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No. 63244-2-I

Court of Appeals, Division I
of the State of Washington

In Re the Marriage of:

Janie L. Block, Respondent

and

Dennis L. Block, Appellant

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF STRICT REPLY

The issue of the parties children were not raised for the first time on Appeal, they were raised almost immediately by Dennis' previous attorney, Mr. Damon Canfield. CP 26-34. The 5 year old son's Down's Syndrome issue was also previously raised. CP 46.

The bulk of the Responsive Brief by Janie asserts two things: (1) that Dennis has this "horrific" anger problem; and, (2) that Dennis has "economically controlled" his ex-wife, by not selling the family home.

First, Dennis asserts that the one-time incident that led to him leaving the family home on December 21, 2007, where he claims Janie had been the aggressor, was used throughout this litigation by Janie to hide her own unclean hands and bad acts. Janie was not harmed that evening and that she has never made any claims that there were other incidences of domestic violence. Dennis' record also demonstrates that there has been no history of domestic violence; that he complied with all court orders, and there has been no subsequent acts of domestic violence. In fact, at one subsequent exchange, Dennis was forced to call the police on Janie for her aggressive behavior towards him. CP 39. But, Janie has used this one time incident at every juncture throughout this litigation, including her Response Brief. It is a main theme of their argument and she makes numerous inflammatory statements not supported by the record.

Secondly, Dennis did not come into possession of the home until two months after mediation and just two months prior to the ruling on March 3, 2009. The record is devoid of any evidence of Dennis failing to comply with orders or attempting to economically control his ex-wife.

The separation of the parents in this case was based on an alleged act of domestic violence (to which the Husband was not charged, but he completed recommended program related to anger issues). It is undisputed that the wife, under temporary orders, was to remain in the family home. Temporary orders were entered respectively on February 22, 2008 and corrected on March 12, 2008 CP 198-201, 202-214, 215-223. Under these orders, Dennis was to pay half of his monthly net income as \$1,476.00 for child support (CP 197), and a combined spousal support and payment of the mortgage on the family home for a total amount of \$1,424.00 a month. (CP 196 -97). Total monthly support amount of \$2,900.00. He had a disproportional amount of child support obligation at 99.6 percent. CP 211. The temporary orders also made each party responsible for their own debts and Janie was specifically responsible for her debts incurred on a BECU credit card and all debts since separation, including her own attorney fees. CP 197, 201. Janie was allowed to use the card up to the amount of \$2,500 for vocational career counseling if the interest rate was lower than the parties' line of credit. CP 197.

In this case, trial was set for November 6, 2008. Mediation occurred on October 22, 2008. *Not one issue was resolved or settled prior to mediation since Temporary orders 9 months earlier.* The agreement was received on October 14, 2008, just days before the mediation.

At mediation, which lasted three and a half (3 & 1/2) hours, (CP 27), Dennis alleges that he relied heavily on his attorney as well as statements made throughout by the mediator telling him that he would “not receive anything better at trial.” Almost as soon as the alleged CR 2(a) agreement was signed problems arose both regarding the agreement itself and in the implementation of the alleged agreement.

On January 3, 2009, Dennis moved back into the family home on Camano Island. On January 26, 2009, after not being told where his children had been moved to, Dennis filed a motion for Contempt on relocation/ removal of spousal support and allocation of tax exemption. Janie’s attorney did not respond and Janie did not appear as required by law for the hearing on February 9, 2009 and instead her attorney presented to the court that day a hundred plus page motion to enforce the alleged CR 2(a) agreement. This was a surprise and was procedurally improper. *Yet, instead of dealing with the issues before the court that day, Commissioner Gaer allowed Ms First to argue her motion to supersede the Contempt*

hearing, although the issue of relocation had nothing to do with the CR2(a) agreement because of the temporary orders.

Ms First's motion on February 9, 2009 was improper procedurally and had to be re-set to March 3, 2009. At the same time Ms First then presented her own motion on contempt against Mr. Block for non-payment of spousal support which was withdrawn later as it was proven he had been current and had over paid on Child Support. *By the time the hearing on Dennis' Contempt could be heard regarding Janie's actions of moving the children in violation of relocation laws the issue was moot.*

On March 3, 2009, the Judge Ellen Fair *upheld the CR 2 (a) agreement and sent all issues back to the arbitrator including new issues raised by the Respondent for the first time at this hearing.* (CP 12-14). No final pleadings were either offered or entered by Janie that day. (CP 45).

II. SUMMARY OF ARGUMENT

In this case, the alleged Civil Rule 2 (a) agreement led the parties into further disputes, was invalid on its face, included terms and conditions to which were either not discussed or were not revealed to Dennis and Janie did not mediate in good faith by hiding vital information.

Furthermore, the court erred in law when it enforced the alleged Civil Rule 2 (a) agreement between the parties but did not apply the Summary Judgment standard as required by case law of this State in the

following manner: The court did not view the disputes in the most favorable light to the non-movant; the movant failed to meet their burden in proving there were no disputes of material facts, or the Court ignored or disregarded the disputes over material facts, and the Court did not find that there be but one outcome that reasonable minds could conclude.

Finally, the Responsive Brief submitted by Janie is non-responsive and filled with statements not supported by the record.

III. ARGUMENT

Dennis strongly believes that he was denied a right to fairly and honestly mediate the issues in only 3 ½ hours and that the subsequent treatment of the alleged CR2(a) agreement demonstrates this fact.

The record demonstrates that almost immediately there were problems on both sides. Since both Mediation and Arbitration are strictly governed by settlement laws and or is sealed Dennis is forced to use only what was put into the record. The record is silent the many months prior to mediation but there was a great deal activity prior to the hearing on March 3, 2009. It should be of great weight, that although Judge Fair ordered that the CR2(a) was enforceable on March 3, 2009, there were no final pleadings entered and more importantly, no final pleadings offered. Interestingly, Janie offered up instead new issues that she said should be ruled upon which were sent back to the Arbitrator for ruling.

A. The Standard of Review is De Novo.

Janie's Response is silent to the issue of the Standard of Review, but to say that the court did not "abuse their discretion". However, "[t]he standard of review is de novo because the motion to enforce a settlement agreement is like a summary judgment motion." *Lavinge v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). The *Lavinge*, court held that:

The standard of review is de novo because the motion to enforce a settlement agreement is like a summary judgment motion. "When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a summary judgment." Citing, *Brinkerhoff v. Campbell*, 99 Wash. App. 692, 696, 994 P.2nd 911 (2000).

Additionally, the application of a court rule to particular facts is a question of law, reviewable de novo. *State v. Tatum*, 74 Wash. App. 81, 86, 871 P.2nd 1123 (1994). *Lavinge* at 16.

If, however, a court enforces a CR 2(a) agreement when there are disputed facts, without first holding an evidentiary hearing to resolve any such disputed facts, it may also have abused its discretion as well. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008), citing *Brinkerhoff* at 696.

B. The CR 2(a) agreement was not enforceable.

There are many reasons to not enforce this agreement.

1. The parties did not reach an agreement on all issues.

It has long been encouraged within our court system to settle disputes and CR 2 (a) agreements are encouraged. However, as the *Howard* Court held, “[t]he purpose of the cited rule and statute is to avoid such disputes and to give certainty and finality to settlements and compromises. . . .” *Howard v. DiMaggio*, 70 Wn. App.734, 738, 855 P.2d 335 (1993). It is clear that the Court’s desire for mediation and CR 2(a) agreements is to resolve disputes, not create more disputes. In the case at hand, the mediation and the CR 2 (a) agreement only created more difficulties and did not finalize all issues although the CR 2 (a) states that it was the “full and final settlement” of the parties as well as this “CR2A Agreement and attached final documents are intended to have **immediate force and effect.**” CP 63.

At the mediation, the parties signed and initialed the CR 2 (a) agreement, as well as the attached documents: a final parenting plan, child support worksheets, a spreadsheet of debts prepared by the mediator and a list of items prepared by Dennis who believed the family home would remain in the wife’s possession. CP 38, 75.

Janie asserts that “all issues” were settled at mediation and cites to the property settlement sheet and the list of items to be given to each party as proof. It is undisputed that Dennis submitted the proposed list of

personal property items but clearly the fact that Janie was to be given all of the built in appliances attached to the family home demonstrates that at all times Dennis believed that Janie had wanted to stay in the family home, even pending sale. CP 75. The Arbitrator had to make a ruling regarding these appliances subsequent to mediation. CP 132.

Finally, Dennis asserts that not all issues were resolved as they were only given a spreadsheet at mediation which outlined only balances for debts, and only later discovered that Janie charged more than the \$2,500 (CP 38, 91) for Career Services and charged her attorney fees on the BECU credit card, in violation of the temporary orders.

Although many things were hidden from Dennis at Mediation by Janie there were also things that were disclosed but not fully explained. For example, upon advice from his attorney, Dennis signed off on the Parenting Plan and the Child Support worksheets yet, even his own attorney at the time admits there were errors and omissions not discovered at mediation. Even Janie overlooked items. Dennis' attorney immediately sent correspondence to Janie's attorney and mediator expressing the errors. Dennis has objected to the errors and omissions from the beginning and Janie has held fast to "Dennis agreed." CP 233-34.

To make matters more difficult, Dennis was told things at mediation which were never implemented in the final documents such as

the fact that Janie's sole decision making right would be dependent upon a requirement of the wife to give him adequate notice to object (CP 32), yet, there was nothing in the parenting plan that gave him this notice. CP 81-82. Dennis also understood that the limitations in the parenting plan cited in section 2.1 (CP 77) would be lifted, since at the time of mediation he had almost fully complied with all recommendations of the courts.

Based upon the case law and statutes of this state, parenting issues are not arbitrated. Mediation is encouraged but not arbitration. (CP 193, Ms First's "Initial Statement of Arbitrability" and note, there was to be no arbitration). *It is interesting to note that the parenting plan allegedly agreed to by the parties in case (submitted by Ms First) does not have a single alteration made to it. Not a single provision, term or word of the parenting plan was changed.* Yet this parenting plan has caused the most difficulties. CP 79-84.

The Parenting Plan adopted at mediation not only keeps the basis for limitations in place and orders no dispute resolution process but court action, but this very same parenting plan is a product of a form of dispute resolution, i.e., the mediation and all of the disputes were sent not to the courts, but to the arbitrator; a *disfavored form of settling parenting disputes*. Did these parties really intend to give up all rights to court intervention by virtue of this CR 2(a) agreement?

It should also be noted, that in this Parenting Plan, in spite of the alleged limitations against the father the time the father spends with the children is far from being limited and in section 3.10, the section which states how a parent's time is limited because of the foregoing restrictions, (CP 79-80) *the limitations set forth are for both parents!* Furthermore, these types of limitations cited in Sec. 3.10 are usual and customary and typically found in section six entitled "Other Provisions." CP 82-83.

Another example of unresolved issues in this case which led to disputes and to confusion was the fact that there was no explanation to Mr. Block of what "First Dollar" meant and how this would affect his payment for extra ordinary medical expenses, despite the parties having a special needs child who would more likely than not be dependent upon his parents for support for the rest of his life. CP 70. However, the legislature has changed this concern and therefore the issue is moot.

Finally, although the wife also agreed to this Parenting Plan she had difficulties with it as well. Almost immediately she sought to have the exchange place changed. CP 119.

2. The parties in this case were not told that the mediation would lead to automatic binding arbitration.

Binding arbitration has a significantly different legal impact and ramifications on a case than mediation. With mediation, you do not give

up your right to a trial as you do with binding arbitration. To understand such differences a person needs to be counseled as to the significant differences each legal process offers in order to accept or reject. Yet in this case, neither the attorney for Dennis nor the mediator spend any time explaining binding arbitration to him. If the parties had gone to trial on the very same issues, at best, it would have been at least a three day trial in this attorney's estimation of the disputes just since the mediation occurred. It is of particular importance that the mediation agreement is silent as to binding arbitration. See attached copy of mediation agreement the Appellant was given in this case. (RCW 5.60.070 (1)(b) allows for this agreement to be attached as it would be normal discovery and was not used specifically for the issues addressed at mediation). The fact that the CR 2(a) agreement, purports to be "a full and final settlement" (CP 63) but that mediation only took three and a half (3 ½) hours, and the fact that the mediation agreement is silent as to binding arbitration, should leave a reasonable person to believe that binding arbitration was not fully discussed in a salient and cogent manner., Hence all the subsequent rulings of the Arbitrator in this case, (CP 106-107, 131-33, 231-82) as well as yet another Award by Arbitrator on August 20, 2009.

3. The Agreements that were made immediately caused further disputes or did not fully resolve the disputes between the parties.

In this case, there is no dispute between the parties that in fact, on October 22, 2008, both parties sat down with a mediator and their respective attorneys on the eve of trial and attempted to hammer out an agreement. As noted in his declaration, Mr. Canfield, Dennis' attorney, at mediation and for a short time thereafter, immediately contacted both the mediator and Janie's attorney regarding the error in the Child Support Worksheets and other issues (CP 28-30).

The parenting plan allegedly agreed to also caused immediate problems. On January 5, 2009, Mr. Canfield set forth many of the concerns in a letter and numerous emails back and forth between the attorneys and the mediator. CP 114-16. These problems continue.

On January 13, 2009, Ms First, sent a letter to the mediator about some of these problems as well. CP 117-20. As late as January 23, 2009 in an email at 12:35 PM the mediator/arbitrator states to both attorneys that "I also heard from Cynthia First that she has an outstanding issue." (CP 140). The difficulties with this agreement were, and are, ongoing.

Even after the Court order of March 3, 2009, the difficulties continued which has lead to numerous written arguments and replies to the arbitrator as well quite a few court hearings and arguments over the entry

over final pleadings that were subsequently entered and which have lead to a second appeal which is now linked with this appeal (64441-6-I).

4. The Petitioner/Wife did not come to mediation in good faith and with unclean hands, thereby deceiving the Appellant regarding what his actual issues were that needed to be settled.

Janie argues that the bills demonstrates her ability to be frugal. This is not true because when she did not order any more propane after July, 2008 she would have left the home without hot water and heat. Dennis submitted a record of the prior year comparing a family of 5 vs a family of 4 need for propane. It is clear from the lack of propane use that the house was abandoned in and about approximately July 11, 2008. Dennis further showed and the cable was shut off in and around September, 2008 and the electrical and water use for four people was substantially low. (CP 159-173 and CP 37-38). Furthermore, by October Janie and the children would have needed some heat and propane was not re-ordered until January, 2009 when Dennis moved back into the home. Finally, Dennis proved on March 3, 2009, that Janie couldn't have gotten Propane from any other source as they had a contract with only one supplier and no one else would have supplied the propane.

More importantly, Janie hid the fact that she had moved the children prior to mediation. This issue was litigated unfortunately after Dennis learned of this in January, 2009. The Relocation laws require

notice when moving children from their school district. Even when Dennis learned he was getting the home, he always thought Janie would be staying on Camano Island to keep the children in their same schools. However, by the time it was before a court, the matter became moot.

5. The CR 2(a) agreement is contradictory on its face and by its own terms should be considered null and void.

By its terms, CR 2A applies only to agreements that satisfy two elements. First, the agreement, hereafter called a settlement agreement, must be made by parties or attorneys “in respect to the proceedings in a cause”. Second, “the purport” of the agreement must be disputed. *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 122, 605 P.2d 348, *affirmed*, 94 Wn.2d 298, 616 P.2d 1223 (1980); see *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954); *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 834 P.2d 662 (1992), *review denied*, 120 Wn.2d 1027, 847 P.2d 480 (1993).

In re the Marriage of Ferree, 71 Wn. App. 35 at 39, 856 P. 2d 706 (1993).

In the case at hand, not all the disputes were handled at mediation and in fact, the CR 2 (a) agreement clearly states on the one hand it was the full and final settlement of all issues, (CP 63) yet, the same alleged agreement contained a binding arbitration clause (CP 70) which by its clear and unequivocal terms allowed further disputes. This latter provision is in direct opposition of the former provision and should demonstrate alone that there was not a full and final settlement of all issues in this case.

This alleged agreement also states that “. . . the provisions in the CR-2A Settlement Agreement will take effect as of the date of signing.” (CP 65). It also states that “[t]he CR2A agreement and attached final documents are intended to have **immediate force and effect.**” (CP 63). In conjunction, there is yet another provision that holds that if this CR 2(a) agreement is not complied with, “*within thirty (30) days of execution of this agreement*” (CP 71) that either party would have the right to assess against the other all remedies, including court remedies and the right to seek legal costs and reasonable attorney fees.

However, months later, the CR 2(a) agreement had not been fully enforced and complied with by either party. The Appellant asserts that the CR 2(a) agreement was not a full and final settlement of all issues. There was only one final *complete* document allegedly agreed to at mediation (the parenting plan) (CP 79-84). There was no child support order proposed at the mediation, only work sheets and such worksheets were not complete and were objected to immediately thereafter. There was no full and final settlement of all issues as the declaration by Attorney Canfield in opposition to enforce the CR 2(a) (CP 41) which states that not only were there immediate difficulties with the CR 2(a) agreement, but also that he and his client were given a stack of final documents by Janie’s attorney at

the end of mediation with only a few moments to review, discovered “the edits were too substantial” to proceed at that time (CP 28).

Attorney Canfield, on the day of mediation, quickly reviewed the documents and after telling both the mediator and Ms First that there were problems with the documents and that there was not enough time to fully review them. (CP 28). After reviewing such documents submitted by Ms First, it became clear that there were provisions not addressed or not fully addressed by Attorney Canfield in the 3½ hours. At first, Mr. Canfield attempted to resolve the issues but over time it became clear that many of the issues were either ignored or not resolvable by settlement discussions and through the alleged CR 2 (a) agreement. CP 28-29.

In addition, Mr. Canfield also had filed a previous objection to the entry of final pleadings by Ms First citing the same. CP 175.

These actions alone should demonstrate that the parties did not “reach a full and final agreement to all issues in dispute” as the *Howard* court would demand as follows:

Even though the evidence establishes the attorneys agreed on the amount of the settlement, it also establishes they did not reach an agreement on the terms of the hold harmless and release documents. Therefore, noncompliance with CR 2A and RCW 2.44.010 left the trial court without authority to enforce the alleged settlement agreement. *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 834 P.2d 662 (1992).

Howard, 70 Wn. App. 734 at 739.

Even at entry of final pleadings on July 20, 2009, Janie still continued to submit alleged final pleadings which manipulates and contradicts both the mediation agreement and the three rulings of the arbitrator. Clearly, although Janie asserts that such CR 2 (a) agreement should be enforced she was as unhappy with the results as Dennis.

C. The Court did not follow the Laws and the Rules when it enforced the alleged CR 2(a) agreement between the Parties.

The court did not follow the applicable rules and law when it ruled that the CR 2(a) agreement of October 22, 2009 was enforceable.

1. Civil Rule 2 (a) Motions to Enforce.

When seeking an Order to Enforce a CR 2(a) agreement, which is governed by Civil Rule 56 (c) and (e) for Summary Judgments, it is the burden of the Moving party to first show that there is no genuine dispute as to either the existence of the agreement and/or to the material terms of the agreement. The Court in, *Ferree* held that “[t]he burden is on the moving party to prove there is no genuine dispute regarding the existence and material terms of a settlement agreement. *See Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985) (in summary judgment proceedings, burden is on moving party to show no genuine dispute). *In re the Marriage of Ferree* 71 Wn. App. 35 at 40.

The *Ferree* court was extensive in its analysis regarding the enforcement of CR 2(a) agreements. The *Ferree* court held that:

At least two criteria govern whether an agreement is disputed within the meaning of CR 2A. First, there must be a dispute over the existence or material terms of the agreement, as opposed to a dispute over its immaterial terms. On its face, CR 2A says that the “purport” of the agreement must be disputed. According to Black’s Law Dictionary, the “purport of something is its meaning, import, substantial meaning, substance, legal effect. . . .”

Second, the dispute must be a genuine one. The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action; indeed, the compromise of litigation is to be encouraged. *Eddleman v. McGhan*, 45 Wash.2d at 432, 275 P.2d 729; *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. at 179, 834 P.2d 662; *Snyder v. Tompkins*, 20 Wn. App. at 173, 579 P.2d 994. **Rather, the purpose of CR 2A is to insure that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one.**

In re the Marriage of Ferree, 7 Wn. App. at 40-41. Emphasis added.

In this case, the parties are not in dispute that they signed on October 22, 2008 what purported to be a CR 2(a) agreement. What Dennis does assert was that the agreement did not resolve the disputes and in fact only created more disputes between the parties and that the court on March 3, 2009 failed to apply the Summary Judgment Standards and if it had, it would have seen that the disputes were material disputes.

When the court is looking at enforcing a CR 2(a) agreement it is before a Motion’s Court and not a Trial Court so the court must rely upon Affidavits rather than live testimony.

When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the governing principles should be the same as those that apply in summary judgment proceedings. In summary judgment proceedings, the issue is whether a genuine dispute of fact exists. CR 56(c),(e). When a motion is made to enforce a settlement agreement on grounds that its existence and material terms are not genuinely disputed, the issue is also whether a genuine dispute of fact exists.

Marriage of Ferree, 71 Wn. App. at 43.

Civil Rule 56(c) states that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*” [Emphasis added]. As the *Ferree* court states a “question is not genuinely disputed when reasonable minds could reach only one conclusion.” *Ferree*, 71 Wn. App. 35 at 43 citing *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993); see *Hartley*, 103 Wn.2d at 775.

In this case, as stated at length above, both parties had substantial and numerous disputes about the issues allegedly resolved through the mediation which gave rise to the CR2(a) agreement before this court and therefore, reasonable minds could not have reached any other conclusion but that there had not been an agreement on all issues in this case.

2. Standards required for Enforcements of Civil Rule 2 (a) Agreements were not applied in this case.

a) The Court did not view the evidence submitted in the most favorable light for the non-movant.

In *Ferree*, the court lays out the procedures in which a summary judgment review is made. This procedure as stated is:

Summary judgment procedures involve several steps which, in combination, ferret out the presence or absence of a genuine dispute of fact. The moving party must initially produce affidavits, declarations or other cognizable materials that show the absence of a genuine dispute of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Graves v. P.J. Taggares*, 94 Wn.2d at 302, 616 P.2d 1223; *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

If and only if the moving party does this, the nonmoving party must produce affidavits, declarations or other cognizable materials that show, internally or by comparison, the presence of a genuine dispute of fact. *Young*, 112 Wn.2d at 225, 770 P.2d 182; *Graves*, 94 Wn.2d at 302, 616 P.2d 1223.

The Court must read the parties' submissions in the light most favorable to the nonmoving party, *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226, 770 P.2d 182; *Jacobsen v. State*, 89, 108-109 Wn.2d 104, 569 P.2d 1152 (1977) and determine whether reasonable minds could reach but one conclusion. If so, summary judgment is appropriate. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). Otherwise, it is not.

In Marriage of Ferree, 71 Wn. App. at 44.

If the court does not view the documents in the most favorable light, it must then either deny the Motion to Enforce or set an evidentiary hearing to determine the weight of the disputes.

b) The court did not have an evidentiary hearing nor gave any weight to the material facts in dispute.

As cited in *Brinkerhoff*, as in this case, “[b]ecause the record reflects a factual dispute. . . , it was an abuse of discretion to make the finding without the benefit of a evidentiary hearing.” *Brinkerhoff* at 699-700.

c) The Court should have ruled against the motion because there were material facts in dispute.

Once the movant has made their assertion that there is an agreement and there are no material facts in dispute, the burden shifts to the non-movant to demonstrate that there are material facts in dispute. Then the court is to view the affidavits and declarations most favorably toward the nonmoving party. In this case, although parts of the agreements were reduced to writing not all of the disputes were resolved and reduced to writing. More importantly, the documents which were reduced to writing only raised more disputes between these parties.

The Court in the *Howard* case held, that the court was without legal authority to enforce the CR 2 (a) agreement because they did not reach an agreement on all the terms and “noncompliance with CR2A and RCW 2.44.010 left the trial court without the authority to enforce the alleged settlement agreement”. *Howard* at 739.

The fact that the parties had allegedly agreed to piecemeal binding arbitration, demonstrates no meeting of the minds at mediation.

On the first page of the alleged CR 2(a) agreement is the statement that “[s]ignature by the parties and attorneys to this Agreement constitutes a binding Civil Rules 2A Settlement Agreement enforceable under the Laws of Washington State, including but not limited to RCW 2.44.010. This is a full and final Settlement.” How can anyone reconcile this statement along with Section X (CP 70) which allows continuing arbitration?

The purpose of a CR2(a) agreement is to simplify or avert trial and that they do not propagate additional disputes. *Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706,(1993). This Premise was upheld in *In re Marriage of Langham*, 153 Wn.2d 553, 561, 106 P.3d 212 (2005).

What occurred, in this case was that the Mediator (also arbitrator) just inserted boilerplate language, an arbitration clause as part of his normal and customary practice. Mr. Block feels he was blindsided. In the *Howard* case the alleged settlement occurred three days before trial. In this case, two weeks before trial.

Janie had concerns and issues with the “final parenting plan” as demonstrated in the record. Maybe not as many as Mr. Block, but she had concerns. Dennis submitted for the hearing on March 3, 2009, not only his declaration (CP 35-41) but also his attorney at the time of the mediation declaration (CP 64) showing the disputes. In addition, the response to

enforce the CR 2 (a) agreement, clearly sets forth the standards to which the court was to follow and cited applicable rules and case law CP 42-48.

IV. ATTORNEY FEES

Janie makes bare assertions of entitlement to attorney's fees for this appeal under three theories: (1) RCW 26.09.140, "need versus ability to pay" (BR 13); (2) RCW 4.84.185 (BR 13); and, (3) intransigence of Dennis. The requests for attorney's fees should be denied because Janie's arguments are not supported by factual citation to the record in argument.

An attorney's fees request under RAP 18.1(b) requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required under the rule to advise the Court of appropriate grounds for an award of attorney fees as costs. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, *review denied* 124 Wn.2d 115, 880 P.2d 1005 (1994).

Here, Janie makes a bare request under various statutes, but her argument fails because she cites no facts to support the argument. Janie attempts to inflame this Court, through inflammatory assertions without citation. For example, that "[Janie] is wholly dependent on Dennis for her financial security" (BR 12); the "unremitting litigation imposed on her by Dennis" (BR 12); "the house . . . is being held hostage by Dennis" (BR 12-13); "[h]is continued prosecution . . . advanced purely for harassment,

delay, nuisance or spite” (BR 13); “Dennis’s refusal to refinance or sell the family home to cash Janie out” (BR 13); and, “his refusal to execute final papers in this case” (BR 13).

RAP 10.3(a)(5) requires a citation to each fact. Yet, the factual assertions that form Janie’s arguments are not supported by citation to the record. This Court should not be required to search the entire record looking for the facts to support the these “claimed facts” of Janie.

In conclusion, because Janie merely requested attorney’s fees, and that bare assertion is not supported by argument and citation to facts supporting that argument, this Court should deny any request for attorney’s fees by Janie.

V. CONCLUSION

On March 3, 2009, the trial court completely ignored the standards set forth by the Courts of Washington State in enforcing CR 2(a) agreements. There were material issues in dispute and such disputes should have either been heard at an evidentiary hearing or remanded back to trial. In addition, the record is clear that the alleged agreement caused more disputes between the parties; was contradictory and incomplete on its face, and that the wife failed to come to mediation in good faith. There was no true meeting of the minds to form a CR2(a) agreement.

Respectfully submitted this 15th Day of March, 2010.

A handwritten signature in cursive script that reads "Scott Peterson". The signature is written in black ink and is positioned above a horizontal line.

Scott Peterson, WSBA #22923
Attorney for Appellant

/s Judith Hendricks

Judith Hendricks, WSBA #22481
Attorney for Appellant