No. 78771-3-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

AMEENA AAMER,

Respondent,

v.

SHARIEF YOUSSEF,

Appellant.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(No. 15-3-00873-4 SEA)

APPELLANT'S REPLY BRIEF

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I. Introduction

This appeal is about much more than a $6400 attorney fee award entered against the Father and in favor of the Mother. There was also a finding of bad faith that the *pro tem* commissioner initially made and then made a second time after remand even though she was not asked to do so. Bad faith, once found, injects itself into subsequent proceedings involving the parents. Much like the Father's perceived pre-modification litigation, during the original dissolution action prompted the commissioner to find bad faith. Here, there was no bad faith. The child was bruised around her feet and ankles and her healthcare provider made a CPS referral after the child disclosed that her Mother was responsible for the bruises. This caused CPS to temporarily remove the child from the Mather's care and place the child with the Father.

II. Argument in Reply

A. Per statute, bad faith is to be assessed at time of filing.

RCW 26.09.260 governs modification of parenting plans or custody decrees. This statute includes a fee provision at RCW 26.09.260(13), which states: "If the court finds that a motion to modify a prior decree or parenting plan *has been brought* in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party." (emphasis added). Thus the statute indicates that bad faith

is to be assessed when the petition was *brought*, i.e., at time of filing, not prior to or subsequently. This is not some limited window for assessing bad faith that the Father is asking this Court to adopt, but rather the plain language of the statute. The Mother has not cited any clear authority for going beyond the plain language of the statute authorizing fees, RCW 26.09.260.

Commissioner *Pro Tempore* Bianco initially concluded Father acted in bad faith. On revision, however, Judge Mack's made no bad faith finding. Instead, she concluded that fees were "justified by the facts in this case." Judge Mack additionally stated that the court "cannot find that the Motion to Reconsider was in bad faith or intransigent." CP 660. Judge Mack remanded the matter back to the Commissioner for the limited purpose of determining the reasonable amount of attorney fees to be awarded. CP 660.

Despite the narrow focus of Judge Mack's remand, Commissioner *Pro Tempore* Bianco erroneously collapsed the frivolous action fee statute with bad faith and again concluded the Father acted in bad faith. Mother continues this error in her brief. (*See* Resp. Br. at 8-10). RCW 4.84.185 provides for an award of fees for opposing a frivolous action or defense. There is no finding below of frivolous litigation, and the Mother cannot add such a finding to the record now by making the finding

herself, especially when she has not filed a cross-appeal. Lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof. *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010), *as amended* (Sept. 16, 2010). RCW 4.84.185 statute is inapplicable.

The Mother goes on to cite *Suarez v. Newquist*, 70 Wn. App. 827, 832-33, 855 P.2d 1200 (1993), in which there is a discussion of "[t]he frivolous lawsuit statute, RCW 4.84.185, [which] was enacted to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for harassment, delay, nuisance or spite." Not only is the statute inapplicable, but there was no finding below of harassment, delay, nuisance, or spite.

Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 982 P.2d 131 (1999) is a case out of Division 2 (not binding on this Court) discussing three types of bad faith conduct warranting attorney's fees in federal court. *Id.* at 927.

The Mother additionally argues that the delay in holding the threshold hearing is further evidence of the Father's bad faith. Again, bad faith under RCW 26.09.260(13) is to be assessed if the modification petition was filed in bad faith; not if either party engaged in bad faith litigation

conduct after the modification petition was filed. Bad faith is not based on what a party did, or didn't, or could have, or should have done later.

Further regarding any supposed delay showing a lack of concern for the child's safety, the Father has explained that while he was waiting for CPS to conclude its investigation, he repeatedly reached out to the CPS caseworker, Victor Stevens (CP 606); and that he had been meeting with Marshan Goodwin-Moultry, the court-appointed counselor, about his daughter's safety (CP 606-7). Furthermore, the CPS investigation turned out to be one that the Washington State Office of the Family and Children's Ombuds found to be "an inadequate investigation" which "violated policy." CP 873-74.

The Mother additionally references an agreement to dismiss the parenting plan modification action in exchange for two hours of her attorney's billable time, or $700. Resp. Br. at 12 and 19, citing CP 394 (a declaration of the Mother) and Ex. 8 at CP 417-20. CP 417-20 is not a signed settlement agreement, but an email exchange between counsel from October, 2017. If this is an enforceable agreement, then it appears to settle all claims and the Mother cannot now raise a claim for fees. If however it is simply an offer to settle, then it is not admissible as evidence under ER 408.

Be that as it may, the Father's counsel withdrew shortly thereafter, and the Mother's counsel neither attempted to communicate with the Father, nor even responded to the Father's e-mail messages and phone calls, for months. CP 609. The Father states, "Mr. Lang had ample opportunity to respond to me or contact me to discuss the 'dismissal' he keeps pointing out, but he did not." *Id*. The Father also points out that he was trying to follow the case schedule, and that the Mother's counsel failed to appear for an ordered status conference. *Id.*

B. The abuse allegations were brought by professional healthcare workers; the Mother mischaracterizes them as baseless allegations brought by the Father.

The Mother accuses the Father of bringing "trumped up, but never supported, allegations of abuse of the child." In fact it was not the Father but professional healthcare workers who reported the child disclosed abuse at the hands of her Mother; Dr. Kelly White and ARNP Rohde, both with Edmonds Family Medicine, were the ones who contacted CPS and police after examining the child. CP 35. CPS removed the child from the Mother's care and implemented a Safety Plan. CP 31. This is not a "frivolous allegation of abuse" "on the flimsiest of basis" brought by "the father," as the Mother characterizes it. Resp. Br. at 10. It is documented abuse; not only is that not frivolous or bad faith, but should have resulted in adequate cause being found. Father reiterates he is not appealing denial

of adequate cause; rather, he is simply arguing that if the evidence before the Commissioner should have resulted in adequate cause being found, then that negates any bad faith or frivolousness argument.

C. The Superior Court judge's decision is the decision under review by this Court, not the Commissioner's decision.

The Father's Motion for Revision (CP 648-53) applied to two orders: Commissioner Bianco's assessment of fees at the adequate cause hearing (March 16, 2018 hearing), and the assessment of fees on the Motion for Reconsideration (order entered April 26, 2018). Judge Mack denied revision (CP 659-60) as to the fees assessed on adequate cause ($6,461.50), but did not conclude that the Father had engaged in bad faith litigation, only that the fee award "was justified by the facts in this case." CP 660.

On appeal of an order on revision, this Court reviews the Superior Court Judge's decision, not the commissioner's. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004) citing RCW 2.24.050 and Const. art. IV, § 23. On revision, Commissioner Bianco's initial bad faith conclusion was replaced by Judge Mack's amorphous "justified by the facts in this case" conclusion. In addition, Judge Mack stated that the court "cannot find that the Motion to Reconsider was in bad faith or intransigent." CP 660. Mother never cross-appealed Judge Mack's revision order.

Judge Mack's amorphous "justified by the facts in this case" finding is insufficient to support an award of fees. Judge Mack "revise[d] the Order on Attorney's fees and remand[ed] back to the Commissioner on the issue of attorney's fees for the March 16, 2018 hearing" to determine the reasonableness of the fee amount, lacking a fee declaration in the record. CP 660. To be clear, the remand to Commissioner Bianco was only to determine the reasonableness of the amount of fees awarded. Despite Judge Mack having remanded only for lack of support in the record for the amount of attorney's fees ordered at the March 16, 2018 hearing (CP 660), Commissioner Bianco proceeded on October 2, 2018, to enter an order explaining the grounds on which she concluded that the Father acted in bad faith (CP 876-78). In that order, Commissioner Bianco erroneously attributed to the Father what was actually the Mother's conduct in bringing two motions, and referenced a second petition to modify, which never actually existed.

D. The Mother concedes that certain trial court findings were clearly made in error.

The Father pointed out that the trial court erroneously attributed two petitions to modify the parenting plan to him (court's order at CP 877-78) when actually he brought only one. The Mother speculates that the trial court might have had in mind the Father's 9/12/2017 Motion re

Clarification, and she re-characterizes this motion as a "virtual motion for modification of the parenting plan." Resp. Br. at 14. There seems to be no support in Washington case law for courts to re-characterize a motion of one type as a "virtual motion" of another type. Based on the record, attributing two petitions to modify to the Father was pure error. The Mother makes a similar argument in her Br. at 13, referencing an "improper and thinly disguised motion to modify the parenting plan [brought] on 9/12/2017," but with no proper citation to the Clerk's Papers. RAP 10.3(a)(6) requires references to relevant parts of the record in the argument section of a brief.

The Mother fully concedes (Resp. Br. at 15) that the Father is correct when he points out that the Motion for Clarification and Motion for Revision that Commissioner Bianco relied upon in concluding Father acted in bad faith (CP 877-78) were actually brought by the Mother, who objected to the court-appointed counselor based on his sexual orientation. (CP 848-51, Mot. for Revision at 2). Commissioner Pro Tempore Bianco's finding was not supported by the record.

The erroneous findings cannot be used to support the trial court's conclusion. Reversal is necessary for the trial court to delete its erroneous findings and bad faith conclusion.

E. The trial court abused its discretion in making the fee award.

The Mother cites *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998), for the proposition that this Court reviews a trial court's award of attorney fees for abuse of discretion. In *Pearsall-Stipek*, the trial court awarded fees under RCW 4.84.185. The Supreme Court stated, "the trial court found only that Mr. Bennett's petition was frivolous and advanced without reasonable cause. In the absence of any findings of bad faith, we are compelled to hold that the trial court abused its discretion in awarding attorney fees. The award of attorney fees is reversed." *Id.* at 267. Here, Judge Mack also did not make a finding of bad faith—in fact she found the opposite, stating that the court "cannot find that the Motion to Reconsider was in bad faith or intransigent," CP 660, for the original denial of adequate cause order. Without concluding bad faith or frivolousness, the trial court abused its discretion in awarding fees against the Father.

F. The Mother is correct that Judge Mack revised the order on reconsideration to not award the Mother the additional $3,640 in fees.

The Mother states in her Br. at 18 that "Judge Mack revised the order on reconsideration to not award the mother's attorney the additional $3,640.00 in fees because there was no fee affidavit filed in the matter." The Mother is correct that the $3,640 fee award was stricken by Judge

Mack. The Mother argues that this fee award should stand, but the Court should disregard her argument; the Mother has not brought a cross-appeal of Judge Mack's order, and cannot appeal or assign error to Judge Mack's Revision Order in her Response Brief.

G. Respondent Mother's brief, as originally filed, did not include the required request for fees and she brought no timely motion to supplement her brief.

RAP 18.1(a) requires that, when applicable law grants a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses as provided in that rule. RAP 18.1(b) states that the party "must devote a section of its opening brief to the request for the fees or expenses."

Respondent Mother's brief, as originally filed on July 12, 2019, did not devote a section of the brief to a fee request. The Court of Appeals *sua sponte* rejected Mother's Response Brief, and in a letter ruling dated July 15, 2019, directed the Respondent to "refile and reserve the brief in compliance with the [enclosed] checklist on or before July 25, 2019." The checklist stated that (a) Respondent's Statement of the Case needed to include references to the record, and (b) that Respondent's Argument section also needed to include record references. Respondent refiled an Amended Brief on July 25, 2019, and took the opportunity to add a request for attorney fees. This fee request, however, is not in a

devoted section, as required under RAP 18.1(b), but is added to the brief's Conclusion.

Respondent has never filed a motion for leave to supplement her response brief to include a request for attorney fees. In *In re Estate of Fitzgerald*, 172 Wn. App. 437, 453, 294 P.3d 720 (2012), the Estate failed to set forth a request for such fees in its response brief as required by RAP 18.1(a). But in that case, "the Estate filed a motion for leave to supplement its response brief to include a request for attorney fees prior to the date on which [Appellant's] reply brief was due." *Id.*, citing *In re Adoption of Baby Girl Doe*, 45 Wn.2d 644, 647–48, 277 P.2d 321 (1954) ("[W]here an appellant seeks permission or leave of court to file an amended brief before respondent has filed his brief ... the privilege is usually granted, subject to terms relating particularly to the matter of costs."). In *Fitzgerald*, the court granted the Estate's motion for leave to file a supplement to its response brief. Here, however, Respondent has not timely filed a motion for leave to supplement her response brief to include a request for attorney fees, and the request should therefore be disregarded. Respondent's request is also deficient and should be denied because it is not in a separate section devoted to an attorney fee request but is instead combined with the brief's conclusion.

Mother also attempts to lead this Court into error by slipping into her Amended Response Brief an argument that Commissioner Bianco's initial $3,640 fee award against Father for filing a Motion for Reconsideration should stand despite Judge Mack revising the Commissioner's conclusion. The refiled brief was to include only the missing references to the record. The Mother has never brought a motion to amend or supplement her originally filed brief. Despite this, her Amended Brief in addition to the insertion of a request for a fee award includes several other changes, most notably the insertion of the argument that the "fee award of $3,640 should stand," at 18 (with an additional inserted mention at 4). Not only should this argument be disregarded by the Court because, as argued above, the Mother has not cross-appealed Judge Mack's order, it should also be disregarded because it was not in the original response brief and the Mother brought no motion to amend or supplement prior to refiling.

III. Conclusion

For the reasons stated above, the finding of bad faith and any attendant fee awards should be reversed.

DATED this 26th day of August 2019.

WESTERN WASHINGTON LAW GROUP, PLLC

/s/ Dennis J. McGlothin

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of **Sharief Youssef's Reply Brief** to the following via:

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Signed this 26th day of August, 2019 at Edmonds, Washington.

/s/ Robert J. Cadranell

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