects essentially two incidences. One that occurred in December ... and one that's alleged after that.

... *I can't find that the record reflects bad faith.* [Palmer] clearly communicated in her e-mail that she forgot. She indicated that she had work commitments, that she did not be able to appear to work around on a short time frame.

There is absolutely no doubt in my mind that this was seriously inconvenient to the father and probably very irritating. *But I have to stick with what the law tells me, which is that I have to find that it was done in bad faith.*

And even the evidence that the father presents to ... me doesn't show that, it doesn't demonstrate that she intentionally somehow tried to do this to him. She suggested the alternative of dropping ... the daughter off at the activity, which the plan does provide for[.] ...

But it provides for that in ... 3.10. "That the parent beginning a residential time with the children will arrange to pick them up from school, the other parent's home", [sic] which was what his preference was, "Or, activities/lessons which the children are attending at the transition time."

Now, clearly the father ... had reasons for why he wanted ... [Palmer] to pick up the child at the residence. ...

But this is not contempt folks, this is life.

Id. at 16-17 (emphasis added).

Finally, as to Palmer's request for the attorney's fees she incurred in responding to McCann's motion, the court orally ruled that "I

appreciate Mr. McCann's frustration, but I *can't find that this motion was brought ... with ... a reasonable basis*, I just, I can't." *Id.* at 20 (emphasis added). Moreover, the court confirmed this finding when asked by McCann's counsel. RP Part II, Sept. 25, 2008 at 4-5. It then awarded Palmer \$1,451.00 in attorney's fees she incurred to respond to McCann's motion. *Id.* at 5.

McCann does not assign error to any of the court's oral factual findings emphasized above or otherwise. *See* Br. of Appellant at 5-7.

The court also entered the following written findings:

... Failure to inform Father of Tommy's medical appointments, diagnostic treatment recommendations and follow up requirements. Did comply; no contempt;

... Scheduling Kelly's appointments, appointment was schedule[d] before the current parenting plan was entered, but occurred after the court order was enter[ed] court finds no bad faith;

... Kelly's medication no compelling evidence to find bad faith;

... ADR no contempt. ... [; and]

... Incident on March 24th on transfer time Mother did not pickup child as scheduled, but no bad faith. No contempt[.]

CP at 2. The court's written order specifically states that "Catherine Palmer is not in contempt of court." CP at 3.

Additionally, the court summarized its oral rulings in a writing named “Attachment ‘A’,” which is attached to the court’s order. CP 6-7. As to each of McCann’s allegations, the court’s summary specifically states it either found “no bad faith” or that Palmer “is not in contempt,” and on all but one of the allegations, the court states both. *Id.* The summary also reiterates the court found “there was no reasonable basis for [McCann’s] bringing this motion.” CP 7. Consistent with that ruling, the court ordered McCann to pay the attorney’s fees Palmer incurred in responding to the motion. CP 1.

As with the court’s oral findings, McCann does not assign error to any of the court’s written factual findings. *See* Br. of Appellant at 5-7.

3. The Revision Motion

McCann filed a motion to revise the commissioner’s order, and Superior Court Judge Middaugh heard the motion on October 28, 2008. The court revised the commissioner’s order only in that it found Palmer had committed a “technical violation” of the parenting plan when she failed to pick Kelly up at McCann’s home at 5:30pm on March 24, 2008. RP Oct. 28, 2008 at 38. Specifically, the court noted that

... there was basically a mutual misunderstanding of whether that was the day off from school or day at school. Day off from schools are 5:30, ... everybody missed the fact that that was a school holiday or a teachers [sic] day or whatever it was that the kids were off school.

And so the mother said she just couldn't pick her up. And that's a violation of the Parenting Plan. I mean, if somebody's got to be inconvenienced it should not be him because it was her time to pick him [sic] up. And if it was inconvenient for her to [sic] bad, it was inconvenient for him too.

Id. at 5.

Later in the hearing, Palmer's counsel explained, under the parenting plan, the parent who presently had the child was responsible for transporting the child to activities scheduled to begin during that parent's residential time. *Id.* at 22. Because Kelly was in McCann's care until 5:30pm, and her water polo class began at 5:30pm, counsel continued, McCann was responsible for transporting her to the class, not Palmer. *Id.* The court noted McCann stated the class began at 6:00pm, and a discussion regarding the correct time ensued. *Id.* at 22-27. The court eventually ruled the evidence showed the class began later than 5:30pm, and, as a result, Palmer was responsible for transporting Kelly to the class. *Id.* at 26-27.

Although the court ruled that this incident constituted a "technical violation" of the parenting plan, the court did not find Palmer in contempt for that technical violation. CP 59. Instead, it vacated the commissioner's award of attorney's fees to Palmer, even though it noted it did not "think the father brought this motion in good faith." *Id.*; RP Oct. 28, 2008 at 7.

The court also declined to award McCann attorney's fees because it did not find Palmer violated the parenting plan in the other ways McCann had alleged. CP 59-60; RP Oct. 28, 2008 at 38.

Again, McCann does not assign error to any of the superior court judge's oral or written factual findings. *See* Br. of Appellant at 5-7.

4. The Reconsideration Motion

Palmer moved for reconsideration of the court's revision order, and presented evidence clarifying that Kelly's water polo class, in fact, did begin at 5:30pm. CP 224-27, 263-71. Thus, Palmer maintained, under the terms of the parenting plan, McCann was responsible for transporting Kelly to the class, she did not violate the plan for failing to do so, and reiterated McCann brought the original contempt motion without a reasonable basis. CP 226-27. Accordingly, she requested the court to reinstate the commissioner's award of attorney's fees in her favor and to award her the additional fees she incurred for the revision hearing. CP 227, 254. In response, McCann presented no evidence to contradict the start time of the water polo class. CP 242-253.

The court granted Palmer's motion. CP 61-62. Specifically, the court reconsidered the revision ruling as follows:

Motion for revision is denied:

1. Catherine Palmer did not violate the parenting plan.

2. Catherine Palmer is awarded a judgment for attorney fees against Thomas McCann in the amount of \$3,321.50.

CP 62. The court explained the award of attorney's fees included the fees "awarded by [the] Court Commissioner and [an] additional \$1,920.50 for revision and motion for reconsideration." *Id.* The court also noted the parties did not provide it with the October 28, 2008 order on revision, and directed the parties to provide it with "copies of any prior pleadings necessary in all other motions." *Id.*

McCann now appeals.

II. ARGUMENT

Although McCann conflates all of the proceedings below, his appeal of the superior court's order on reconsideration requires this Court to review two separate decisions the superior court made in that order. First, the court granted Palmer's motion for reconsideration. Second, and consequently, it denied McCann's earlier motion for revision of the commissioner's original contempt order. These issues are addressed in turn below.

McCann devotes all of his attention to the second issue, and offers no argument or authority addressing the first. Despite said attention, McCann fails to assign error to a single factual finding made by either the commissioner or the judge in any of the proceedings below. *See Br. of*

Appellant at 5-7. As a result, all of the factual findings from all of the trial court proceedings are verities on appeal. *See Young v. Young*, 164 Wn.2d 477, 482 n.2, 191 P.3d 1258 (2008).

A. The superior court did not abuse its discretion when it granted Palmer’s motion for reconsideration.

Motions for reconsideration are “addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of that discretion.” *Kinnan v. Jordan*, 131 Wn.App. 738, 753, 129 P.3d 807 (2006). A trial court abuses its discretion when its decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Brown*, 132 Wn.2d 529, 569, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). A trial court’s decision

is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Here, the superior court in the revision hearing stated it found a single “technical violation” of the parenting plan when Palmer did not pick Kelly up at 5:30pm on March 24, 2008, because the court interpreted

the evidence to mean Kelly's water polo class began at a time later than 5:30pm. RP Oct. 28, 2008, at 26-27. It also specifically found that none of McCann's other allegations constituted violations of the parenting plan. RP Oct. 28, 2008, at 38. Because McCann did not assign error to that finding, it is a verity on appeal. *Young*, 164 Wn.2d at 482 n.2.

On reconsideration, Palmer presented evidence demonstrating the class began at 5:30pm. CP 224-27, 263-71. That is, she clarified the single issue contributing to the court's finding of a technical violation. With the issue clarified, the record illustrated that Kelly was with McCann at the time her activity, water polo, was to begin. Under the terms of the parenting plan, then, it was his responsibility, not Palmer's, to transport Kelly to the class. Sensibly, the court reconsidered its earlier ruling that Palmer had technically violated the plan.

Similarly, the superior court had vacated the commissioner's award of Palmer's attorney's fees only because it had found a technical violation of the plan. With that single violation reconsidered, it was entirely appropriate for the court to reinstate the award of fees, particularly considering the court's note at the revision hearing that McCann did not bring the motion "in good faith." RP Oct. 28, 2008 at 7.

Because the evidence Palmer presented squarely addressed the court's original reason for finding the technical violation, the court's

decision to grant her reconsideration motion was not outside the range of acceptable choices, unsupported by the record, or based on an incorrect legal standard. The court did not abuse its discretion in granting Palmer's motion. McCann fails to present any evidence or argument to the contrary. Accordingly, this Court should affirm the superior court's order granting Palmer's motion for reconsideration.

B. The superior court did not err when it denied McCann's motion for revision.

1. The superior court on revision.

Under RCW 2.24.050, the acts and proceedings of court commissioners are subject to revision by the superior court. *See In re Marriage of Dodd*, 120 WnApp. 638, 643, 86 P.3d 801 (2004). "In cases such as this one, where the evidence before the commissioner did not include live testimony, then the superior court judge's review of the record is de novo." *Id* (quoting *In re Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1990))(internal quotations omitted). On revision, the superior court is authorized to "review the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." *Id* (quoting *In re Marriage of Ballcom and Fritchle*, 101 Wn.App. 56, 59, 1 P.3d 1174 (2000))(internal quotations omitted). Here, the superior court noted that it had employed the *de novo* standard of

review, and it had reviewed the entire record before the commissioner. RP Oct. 28, 2008, at 3, 6, 10.

On revision, the superior court also “has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner.” *Dodd*, 120 Wn.App. at 644. Although the court may review the commissioner’s “factual determinations for substantial evidence,” it is not limited to that standard. *Id.* at 645. Unless the commissioner’s findings, conclusions, and order are successfully revised, they become those of the superior court. *See In re Marriage of Bralley*, 70 Wn.App. 646, 658, 855 P.2d 1174 (1993). That is, the superior court’s “refusal to ‘revise’ leaves the action of the commissioner unchanged.” *See In re Dependency of BSS*, 56 Wn.App. 169, 170-71, 782 P.2d 1100 (1989), *review denied*, 791 Wn.2d 536 (1990). In that situation, the superior court on revision may adopt the commissioner’s findings and conclusions “either expressly or by clear implication from the record.” *Id.* at 170. Contrary to McCann’s bald assertion,² a superior court’s failure to enter its own findings and conclusions in support of an order denying revision is not reversible error, nor does it, in every case, prevent effective review on appeal. *See In re Parentage of JMK*, 155 Wn.2d 374, 395, 119 P.3d 840 (2005).

² *See* Br. of Appellant at 18.

Here, after it reviewed the entire record before the commissioner and heard argument from counsel, the superior court initially revised only a single finding of the commissioner, namely, that Palmer did not violate the parenting plan when she failed to take Kelly to water polo. Based on the superior court's own conclusion that Palmer's failure was a "technical violation" of the plan, it vacated the commissioner's award of her attorney's fees. All other findings and conclusions of the commissioner remained unchanged and became those of the superior court. *BSS*, 56 Wn.App. at 171; *Bralley*, 70 Wn.App. at 658.

As described above, the superior court properly reconsidered its ruling as to that single issue. As described below, the record substantially supports the commissioner's findings and conclusions. Accordingly, the superior court properly denied McCann's revision motion in its entirety, reinstated the commissioner's earlier award of attorney's fees to Palmer, and awarded her additional attorney's fees.

2. The standards for contempt and fees.

Under RCW 26.09.160(2)(b), a court must find a parent in contempt if it finds that the parent, "in bad faith, has not complied with the order establishing residential provisions for the child." *See also In re Marriage of James*, 79 Wn.App. 436, 440, 903 P.2d 470 (1995). "A parent who refuses to perform the duties imposed by a parenting plan is

per se acting in bad faith.” *In re Marriage of Myers*, 123 Wn.App. 889, 893, 99 P.3d 398 (2004) (citing RCW 26.09.160(1)). Contempt is also defined as “intentional disobedience of a lawful court order.” *In re Marriage of Humphreys*, 79 Wn.App. 596, 599, 903 P.2d 1012 (1995) (citing RCW 7.21.010(1)). Thus, a trial court must first find “a parent has acted in bad faith or committed intentional misconduct[]” to hold that parent in contempt pursuant to RCW 26.09.160. *James*, 79 Wn.App. at 441; *see also In re Davisson*, 131 Wn.App. 220, 224, 126 P.3d 76, *review denied*, 143 P.3d 828 (2006). Here, neither the commissioner nor the superior court judge ever found Palmer in contempt for any of the violations McCann alleged because neither tribunal found that she acted in bad faith. CP 1-7, 59, 62.

When one parent moves for contempt, and no contempt is found, the trial court must award the other parent her reasonable attorney’s fees, costs, and a civil penalty “if the court finds the motion was brought without a reasonable basis.” RCW 26.09.160(7). Here, the commissioner explicitly found, and then repeated, that McCann’s motion was brought without a reasonable basis, and awarded Palmer the attorney’s fees she incurred to respond to it.³ RP Part I Sept. 25, 2008, at 20; RP Part II Sept. 25, 2008 at 4-5; CP 1, 7. Although the superior court initially vacated the

³ The commissioner declined to award Palmer the civil penalty required under RCW 26.09.160(7), but Palmer is not cross-appealing that issue. RP Part II Sept. 25, 2008, at 5.

award when it found Palmer in “technical violation” of the parenting plan, the court properly reconsidered that issue and reinstated the award when it denied McCann’s revision motion in its entirety. CP 61-62.

Incredibly, McCann bases his entire argument on appeal regarding the attorney fee award to Palmer on the wrong statute. He states “[i]n *parenting plan enforcement actions*, the court can award attorney fees against a party who has acted in bad faith[.]” and cites RCW 26.18.160 for that proposition. Br. of Appellant at 14 (emphasis added). Quite to the contrary, that statute governs costs, including reasonable attorney’s fees, awardable to the prevailing party in “any action to enforce a *support or maintenance order* under this chapter[.]” RCW 26.18.160 (emphasis added). To be considered a prevailing party under that statute, the other party must have “acted in bad faith[.]” *Id.* Then, puzzlingly, McCann claims the term “bad faith” is not defined in “family law or parenting plan enforcement” cases. Br. of Appellant at 14. A simple review of the first paragraph of this section (and pages 25 and 26 of McCann’s own brief) reveals otherwise.

From this odd position of ignoring the directly applicable statute and attendant case law, and misleadingly referring this Court to a clearly inapplicable statute, McCann launches into a discussion of several cases analyzing attorney fee awards for a party’s alleged bad faith. *See* Br. of

Appellant at 14-16. This lengthy discussion is wholly irrelevant to this case, however, because, simply put, RCW 26.09.160(7), *not* RCW 26.18.160, applies here. And, to award the fees, RCW 26.09.160(7) requires the trial court to find McCann brought the motion “without a reasonable basis,” *not* that he brought it “in bad faith.” None of the cases McCann relies on discusses RCW 26.09.160(7), or even arguably applies by analogy. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 926-31, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010, 999 P.3d 1259 (2000)(discussing award of attorney’s fees on equitable grounds); *In re Pearsall-Stipek*, 136 Wn.2d 255, 265-67, 961 P.2d 343 (1998)(discussing award of attorney’s fees under CR 11 or trial court’s inherent authority); *In re Marriage of Cummings*, 101 Wn.App. 230, 235, 6 P.3d 19, *review denied*, 141 Wn.2d 1030, 11 P.3d 825 (2000)(discussing award of attorney’s fees under RCW 26.18.160); *Casa Del Rey v. Hart*, 46 Wn.App. 809, 816, 732 P.2d 1025 (1987), *affirmed* in 110 Wn.2d 65, 750 P.2d 261 (1988)(discussing award of attorney’s fees under RAP 18.9).

3. The record supports the trial court’s findings and conclusions regarding McCann’s contempt motion.

On appeal from a revision motion, the appellate court reviews the trial court’s factual findings for substantial evidence and then determines

whether the factual findings support the conclusions of law. *See In re Marriage of Rideout*, 150 Wn.2d 337, 351-52 (2003); *Myers*, 123 Wn.App. at 893. The record before the commissioner supports the court's original findings and conclusions regarding McCann's contempt motion. The superior court judge reached the same conclusions, save one, after it conducted its own de novo review of the record, and reconsidered its ruling as to the one allegation. Accordingly, the court did not err when it denied McCann's revision motion in its entirety.

a. *Tommy's physical therapy*

The superior court did not revise the commissioner's findings or conclusions as to McCann's allegations that Palmer failed to inform him of Tommy's progress in physical therapy. CP 59-60; RP Oct. 28, 2008 at 14-15. Instead, it adopted the commissioner's decision by implication. *See BSS*, 56 Wn.App. at 170. The commissioner found Palmer had no obligation to inform McCann of the outcome of physical therapy sessions that she did not attend, found Palmer did not act in bad faith when she failed to do so, and concluded that she was not in contempt. RP Part I, Sept. 25, 2008, at 15; CP 2, 3, 6.

McCann does not assign error to the factual findings, and they are thus verities on appeal. *Young*, 164 Wn.2d at 482 n.2. Nor does he provide any evidence that Palmer intentionally refused to provide him

information regarding the physical therapy sessions (i.e., that she acted in bad faith). Rather, he simply reiterates the argument he made first to the commissioner and then to the superior court judge. The court rejected his argument twice. His disagreement with the court's rulings does not amount to a reversible error. Because the superior court judge did not revise the commissioner's finding or conclusion on this issue, they became those of the superior court. *Bralley*, 70 Wn.App. at 658. They are clearly supported by the record, and, as a result, the superior court did not err in denying McCann's motion for revision.

b. *Kelly's dentist appointment*

The superior court did not revise the commissioner's findings or conclusions as to McCann's allegations on this issue. CP 59-60; RP Oct. 28, 2008, at 19. Rather, it adopted the commissioner's decision by implication. *See BSS*, 56 Wn.App. at 170. The commissioner explicitly found Palmer did not act in bad faith, and, to the contrary, once the parties began using the new parenting plan, she attempted to coordinate the appointment with McCann, who responded only with cryptic references to the plan. RP Part I, Sept. 25, 2008, at 15-16; CP 2, 6. Accordingly, the court did not find her in contempt. *Id.* at 16; CP 3, 6.

Again, McCann assigns error to none of the factual findings; they are verities. *See Young*, 164 Wn.2d at 482 n.2. He also fails to present

any evidence that Palmer acted in bad faith when she scheduled the dentist appointment six months earlier and then followed through with the appointment when McCann refused to discuss the situation with her. Instead, he simply asserts, without citing any authority, the fact that the parenting plan giving him sole responsibility for Kelly's routine health care had not been entered when Palmer scheduled the appointment is "irrelevant" because the plan was effective the date it was signed. Br. of Appellant at 23.

McCann's argument fails for several reasons. First, this Court need not even consider it because McCann cites no authority for it. *See Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008); RAP 10.3(a)(6). Second, the argument is based on a false legal premise. "Contempt of court is intentional disobedience of any lawful order of the court." *State v. Breazeale*, 144 Wn.2d 829, 842, 31 P.3d 1155 (2001)(citing RCW 7.21.010(1)(b)(emphasis added). Here, the parenting plan became an order of the court on March 20, 2008. CP 86. The parties could be found in contempt for intentionally violating the plan, as a court order, only *after* that date, not before. Although McCann's claim, that the parties were bound to the terms of the plan when they either signed or began following it, may make some sense in a breach of contract action, it does not hold sway in one for contempt.

Third, McCann's argument does not even withstand an examination of the record. He claims in his brief the plan was effective the date the parties signed it. Br. of Appellant at 23. The record reflects that both parties signed the plan in March 2008. CP 86-87. If McCann's argument is based on his counsel's statement at the revision hearing that the parties began following the plan in January 2008,⁴ it still rings hollow because he fails to demonstrate that the parties were following the parenting plan *when Palmer scheduled the appointment*. She made the April 2008 dentist appointment approximately six months earlier, which is October or November 2007 – two or three months before the plan was arguably effective even according to McCann. Therefore, Palmer could not possibly have intentionally disobeyed a parenting plan that the parties were not even observing when McCann claims she violated it.

By contrast, the record amply supports the court's findings and conclusions that Palmer did not act in bad faith, and thus was not in contempt, regarding this issue. As a result, the superior court did not err in denying McCann's motion for revision.

c. *Kelly's medication*

The superior court did not revise the commissioner's findings or conclusions as to McCann's allegations on this issue. CP 59-60. Rather,

⁴ See RP Oct. 28, 2008, at 9.

it adopted the commissioner's decision by implication. *See BSS*, 56 Wn.App. at 170. The commissioner found McCann failed to present sufficient evidence that Palmer had intentionally violated the parenting plan in this regard, and consequently concluded she was not in contempt. RP Part I Sept. 25, 2008, at 18; CP 2,3,6.

The above factual findings are verities, as McCann fails to assign error to them. *See Young*, 164 Wn.2d at 482 n.2. He also fails to present any evidence that Palmer acted in bad faith. He simply offers the same argument that he lost twice below, and does not support it with either citation to the record or to authority. *See Br. of Appellant* at 23. As a result, this Court need not consider this argument. *See RAP 10.3(a)(6); Cowiche v. Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, *reconsideration denied* (1992). And even if it does, the record reveals substantial support for the superior court's findings and conclusions on this issue. Therefore, the court did not err in denying McCann's revision motion.

d. *Dispute resolution*

The superior court did not revise the commissioner's findings or conclusions as to McCann's allegations regarding Palmer's refusal to participate in the dispute resolution process delineated in the parenting plan. CP 59-60; RP Oct. 28, 2008, at 20-21. Instead, it adopted the

commissioner's decision by implication. *See BSS*, 56 Wn.App. at 170. The commissioner explicitly found Palmer was not in contempt as to this issue. RP Part I Sept. 25, 2008, at 19; CP 2, 3, 7. That finding is a verity. *See Young*, 164 Wn.2d at 482 n.2.

McCann presents no evidence Palmer acted in bad faith. He simply reiterates his argument that he twice lost below, and disagrees with the superior court's decision. Such is not a basis for reversal. To the contrary, the court's decision is substantially supported by the record, and it did not err in denying McCann's motion for revision.

e. *Kelly's water polo pick-up*

This is the only basis on which the superior court revised the commissioner's ruling. CP 59; RP Oct. 28, 2008, at 38. Even on revision, however, the superior court did not find Palmer in contempt for her failure to pick Kelly up. CP 59. Moreover, as explained in section II-A above, the superior court properly reconsidered its initial revision, and denied McCann's motion to revise in its entirety. CP 62. As a result of the court's reconsideration order, the commissioner's findings and conclusions regarding Palmer's failure to transport Kelly to water polo class became those of the superior court. *See Bralley*, 70 Wn.App. at 658. The commissioner explicitly found Palmer had not acted in bad faith. RP Part I Sept. 25, 2008, at 16-17; CP 2, 7. Indeed, the commissioner

described the situation succinctly with the statement “[T]his is not contempt folks, this is life.” *Id.* at 17.

Again, the factual findings are verities because McCann does not assign error to any. *See Young*, 164 Wn.2d at 482 n.2. Nor does he present any evidence that Palmer intentionally violated the parenting plan in this respect. He baldly asserts that because the superior court found Palmer had violated the plan, it should have held her in contempt. *See Br. of Appellant* at 29. But he forgets, to find a parent in contempt, the court must find a violation of a court order *and* the parent acted in bad faith. *See James*, 79 Wn.App. at 441. This the superior court on revision refused to do. CP 59. Moreover, McCann fails to mention the superior court reconsidered its own decision on this very issue. CP 61-62. Because substantial evidence supports the superior court’s decision, and McCann fails to present any evidence, authority, or argument to the contrary, the court did not err when it denied his motion for revision.

f. *Attorney’s fees*

Because the superior court initially revised the commissioner’s order and found that Palmer committed a “technical violation” of the parenting plan, the court vacated the commissioner’s award of attorney’s fees in her favor. CP 59; RP Oct. 28, 2008 at 7. When the superior court properly reconsidered that decision and denied McCann’s motion in its

entirety, however, it reinstated the award and granted Palmer the additional fees she incurred to respond to the revision motion and to bring the reconsideration motion. CP 62. Such an award is consistent with the case law holding that when a superior court does not revise a commissioner's decision, the initial action remains "unchanged." *See BSS*, 56 Wn.App. at 170-71.

The commissioner explicitly found, and repeated when prompted by McCann's counsel, that he brought the contempt motion without a reasonable basis. RP Part I Sept. 25, 2008 at 20; RP Part II Sept. 25, 2008 at 4-5; CP 7. These findings are verities. *See Young*, 164 Wn.2d at 482 n.2. Under RCW 26.09.160(7), the commissioner was required to award Palmer the attorney fees she incurred to respond to the motion. Because the superior court eventually denied McCann's revision motion, the commissioner's finding became that of the court. *See Bralley*, 70 Wn.App. at 658. The superior court then properly reinstated the original award and granted additional fees for the additional proceedings stemming from the original contempt motion.

On appeal, McCann first recycles his claim that because the superior court found that Palmer had technically violated the plan, it should have held her in contempt and awarded him attorney's fees. *See Br. of Appellant* at 29-30. This argument fails here for the same reasons it

failed above: the superior court never found that Palmer acted in bad faith, and it later reconsidered its ruling that she even technically violated it.

McCann's next argument, that the superior court erred in granting Palmer her attorney's fees because it failed to enter its own findings or conclusions that he brought the original contempt motion without a reasonable basis, is plainly contrary to well-established law. When a superior court denies a motion to revise a commissioner's decision, it may adopt the commissioner's findings "*either* expressly *or* by clear implication from the record." *BSS*, 56 Wn.App. at 170 (emphasis added). A superior court's failure to enter its own findings and conclusions in support of an order denying revision is not a reversible error, nor does it, in every case, prevent effective review on appeal. *See JMK*, 155 Wn.2d at 395; *Bralley*, 70 Wn.App. at 658; *BSS*, 56 Wn.App. at 170-71.

Here, the superior court reconsidered the only basis upon which it revised the commissioner's original order and vacated that tribunal's award of attorney's fees. CP 61-62. By doing so, the superior court denied McCann's revision motion in its entirety. CP 62. It thus impliedly adopted the commissioner's findings and conclusions. *See BSS*, 56 Wn.App. at 170. The superior court's failure to enter its own findings is not, by itself, reversible error, and it cannot be seriously argued that the absence of such findings has prevented this Court's effective review of the

record. *See JMK*, 155 Wn.2d at 395. The commissioner’s explicit finding that McCann’s motion was brought without a reasonable basis was adopted by the superior court and enjoys ample support from the evidence presented to both tribunals. The superior court did not err when it reinstated Palmer’s attorney fee award and granted her the additional fees she incurred in the revision and reconsideration motions.

Finally, McCann misconstrues the superior court’s directive in its order on reconsideration that the parties provide it with copies of pleadings in all future motions in an attempt to invent some “confusion” on the court’s part “about the history of the action[.]” Br. of Appellant at 32; *see also Id.* at 17. This strains credulity. When read in context, the court’s notation clearly relates only to it admonishing the parties to provide it with copies of pleadings in the future. CP 62. The court in no way expressed any confusion about the case, or any hesitation about its decision. The fact that McCann appears to be confused about the superior court’s authority to grant either party attorney’s fees⁵ in no way reflects upon the court’s decision.

C. McCann is not entitled to attorney’s fees on appeal, Palmer is.

⁵ *See* Br. of Appellant at 9, 17, 32.

Despite findings and conclusions from two tribunals to the contrary, McCann simply asserts he is entitled to attorney's fees and costs because Palmer "acted in bad faith in not complying with the Parenting Plan." Br. of Appellant at 35. His bare assertion fails for all of the reasons described in Section II-B above.

Rather, Palmer is entitled to the fees she incurred in responding to McCann's appeal on two grounds. First, because she properly recovered such fees under RCW 26.09.160(7) at the trial court level, she may recover them on appeal. *See Rideout*, 150 Wn.2d at 359 ("a party is entitled to an award of attorney fees on appeal to the extent the fees relate to the issue of contempt.").

Second, RAP 18.9(a) authorizes this Court to award Palmer her attorney's fees for responding to McCann's frivolous appeal. An appeal is frivolous if it "raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Andrus v. State Dept. of Transportation*, 128 Wn.App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005, 136 P.3d 759 (2006). McCann's arguments on appeal are repetitions of those he asserted, and lost, twice below, based on patently inapplicable law, or otherwise "precluded by well-established and binding precedent that he does not distinguish." *Id.* at 900-01. Therefore, Palmer is entitled to recover the fees she incurred to respond to it. *Id.*; *see*

also Johnson v. Jones, 91 Wn.App. 127, 138, 955 P.2d 826 (1998)(awarding fees pursuant to RAP 18.9(a) because “there was no reasonable basis to argue that the trial court abused its discretion[.]”)

III. CONCLUSION

The record substantially supports the findings and conclusions entered by the commissioner and adopted by the superior court that Palmer was not in contempt as alleged by McCann. He assigns error to none of the factual findings. He presents no evidence to demonstrate Palmer acted in bad faith. He utterly fails to show the superior court abused its discretion when it granted Palmer’s motion for reconsideration, or erred when it denied his motion for revision. Accordingly, this Court should affirm the superior court’s order on reconsideration, and award Palmer her attorney’s fees on appeal.

Dated this 3rd day of December, 2009.



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CERTIFICATE OF SERVICE

Sandra Prehm, being first duly sworn, on oath deposes and says:

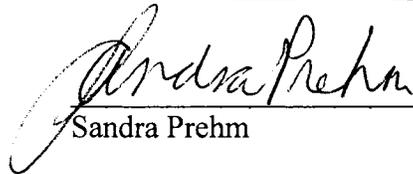
I am over the age of 18 years and am not a party to the within cause. I work at Curran Law Firm P.S. and on this date I delivered to ABC Legal Messengers a true and correct copy of the above **Brief of Respondent** to be served on the following persons set forth below:

Counsel for Appellant

Alisa Maples
Maples Lane
15 South Grady Way, Suite 400
Renton WA 98055

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Kent, Washington, this 31 day of December, 2009.



Sandra Prehm