

FILED

OCT 17 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 306461

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STEPHINE BARE, Respondent,

v.

JEREMY SHERVEY, Appellant.

BRIEF OF RESPONDENT

Cathy Busha', WSBA # 36297
Attorney for Respondent
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Ellensburg, Washington 98926
(509) 933-2646

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RESPONSE TO THE ASSIGNMENT OF ERRORS

A. THE COURT DID NOT ERR BY DENYING JEREMY SHERVEY'S CR 60 MOTION TO VACATE THE NOVEMBER 14, 2011 DEFAULT ORDER FOR PROTECTION

- a. Ms. Bare's petition for order for protection alleged sufficient facts to issue the domestic violence protection order
- b. The court did not err by denying Mr. Shervey's CR 60 motion to vacate the default order for protection.
- c. The court did not err by denying Mr. Shervey a continuance of the November 14, 2011 hearing on the order for protection where he appeared in Tukwila Municipal Court that same day.

II. REPLY TO THE APPELLANT'S STATEMENT OF CASE

The Appellant has left out a number of critical facts regarding this case which will give the court a full picture of the totality of the circumstances surrounding the long history of domestic violence in this case. CP 1-49, 136-141, 148 -151, 192-199, 202 - 212, 213-220, 242-245)

The parties met in 1997. The parties have two children together, Serina age 13 and Shantelle age 9. The parties separated in 2004. There is a Final Parenting Plan for Serina filed in King County dated December 17, 1999 under cause number 99-2-25783-9. (CP 159-171)

In 1999, after physically attacking Ms. Bare, Mr. Shervey was sent to jail and a no contact order was put in place. Mr. Shervey was convicted of a felony and a no contact order was in place for five years. After the no contact order expired, Ms. Bare explains that she was young and stupid and got back together with Mr. Shervey. (CP 232) Ms. Bare suffered severe emotional and physical abuse and encountered numerous injuries at the hands of Mr. Shervey over the years including black eyes, strangulation, cuts and bruising. There have been threats to kill her as well over the years. (CP 136-141, 148 -151, 192-199, 202 - 212, 213-220, 231-236, 242-245) Mr. Shervey has a long criminal record stemming back to 2000. (CP 213-220) Mr. Shervey was arrested a number of times involving forgery, drugs, and domestic violence. (CP 213-220) There was an Order for Protection issued in 2004 under cause number 99-2-25783-9 KNT between Ms. Bare (formerly Stephine Fambrough) and Mr. Shervey. (CP 202-212) There was another Order for Protection issued in April 2007 no contact for one year between the parties. (CP 192-199) Eventually, Mr. Shervey had found a new girlfriend, Heidi, and had another child with her. (CP 234-236) The parties co-parented the children and Mrs. Bare was able to finish her degree as a Certified Medical Assistant. (CP 231-236)

In the beginning of September, 2011, child support was increased due to the fact one oldest child turned twelve. Mr. Shervey blamed Mrs. Bare for the increase in child support. (CP 139) Mrs. Bare was extremely

concerned that he was so upset as she knew what he was capable of in terms of violence. (CP 231-236) Mr. Shervey was involved with physical altercations with his girlfriend, Heidi, and showed Mrs. Bare his bandaged hand from punching his vehicle in outrage. (CP 234)

On September 24, 2011, Ms. Bare and her husband had an argument at their home. Ms. Bare called Kittitas law enforcement reporting a dispute between herself and her current husband, Dave Bare. Once officers arrived, they determined that Ms. Bare was the primary aggressor. Ms. Bare was arrested and charged with Assault 4th Degree. The charge was immediately dismissed. Over the weekend, prior to the dismissal of the case, Ms. Bare was held at the Kittitas County jail overnight. The children were with her husband, Dave Bare at the family home. Mr. Shervey took it upon himself to pick up the children, without permission and took them to King County where he resides. He failed to bring them back to Ms. Bare's home despite the fact that the children were residing with her and in school. (CP 1-49)

On September 26, 2011, Mr. Shervey filed a Motion for an Order of Protection against Ms. Bare in King County; cause number 99-5-02112-7 KNT. On October 10, 2011, the court denied and dismissed the case. (CP 184-185)

Due to the fact that Mr. Shervey took the children without permission and continued to threaten taking the children again, Ms. Bare

filed an ex parte Motion for Temporary Protection Order in Kittitas County on October 18, 2011. (CP 1- 49) Ms. Bare appeared in Kittitas Superior Court on October 31, 2011. Mr. Shervey had not been served due to the fact he was avoiding service. (CP 138) Ms. Bare asked the court for permission to serve him by certified mail. (CP 140) The court gave permission to do so. The hearing was reset for November 14, 2011. (October 31, 2011 RP 1) The reissued the Temporary Order for Protection on October 31, 2011. (CP 56) During this same time frame, Ms. Bare filed a Petition and Summons and proposed Parenting Plan on October 28, 2011 in Kittitas County; cause number 11-3-00172-1. (CP 221-230) The children were residing in Kittitas County. Again, Ms. Bare had trouble getting Mr. Shervey served.

Mr. Shervey was not served due to the fact he avoided all attempts to serve him. (CP 136-141) He was served with the reissued Temporary Order for Protection on November 2, 2011 by certified mail after Ms. Bare received permission by to do so by the court. Mr. Shervey did not appear at the hearing but instead faxed a note to the court, the day of the hearing, asking for a continuance. At no time, did Mr. Shervey contact Ms. Bare's attorney nor Ms. Bare asking for a continuance. Mr. Shervey claimed that he could not attend the court hearing because he was attending a court hearing in King County for an outstanding warrant for failure to complete Domestic Violence classes and pay fines which were associated with

violation of a no contact order between he and Ms. Bare from 2006¹.
(App. Br pg 6)

The court in Kittitas County ordered the Protection Order with no contact provisions for a period of one year. (CP 60-64) It should be noted that Mr. Shervey's excuse that he had other court hearings was due to the fact that he was taking care of outstanding warrants which were over six years old having to do with the domestic violence against Mrs. Bare six years prior. Mr. Shervey had initially violated the 2006 no contact order and had failed to finish the Domestic Violence Treatment. Without a doubt, if Mr. Shervey had shown up to court in Kittitas he would have been ultimately arrested and was undoubtedly attempting to avoid that problem. Mr. Shervey was served with the DV Protection Order on November 22, 2011 by the King County Sheriff's Department. (CP 80) However, he had already been served prior to that by certified mail.

The court did not allow the request by Mr. Shervey for a continuance, based on his faxed note, which was devoid of information pertaining to which court the proceedings were taking place and the purpose of the court hearing and where he was located. The note faxed to the courthouse by Mr. Shervey didn't give the judge any pertinent information. "Yes, there are rules we have to follow when it's a faxed request for a continuance. He doesn't tell me when or what court or anything like that. So I am not going to find good cause to continue this

hearing and since he is not here –did you estimate –want to have the court enter an order prohibited Mr. Shervey from having any contact with you or the children?” (November 14, 2012 RP 1-2) The judge further explained that if Mr. Shervey wanted to see the children, he would need to motion the court. “What I am doing here is entering this order though that prohibits him from having any contact with the children. If he wants to modify that he’ll have to come back and ask to modify that and he’ll give you a notice of hearing and we’ll have a modification on this – but you can of course seek a modification of that parenting plan.” (November 14, 2012 RP 3) The court further modified the order to say: “...I am modifying it to say no for visitation until hearing is held period. Okay. And the way to do this, there’s a right way to do this and a wrong way to do this. He hasn’t availed him of the right way. You have so I entered the order and we’ll try to get him served with it.” (November 14, 2012 RP 4)

Mr. Shervey ignored the Order of Protection in Kittitas County and proceeded to file a family law action in King County for a parenting plan giving him custody of both children. *Mr. Shervey was clearly forum shopping.* The children did not reside in King County nor had they resided with him. The Petition for the Protection Order he filed in King County previously had been denied. (CP 1-49, 136-141, 231-236) It should be noted that Mr. Shervey did not bring this case to the attention of the King County Court. Upon review of the Child Custody Information Sheet

under item C, the question is: “Have you been involved in any other litigation concerning the custody or visitation with the children in this or any other state? If known, list the court, the case number and the date the parenting plan, residential schedule, visitation schedule or custody decree was entered:” Mr. Shervey only identified the prior parenting plan from 1999. He failed to disclose the Temporary Order of Protection that was in place with Kittitas County. (CP 82 - 129)

Despite that, on November 7, 2011, Mr. Shervey filed a Petition and Summons along with a Parenting Plan in King County; cause number 11-3-07462-9. (CP 82-129) The Petitioner was served on November 12, 2011. On November 28, 2011, Mr. Shervey filed a Motion for Reconsideration which was denied on December 7, 2011. (CP 66-69) On December 22, 2011, the court ordered in favor of Mr. Shervey’s parenting plan giving him custody of the children in King County based on lies and false allegations by Mr. Shervey. (CP 99-113, 136-141) Ms. Bare was not represented by counsel and did not properly file her response declarations for consideration by the pro tem judge in King County. (CP 138-141)

Ms. Bare attended the hearing in King County without representation. Ms. Bare declared that Mr. Shervey’s attorney completely lied and misrepresented facts to the court. (CP 138-139) For example, he represented to the court that the children lived in King County, when in fact they were residing in Kittitas County; that there was in fact an Order

of Protection in place in Kittitas County and that the children were “scared” of their mother; that Ms. Bare had drafted the parenting plan, when in fact Mr. Shervey had done so, and that Ms. Bare had a substance abuse and anger problem.” (CP 138-139) They told the court that Ms. Bare had issues with Child Protective Services when in fact the investigation against her based on an anonymous referral came back “unfounded”. (CP 189-191) In addition, Ms. Bare had provided Drug Screenings which showed negative for any drug use. (CP 174-177, 180-181)

The judge pro tem completely ignored the fact that Mr. Shervey had three different no contact orders over the past years with Ms. Bare and one of them due to the fact he violated the 2006 Protection Order and as a result had two warrants out for his arrest. Mr. Shervey is the one who had the long arrest record involving domestic violence, forgery and drug use and had just recently completed the Domestic Violence treatment after six years and that the children resided in Kittitas. (CP 92, 136-141, 142-144, 213-220, 231-236) Ms. Bare was ignored and her side of the story was not taken into consideration. Instead she was belittled and berated by Mr. Shervey’s attorney in a public forum where there was no foundation nor evidence supporting any of the false allegations against her. (CP 136-141, 231-236) At this point, there were now competing orders in both King

and Kittitas Counties. The Order of Protection in Kittitas County and the Temporary Parenting Plan in King County. (CP 60-64, CP 82-129)

On January 27, 2012, Mr. Shervey filed a motion in Kittitas County asking the court to set aside the Protection Order under CR60 - Court denied the motion and ordered that the Protection Order remain in place. (CP 257)

On February 2, 2012, Mr. Shervey filed an appeal regarding the decision of the court regarding the Order for Protection in Kittitas County; case number 306461. (CP 258-265)

The following is a timeline of the history of the case.

Table 1-1 Procedural History Timeline

9/26/11 Mr. Shervey Filed Motion for Order of Protection; case no. 99-5-02112-7 KNT (CP 4, 136-141)

10/10/11 Motion for Order of Protection; dismissed by King County Superior Court; case no. 99-5-02112-7 KNT (CP 136-141)

10/18/11 Mrs. Bare files a Motion for Protection Order in Kittitas County; case no.11-2-00444-1; Court issues a Temporary Order of Protection (CP 1-49)

10/31/2011 Kittitas County Superior Court held a hearing regarding Temporary Protection Order; Allows Service by Certified Mail (CP 58); Court issues a Temporary Order of Protection (CP 56)

10/28/11 Mrs. Bare Files Petition/Summons/PP in Kittitas County; case no.11-3-00172-1 (CP 221-230)

11/2/11 Mrs. Bare Serves Mr. Shervey by Certified Mail per permission of Kittitas Superior Court (CP 138)

11/7/11 Mr. Shervey Files Petition/Summons/PP in King Cty;
case no. 11-3-07462-9 KNT (CP 99-113)

11/12/11 Mrs. Bare served with Petition/Summons/PP;
case no. 11-3-07462-9 KNT
(CP 99-113)

11/14/11 Kittitas County Superior Court ordered the Order of Protection;
case no.11-2-00444-1 Mr. Shervey does not appear for the court hearing.
He is in King County taking care of outstanding warrants for his
arrest for the violation of an Order for Protection filed by
Ms. Bare in 2006. Mr. Shervey had two outstanding warrants when
he picked up the children and transported them to his home in
King County. (The next day he filed an Order for Protection which
was dismissed in King County)¹ (CP 1-49)

11/28/2011 Motion for Reconsideration by Mr. Shervey of Order of Protection
issues in Kittitas County (CP 66-79)

12/7/11 Motion for Reconsideration of the Order for Protection in Kittitas
County by Mr. Shervey is denied in Kittitas; case no. 11-2-00444-1 (CP 81)

12/22/11 Court hearing in King County for case no. 11-3-07462-9 KNT;
Ordered Mr. Shervey's parenting plan. (CP 99-113)

12/30/2011 Motion for CR 60 Order/Shorten Time by Mr. Shervey to set
aside the Order of Protection in Kittitas County (CP 82-129)

12/30/2012 Order to Show Cause re: Vacation of Default of DV Order;
Hearing set January 9, 2012 (CP 130-131)

¹ There were three Protection Orders filed against Mr. Shervey for the years, 2004, 2006 and 2007. He violated the 2006 Protection Order. There were two outstanding warrants for Mr. Shervey for failure to pay a DUI fine of \$5,050.00 and the other from Tukwila PD for violation of a no contact order. He went to All City Bail Bonds and posted bail. (CP 60-64, 192-199,202-212)

1/27/2012 Motion for CR 60 Order filed by Mr. Shervey in Kittitas County denied Court ordered that the Order of Protection issued November 14, 2011 remains in place. (CP 257)

2/2/2012 Mr. Shervey filed an appeal; case number 306461. The appeal is expedited and Appellant's brief is due by August 30, 2012. (CP 258-265)

In this case, Mrs. Bare not only filed a Petition/Summons and Parenting Plan under case number 11-3-00172-1 *prior* to the filing by Mr. Shervey in King County, but also filed and served the Motion for a Protection Order, case number 11-2-00444-1. (CP 1-49) The Petition/Summons and Parenting plan were filed by Ms. Bare on October 28, 2011. (CP 221-230) The documents were not served because Mr. Shervey avoided service. One of the main arguments regarding Mr. Shervey's Motion to Set Aside the Order of Protection under CR 60 was the question of jurisdiction. Ms. Bare argued that under Seattle Seahawks Inv. v. King County, 128 Wn.2d 915 (1996), personal service is not necessary to establish jurisdiction. **At every turn in this case, when Mr. Shervey does not get his way, he continued to forum shop for a court that would rule in his favor.**

III. ARGUMENT

- A. The court did not err by denying Mr. Shervey's CR 60 motion to vacate the default violence protection order.

“In deciding a motion to **vacate [a default judgment]**, the court addresses **two primary and two secondary factors** that must be shown by the moving party:

- (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party;
- (2) that the moving party’s failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect;
- (3) that the moving party acted with due diligence after notice of the default judgment; and
- (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated.” *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003); *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 832, 14 P.3d 837 (2000), *review denied*, 143 Wn.2d 1021 (2001); *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019, 3 P.3d 207 (1999), *review denied*, 142 Wn.2d 1004 (2000); *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)

The court must first consider that : (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party.

Mr. Shervey argues that he had faxed a continuance request to the court on the day of the hearing and that the court should have granted him a continuance based on the fact he was in another court hearing. Mr.

Shervey deliberately avoided service of the Order of Protection. He also knew well in advance of the date of the hearing. Mr. Shervey did not follow proper court procedures when asking for a continuance.

Mr. Shervey should not be excused from appearing in court and failing to respond in any way to the hearing due to the fact he is busy taking care of a criminal matter in another county which involved his failure to comply with probation requirements for a domestic violence incident against Ms. Bare. The court should note that these warrants were over six years old. Mr. Shervey could have taken care of these warrant years earlier but made a decision to not do so. He also had ample time to draft and collect declarations on his behalf and submit them to the court for consideration. He failed to do so. He also failed to notify Ms. Bare's attorney of the need for a continuance.

Instead, he chose to minimize his obligation to attend the hearing. It should also be noted that if indeed Mr. Shervey would have attended the hearing, he would more likely than not been arrested. It appears that Mr. Shervey's reasons for not appearing in Kittitas County Court had more to do with self-serving purposes of not being arrested for his failure to abide by probation obligations.

The court must also consider the second factor: (2) that the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect. Mr. Shervey deliberately did

not submit response declarations nor appeared in court. There was no mistake, inadvertence issues, surprise nor excusable neglect. He simply chose not to appear or answer respond in a timely manner per the court rules.

The court must also consider the third and fourth factor: (3) that the moving party acted with due diligence after notice of the default judgment; and

(4) that the opposing party will not suffer substantial hardship if the default judgment is vacated.” Mr. Shervey failed to follow the court processes after the judge ordered the Protection Order.

Mr. Shervey failed to follow the Local and Civil Rules in response to the motion before the court for the Order of Protection signed November 14, 2012. (CP 60-64) Mr. Shervey failed to appear before the court and didn't produce a motion for continuance in a timely manner. Under the Kittitas Local Rules, LCR 7, Motions Practice (2) “If no one appears in opposition to a duly noted motion, the court may grant the relief requested upon proper proof of notice. If no one appears for a motion, it will be stricken”. Kittitas County Superior Court LCR 7 (2). Here, Mr. Shervey didn't appear and the court properly ordered the Order of Protection in favor of Ms. Bare.

Under the Kittitas County Superior Court LCR(3) Mr. Shervey could have called Ms. Bare's attorney and arranged for a continuance in advance

of the court hearing. He did not do so. Under LCR (3), “Continuances of Motions. Counsel, by agreement, may continue any motion by executing a stipulation of continuance or by orally stipulating on the record in court to a continuance. Continuances shall not be granted by telephone. Upon agreement of counsel to continue or strike a hearing, counsel for the moving party shall advise the court of the agreement to continue or strike the hearing at the time of the agreement and no later than one day prior to the hearing.” Kittitas County Superior Court LCR (3)

These rules apply to Ex Parte Matters as well. Kittitas County Superior Court LCR (5)(a)

“(a) Scope. This rule applies to all temporary restraining orders, orders to show cause, and all other ex parte matters.” Kittitas County Superior Court LCR (5)(a)

Mr. Shervey also failed to follow the Kittitas Superior Court Family Law Actions rules regarding the Exparte Restraining Orders. Under SPR 94.04 (A), (B)(1) and (B)(2)

“A. Ex Parte Restraining Orders. Personal appearance of a party may be required upon the judge's request if a party requests an ex parte order be entered immediately restraining the other party from the family home.

B. Temporary Orders. The initial show cause hearing for temporary relief shall be heard on affidavits only unless, after appropriate motion, the court allows live testimony. The following shall apply to all contested

hearings in which temporary relief is sought:

(1) Responsive Affidavits. Responsive affidavits shall be served and filed no later than one business day prior to hearing pursuant to CR 6(d). To ensure that pleadings are available in the court file for timely review by the court, parties are encouraged to file pleadings before noon two days prior to the hearing.

(2) Exhibits and Worksheets. Financial exhibits and support worksheets shall be filed in the form as provided by these rules whenever financial matters are in issue.”

Mr. Shervey failed to file the request for a continuance in a timely manner as required by the court rules in Kittitas County and CR 6(d).

Furthermore, Kittitas County does not allow filings by facsimile. Located on the Kittitsa Clerk’s website, there is a Notice which reads, **“Notices The Kittitas County Clerk's Office does NOT accept fax filings or email filings. Hard copy is required.”**

(<http://www.co.kittitas.wa.us/clerk/>)

Under the Washington Superior Court Rules, CR 5, SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS, the rule states that papers may only be filed by facsimile if the county allows it.

“(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the

papers to be filed with him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted elsewhere in these or other rules of court, or if authorized by the clerk of the receiving court. The clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices.” (CR 5)

Mr. Shervey failed to follow the local rules and the civil rules with regards to the proper timely filing of his response pleadings and then faxed his request for a continuance which is not allowed by Kittitas County. He also failed to show up for the hearing and did not obtain agreement with Ms. Bare’s attorney for a continuance. Mr. Shervey also did not file the motion for reconsideration in a timely manner as required under CR 59(b) requires reconsideration motions to be filed within ten days of the decision for which reconsideration is being sought. Mr. Shervey filed the motion fourteen (14) days after entry of the order, therefore the motion for reconsideration was denied. CR 59(b) The court should note that Mr. Shervey had been served by the King County Sheriff the Order of Protection on Tuesday, November 22, 2011, yet he did not file the motion for reconsideration until Monday, November 28, 2011. (CP 81)

Mr. Shervey filed an appeal regarding the decision. However, the fourth factor is extremely problematic. There is a trial set for October 23,

2012 in King County with respect to the final parenting plan. It is unknown what the outcome of the trial. Both Mr. Shervey and Ms. Bare are arguing that they should have custody of the children. If the decision to vacate the Order of Protection is upheld by the appeals court, the result will be a temporary order of protection. Mr. Shervey is arguing that the trial court could have given him a chance to come to court and argue that case leaving the temporary order of protection in place. After the trial on October 23, 2012, the Superior Court of King County will make a determination as to the Final Parenting Plan for both children and this issue will be moot.

Vacating a final order under CR 60(b)(11) requires extraordinary circumstances, but such circumstance must relate to **irregularities extraneous to the action of the court** or questions concerning the regularity of the court's proceedings. *In re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681 (2003); *Hammack v. Hammack*, 114 Wn. App. 805, 810, 60 P.3d 663 (2003); *In re Marriage of Jennings*, 138 Wn.2d 612, 625, 980 P.2d 1248 (1999) In this case, the presiding judge was not presented with any irregularities where were extraneous to the action of the court. As a matter of fact, the court followed all local and civil rules and even where Mr. Shervey continued to ignore the civil rules, the court still ordered an Order to Show Cause re: Vacation of Default DV Order dated November 14, 2011. (CP 130-131)

Mr. Shervey simply chose to not appear at court nor submit declarations on his behalf. Instead, he did not appear, asked for a continuance the day of the hearing. However, he was able to successfully file a parentage action and residential schedule in King County. This was despite the fact that the children did not reside with him in King County and after he was rejected by the King County Court when he attempted to file an Order of Protection against Ms. Bare. (CP 136-141, 231-236)

Mr. Shervey argues that the court abused its discretion on the decision to disallow a continuance. (App. brief pg 8) That the decision was based on “untenable grounds”. (App. brief, page 8) It is disingenuous of Mr. Shervey to now argue that he did not have a chance to argue his case when in fact the Kittitas Superior Court did indeed sign the Order to Show Cause. (CP 130-131).

Mr. Shervey cites to the case of *Bowcut v Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999) as case law supporting the fact that the court’s decision to enter a default protection order was based on untenable grounds or reasons as provided. “Indeed, the court refused to exercise its discretion. Discretion unexercised is discretion abused.” (P brief page 8) Mr. Shervey is citing to a case which involved a homeowner who sought to enjoin a nonjudicial foreclosure pending resolution of their criminal conspiracy civil suit seeking damages from the mortgagee, purchaser, and others for engaging in an equity-skimming scheme. The

Superior Court for Spokane County, No. 97-2-02584-7, Harold D. Clarke, J., on June 5, 1997, granted a preliminary injunction conditioned on the homeowners' posting of a bond pursuant to the Deeds of Trust Act (RCW 61.24.130(1)).

On August 13, 1997, Salvatore F. Cozza, J., awarded the mortgagee attorney fees and interest for resisting a temporary restraining order that had previously been issued by a court commissioner. The Court of Appeals held that private plaintiffs can obtain injunctive relief under the Criminal Profiteering Act (RCW 9A.82), that the trial court abused its discretion under the Criminal Profiteering Act by conditioning the injunctive relief on payment of a bond pursuant to the Deeds of Trust Act, and that the mortgagee was not entitled to attorney fees or interest for resisting a legally issued temporary restraining order, the court reverses the award of attorney fees and interest, reverses the order granting the preliminary injunction, and remands the case for a new hearing on the injunction pendente lite.

In this case, the Superior Court in Kittitas County ordered the Order of Protection because Mr. Shervey didn't show up for court on November 14, 2011. There is absolutely no comparison between the court entering an order conditioning injunctive relief on payment of a bond and that being reversed for an abuse of discretion under the Criminal Profiteering Act. The cases are distinguishable as Bowcutt involved potential violations of

the criminal profiteering act RCW 9A.82, which are not alleged here. The court in Bowcutt did not hold that the requirements of RCW 61.24.130 could be waived, but rather held that the deeds of trust act did not apply. The [trial] court granted the injunction pursuant to RCW 61.24.130, . . . [but] should have granted the injunction under RCW 9A.82").

It should also be noted that in order to vacate a final order, the petitioning party must demonstrate a “meritorious defense” (i.e. a substantial potential for prevailing on the merits) to justify requiring the parties to resume litigation. *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 976 P.2d 1240 (1999); *Flannagan v. Flannagan*, 42 Wn. App. 214, 224, 709 P.2d 1247 (1985); *Sollenberger v. Cranwell*. 26 Wn. App. 783, 614 P.2d 234 (1980); *Nisqually Mill Co. v. Taylor*, 1 Wash. T. 1 (1854)

Mr. Shervey argues that the Petition for Order of Protection is inadequate and does not

allege any act of domestic violence as defined in RCW 26.50.010(1). However, under RCW

RCW 26.50.030 Petition for an order for protection , the statute reads that

“There shall **exist** an action known as a petition for an order for protection in cases of domestic violence.

(1) A petition for relief shall allege the **existence** of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought...”

Mr. Bare wrote in her declaration the following: “On 9/25/2011, Jeremy took my girls and put a protection order on me. On 10/10/2011, the no-

contact order was denied and the girls were returned to me. I am afraid Jeremy will come to Ellensburg and take off with my girls.” (CP 1-49)

She further explained to the court the past incidences of domestic violence: “ Jeremy has many DV charges with me. He is currently going to court for violating a no-contact order. I have attached all police records involving Jeremy and I.” (CP 1-49) She goes on to describe that the children came back from his home with bruising on them and she provided a police report which described them. She also went on to describe that she was receiving constant calls from him where he was harassing her. She indicated that she was trying to work with him and he just wanted to fight and argue. (CP 1-49)

Ms. Bare did describe the existence of the issues and the conflict in the Petition for the Order of Protection. (CP1-49) Due to the extensive history of domestic violence between herself and Mr. Shervey, it was not a leap that Ms. Bare was afraid of him. She also described the fact that the children did come back from his home with bruising. (CP 1-49) Ms. Bare was clearly protecting herself and the children.

Ms. Bare further explained in the Petition: “I have been dealing with Jeremy and DV cases since 1000. I am tired of dealing with him and his family and just want a peaceful life for me and my children. Jeremy has 22 charges on his record, 3 are felonies and is currently going to court for

two more. All his charges are DV, drugs, DUI's and forgery. He is dangerous and needs help. Jeremy has taken class, but nothing is helping him." Ms. Bare clearly describes her fear of him in this paragraph. (CP 1-49) Mr. Shervey argues that the only outstanding case was the 2005 Tukwila case set for probation review on November 14, 2011. (App. Br. Pg XX) He fails to state that this was for his failure to meet his obligations regarding Domestic Violence Treatment for the crimes of domestic violence he had committed against Ms. Bare.

Mr. Shervey is arguing that the Domestic Violence petition does not contain sufficient basis for the order. Ms. Bare disagrees. In this situation, the court should look at the totality of the circumstances with regards to this issue. (App. Br pg 5)

Mr. Shervey relies on the 2010 case, Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010) arguing that "the case is instructive as to what quality and quantum of fear is necessary for issuance of a fixed period or permanent domestic violence protection order." (App. Br. Pg 10)

This case, however, can be distinguished in several ways from this case. In fact, there are factors and analysis in this case which actually are in favor of Ms. Bare. First, this case involved Ms. Freeman obtaining a "permanent" protection order against her husband, Mr. Freeman. The protection order was signed and filed with the court in 1998. Mr. Freeman

was reassigned in the military and never returned. In 2006, he moved the court to modify or terminate the permanent protection order. The appeals court ruled that the commissioner abused her discretion when she denied Mr. Freeman's motion to terminate the order. *Freeman v Freeman*, 169 Wash.2d 664, 239 P.3d 557 (2010)

There were only two incidents underlying the permanent protection order. The first was where he pushed Ms. Freeman's 16 year old into her bedroom. He claimed he was "escorting her". He admitted to physically forcing her down a hallway and through the bedroom. The second incident is where he opened his gun safe to show Ms. Freeman that he had not hidden her jewelry inside, after Ms. Freeman accused him of stealing it. She claimed that he inventoried his guns while telling her he was not going to harm her, acts she perceived as threats. When she told him she was afraid of the guns, he replied, "Fine, fine you're scared." *Freeman v Freeman*, 169 Wash.2d 664, 239 P.3d 557 (2010)

The court ruled that Mr. Freeman would bear the burden of proving by a preponderance of the evidence that he will not commit future acts of domestic violence, the facts must also support a finding that Ms. Freeman's current fear of imminent harm was reasonable. The court was clear that Ms. Freeman should not have been compelled to prove her case

again by overcoming a presumption. Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

The court indicated that to permit the permanent protection order to continue forever would hold Mr. Freeman hostage to his decade-old imprudence. There was scant evidence that he would subject his former wife and her children to future domestic violence. Through his testimony, deeds, relocation, career ambitions and now 10-year compliance with the permanent protection order, he had met his burden to prove that he will more likely than not refrain from future acts of domestic violence against Ms. Freeman or her children. Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

The situation between Mr. Shervey and Ms. Bare is significantly different and can be distinguished in a number of ways. First, the protection order that was ordered by the Kittitas Superior Court is not a permanent protection order, it is for one year. Mr. Shervey is not being held hostage by it as the court depicted in Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010).

Mr. Shervey has a long history of domestic violence against Ms. Bare. (CP 1-265) There are three protection orders and numerous police incident reports during and after their relationship involving Mr. Shervey's domestic violence behavior. (CP 1-49) There is also a police report regarding bruising of the children while in Mr. Shervey's care. (CP 1-49)

He violated the protection order and only recently took care of the outstanding warrant. When Mr. Shervey did not get his way, he used severe and extreme physical and emotional abuse against Ms. Bare for years. The fact is Ms. Bare has very valid reasons for fearing Ms. Shervey. (CP 1-49, 136-141, 231-236)

In the case of *Freeman v Freeman*, 169 Wash.2d 664, 239 P.3d 557 (2010), Mr. Freeman left to do a military assignment and was gone from 1998 until 2006. He was completely absent from Ms. Freeman and her daughters lives. There was no history of domestic violence except for the two incidents with Ms. Freeman's daughter. This is in contrast to the situation here where Ms. Bare, indicates in the Petition that he has constantly harassed her. She is tired of dealing with this. It has been going on since 1999.

Under *Freeman*, the court decided that the likelihood that Mr. Freeman would commit future acts of domestic violence were low on those facts. This is not the case in this situation. The record is clear that Mr. Shervey has a long history of domestic violence and lengthy criminal record. He has undergone domestic treatment at least two times and has been ordered to do domestic violence treatment again. It is unclear if he has completed any of the courses. Mr. Shervey continues to harass Ms. Bare. There should be no doubt that Ms. Bare is reasonable in her fear of imminent harm by Mr. Shervey. In the case of *Freeman*, this case had a

completely different set of circumstances which is in no way analogous to the situation between Mr. Shervey and Ms. Bare, with the exception that Mr. Shervey would like the order vacated.

Mr. Shervey is arguing that the court abused its discretion by ordering the Order of Protection by default. The Freeman court's analysis provides guidance as to what constitutes an abuse of discretion by the court.

In Freeman, the court needed to decide whether the commissioner abused her discretion when refusing to terminate the permanent protection order. Whether to grant, modify, or terminate a protection order was a matter of judicial discretion. The statute authorizing permanent protection orders provides, “[I]f ... the court found that the respondent was likely to resume acts of domestic violence[,] the court could either grant relief for a fixed period or enter a permanent order of protection.” RCW 26.50.060(2). Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

The court was instructive with regards to the matter of discretion by the trial court judge. “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel.

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

”Washington's Domestic Violence Prevention Act (DVPA) defines domestic violence as “[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members” RCW 26.50.010(1). The legislature has articulated a clear public policy to protect domestic violence victims. RCW 26.50; see also RCW 10.99 (domestic violence official response act); RCW 10.99.010 The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.”). Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

“[I]f ... the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.” Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

The court further articulated that whether the father, (Rob) in Freeman proved an unlikelihood of committing future acts of domestic violence and whether the facts support a current reasonable fear of

imminent harm. “While Rob (father) bears the burden of proving by a preponderance of the evidence that he will not commit future acts of domestic violence, the facts must also support a finding that Robin's (wife) current fear of imminent harm is reasonable. We can determine if the commissioner abused her discretion when denying a request to modify a permanent protection order only if the facts of the matter are placed before us on review. This should not be confused with compelling Robin to prove her case again by overcoming a presumption.” *Freeman v Freeman*, 169 Wash.2d 664, 239 P.3d 557 (2010)

Again, RCW 26.50.010(1) defines domestic violence as “[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.” The facts supporting a protection order must reasonably relate to physical harm, bodily injury, assault, or the fear of imminent harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be in the present. This notion dovetails with the legislature's authorization for courts to modify existing permanent protection orders. See RCW 26.50.130. While permanent protection orders are contemplated to be permanent when the facts require it, the legislature's grant of modification clearly authorizes the court to rescind some if the petitioner meets his or her burden.

Under Spence, the court ruled that if the victims needed to show a reasonable present likelihood of violence, in addition to past abuse. Spence, 103 Wn. App. at 333; Barber, 136 Wn. App. at 513, 516. As in this case, the victims had ongoing relationships with their abusers. In Spence the couple's relationship continued after a divorce as they bickered over child custody. “[T]he continuing relationship of the parties, who still struggled over custody issues, presented ongoing opportunities for conflict.” Spence, 103 Wn. App. at 333. In Barber the couple also interacted after their divorce. Barber v Barber, 136 Wn. App. at 513. Under Freeman, there was little likelihood that domestic violence would recur given the time of several years that the couple were apart.

The court in Freeman found that to permit the **permanent protection order** to continue forever would hold Rob (husband) hostage to his decade-old imprudence. There was scant evidence that Rob would subject his former wife and her children to future domestic violence. “ Through his testimony, deeds, relocation, career ambitions, and now 10-year compliance with the permanent protection order, Rob has met his burden to prove that he will more likely than not refrain from future acts of domestic violence against Robin or her children.” Freeman v Freeman, 169 Wash.2d 664, 239 P.3d 557 (2010)

Again, the Freeman case is completely distinguishable from this case. Mr. Shervey and Ms. Bare have had an ongoing custody dispute

over the years. Ms. Shervey said in the Petition for the order of protection that there was a long history of domestic violence. (CP 1-49) She was afraid of him and provided several exhibits regarding the past history of domestic violence. (CP 1-49)

The court must “provide a sensible framework for analyzing whether the preponderance of the evidence suggests a restrained party will commit a future act of domestic violence.” *Freeman v Freeman*, 169 Wash.2d 673, 239 P.3d 557 (2010)

The court also considered factors from a New Jersey court based on the case, *Carfagno v. Carfagno*, 288 N.J. Super. 424, 435, 672 A.2d 751 (1995). The court considered the so-called Carfagno factors when determining whether or not the commissioners decision was in error. “Namely, (factor 2) Robin's fear of Rob is objectively unreasonable;⁵ (factor 3) they have had no contact for 10 years; (factor 4) Rob has not violated the permanent protection order, so no contempt orders exist; (factor 5) Rob has no known problems with alcohol or drugs; (factor 6) Rob has no criminal record and has committed no other violent acts; (factor 8) Rob's health has suffered as a result of his war injury and amputation; (factor 10) the record does not reflect any other protection orders against Rob; and (factor 11) other relevant considerations include Rob's career ambitions.” As cited in *Freeman v Freeman*, 169 Wash.2d 664, 239 P.3d 557 (2010)

If these factors were applied to this case, Ms. Bare's fear is reasonable. She has had numerous instances of physical abuse over the years. Mr. Shervey also has a history of violating no contact orders. He has had issues with drugs and alcohol and has an extensive criminal record. He has committed violent acts. The record reflects at least three no contact orders were in effect protecting Ms. Bare and children from Mr. Shervey over the past few years. Furthermore, by the mere fact that Ms. Bare even applied for an Order of Protection proves that she did have fear of imminent harm by Mr. Shervey.

The likelihood that Rob will commit future acts of domestic violence on these facts is high given his history of domestic violence. Hand in hand with that determination, the facts do suggest that Ms. Bare's fear of Mr. Shervey is based on a reasonable threat of imminent harm. Accordingly, the judge did not abuse his discretion; he based his order of protection and denial of the CR 60 Motion to dismiss the protection order on tenable grounds. State ex rel. Carroll, 79 Wn.2d at 26.

In this situation, the Honorable Judge Sparks made a decision any reasonable person would conclude. "A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take." In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)). " The court applied the correct legal standard and relied on supported facts albeit the severe history of domestic violence and criminal

record of Mr. Shervey. "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The court should take judicial notice that Mrs. Bare has also filed the following documents supplementing the evidence with regards to the long history of domestic violence and proof of the false allegations of drug use against her as alleged by Mr. Shervey.

- 1) An Order for Protection in 2004. The court should note that Mr. Shervey violated this court order and was unable to attend the court hearing due to the fact he was in King County dealing with the outstanding warrant; (CP 202-212)
- 2) An Order for Protection in 2007 against Mr. Shervey; (CP 192-199)
- 3) Department of Social and Health Services- Showing an unfounded allegation against Mrs. Bare dated November 29, 2011; filed 1/25/2012; 9 (CP 189-191)
- 4) Order denying Motion for Reconsideration of Order for Protection filed December 7, 2011 in Kittitas County; (CP 200-201)
- 5) Criminal History of Mr. Shervey based on WATCH report; filed 1/25/2012; (CP 213-220)
- 6) Supplemental Declaration by Stephine Bare; (CP 231-236)
- 7) Lower Kittitas County District Court showing dismissal of Assault 4 as to allegations against Ms. Bare on 9/24/2011; (CP 184-185)

- 8) Everest College Letter Regarding Ms. Bare's college program; (CP 182-183)
- 9) Response to Petitioner for Order for Protection by Mrs. Bare; (This is the response she wrote where Mr. Shervey unsuccessfully attempted to obtain a protection order against her); Order dismissing the motion; (CP 186-188)
- 10) Picture taken of Mr. Shervey Using a Hooka Pipe (this was printed by Mrs. Bare from Mr. Shervey's facebook account in 2010); (CP 178-179)
- 11) ADDs Drug Screening dated 1/24/2012; Results negative for drugs as to Mrs. Bare; (CP 174-177)
- 12) ADDs Drug Screening dated 9/28/2011; Results negative for drugs as to Mrs. Bare; (CP 180-181)
- 13) Final Parenting Plan filed 12/14/1999 as to Serina Ann Shervey; Cause number 99-5-02112-7 KNT (CP 159-171)
- 14) Police report dated 9/26/2011; Showing that Mr. Shervey had two outstanding warrants when he picked up the children. (The next day he filed an Order for Protection which was dismissed in King County) (CP 172-173)
- 15) Residential Schedule filed by Ms. Bare in Kittitas County; (CP 221-230)
- 16) Affidavit of Service by Ms. Bare regarding service of the Motion for Protection Order; (CP 80)
- 17) Affidavits of Service of Process by Sheriff's office (CP 80);
- 18) Declaration by Diane Passineeti in support of Ms. Bare testifying to acts of domestic violence by Mr. Shervey (CP 242-245)

- 19) Declaration by Brandi Passinetti in support of Ms. Bare testifying to acts of domestic violence by Mr. Shervey (CP 148-151)
- 20) Declaration by Stephine Bare (CP 136-141)

III. CONCLUSION

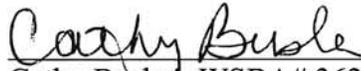
Furthermore, Mr. Shervey has not presented any evidence that he would prevail on the merits even if the court had allowed him the continuance on November 14, 2011. Mr. Shervey argues that the petition itself was not sufficient. (App. Br. Pg 6) However, Mr. Shervey has a long history of documented domestic violence, harassment and the use of intimidation against Ms. Bare. (CP 1-265) It would be difficult to imagine that Mr. Shervey could offer any possible defense on his behalf without perjuring himself as to the fact he threatened to take the children and did in fact continue to forum shop in the court system. The fact is that he demonstrated that he would fact take the children without permission back in September. Mr. Shervey gave no thought to the fact that he was removing the children from their home, their community, their family and their school. He gave no thought to the fact that this could be highly detrimental to the children.

Mr. Shervey argues that he was acting in compliance with the King County court order where he was granted custody of the children. Here, Mr. Shervey was well aware that there was an Order of Protection in

Kittitas County. Yet, he went ahead and filed an action in King County in attempt to forum shop. The Superior Court in Kittitas County was fully aware of Mr. Shervey's actions and the parentage case in King County, however denied his request for Reconsideration and the Motion to Vacate the Protection Order.

Ms. Bare respectfully asks the court to uphold the denial of the CR60 motion to vacate the default domestic violence protection order and grant attorney's fees due to the fact that this claim is frivolous and the outcome will have no effect on the Final Parenting Plan which will be decided by the Superior Court in King County, trial is set for October 23, 2012.

Presented by:



Cathy Busha, WSBA# 36297
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on October 15, 2012, I served a copy of the Responsive Brief of Respondent by USPS certified mail, postage prepaid, on Kenneth H. Kato, Attorney at Law 1020 N. Washington Street, Spokane, WA 99201.



Cathy Busha, WSBA# 36297