

No. 66615-1

2011 NOV 28 AM 11:17
COURT OF APPEALS DIV I
STATE OF WASHINGTON

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARK B. MAYO, APPELLANT PRO SE

v.

KARI P. MAYO, RESPONDENT

BRIEF OF APPELLANT

Mark B. Mayo, Appellant Pro Se
410 4th Ave
Seattle, WA 98104
425.451.4400

TABLE OF CONTENT	Page
TABLE OF AUTHORITIES	4
INTRODUCTION	8
A. ASSIGNMENTS OF ERROR	10
B. STATEMENT OF THE CASE	11
1. Allegations	11
2. Court ruling	12
3. Intransigence	13
4. Public Disclosure	14
C. ARGUMENT	15
1. Contracts	15
3. Purported Repudiation	19
5. Material Terms	22
6. Bifurcation	30
7. Child Support Contradictions	33
8. Serious Contradictions	33
9. Substance Abuse	34

The denial of the motion to enforce the settlement agreement of December 7, 2011 must be reversed, because the trial court erred in its ruling, allowing hearsay and uncooperated statements, substituting crucial and incorrect language into its ruling and disallowing the undisputable evidence that would have supported the validity of the agreement.

D. CONCLUSION	36
E. RAP 18.1 REQUEST FOR FEES AND SANCTIONS	37

TABLE OF AUTHORITIES

<u>Ashley v. Hall</u> , 138 Wn.2d 151, 978 P.2d 1055 (1999)	27
<u>Austin v. U.S. Bank of Wash.</u> 73 Wn. App. 293, 313, 869 P.2d 404, Wn.2d 1015 (1994).	37
<u>Barnett v. Lincoln</u> 162 Wash. 613, 617, 299 P. 392 (1931)	25
<u>Bryant v. Palmer Coking Coal Co</u> 67 Wash.App. 176,179,834 P.2d 662 (1992).	41
<u>Cahn v. Foster and Marshall, Inc.</u> 33 Wn., App. 838, 840, 658 P.2d 42 (1983),	16

citing <u>Johnson v. Nasi</u> , 50 Wn. 2d 87, 91, 309 P.2d 380 (1957)	
<u>DePhillips v. Constr. Co., Inc</u> 136 Wn. 2d 26,959 P.2d 1104, 1107 (1998)	16
<u>Eide v. Eide</u> , 1 Wn. App. 440, 462 P.2d 562 (1969)	43
<u>Ferree</u> , atp.40-41, citing <u>Eddleman v. McGhan</u> , 45 Wash.2d 430, 432,275 P.2d 729(1954)	30
<u>Ferree</u> , atp.40-41, citing <u>Eddleman v. McGhan</u> , 45 Wash.2d 430, 432,275 P.2d 729(1954);	
<u>Bryant v. Palmer Coking Coal Co.</u> , 67 Wash.App. 176,179,834 P.2d 662 (1992);	25
<u>Snyder v. Tompkins</u> , 20 Wash.App. 167,173,579 P.2d 994 (1978)	30
<u>Griffin v. West RS, Inc</u> 143 Wn. 2d. 81, 18 P.3d 558 (2001)	27
<u>Hearst Communications, Inc v. Seattle Times Co</u> 154 Wn. 2d 493, 115 P.3d 152 (2005)	16
<u>In In Re Marriage of Burrill</u> ,	40

113 Wn. App. 863, 53 P. 3d 993 (2002)	
<u>In Marriage of Katare,</u>	35
125 Wn. App. 813, 105 P.3d 44 (2004), <u>rev. denied,</u> 155 Wn.2d 1005 (2005), t	
113 Wn. App. 863, 56 P. 3d 993 (2002)	
<u>In Re Marriage of Littlefield</u>	15
133 Wn. 2d 39,940 P.2d1362 (1997).	
<u>In Re Marriage of Ferree,</u>	29
71 Wn. App. 35, 856 P.2d 706 (1993)	
<u>In Re Marriage of Schweitzer,</u>	18
132 Wn. 2d 318, 937 P.2d 1062 (1997)	
<u>Jones Associates, Inc. v. Eastside Properties, Inc.,</u>	17
41 Wn. App. 462, 704 P.2d 681 (1985)	
<u>King v. King</u>	15
162 Wn.2d 378, 416, 174 P.3d 659 (2007).	
<u>Lockwood v. Wolf Corp</u>	17
629 F.2d 603 (1980).	
<u>Morris v. Maks,</u>	16
69 Wn. App.865,868,850 P.2d 1357 (1993).	
<u>Marriage of Morrow,</u>	39

53 Wn. App. 579, 770 P.2d 197 (1998).	
<u>Northern State Const. v. Robbins,</u>	17
76 W. 357,457 P.2d 187 (1969)	
<u>Phillips Bldg. Co. v. An,</u>	37
81 Wn. App. 696, 705, 915 P.2d 1146 (1996).	
<u>Quadrant Corp. v. American States Inc. Co.,</u>	17
154 Wn. 2d 165,110 P.3d 733 (2005)	
RAP 18.9 CR 11; <u>Rich v. Starczewski,</u>	40
29 Wn.App. 244, 628 P.2d 831,	
rev. denied, 96 Wn.2d 1002 (1981); <u>Bryant v. Joseph Tree,</u>	
119 Wn.2d 210, 829 P.2d 1099 (1992)	
<u>Ross v. Bennett</u>	18
148 Wn. App. 40 203 P.3d 383 (2008)	
<u>Ross v. Harding,</u>	17
64 Wn. 73 96 P.3d 454 (2004)	
<u>Ross, id, at ___ citing, Hollis v. Garwall,</u>	18
Inc.137 Wn. 2d 683, 695,974 P.2d 836 (1999);	
See also In Re Marriage of Schweitzer,	
132 Wn. 2d 318, 326-327, 937 P.2d 1062 (1997)	
<u>State v. Rundquist</u>	26

19 Wn. App. 786,793, 905 P.2d 922 (1995).	
(citing Washington State Bar Ass'n,	
Washington Appellate Practice Deskbook § 18.5	
(2d. ed. 1993)),	
<u>review denied</u> , 129 Wn.2d 1003,914 P.2d 922 (1995)	
<u>Scott Galvanizing, Inc v. Northwest Enviroservices, Inc.</u>	25
120 Wash. 2d 573, 582, 844 P.2d 428 (1993)	
<u>Snyder v. Tompkins</u>	29
20 Wash.App.	
167,173,579 P.2d 994 (1978)	
<u>Super Valu Stores v. Loveless</u>	17
5 Wn. App. 551,489 P.2d 368 (1971)	
<u>Thweatt v. Hommel</u> ,	37
67 Wn. App. 135, 148, 834 P.2d 1058,	
review denied, 120 Wn.2d 1016 (1992)	
RCW 2.44.01015	16
RCW 26.09.070(1)	15
RCW 26.09.070(3)	16
RCW 26.09.070(8)	16
RCW 26.09.184(4)(d)	38
RCW 26.19.010	16

RCW 26.09.191(1)	36
RCW 9A.72.020.2845	29
RAP 18.1(a)	37

INTRODUCTION

“There is not a snowball’s chance that my client will authorize me to cooperate in your effort to overcome the obvious. Do you expect her to assist you in dragging the mess of her marriage to the Court of Appeals? What a waste of time and money.

Kari Mayo will be our only witness. She will testify to what it was like to be married to an irresponsible alcoholic, Bi-polar gambler and what it is like to co-parent with an incarcerated control freak who can’t pay dime one for the support of his children. No response to your offer of settlement is my client’s response”. (CP) 13-14

This case involves issues of control, anger and resentment. Ms Mayo, (Respondent) has been angry with Mr. Mayo, (Appellant), regarding child support since Dec 09, when he declined to pay for non work related daycare, suggesting the alternative that the couple save money by allowing him to watch the children a couple of days a week. Her anger has driven her and her Attorney, (Mr. Zingarelli) to be deceitful, furnish numerous contradictory

statements and attack Mr. Mayo's ability to parent his children, all in an effort to gain relief from the court.

In evaluating this case, the questions the court should consider are; was the settlement agreement parenting plan of December 7, 2010 fully executed? Did the Court rule correctly denying enforcement of the agreement? Should the Court have admitted irrefutable evidence at trial to prove the validity of the contract? Did the Respondent (Ms Mayo) and her Attorney (Mr. Zingarelli) offer truthful and factual reasoning in support of their alleged repudiation of the agreement? Did they prove their allegations of a dispute over the existence or material terms of the agreement were genuine? And, did Mr. Mayo suffer damages due to Ms Mayo's and Mr. Zingarelli's fraudulent actions and allegations?

The evidence in this case sheds light on the Court's errors and its abuse of discretion. It demonstrates that Ms Mayo and counsel (Mr. Zingarelli) did not offer truthful statements regarding repudiation, and that there is no legitimacy to their claims of a genuine dispute over material terms of the agreement.

Because of Ms Mayo's history of an inability to resolve custody issues, due to her anger and resentment toward Mr. Mayo,

the parties, including the children, are temporarily bound by a less comprehensive and ambiguous parenting plan, which eliminates precious time between child and father, essentially negatively impacting the children, as well as leaving vast opportunities for parent conflict.

Finally, the evidence proves Ms Mayo's and Mr. Zingarelli's false and perjures statements were made with the intent to mislead the court, discredit Mr. Mayo as a loving and capable father, and cause him undue suffering.

A. ASSIGNMENTS OF ERROR

1. The court erred, admitting self serving, hearsay evidence.

Issue Pertaining to Assignment of Error

The contract was crystal clear and unambiguous.

2. The court erred by admitting extrinsic evidence.

Issue Pertaining to Assignment of Error

The court has the duty to enforce all lawful agreements brought before it.

3. The court erred by considering a condition precedent.

Issue Pertaining to Assignment of Error

The contract did not contain a condition precedent.

4. The court erred by ruling on unsworn statements.

Issues Pertaining to Assignment of Error

In the court's order to deny Appellant's motion to enforce agreement, it inserted incorrect language into its ruling.

5. **The court erred considering allegations of a genuine dispute of the material terms, bizarre behavior and repudiation from one party while denying the other party and equitable opportunity to defend itself, and by not considering the evidence before it.**

Issue Pertaining to Assignment of Error

If the court reviewed all the evidence, the Settlement Agreement would have proven agreement.

6. **The court erred ordering .191 restrictions.**

Issue Pertaining to Assignment of Error

The trial court erred by placing RCW 26.09.191(3) restrictions on Mr. Mayo.

7. **The court erred by not ordering an (ORC) for Ms Mayo.**

Issue Pertaining to Assignment of Error

With 5 witnesses' testimony, including a DSHS case manager, the court erred by not holding the children's best interest paramount.

STATEMENT OF THE CASE

The parties reached a settlement agreement regarding a permanent parenting plan, final order on December 7th, 2010, (CP) 127-147. Ms Mayo subsequently refused to execute the parent plan Final Order, and so the Mr. Mayo brought a motion to enforce the settlement agreement (CP) 118-126.

Ms Mayo responded by alleging the mediation process was “fatal” as the parties had been required to be in the same room, where she was subjected to “*rants and personal attacks*” by Mr. Mayo. That, “*throughout the day he called her selfish and unwilling to consider his position*”. Her pleadings characterized him as making “*outrageous*” and “*bizarre*” demands. (CP) 179 Ms Mayo alleged that the father continued to negotiate after the execution of the contract, and that “*within “minutes”* of executing she advised Mr. Mayo and counsel that she was rescinding the agreement. (CP) 173

All allegations were denied through Mr. Mayo’s counsel who moved to strike the unsupported, hearsay allegations. As Mr. Mayo was incarcerated at the time, he participated by telephone and all communications were recorded by the Department of

Corrections (DOC). An offer of proof was made to prove the falsity of Ms Mayo's and Mr. Zingarelli's misrepresentations by securing the audio tapes of December 7, 2010 settlement conference from Department of Corrections.

On January 3, 2011 and January 27, 2011, the court entered an order first denying enforcement of the settlement agreement and subsequently reconsideration, including denial of reconsideration and the request for a denial without prejudice, to provide Mr. Mayo the opportunity to secure the December 7, 2010 audio tapes from DOC. The January 3, 2010 denial order found as follows:

"...orders that Respondent's motion is denied. Although both Attorneys signed the Proposed Parent Plan, petitioner asserts that she did not agree and advised counsel of the same within minutes. She also asserts that the Respondent continued to negotiate the terms even after the Attorneys signed the proposed parent plan. The record is insufficient to enforce the proposed parent plan as there was no final agreement. Respondent's motion to strike is denied." (CP) 190-191

On January 26, 2011, the court also entered an order denying Mr. Mayo's request for a trial continuance to provide the father the opportunity to secure the audio tapes. (CP) 247

Ms Mayo, at the time, had refused to respond to offers of settlement, she refused to participate in the submittal or formation

of a pretrial order as ordered by the court on December 1, 2010, she provided discovery one month late on January 19, 2011 and the answers provided were misleading, vague, incomplete and bizarre. Her anger and resentment are prevalent throughout the document.

“I answered the interrogatories and requests for production to the best of my ability and returned the answers to Respondent’s counsel’s office January 17”. (CP) 206

She also refused to enter into any stipulations to narrow the issues, but simply claimed *“there are no issues of property or debt”*. On January 31, 2011, Mr. Mayo filed a Notice of Discretionary Review.

On February 7, 8 and 9, 2011 this matter proceeded to trial on all issues in the dissolution action (all evidence regarding the enforceability of the settlement agreement excluded and not before the trial court.) On February 8, 2011, the court ordered the audio tapes be released to Mr. Mayo, pursuant to his request for Public Disclosure. (CP) 283-284

The court entered an oral ruling on February 9, 2011, and a written ruling on February 25, 2011. Mr. Mayo asserts he was denied his constitutional right to question Ms Mayo and present evidence that would negate the misleading allegations by both Ms

Mayo and Mr. Zingarelli. He also asserts that the Final Ordered Parenting Plan falls well short of the comprehensive and unambiguous plan executed December 7, 2010.

C. ARGUMENT

In Washington, the parties to dissolution of marriage may enter into contracts providing for a parent plan, support of the children, and disposition of property and debt, RCW 26.09.070(1). Except for the parent plan provisions, the court is bound by the parties' contract unless it finds the contract was unfair at the time of its execution. RCW 26.09.070(3). Even if the divorcing parties agree as to every aspect of the dissolution, their stipulations must be approved and entered by a court to have effect, and with regards to agreements regarding a parent plan, the court must find that the parent plan is in the best interest of the children. *King v. King*, 162 Wn.2d 378, 416, 174 P.3d 659 (2007). See also, *In Re Marriage of Littlefield*, 133 Wn. 2d 39,940 P.2d1362 (1997). A contract regarding child support must be reviewed for compliance with the terms of RCW 26.19.010, RCW 26.09.070(3). Termination of the contract or agreement requires mutual agreement, RCW 26.09.070(8).

In Washington, a trial court's authority to compel enforcement of a settlement agreement is governed by CR2A and RCW 2.44.010. Settlement agreements are governed by general principals of contract law, Morris v. Maks, 69 Wn. App.865, 868, 850 P.2d 1357 (1993). The essential elements of a contract are 1) the subject matter of the contract, 2) the parties, 3) the promise, and 4) the terms and conditions, DePhillips v. Constr. Co., Inc., 136 Wn. 2d 26, 959 P.2d 1104,1107 (1998).The burden of proving a contract, whether expressed or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention, Cahn v. Foster and Marshall, Inc., 33 Wn., App. 838, 840, 658 P.2d 42 (1983), citing Johnson v. Nasi, 50 Wn. 2d 87,91, 309 P.2d 380 (1957).

The court has the duty to enforce agreements brought before it, Hearst Communications, Inc v. Seattle Times Co, 154 Wn. 2d 493, 115 P.3d 152 (2005). Where the language of the contract is unambiguous, the court must enforce it exactly as it is written, Quadrant Corp. v. American States Inc. Co., 154 Wn. 2d 165,110 P.3d 733 (2005).

“Conditions precedent” are those facts and events which occur subsequently to the making of a valid contract and which must

exist or occur before there is a right to immediate performance, before there is a breach of contract duty, or before usual judicial remedies are available, Ross v. Harding, 64 Wn. 73 96 P.3d 454 (2004). Conditions precedent must arrive by agreement of the parties, Northern State Const. v. Robbins, 76 W. 357,457 P.2d 187 (1969). Under Washington law, conditions precedent are not favored by courts, Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wn. App. 462, 704 P.2d 681 (1985). Courts are especially loathed to find conditions precedent when the alleged condition is peculiarly within control of one of the contracting parties, Lockwood v. Wolf Corp., 629 F.2d 603 (1980).

When a contract is proven, equity will grant rescission where there is clear bona fide mutual mistake regarding a material fact,, Super Valu Stores v. Loveless, 5 Wn. App. 551,489 P.2d 368 (1971). Where there is no mutual mistake, but only an expectation that failed to materialize, a court will not rescind the contract, In Re Marriage of Schweitzer, 132 Wn. 2d 318, 937 P.2d 1062 (1997). In cases of ambiguity, the court will look beyond the document to ascertain intent from surrounding circumstances, Ross v. Bennett, 148 Wn. App. 40 203 P.3d 383 (2008). However, admissible extrinsic evidence does not include: (1) evidence of

parties unilateral or subjective intent as to the meaning of a contrary word or term; (2) evidence that would show the intention independent of the instrument; or (3) evidence that would vary, contradict, or modify the written word. Ross, id, at citing, Hollis v. Garwall, Inc. 137 Wn. 2d 683, 695,974 P.2d 836 (1999); see also In Re Marriage of Schweitzer, 132 Wn. 2d 318, 326-327, 937 P.2d 1062 (1997).

Here the parties, through their lawyers entered into a written agreement. It is undisputed the parties signed a contract regarding the terms of a Parent Plan Final Order on December 7, 2010 with the mutual intent of each party to be bound by every single provision evidenced by the initialization of the attorneys of record on each and every page that contained a change from the original settlement offer, and by signature of the attorneys of record at the end of the document, **(CP) 127-147**

The terms of the contract were clear and unambiguous. Mr. Mayo met the burden of proof that a final and binding contract was executed and proved each and every provision contained in the contract. It was Ms Mayo who had the burden of proof regarding her allegations of rescission or any other defense to nullify a valid

contract. On December 8, 2010, in Response to a request by Mr. Mayo to sign off on a CR2A, Mr. Zingarelli first states;

“The agreement on the Parenting Plan is on hold pending the resolution of the remainder of the issues in the dissolution. It is not enforceable as executed and I will not be signing off on a piecemeal CR2A.”

“As stated upon my departure, Respondent is invited to submit his proposal language on property and debt issues for consideration. However, at this juncture the matter will remain on the trial calendar”. (CP) 183-189

In later pleading Mr. Zingarelli states;

“I immediately responded that the plan was a nullity due to Petitioner’s adamant rejection during mediation”. (CP) 176

MR. Zingarelli’s response is contradictory and false. Not once does he mention **“nullity”** or his client’s **“adamant rejection”** in his email. Mr. Mayo asserts that Ms Mayo departed mediation during the property and debt discussion, well after the parenting plan was executed. Mr. Mayo filed a motion to enforce and submitted a proposed order with his motion that would have made effective all the terms set forth in the parties December 7, 2010 contract. (CP) 118-168

The questions before the court were;

- 1) Whether or not the parties entered into a binding contract, and if so,
- 2) Whether the proposed order submitted to the court accurately reflected the terms of the parties' agreement.

Ms Mayo did not deny that the proposed order mirrored the parties' December 7, 2010 agreement. Because the contract was crystal clear and unambiguous the court erred, having no basis upon which to admit extrinsic evidence to prove elements necessary to support rescission and the court also erred by admitting and considering Ms Mayo's self serving, hearsay allegations.

A court may only grant a rescission where there is a clear bona fide mutual mistake regarding a material fact. There was no evidence of any material mistake. The email by Mr. Zingarelli the next day, December 8, 2010 did not corroborate the hearsay statements of Ms Mayo. It does not indicate any concerns regarding duress and/or disagreement with the provisions of the Parent Plan. The sole evidence before the court was that Ms Mayo had a change of heart, and chose to renege on her agreement.

Likewise, the court erred by considering evidence to prove either;

- 1) There was an agreement that additional steps or agreements would be necessary in order for the parties to be bound by the contract they executed or
- 2) That the settlement of all trial issues was a condition precedent to be bound by the December 7, 2010 contract.

However, a condition precedent must arrive by agreement of the parties, (not should or may) The December 7, 2010 contract does not contain a condition precedent and the court has no authority to read provisions into the contract that are simply not there. Ms Mayo's hope or failed expectation that all issues would settle is not a basis for a rescission of the contract.

Finally, the court erred by ruling on a statement contained in the Petitioner's Response to Motion to Enforce Agreement and to Approve Parenting Plan Order. (CP) 172-174 That legal memorandum set out facts not sworn and not contained in either declaration. Most importantly, neither declaration alleged that Ms Mayo gave notice of rescission "within minutes" of execution of the contract, "*I informed both attorneys that I rejected the plan and halted the mediation*", ("*within minutes*".) (CP) 179

The court also inserted "signed", when the statement factually declared, after the "initialing", "*...subsequent to the initialing of*

the proposed order during ongoing negotiations, respondent attempted several times to revisit transportation issues”. (CP) 173

Furthermore, if the court considers evidence such as Mr. Mayo was “bizarre” in the mediation”, those allegations were also not included in either declaration, then the court erred in relying on that extrinsic evidence. In petitioner’s response to motion to enforce the agreement, Ms Mayo states,

“Contrary to Ferree, As demonstrated herein, Petitioner disputes material terms. Respondents request for relief can only be granted upon showing there is no genuine dispute regarding the existence and material terms of a settlement agreement,” Ferree @41 quoting Hartley v. State, 103 Wn. 2d 76, P.2d 77 (1985). (CP) 173

The following are Ms Mayo and / or Mr. Zingarelli’s statements regarding their dispute of the “material terms” of the agreement, followed by Mr. Mayo’s responses;

1. Statement *“Toward the end of a long day Respondent continued to press unreasonable demands upon Petitioner. It became clear to me that the efforts of the day were unraveling as Petitioner became more upset. Eventually Petitioner called a halt to the proceedings and declared that she could not accept the terms of the parenting plan and would proceed to trial on all issues.” (CP) 176*

1. Response Mr. Mayo was on speakerphone, only while Settlement Master Barb Wexler at the mediation as she “*was limited to being present for three hours of the seven hour session*”. (CP) 172 Ms Silva, (Mr. Mayo’s attorney) did not have speakerphone capabilities. Petitioner claims “*at the end of a long day she called a halt to the proceedings.*” But Mr. Mayo had not been on speaker phone for hours and therefore could not have possibly “*continued to press unreasonable demands*”, near the end of the day. The claim is not genuine.

2. Statement “*The Petitioner does not believe the terms set forth are in the children’s best interest*”. (CP) 173

2. Response Ms. Mayo has made this allegation since separation, as a tactic to control the issues and gain sympathy from the court. It is complete opinion, hearsay and conjecture. The claim is not genuine.

3. Statement “*3.1 of the plan grants extended visitation to Respondent from Thursday after school until Monday morning*”. *This works a hardship on Petitioner by requiring her to transport the children to and from West Seattle during rush hour traffic and subjects the children to drive times in excess of 1.5 hours prior to the start of school*”. (CP) 173

3. Response Ms Mayo’s assumption that Mr. Mayo will be residing in West Seattle is presumptive. Mr. Mayo will be living in Bellevue. He hopes to move closer to his children, once financially

able to do so. It is 53.8 miles from Bellevue to Stanwood, forty five to fifty five minutes, and a drive the children have made at least 30 times, with no ill effect to them or objection by Ms Mayo.

The most spurious element of claim “3” is that the current Final Court Ordered Parenting Plan, (CP) 333-334, the Settlement Conference Parenting Plan, (CP) 132 Mr. Mayo’s Proposed Parenting Plan (proposed at trial) and Ms Mayo’s Proposed Parenting Plan (proposed at trial) ALL mirror each other exactly, stating; *“If they live more than 10 miles from each other, the parents shall meet at a mutually convenient location which is close to ½ way between each of their residences”*.

In reality, Ms Mayo only has to drive half way, against the flow of traffic. That is a 22 to 28 minute commute each way, 2 times a month. A commute she has been making since July, 2009. There is no significant difference whether Ms Mayo’s drive to meet Mr. Mayo is on a Friday or a Thursday.

It is in fact the father who will bear the greatest burden, having to navigate northbound traffic to pick up the children. It is not a genuine hardship to ms mayo or to the children. The fact is Ms Mayo was unhappy this particular provision and wanted to renege. The claim is not genuine.

4. Statement “Subsequent to the initialing of the proposed order during ongoing mediation, Respondent attempted several times to revisit transportation issues. His actions demonstrated his unwillingness to cooperate with Petitioner and set the tone for the break down in mediation”. (CP) 173

4. Response There was no prejudice to Ms Mayo for Mr. Mayo simply making a request, (alleged request), during ongoing negotiations regarding transportation issues. The existence and material terms of an agreement are a question of fact, Barnett v. Lincoln, 162 Wash. 613, 617, 299 P. 392 (1931). But the question is not genuinely disputed when reasonable minds could reach only one conclusion. Scott Galvanizing ,Inc v. Northwest Enviroservices, Inc., 120 Wash. 2d 573, 582, 844 P.2d 428 (1993)

If it were true that Respondent “*attempted several times to revisit transportation issues*”, and it was still during “*ongoing mediation*” and only “*subsequent to initialing*”, then the parties were technically still in negotiations. If Ms Mayo or her Counsel were not in agreement with Mr. Mayo’s alleged requests regarding transportation, then they could have simply said no thank you. It is Mr. Mayo who then might have chosen not to execute the document, due to his requests being denied by opposing party, not Ms Mayo, as she already had an initialed contract. There was no

claim by Ms Mayo that Mr. Mayo would not execute the document if Ms Mayo did not relent to his requests. It makes no sense. The allegation is not genuine.

Additionally, after the initialing, and subsequent to the alleged misbehavior by Mr. Mayo, Mr. Zingarelli SIGNED the agreement.

The Court declined to ask the party why they would sign the document if so discouraged after initialing. The reasonable conclusion is, post initialing, the parties agreed to all terms of the agreement. Mr. Mayo's alleged, post-initialing transportation requests did not affect the execution of the agreement. It is a disingenuous allegation.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, 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. State v. Rundquist 19 Wn. App. 786,793, 905 P.2d 922 (1995). (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d. ed. 1993)), review denied, 129 Wn.2d 1003,914 P.2d 922 (1995).

An error will normally be disregarded if it had no material, prejudicial effect upon the party asserting the error. See , e.g., Griffin v. West RS, Inc., 143 Wn. 2d. 81, 18 P.3d 558 (2001) (appellant not entitled to relief where erroneous jury instruction did not prejudice case); Ashley v. Hall, 138 Wn.2d 151, 978 P.2d 1055 (1999).

By allowing Ms Mayo to use alleged confidential information, while simultaneously denying the same to Mr. Mayo, the court erred, applying a double standard, a method which is unreasonable, arbitrary and capricious. It was outside the range of acceptable choices and not supported by the record.

The Court's ruling is prejudicial. It has enormous material effect on the father and the children. It eliminates an opportunity for the children to have an additional seventy two, (72) days a year with the father. It eliminates an opportunity for the children and the father to begin a reasonable summer schedule together. It eliminates a provision that assists in accommodating the father's work schedule. It eliminates a provision holding both parties accountable for any future substance abuse.

5. Statement *"3.7 Schedule for Holidays as set forth do not serve the children's best interest. Respondent demanded designation of*

the Jewish holidays despite the fact that he admits he does not practice that faith. The proposed plan sets up a conflict and allows the Respondent to take the children from school unnecessarily and under false pretence". (CP) 173

5. Response Ms Mayo's claim is absurd. Mr. Mayo's 16 yr old daughter Amanda Mayo, from a previous marriage, had a Bat Mitzvah where Ms Mayo's family and friends attended. Ms Mayo's parents were specifically honored in the program as "Grandparents of Amanda Mayo." Ms Mayo participated in all facets of the occasion, including picture taking ceremonies.

Irrefutably egregious and fraudulent is the fact that Mr. Mayo's and Ms Mayo's own children, Max 5 and Emma 6, were enrolled in Jewish Day School at Temple De Hirsch Sinai in Bellevue. (There were many schools to choose from close to Mr. Mayo's and Ms Mayo's previous residence). Emma attended the 2008 school year and both Emma and Max were enrolled for the 2009 school year. (Proof of the enrollment can be provided at the court's request). When Ms Mayo subsequently took the children, unilaterally relocating them to Stanwood, she procured the \$750 deposit paid to the school for the following school year.

After witness testimony and declarations, the trial court was convinced of Mr. Mayo is in fact Jewish, practice the faith, and

awarded him all Jewish holidays, (CP) 333 However, the court was still not moved to make even simple inquiry into the balance of Ms Mayo's claims, by considering the settlement agreement or reviewing the recordings.

In addition, Ms Mayo made no objection at the settlement conference, at trial, or in any post trial pleadings to the holidays being awarded to Mr. Mayo. Her allegation is not genuine.

Ms Mayo's allegation qualifies as perjury under Revised Code of Washington, RCW 9A.72.020, Perjury in the first degree, which states; "A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law."

For CR2A to prevent the court from enforcement there must be a genuine dispute regarding the material terms, as opposed to a dispute over immaterial terms of the agreement, *In Re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993). The purpose of CR2A is not to impede, without reason, the enforcement of agreements intended to settle or narrow a cause of action, *Ferree*, atp.40-41, citing *Eddleman v. McGhan*, 45 Wash.2d 430, 432,275 P.2d 729(1954);*Bryant v. Palmer Coking Coal Co.*, 67 Wash.App.

Mark Mayo
410 4th Ave
Seattle WA 98104

176,179,834 P.2d 662 (1992); Snyder v. Tompkins, 20 Wash.App. 167,173,579 P.2d 994 (1978).

Here, there was a dissolution action where the distribution of debt and property, parent plan and legal fees were at issue, (child support already determined by DCS months earlier and so not an issue). On December 7, 2010, the parties entered into a binding contract regarding all terms of the final parent plan. That agreement was intended to narrow the issues. There was no agreement that the terms of the parent plan were contingent on a settlement of other issues.

Ms Mayo quotes Mr. Mayo;

“The terms of the parenting plan should stand on its own and that there was no agreement that the terms of the parent plan were contingent on the settlement of other issues”. **(CP) 174**

Ms Mayo then alleges, *“In reality, the parties would have to bifurcate issues to allow enforcement of the parenting plan, not the other way around”.* **(CP) 174**

Below are contradictions made by Mr. Zingarelli and Ms Mayo regarding bifurcation of the issues. Mr. Mayo asserts these contradictions are relevant to the argument because they represent a portion of the misleading allegations presented to gain repudiation.

A1. Bifurcation “Respondent claims we have modest assets and debt to determine at trial, there is nothing left to debate. I filed for bankruptcy protection last year shortly after separation from Respondent. **Personal belongings have already been mutually agreed upon**”. A final parenting plan is the only issue before the court”. (CP) 95

A1. Contradiction “As stated upon my departure, Respondent is invited to submit his proposal language on **property and debt issues for consideration**. However, at this juncture the matter will remain on the trial calendar”. (CP) 200

B1. Bifurcation “The parties through their attorneys initialed a proposed final order but both parties continued to discuss terms and **transportation and holiday issues** remained in contention”. (CP) 175

B1. Contradiction “...but the parties needed to **resolve child support, property and debt issues**”. (CP) 172

Both (CP) 175 and (CP) 172 are both signed by Mr. Zingarelli. However, (CP) 172 is not sworn to. The significance of these two statements is that in one document they imply there were two issues remaining to resolve during the mediation, and then two completely different issues to resolve in the other. The Court ignored Mr. Mayo’s disputation of the two relevant contradictory statements.

Because the Court's ruling denying the motion to enforce the agreement states,

"...and the Court's having considered the moving, opposing and in reply materials and brief, and having reviewed the legal file, now, hereby orders that Respondent's Motion is DENIED",
(CP) 247

it is clear the court abused its discretion, not applying a proper standard of review regarding the materials, as the inconsistencies contained in Ms Mayo's and Mr. Zingarelli's pleadings were far too extensive and obvious for the court to overlook.

Mr. Mayo has established a pattern of contradictory and deceitful statements made by Ms Mayo and Mr. Zingarelli. This pattern is overwhelmingly clear. The trial court either, did not identify the discrepancies as relevant, or simply chose to ignore them. The Court of Appeals should take notice. It should make inquiry, by reviewing the settlement agreement and transcripts, before making its ruling.

The following are a number of additional contradictory statements proffered by Ms Mayo and/or Mr. Zingarelli, offered by Mr. Mayo to illustrate the fact that Ms Mayo and Mr. Zingarelli

were willing to say anything, at any time, to gain rescission of the agreement.

6/15/10 “*The division of child support has issued an administrative order at this time. There is no justifiable reason for continuing this case*”. (CP) 96

12/23/10 “*The bulk of the mediation was focused on parenting issues but the parties needed to resolve child support*, (CP) 172

1A. “*I will actively involve our children in Mark’s families’ activities. I will cooperate in good faith.*” (CP) 75

1B. “*Frankly, if they, (Mr. Mayo’s family) believe they are that important they should file for third party visitation rights rather than attempt to manipulate our divorce process*”. (CP) 77

2A. “*Ms Moats recalled the mother specifically discussed telling the father that she moved out while he was away **because she was fearful** of his reaction and that she would have left the relationship sooner but for her fears*”. (CP) 409

2B. “*In response to screening questions for domestic violence, the mother denied there was ever any physical violence by either party towards the other. **The mother denied ever feeling fearful of the father.***” (CP) 402

3A. “*...the mother described her use of alcohol as “occasional consumption on special occasions and one or two glasses of wine a week with dinner.*” (CP) 401

3B. “*However this evaluator found the father’s descriptions of the mother’s abusive use of alcohol to be detailed and credible*”.

(CP) 412,

*“A chemical dependency assessment consistent with family court requirements should be court ordered. The mother’s treatment evaluator should receive a version of this report. Regardless of the outcome of the assessment, there is sufficient concern to **recommend the mother not consume alcohol when the children are scheduled to be in her care.**” (CP) 413*

However, even with the overwhelming and cooberating evidence, including 3rd party testimony, the Court included an odd prediction in the final ordered parenting plan regarding Ms Mayo’s voluntary assessment, which reads;

*“Petitioner is scheduled for a chemical dependency evaluation. The court deems that dependency education for petitioner would be a good idea **but does not anticipate the evaluation resulting in treatment recommendation**”.*

This type of conjecture is another example of how the court abused its discretion by putting on record its opinion regarding the outcome of a medically related issue, while ignoring all evidence to the contrary. **(CP) 345**

Upon Ms Mayo’s voluntary, post trial submittal to an evaluation upon the recommendation of the trial Court, Ms Mayo

was requested to submit to a UA during her evaluation appointment. She declined on providing a urine sample. The court's ruling and comments is not in best interest of the children.

In addition to the court ignoring the evidence regarding Ms Mayo's substance abuse, it instead imposed .191 limitations on Mr. Mayo, largely based upon Ms Mayo's allegations. *In Marriage of Katate*, 125 Wn. App. 813, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005), the Court of Appeals reversed because the trial court imposed limitations in the parenting plan without making adequate findings regarding the alleged risk that the father would abduct the children to a foreign country.

Although Mr. Mayo admits he struggled with substance abuse in the past, there is no evidence, medical or otherwise, that he has an impairment that presently interferes with his performance of parenting functions. The declarations of Heidi Schneider **(CP) 1-2**, the Mayo's next door neighbor for 2 years, who also provided a declaration for Ms Mayo, Shay Plunk, Nanny for the Mayo's from February 2006 to October 2007**(CP) 16-18**, and Pamela Schwartz, Mr. Mayo's sister **(CP) 19-21**, all cooborate Mr. Mayo's claim. The parties agreed to an alternate substance abuse provision in the Settlement Agreement. It covers BOTH parents.

CONCLUSION

“Given his history of controlling the parties’ relationship, it is apparent to Petitioner this is Respondents last ditch effort to control her life for outside their marriage as well, for the duration of raising their children”. (CP 107)

It is in fact Ms Mayo who controlled the parties’ relationship. She unilaterally moved the children to Stanwood, chose when Mr. Mayo could see the children, did not participate in good faith to resolve the issues and now, upon hearsay evidence only (and confidential as argued by opposing party); she has achieved rescission of a fully executed contract.

Through case law, authorities cited, positive declarations, contradictory and false statements, evidence of anger and resentment, and the fact that the court erred several times in its assessment of the evidence and its ruling, Mr. Mayo hopes the Court will find such disparity, that it will be compelled to reverse the trial Court’s decision and enforce the fully executed settlement agreement. Mr. Mayo asks the court to either review the transcripts to determine the true facts of the case, or simply order enforcement of the Settlement Agreement Parenting Plan.

LEGAL FEES AND SANCTIONS

Rap 18.1(a), if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court. Rap 18.1(b) requires that parties must devote a section of its opening brief to the request for the fees or expenses. This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The rule requires more than a bald request for attorney fees on appeal. *Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058, *review denied*, 120 Wn.2d 1016 (1992). Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees and costs. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, Wn.2d 1015 (1994).

RCW 26.09.184(4) (d) allows a trial court to award attorney fees if it finds that a parent has used or frustrated the dispute resolution process without good reason.

Ms Mayo and Mr. Zingarelli lied. They provided false testimony and conspired to confuse the issues before the court.

They made slanderous allegations against a parent, putting question in the mind of the court of his ability to parent his children. They made perjures and defamatory statements regarding Mr. Mayo and his religion and his medical condition. They stalled and delayed the legal process.

RCW 26.09.184(4)(d) allows a trial court to award attorney fees if it finds that a parent has used or frustrated the dispute resolution process without good reason.

An attorney has the authority to bind his client in an action by his agreement duly made, RCW 2.44.010.

“She never initialed or signed the parenting plan during or after the mediation”. (CP) 174

Mr. Zingarelli had already signed multiple pleadings on Ms Mayo’s behalf. He knows the rules and procedures and abused them.

“Father has delayed this process for eight months now based on untruths” (CP) 208

Ms Mayo has never proved one instance of untruth. Mr. Mayo has proved several. These types of frivolous and false allegations have marred the dissolution process.

Ms Mayo falsely alleged that discovery was not served on her until November 29, 2010. (CP) 221-224

Ms Mayo falsely alleged that there has been “several negotiations” (CP) 212

Ms Mayo falsely alleged she provided a response to a settlement offer on October 21, 2010. (CP) 228, 229-230

Ms Mayo refused to provide meaningful answers to discovery request. (CP) 239-244

Ms Mayo accused Mr. Mayo of not practicing the Jewish faith. (CP) 173 Mr. Mayo has more than established this to be a lie.

Legal fees may be imposed, without regard for ability to pay where there is intransigence. *Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1998). Intransigence includes foot dragging and obstruction, *Eide v. Eide*, 1 Wn. App. 440, 462 P.2d 562 (1969).

In this case Ms Mayo had refused to increased legal fees by refusing to make any offer of settlement even though the court ordered to do so, by refusing to participate in a pretrial conference or to communicate on issues necessary to bring the matter to trial in an orderly fashion in the event parties were unable to settle. Most importantly, Ms Mayo secured the invalidation of the settlement agreement through misconduct and misrepresentation.

In Re Marriage of Burrill, 113 Wn. App. 863, 56 P. 3d 993 (2002), the court found that unsubstantiated, false and exaggerated claims against the other parent concerning their fitness as a parent, cause him to incur unnecessary and significant legal fees.

“His statements complaining that his needs were not being met undermined my confidence that he could hold the children’s needs paramount”. (CP) 179

“I also believe Mark Mayo has anger and control issues that impede his parenting and restrictions should be put in place to protect the children”. (CP) 179

“In light of his unreasonable and bizarre demands, Petitioner realized that Respondent should be subjected to RCW 26.09.191(1) restrictions as recommended to the court by Deb Hunter, evaluator for King County Family Court Services.”
(CP) 173

Each and every one of these allegations is uncooperated, completely false and very serious. Ms Mayo has not substantiated a single allegation against Mr. Mayo.

The wreckage of an incorrect ruling to a good parent who loves his children cannot be measured. A parents ability to secure unwarranted and uncooperated restrictions, can severely limit any attempts to modify the parenting plan down the road. Mr. Mayo is

the parent who is currently limited because of Ms Mayo's and Mr. Zingarelli's deception.

Per RCW 26.184(4)(d) Mr. Mayo therefore asks the court to award him financial damages in the sum of Twenty Thousand Dollars (\$20,000), for reasonable attorney's fees, against Ms Mayo and Mr. Zingarelli, jointly and severely. This amount is what he has incurred from the time of the Settlement Conference to date. Mr. Zingarelli and Ms Mayo lied to gain rescission and therefore are responsible for all the unnecessary costs incurred by Mr. Mayo from the Settlement Conference forward.

Fees may also be available as sanctions against a party pursuing a frivolous appeal or abusing the court rules and procedures. RAP 18.9 CR 11; *Rich v. Starczewski*, 29 Wn.App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981); *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

Mr. Mayo also asks the Court to impose sanctions against Ms Mayo and Mr. Zingarelli, jointly and severely in the amount of Twenty Thousand Dollars (\$20,000) for their perjures statements, unwarranted and unsupported by the evidence, and for their egregious personal attacks against Mr. Mayo.

It should not matter if the perpetrator is an experienced criminal, an Attorney, or an ex wife, the law should apply to everyone.

Dated this 10th day of November, 2011

A handwritten signature in black ink, appearing to read 'M Mayo', is written over a horizontal line.

Mark Mayo, Appellant Pro Se
410 4th Avenue
Seattle, WA 98104
425.451.4400