

No. 44014-8

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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SCOTT KRIEGER,

Appellant,

vs.

PERILYNN KRIEGER,

Respondent.

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FILED  
COURT OF APPEALS  
DIVISION II  
2013 JUL 25 PM 1:27  
STATE OF WASHINGTON  
BY             
DEPUTY

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APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COUNTY  
THE HONORABLE JAMES RULLI

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BRIEF OF RESPONDENT

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## I. RESTATEMENT OF ISSUES

Perilynn and Scott Krieger were married 25 years and had six children. Perilynn raised the children while Scott built a lucrative practice as a patent attorney, averaging more than \$250,000 in after-tax annual income. After the parties separated, a commissioner awarded Perilynn temporary child support and maintenance totaling \$9,000 a month. Scott appeals a contempt order entered eight months later on findings he intentionally failed to pay support and maintenance he had the ability to pay.

1. Should this court reject Scott's assignments of error directed to temporary orders from which he did not timely seek review?

2. Did the trial court abuse its discretion by finding Scott in contempt, rejecting his allegation that he could not afford to pay support and maintenance, based on his established after-tax income of over \$250,000, his threats to decrease his workload in order to avoid support obligations, and his failure to alter his lifestyle or spending habits despite claims of impoverishment?

3. Should this court award Perilynn her attorney's fees under RCW 26.18.160, which authorizes an award of fees "[i]n any action to enforce a support or maintenance order," and under RCW

7.21.030(3), which authorizes an award of attorney's fees to a party who defends a contempt order on appeal?

## II. RESTATEMENT OF FACTS

### A. **Perilynn Krieger Raised Six Children While Scott Krieger Cultivated A Lucrative Practice As A Patent Attorney During A 25-Year Marriage.**

Respondent Perilynn Krieger and appellant Scott Krieger were married on August 23, 1985, and separated on February 7, 2011. (CP 151; App. Br. 4) Perilynn, age 47, was a stay-at-home mother for the parties' six children; she has served on PTA boards, participated in co-op school programs, and was president of the children's organization at the parties' church. (CP 1, 52-54, 439; 12/28/11 RP 10) Scott, age 52, has degrees in engineering and earned his law degree during the parties' marriage. (CP 26, 151; 12/28/11 RP 6) Scott is a patent attorney whose annual net income, after taxes, regularly exceeded \$250,000. (CP 55, 61, 152)

### B. **In January 2012 A Commissioner Awarded Perilynn Temporary Child Support And Maintenance Based On Her Lack Of Income And Assets.**

Two of the parties' six children are still dependent. (CP 124) Perilynn had no income or available assets after the parties separated. (CP 1-3) Perilynn sought temporary child support and maintenance, detailing monthly expenses totaling \$8,836,

including a \$3,213 mortgage payment for the family home and \$1,223 in expenses for the children. (CP 1-6, 440) Scott's financial declaration listed similar expenses. (CP 26)

Scott objected to Perilynn's request for child support and maintenance, claiming his "earnings are not what they used to be." (CP 20) Although he had roughly 50 active cases, Scott claimed his primary patent client "substantially reduced the projects that they have given" him, and he has "not received any new work for several years." (CP 20, 80) Scott also claimed Perilynn had "stockpiled funds over the last several years." (CP 20)

Clark County Commissioner Dayann Liebman was "very skeptical about the claim of reduction" in Scott's income. (12/28/11 RP 18) On January 18, 2012, the commissioner entered temporary orders awarding Perilynn \$2,104 in temporary child support and \$6,896 in monthly maintenance, and requiring Scott to continue providing health insurance for Perilynn and the children. (CP 123-31, 144-46) Commissioner Liebman also equally divided \$140,000 in joint liquid assets. (CP 145) The temporary support and maintenance orders required payment on the first day of each month. (CP 126, 145) Commissioner Liebman also ordered that Scott pay all of Perilynn's expenses for December 2011. (CP 145)

Scott never sought review of these temporary orders.

**C. In April 2012 The Commissioner Held Scott In Contempt For Failing To Pay Child Support And Maintenance As Required By The Temporary Orders.**

Scott had previously threatened that “he would flat out refuse” to pay child support and maintenance. (CP 157) On January 31, 2012, Scott secretly canceled the health insurance for Perilynn and the children, in violation of the temporary support order. (CP 156, 159-60) Scott then failed to pay March 2012 support or maintenance, and failed to divide the \$140,000 in liquid assets as ordered. (CP 164-65)

On March 8, 2012, Perilynn filed a motion for contempt seeking judgment for delinquent child support and maintenance (including Perilynn’s expenses in December 2011), seeking to have health insurance reinstated, and seeking her share of the \$140,000 in liquid assets. (CP 155-80) Perilynn also expressed concern that Scott was funneling work to his current girlfriend to conceal his income. (CP 153; *see also* CP 55, 440)

After Perilynn filed her contempt motion, Scott paid Perilynn \$9,000 for child support and maintenance, but did not pay \$4,732.45 owed for Perilynn’s December 2011 expenses. (CP 189,

206) On March 13, 2012, Scott paid Perilynn her \$70,000 share of the liquid assets. (CP 189)

On April 11, 2012, Commissioner Liebman found Scott in contempt for failing to pay child support, maintenance, and Perilynn's expenses for December 2011; for failing to divide the liquid assets; and for failing to provide health insurance for Perilynn and the children. (CP 205-09) Commissioner Liebman also held Scott in contempt for removing from the parties' joint account \$9,000 of the parties' \$10,000 2011 tax refund. (CP 206) Commissioner Liebman entered judgment in Perilynn's favor for the unpaid amounts and awarded Perilynn \$750 in attorney's fees. (CP 207-08)

Scott moved for reconsideration of the contempt order and judgment on April 20, 2012. (CP 215-26) On May 16, 2012, Commissioner Liebman entered an order allowing Scott additional credits for payments he had made towards Perilynn's expenses. (CP 242) Commissioner Liebman reserved for later determination property division issues, including division of the 2011 tax refund and remaining bank accounts. (CP 242; 5/16/12 RP 55)

Clark County Superior Court Judge Rulli denied Scott's motion to revise the Commissioner's order on June 20, 2012. (CP 243, 343) Scott did not seek review of Judge Rulli's order.

On June 7, 2012, Scott moved for new temporary orders seeking to reduce maintenance to \$3000 per month and child support to \$100 per month. (CP 326-36) Perilynn opposed the motion, noting that despite asserting his income had substantially decreased, Scott had recently purchased a new truck and his "lifestyle and spending habits have not changed." (CP 338) Perilynn also questioned Scott's assertion that his primary client had reduced the work sent to its patent attorneys, because Scott's girlfriend (who is also a patent attorney) continued to receive work from the same client. (CP 337-38) Perilynn again expressed fear that Scott was using his girlfriend to conceal his income. (CP 338)

Commissioner Liebman denied Scott's motion to reduce his temporary support obligations on June 20, 2012. (CP 344) Scott did not seek review of that order.

**D. In August 2012, The Commissioner Held Scott In Contempt A Second Time After He Again Failed To Pay Child Support And Maintenance.**

Scott failed to pay support, maintenance, and health insurance premiums for July 2012. (CP 349) On August 1, 2012,

Perilynn once again moved for contempt. (CP 348-51) Perilynn again noted that despite Scott's claims that his income had sharply declined, he had "not changed his spending or life style at all," was entertaining friends on the parties' boat, and had threatened to "do whatever it takes to get out of paying child support and spousal support." (CP 408-09) Perilynn also disputed Scott's calculation of his net business income, noting that his calculations subtracted thousands in filing fees for which his client reimbursed him. (CP 407; 8/22/12 RP 4-5)

On August 22, 2012, Commissioner Liebman found Scott in contempt for failing to pay any amount towards July child support and maintenance, and for failing to pay health insurance premiums for Perilynn and the children. (8/22/12 RP 5-9) Commissioner Liebman rejected Scott's assertion that he did not have the ability to pay his obligations as "suspect," noting both that his 2010 income "was well in excess of three hundred thousand dollars," and Scott's threats to refuse to pay support or maintenance. (8/22/12 RP 6-8; CP 415) Commissioner Liebman entered an order of contempt and a \$9,000 judgment for delinquent child support and maintenance on August 29, 2012. (CP 414-18)

Scott filed a motion to revise the August 29<sup>th</sup> contempt order on September 7, 2012. (CP 419) However, Scott did not schedule a hearing for his motion within 21 days of entry of the commissioner's order, as required by Clark County Local Rule 53.2(b). Because Scott did not timely cite his motion for a hearing, Judge Rulli dismissed his motion to revise on September 21, 2012. (9/21/12 RP 79) On September 28, 2012, Scott filed a notice of appeal seeking review of the August 29 contempt order. (CP 429)

The parties' dissolution action remains pending, and has not been set for trial.

### III. ARGUMENT

**A. The Only Order Before This Court Is The Second Contempt Order. Scott Cannot Collaterally Attack The Temporary Orders By Appealing The Second Contempt Order.**

Scott's assignments of error challenge almost exclusively the January 18, 2012, temporary orders requiring him to pay child support and maintenance. (App. Br. 1-2 (Assignments of Error #1-4, 6)) But Scott did not seek review of those orders or of the June 20, 2012 order denying his motion for new temporary orders within 30 days. His appeal of the August 29, 2012, contempt order cannot be used to collaterally attack the prior orders setting child support

and maintenance. This court should reject Scott's assignments of error directed towards the temporary orders and the order denying his motion for new temporary orders.

A party must seek review within 30 days of the entry of an order for this Court to acquire appellate jurisdiction. RAP 5.2; *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007) (dismissing appeal filed more than 30 days after entry of appealed order); *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009) (same). Because Scott only timely appealed the August 29 contempt order, it is the only order before this court.

A party may appeal from a contempt adjudication that establishes the party's willful resistance to the court's orders and that attempts to compel compliance with the court's orders. *Wagner v. Wheatley*, 111 Wn. App. 9, 15-16, 44 P.3d 860 (2002). Scott's appeal of the contempt order, however, does not allow him to challenge "the erroneous orders on which it is based" (App. Br. 12), because "a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid." *Matter of J.R.H.*, 83 Wn. App. 613, 616, 922 P.2d 206 (1996) (declining to review validity of order underlying contempt order because it was

not timely appealed); *Griffin v. Draper*, 32 Wn. App. 611, 614, 649 P.2d 123 (appeal of contempt order did “not bring forward the original judgment for review because the appeal is more than 30 days from the judgment”), *rev. denied*, 98 Wn.2d 1004 (1982); *see also Holiday v. City of Moses Lake*, 157 Wn. App. 347, 353, 357, ¶¶ 15, 28, 236 P.3d 981 (2010) (City’s attempt to appeal writ of prohibition by appealing show cause order entered a year and a half later warranted imposition of fees under RAP 18.9(a)), *rev. denied*, 170 Wn.2d 1023 (2011).<sup>1</sup>

Moreover, because the temporary orders and order denying his motion for new temporary orders could not be appealed as a matter of right under RAP 2.2, Scott could only seek review of those orders by demonstrating that they met the criteria for discretionary review under RAP 2.3(b). Scott has not even attempted to do so. Indeed, Scott’s theory of appellate review would obliterate any

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<sup>1</sup> This collateral bar rule is akin to the well-established rule that a court may not review an underlying judgment while reviewing an order on a CR 60 motion. *Marriage of Moody*, 137 Wn.2d 979, 993 n.5, 976 P.2d 1240 (1999) (“an error of law may properly be challenged on appeal from a judgment or decree, but it is not subject to collateral attack in a CR 60 motion”); *see also* Karl Tegland, 2A Washington Practice, *Rules Practice* at 115 (7th ed. 2011) (“Under RAP 2.4, the appeal [of an order on a CR 60 motion] does *not* bring the final judgment itself up for review.”) (emphasis in original).

distinction between discretionary review and appeal, because it would allow a party to obtain immediate review of an interlocutory order by disobeying that order and then appealing a subsequent contempt order. *See* RAP 2.1(a).

If Scott believed the temporary orders were erroneous he should have timely sought discretionary review of those orders; he cannot seek review as a matter of right by summarily disobeying them. *Deskins v. Waldt*, 81 Wn.2d 1, 5, 499 P.2d 206 (1972) (“The proper method of challenging the correctness of an adverse ruling is by an appeal and not by disobedience.”).

Not only did Scott fail to seek timely review of the temporary orders, he also failed to preserve his arguments directed to those orders. Scott never argued to the trial court that it misapplied the child support schedule worksheet, that it should discount his “overtime” income, that it should impute income to Perilynn, or that it could not “retroactively” require Scott to pay Perilynn’s December 2011 expenses – all issues he attempts to raise on appeal of the August 29 contempt order. (App. Br. 17-23, 28) This court should reject Scott’s arguments for this additional, and independent, reason. *In re Disciplinary Proceeding Against Sanai*,

\_\_\_ Wn.2d \_\_\_, ¶¶ 46-48, 302 P.3d 864 (2013) (refusing to consider argument raised for the first time on appeal).

Scott has timely challenged only one order – the August 29 contempt order. This court should reject Scott’s unpreserved assignments of error (#1-4, 6) that are not directed to the August 29 contempt order.

**B. The Trial Court Did Not Abuse Its Discretion By Holding Scott In Contempt Based On His Undisputed Failure To Pay July Support Maintenance And Insurance.**

Scott fails to cite the record even once in support of his argument that he “cannot pay court-ordered support payments” and thus should not have been held in contempt. (App. Br. 25-28) This court should reject Scott’s argument for this reason alone. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider arguments “not supported by any reference to the record nor by any citation of authority”). Regardless, the trial court did not abuse its discretion by rejecting Scott’s unsubstantiated claim that his income had precipitously declined after the parties separated.

Contempt is “intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010(1).

Recognizing an “urgent need for vigorous enforcement of child support and maintenance obligations,” RCW 26.18.010, the Legislature has authorized a contempt motion “[i]f an obligor fails to comply with a support or maintenance order.” RCW 26.18.050(1). This court “review[s] a trial court’s decision on contempt for an abuse of discretion.” *Marriage of Davisson*, 131 Wn. App. 220, 224, ¶ 6, 126 P.3d 76, *rev. denied*, 158 Wn.2d 1004 (2006); *see also Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988) (“On appeal, a court will uphold a contempt order if any proper basis can be found.”).

A party who asserts that he is unable to comply with a court’s support or maintenance order bears the burden of establishing his inability to pay:

If the obligor contends . . . that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court’s order.

RCW 26.18.050(4). This court defers to a trial court’s determination that a party had the ability to pay its support obligations. *See, e.g., State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 251, 973 P.2d 1062 (1999) (trial court correctly held parent in

contempt for failing to pay child support because he had “the skills and the ability to earn money” but “had not made a diligent effort to comply with the support order”); *Marriage of Didier*, 134 Wn. App. 490, 498, ¶ 16, 140 P.3d 607 (2006) (deferring to trial court’s finding that spouse’s statement he had no income was not credible), *rev. denied*, 160 Wn.2d 1012 (2007); *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999) (deferring to trial court’s finding that underemployment was voluntary where it “came on the heels of the increased child support ordered by the court just a few months earlier”); *Marriage of Dodd*, 120 Wn. App. 638, 641-42, 646, 86 P.3d 801 (2004) (deferring to trial court’s findings regarding party’s income where party had girlfriend cash checks to conceal income).

The trial court did not abuse his discretion by finding that Scott had intentionally disobeyed the temporary orders after he failed to pay *anything* towards his July support and maintenance obligations and left Perilynn and their children (for the second time) without health insurance. Scott has the “skills and the ability to earn money.” *Shafer*, 94 Wn. App. at 251. Scott is a well-educated patent attorney with a lucrative practice and an

established history of earning more than \$250,000 annually. (CP 55, 61, 151-52; 12/28/11 RP 6) As in *Mattson*, his income only “declined” after he was ordered to pay child support and maintenance. (Compare CP 295 (showing \$37,525 in gross income for January 2012) with CP 296 (showing \$7,865 in gross income for February 2012); see also CP 36 (showing \$45,030 in gross income for September 2011)).

The trial court rejected Scott’s contention that his annual income dropped from \$250,000 to less than \$60,000 – a more than 75% decrease – as “suspect” based on Scott’s earning history and his threats to refuse to pay support or maintenance. (8/22/12 RP 6-8; CP 55, 61, 152, 157, 409, 415) That determination is entitled to deference on appeal. *Didier*, 134 Wn. App. at 498, ¶ 16. Perilynn expressly disputed Scott’s hearsay allegation that his primary client “has stated that they will file no new patent[s]” (App. Br. 14) and noted that Scott’s girlfriend, who works as a patent attorney for the same client, had continued to receive work. (CP 337-38) Scott never refuted Perilynn’s assertion that he was using his girlfriend to conceal his income. (CP 55, 153, 337-38, 440); *Dodd*, 120 Wn. App. at 641-42, 646. Nor did Scott ever explain why

his net income calculations subtract thousands in fees for which he received reimbursement. (CP 407; 8/22/12 RP 4-5)

Moreover, far from demonstrating that he “conserved assets,” as required by RCW 26.18.050(4), Scott refused to change his lifestyle or spending habits. (CP 338, 408) Despite his assertion that he did not have enough money for rent, Scott purchased a new truck and continued to entertain friends on the parties’ boat. (*Compare* 8/22/12 RP 7 *with* CP 338, 408) Further, Scott had also been awarded \$70,000 in liquid assets from which he could pay his support obligations. (CP 145)

Scott misplaces his reliance on RCW 26.09.160 and *Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995), in arguing that a “finding of bad faith or intentional misconduct is a predicate for a contempt judgment.” (App. Br. 25) *James* interpreted RCW 26.09.160, which applies to violations of *residential* provisions, and contains a specific requirement that the court find a contemnor “in bad faith, has not complied with the order establishing residential provisions for the child.” RCW 26.09.160(2)(b). RCW 26.18.050, which governs a party’s refusal to pay *support* obligations, contains no similar provision. Moreover, even under RCW 26.09.160 an order finding that a party

“intentionally failed to comply with a lawful order of the court” satisfies the “bad faith” requirement. *See Marriage of Davisson*, 131 Wn. App. 220, 224, ¶ 8, 126 P.3d 76 (2006). Here, the trial court expressly found that Scott “intentionally failed to comply with a lawful order of the court.” (CP 414)

This case remains pending for trial. At trial, the court can consider Scott’s previous support payments and fully explore his income when determining a “just and equitable” disposition of the parties’ property. RCW 26.09.080. But regardless of the court’s ultimate property division, Scott undisputedly refused to comply with lawful support and maintenance orders. Rather than pay *anything* towards his obligations, Scott left Perilynn, a stay-at-home mother, to care for the parties’ children without any financial support. The trial court did not abuse his discretion by rejecting Scott’s claim of impoverishment and holding him in contempt.

**C. Perilynn – Not Scott – Is Entitled To Attorney’s Fees Because She Was Forced To Bring A Contempt Motion To Enforce Scott’s Support And Maintenance Obligations.**

Scott, a licensed attorney, can prosecute this meritless appeal of orders that will likely be mooted by trial, pro se, at little cost. This court should reject Scott’s perfunctory request for attorney’s

fees and should instead award Perilynn her fees incurred in enforcing Scott's obligations in this court. RAP 18.1; *Whidbey Gen. Hosp. v. State*, 143 Wn. App. 620, 637, ¶ 37, 180 P.3d 796 (2008) (rejecting party's request for fees where it "failed to cite applicable law creating a right to recover attorney fees").

RCW 26.18.160 authorizes an award of attorney's fees to a prevailing party "[i]n any action to enforce a support or maintenance order." RCW 26.18.160 "encompasses both actions at trial and on appeal" and authorizes "an award without showing financial need or [the opposing spouse's] ability to pay." *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 696, 959 P.2d 687 (1998) (awarding fees incurred on appeal defending contempt order entered under RCW 26.18.050), *rev. denied*, 137 Wn.2d 1017 (1999). The contempt statute, RCW 7.21.030(3), also authorizes an award of attorney's fees to a party who defends a contempt order on appeal. *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502-03, 903 P.2d 496 (1995), *rev. denied*, 129 Wn.2d 1010 (1996). Here, as in *Rhinevault*, Perilynn was forced to seek an order of contempt against Scott in order to enforce his support and maintenance obligations, and has been forced to defend the

contempt order on appeal. She is entitled to her fees incurred in this court under both RCW 26.18.160 and RCW 7.21.030(3).

#### IV. CONCLUSION

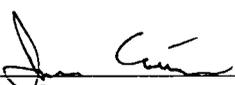
This court should reject Scott's assignments of error directed to orders from which he did not timely seek review, affirm the August 29, 2012, contempt order, and award Perilynn her attorney's fees and costs on appeal.

Dated this 24th day of July, 2013.

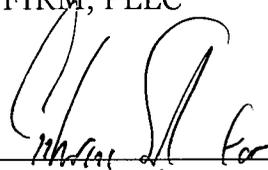
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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 24, 2013, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Scott J. Horenstein Attorney at Law 900 Washington St., Suite 1020 Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Scott Krieger 16900 SE 26th DR # 5 Vancouver, WA 98683	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 24th day of July, 2013.

  
\_\_\_\_\_  
Victoria K. Isaksen

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