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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

**WASHINGTON STATE COURT OF APPEALS**

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DEPUTY

**DIVISION II**

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**NO. 49237-7-11**

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**Elizabeth Urner Wennstrom (fka Elizabeth Vaughan Urner),**

**RESPONDENT,**

**Vs.**

**Douglas Urner**

**APPELLANT**

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**BRIEF OF RESPONDENT**

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**ALTON B. McFADDEN**  
**Attorney for Respondent**  
**WSBA No. 28861**

**OLSEN & McFADDEN, INC., P. S.**  
**216 Ericksen Avenue NE**  
**Bainbridge Island, WA 98110**  
**(206) 780-0240**

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## **B. ASSIGNMENTS OF ERROR**

1. Ms. Urner does not have any assignments of error, regarding the trial court and its ruling.

## **C. QUESTIONS PRESENTED**

1. Whether there is substantial evidence to support the trial court's finding of a \$220.92 voluntary monthly deduction by Mr. Urner for his retirement?
2. Whether the plain language of RCW 26.19.071(5), requires Mr. Urner to prove that for a year proceeding the action he was contributing the amount claimed as a deduction for pensions, and that this amount was not being used as a means to decrease support.
3. Whether, Mr. Urner's argument that RCW 26.23.050 denies the trial court authority to find a history of unreimbursed medical expenses and allow this figure to be inserted at line 10b of the child support worksheet has any authority to support it?
4. Whether when Appellant choose not to contest at trial, a request and finding under RCW 26.19.090 that because the child graduate late from high school, and had health disabilities delaying his continuation in college, and so meet the requirements for mental, physical or emotional

disabilities in the statute, an Appellant should not be able to raise the issue for the first time on appeal?

5. Whether Mr. Urner's assignment of error number 4, and argument at section E that Judge Harper was bound to follow a similar process for reimbursement of medical expense as was set up by the arbitrator in 2008, is without authority and should be not be considered by this court?

6. Whether Mr. Urner's argument is without authority regarding the Order of Support, which states the Children shall stay in compliance with RCW 26.19.090; that this language is somehow deficient, and requires some additional language regarding the timeliness of said information to be provided?

7. Whether Mr. Urner should be required to pay Ms. Urner's attorney fees and costs in defending this appeal, based upon either their financial situations, or upon his intransigence?

#### **D. STATEMENT OF THE CASE**

"The parties have reserved the right for post-secondary educational expenses since originally filing for divorce in early 2000. The request for post-secondary support for Isaac was exercised before Isaac turned 18 or graduated from high school, as part of this action filed in May 2012. Mr. Urner has agreed in his responses to this action (both in 2012 and again in 2015) that post-secondary support is appropriate for Isaac." CP 546.

Judge Harper allowed the filing of an amended petition in this matter, joining the motion for adjustment of child support into the amended petition in 2015. CP 502-505, 861, 536-527, 528-533.

The trial in this matter was 8 January 2016. CP 810. The parties have two children, Isaac (age 21) and Rachel (age 17) at the time of trial. CP 810. Previously support had been modified in 2008. CP 810.

Isaac began Deep Springs College in the fall of 2013, and in the spring of 2014 he took a medical leave from college. CP 810. Isaac attended Evergreen College the winter and spring quarters of 2015. CP 810. Starting in the fall of 2015 Isaac started at Leiden University College, The Hague for a 3 year program. CP 810-11.

Ms. Urner sought child support modified effective 8 May 2012, for Isaac's post-secondary education, and Rachel's age adjustment and her post-secondary education. CP 810. Ms. Urner specifically requested at trial for Isaac's post secondary support to extend past his 23<sup>rd</sup> birthday, because of his health disabilities, and the request was not opposed at trial. VRP at 12-13; See also CP 688-693, where no such objection was raised.

A factual issue regarding pension plan payments sought by Mr. Urner is also at issue. Mr. Urner at CP 691 raised the following related to his deductions for pension plan payments: "For much of my teaching career I was contributing less than the maximum allowed to my TRS3

retirement account. At the end of 2014, unaware that Elizabeth had lost her job at Microsoft, I increased my contribution.” Thus, factually, it appears that at least not all or perhaps none of the TRS3 are mandatory pension plan payments. CP 691. Further, it may be said factually, that Mr. Urner knew of the litigation for modification of support, and willfully choose to increase his contribution. *See* CP 691.

Mr. Urner at CP 521, which was his initial child support worksheet, (filed under oath at CP 525) claimed a total of \$220.92 per month for pension plan payments at the beginning of the action. He did list these payments as mandatory. CP 521. But as noted above he stated he could change the payment amounts, which Ms. Urner then characterized as voluntary. *See* CP 691 and 846.

The court’s unreimbursed medical expenses, finding of \$370.61, on line 10b of the child support worksheet, is at issue, and was derived from the testimony of Ms. Urner at CP 537. She testified she was spending approximately \$4,447.43 each year for 2013-14, on Rachel’s uninsured medical costs. CP 537. Simple division of this yearly amount to a monthly amount results in \$370.61 average per month of uninsured medical costs per month from the \$4,447.43 yearly amount. CP 537; *See also* CP 19-24, medical billing print out for Rachel for 2014. Ms. Urner, also testified that Mr. Urner had not paid for any of the uninsured costs. CP 537.

His Honor Judge Harper found Ms. Urner to be credible and found Mr. Urner not to be a credible witness. CP 811, VRP at 8.

### **E. ARGUMENT**

#### **I. There is substantial evidence to support the court's finding of a \$220.92 voluntary deduction for retirement.**

##### **a. Standard of Review:**

Findings of fact are viewed as verities, provided however, there is substantial evidence to support the findings. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313, (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644-47.

In determining substantial evidence, the court gives the inferences in the light most favorable to the prevailing party.

We defer to the fact finder and “**consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed** in the highest forum that exercised fact-finding authority.” *Cingular Wireless*, 131 Wn. App. at 768. And “[w]e **reserve credibility determinations for the fact finder and do not review them on appeal.**” *J.L. Stordahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 11, 103 P.3d 802 (2004). In the end, “A trial court’s findings of fact must justify its conclusions of law.” *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

*Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 285 (2009) (Emphasis added).

b. Argument

Construed liberally, Mr. Urner appears in his assignment of error to be challenging the finding of \$220.92 monthly deduction given him for his pension deduction on the child support worksheets entered by the court. Worksheets are at CP 834-846.

Mr. Urner at CP 521, of his initial child support worksheet, (filed under oath at CP 525) claimed a total of \$220.92 per month for pension plan payments. He did list these payments as mandatory. CP 521.

However, Mr. Urner's statement indicates that he was choosing not to invest significantly into his retirement: "**For much of my teaching career I was contributing less than the maximum allowed to my TRS3 retirement account.** At the end of 2014, unaware that Elizabeth had lost her job at Microsoft, **I increased my contribution.**" CP 691. (Emphasis added). Thus, factually, it appears that at least not all or perhaps none of the TRS3 are mandatory pension plan payments. CP 691. Further, it may be said factually, that Mr. Urner knew of the litigation for modification of support, and willfully choose to increase his contribution. See CP 691.

Mr. Urner at page 10 of his brief states, "The mandatory default pension plan payment for the Teachers Retirement System Plan 3 is 5%." In addition, he goes onto to state, "[T]he mandatory retirement

contribution is \$3,471.45 or \$289.29 per month.”<sup>1</sup> However, Mr. Urner does not make any citation to the record for these factual claims and so they must be not be considered, as held below:

[A]rgument unsupported by citation to the record or authority will not be considered); RAP 10.3(a)(6 [sic]RAP 10.3(a)(6). Unfortunately, his brief is conclusory and does not identify any specific legal issues or cite any authority. It does not comply with RAP 10.3 and 10.4 pertaining to the content of briefs. This court will not consider these arguments. *Palmer v. Jensen*, 81 Wn.App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

*State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501, 506 (1999);

*See also Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803,

818 n.13, 225 P.3d 280, 287 (2009) stating, “Mitchell does not cite to the

record to support this contention. We do not review matters for which the

record is inadequate. *Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 34, 614 P.2d

1323 (1980).”

Ms. Urner at CP 540 testified regarding the calculation of Mr.

Urner deductions as follows:

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<sup>1</sup> Mr. Urner at page 4 of his opening brief, in his assignments of also cites the court failed to correct the original error, on reconsideration. Ms. Urner would note, Mr. Urner did not provide any record of a motion for reconsideration and under RAP 10.3 and *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501, 506 (1999) the court should disregard this unsupported assertion.

I calculated Mr. Urner's income based upon the pay stubs provided by Mr. Urner in his 15 July 2015 declaration, (see exhibit 2), which shows a gross income of \$34,522.48 for six months, or \$5,753.75 a month. It also shows deductions accepted under RCW 26.19.071(5) of taxes six months as \$1983.43 or \$330.57, a month. Social Security and Medicare deductions of \$2140.39 and 500.58 for six months or \$356.73 and \$83.43 respectively and together \$440.16 per a month. L & I pension averages \$5.55 a month over the six months. Union dues to HEA and WEAPAC total \$85.50 a month. Total deductions allowed are \$861.78 a month. Net income is thus, \$4,891.97 a month. **Assuming Mr. Urner testifies he was making the pension payments of \$220.92, as he was claiming in his financial declaration, and worksheet filed in 2012 (see Exhibits 6 and 7), he would also be entitled to that deduction,** giving a net income of \$4,671.05.

*Id.*, (Emphasis added). Exhibits 6 and 7 referenced above they can be seen at CP 573.-579 and CP 580 – 585. The \$220.92 pension deduction is listed on Mr. Urner's worksheet at CP 581.

Judge Harper did not find Mr. Urner to be a credible witness stating, "I realize that Mr. Urner, even though he keeps saying, oh I want to help my kids in college, I mean, I don't believe that. And that's why I said in my opinion that I didn't think he was very credible about some things and I basically went along with Miss -- Mrs. Urner's rendition of some facts." VRP at 8. His honor also, made the same credibility finding in his written opinion stating, "Generally without going into detail and except as otherwise stated or implied by this decision, the Court finds

Petitioner to be more credible regarding pertinent facts and respective incomes of the parties.” Memorandum opinion at CP 811.

This court should “[C]onsider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed . . . And . . . reserve credibility determinations for the fact finder and do not review them on appeal.” *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. at 814. Given that standard, it is not unreasonable to infer that his honor, believed that Mr. Urner’s description of being able to change the amount he put into his retirement plan<sup>2</sup>, meant a voluntary plan. The court was not obligated to believe Mr. Urner assertion this was a mandatory deduction, because Mr. Urner was not a credible witness. Therefore, finding \$220.92 as a voluntary pension deduction was done with substantial evidence. Further, a pension deduction you may change to some other number is not mandatory, the amount is his choice. Lastly, the deduction applies the same on either the mandatory line or voluntary line on the worksheet. There is no difference in the amount deducted based upon the line as they both subtract from income.

**II. The court should not ignore the phrase, “if the contributions show a pattern of contributions during the one-year period preceding**

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<sup>2</sup> CP 691

**the action” and rewrite RCW 26.19.071(5) as Mr. Urner requests. The plain language of RCW 26.19.071(5) requires Mr. Urner to show that for a year, proceeding the action he was contributing the amount claimed as a deduction for pensions.**

*a. Standard of Review:*

The appeals court reviews issues of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293, 300 (1996).

*b. Argument*

Mr. Urner at page 10 of his brief argues RCW 26.19.071(5) requires a factual finding determining why a deduction for pension, was made if it was substantially increased, as it was in this case, after the proceedings to modify child support were in litigation. Mr. Urner at the beginning of the proceedings, was taking a deduction of \$220.92 for his pension at CP 581. He subsequently claims he should be allowed to take \$416.66 a month (Mr. Urner’s opening brief at page 11); however, again he does not provide any citation as to when he started taking a larger deduction. He does note in his statement of facts, that CP 357 shows his latest 2015 paystub. Mr. Urner’s opening brief at page 7, makes an allegation, which is not reflected in the record or cited to authority that he increased his

retirement contribution after January of 2015 well after the start of the proceedings.<sup>3</sup> See CP 502-05 and CP 506-514.

An analysis of RCW 26.19.071(5)(g) shows that Mr. Umer has completely misconstrued the statute.

**(5) Determination of net income.** The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income: . . .

(g) Up to five thousand dollars per year in voluntary retirement contributions actually made **if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a determination that the contributions were made for the purpose of reducing child support;** and

*Id.* (Emphasis added).

Mr. Umer misreads the statute. The plain language of the statute, allow for an up to \$5000 deduction, “[I]f the contributions show a pattern of contributions during the **one-year period preceding the action** establishing the child support order”. *Id.* Ms. Umer and the trial court took at face value Mr. Umer’s claim of the amount of money he was paying into his pension at the start of the action. CP 521. Further as argued above in section I, the \$220.92 as a voluntary pension deduction was done with

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<sup>3</sup> Under RAP 10.3 and *State v. Murintorres*, 93 Wn. App. at 452, this court should not consider unsupported assertions that are without citation to the record or authority.

substantial evidence, and was based upon Mr. Urner's original worksheet filed in this matter. CP 521.

Mr. Urner would turn the next portion of the statute on its head and as the phrase issue states: "if the **contributions show a pattern of contributions during the one-year period preceding** the action establishing the child support order **unless there is a determination that the contributions** were made for the purpose of reducing child support" *Id.* (Emphasis added). The contributions being referred to in this phrasing, are the "contributions during the one-year period preceding the action". *Id.* Thus, the trial court's duty under the statute is to determine, if the contributions made at least for a one-year period preceding the action were made for the purpose of reducing support.

Mr. Urner, is arguing the court should completely ignore the phrase, "if the contributions show a pattern of contributions during the one-year period preceding the action". *Id.* He provides no authority or analysis for this complete re-phrasing of the statute. Nor does he explain why it is unclear in its phrasing requiring this court to interpret it.<sup>4</sup> This court should not re-write the statute and it should uphold the trial court's ruling.

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<sup>4</sup> Mr. Urner has not explained why the statute is ambiguous. Ms. Urner would argue his analysis is conclusory, and lacks authority. First, the plain meaning rule should apply:

**III. Mr. Urner argument that RCW 26.23.050 denies the trial court authority to find a history of unreimbursed medical expenses and allow this figure to be inserted at line 10b of the child support worksheet is without authority, and he did not cite this in his assignment of errors.**

a. Standard of Review. First, an argument unsupported by citation to the record or authority will not be considered. RAP 10.3(a)(6) and *State v. Marintorres*, 93 Wn. App. at 452. Further a brief that is conclusory and does not identify any specific legal issues or cite any authority, comply with RAP 10.3 and 10.4 pertaining to the content of briefs will not have its

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“[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994).

*Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4, 10 (2002).

Thus, Ms. Urner argues this court should refuse to consider this argument by Mr. Urner as his brief is conclusory and does not identify any specific legal issues or cite any authority and so it does not comply with RAP 10.3 and 10.4. *See also, State v. Marintorres*, 93 Wn. App. at 452.

arguments considered by the court of appeals. *State v. Marintorres*, 93 Wn. App. at 452.

Further, under RAP 10.3(a)(4) a specific assignment of error is required for an appellate court to consider the merits of an issue. *See also State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

b. Argument: First, Mr. Urner's only assignment of error that might somehow relate to RCW 26.23.050 is number 4, claiming that the arbitration decision process for unreimbursed expenses should have been adopted. However, he does not make any citation to record regarding this argument and he cites no authority for such a position. The court should not consider his argument. . RAP 10.3(a)(6) and *State v. Marintorres*, 93 Wn. App. at 452.

Second, Mr. Urner does not assign any specific error to the court's application of RCW 26.23.050; but, the amount of monthly medical expenses of \$370.61<sup>5</sup>, is addressed with his assignment of error number 2, regarding unreimbursed medical expenses. However, again he does not cite to any portion of the record where he argued this application of the statute or the monthly amount of \$370.61 for medical expenses at CP 847.

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<sup>5</sup> The figure of \$370.61 he refers to is at CP 847.

Under the error preservation doctrine he should not now be able to raise this issue for the first time on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983), citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); and RAP 2.5(a). “An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” *In re Det. of Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982, 988 (2006).

If the court believes he has sufficiently raised the issue then Ms. Urner argues that the appeals court reviews issues of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293, 300 (1996). Findings of fact are viewed as verities, provided however, there is substantial evidence to support the findings. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313, (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644-47.

The \$370.61 on line 10b of the child support worksheet, is derived from the testimony of Ms. Urner at CP 537.<sup>6</sup> She testified she was spending approximately \$4,447.43 each year for 2013-14, on Rachel's uninsured medical costs. Simple division of this yearly amount to a monthly amount results in \$370.61 average per month of uninsured medical costs per month. CP 537; *See also* CP 19-24, medical billing print out for Rachel for 2014. Ms. Urner, also testified that Mr. Urner had not paid for any of the uninsured costs. CP 537. The court could on substantial evidence and taking all inferences in favor of Ms. Urner find that she had shown an average uninsured medical costs, which would continue, as it had for the last two years. Further, Mr. Urner's obstructionism meant that the most efficient manner to get this paid, would be to average it per month.

Judge Harper stated the following:

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<sup>6</sup> "Mr. Urner has not paid any uninsured medical expenses, educational expenses, or other expenses for either child from 2008-present. . . . Medical expenses for Rachel not covered by my insurance totaled \$4,447.43 for 2014; costs for 2013 were similar." CP 537. *See also* CP 19-24, billing print out for Rachel for 2014; 141-169 Medical billing print out: 545-46 & CP 679-687 summaries providing detail of the medical expenses.

I mean, I'm not stupid. I realize that **Mr. Urner, even though he keeps saying, oh I want to help my kids in college, I mean, I don't believe that. And that's why I said in my opinion that I didn't think he was very credible** about some things and I basically went along with Miss -- Mrs. Urner's rendition of some facts.

He says he wants to pay but he didn't, doesn't want to. And so really your biggest argument was, gee, don't make us pay hardly anything and don't do it retroactively, especially. And I think I said in here, in my view, **Mr. Urner is the one that delayed this and delayed this, leading on Mrs. Urner thinking, oh gee, we can resolve this.** And some things changed and everything in the interim and so she put it, put it off. But then when they did try to communicate he didn't want to -- he, he just wanted to talk and talk and talk until somebody finally got tired. That's my perception of what's transpired here.

VRP 8. (Emphasis added).

Judge Harper had evidence to ascertain the average monthly figure of \$370.61 based upon Ms. Urner's testimony. CP 537; *See also* CP 19-24, medical billing print out for Rachel for 2014; *See also* CP 545-46 & CP 679-687. This meets the substantial evidence standard as there are testimony, and exhibits from which an inference of the amount maybe drawn. Also, in determining facts the appeals court should "defer to the fact finder and consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed". *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. at 814. Also, again credibility determinations are reserved for fact finder and are not reviewed on appeal. *Id.*

Thus, based upon the above analysis and giving Ms. Urner all of the inferences in the light most favorable to her, there is substantial evidence to show that the average monthly amount of uninsured medical expense she was bearing every month was \$370.61 for 2013-14, which provided a basis to derive an average monthly figure by the court.

As to the issue of the interpretation of RCW 26.23.050(1)(c), again Mr. Urner only quotes a snippet of the statute, taking it out of context, and ignores the rest of the statute. The portions at issue are as follows:

**(1) If the division of child support is providing support enforcement services under RCW 26.23.045, or if a party is applying for support enforcement services by signing the application form on the bottom of the support order, the superior court shall include in all court orders that establish or modify a support obligation:**

...

**(c) A statement that the receiving parent might be required to submit an accounting of how the support, including any cash medical support, is being spent to benefit the child”.**

*Id.* (Emphasis added).

An unambiguous reading of the above statute requires a statement in the order that includes the following statement: “the receiving parent might be required to submit an accounting of how the support, including any cash medical support, is being spent to benefit the child.” This exact statement is in the order, at CP 857, lines 8-9. The statute does not require

the order to set up an accounting system, only a warning that an accounting may be required. This was done.

Once again, Mr. Urner has not explained why the statute is ambiguous or why his analysis is preferred. Ms. Urner would argue his analysis is conclusory, and lacks authority and should be disregarded. *State v. Marintorres*, 93 Wn. App. at 452. Further, the plain meaning rule should apply and the reading of the statute submitted by Ms. Urner adopted. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 11-12.

Based upon the above analysis, Mr. Urner's argument in his section C and his assignment of error number 4, regarding the prior arbitration decision process should be denied and found not to be an error.

**IV. Appellant choose not to contest at trial, a request and finding under RCW 26.19.090 that the child graduate late from high school, and had health disabilities delaying his continuation in college, meeting the requirements mental, physical or emotional disabilities in the statute, and now should not be able to raise the issue for the first time.**

a. *Standard of Review.* Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308

(1978); RAP 2.5(a). *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983).

Commentators have said that the policies behind the preservation of error doctrine, codified in RAP 2.5, are twofold:

Some opinions have given the impression that the practice arose out of solicitude for the sensibilities of the trial court--that the trial court should be given an opportunity to correct errors and omissions at the trial level, and that it was the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal.

An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5(1), at 192 (6th ed. 2004). *See also Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

P24 In this case, we agree that the State has offered compelling reasons to find that Audett failed to preserve the issue of whether evidence derived from a CR 35 exam ordered in a sexually violent predator proceeding must be excluded.

*In re Det. of Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006).

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a). *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983). Lastly, the appeals court reviews issues of law de novo. *Johnson*, 128 at 443.

*b. Argument:* Mr. Urner at trial never raises any argument or complaint about Ms. Urner's request for Isaac to have support past his 23<sup>rd</sup> birthday. See his declaration at CP 688-693, which lacks any such objection. In addition, his Honor Judge Harper specifically noted at the entry of the orders that Mr. Urner had not addressed this issue in any way at trial as follows:

MR. BAUMANN: So I guess just for the record to be as clear as we can. In 3.5 you said that Isaac's support goes 35 months past his 23<sup>rd</sup> birthday. Are you saying that you don't want me to make argument on that right now? That, and that, if you say yes then I will just stop.

THE COURT: Okay. I, yeah, I -- well --

MR. BAUMANN: Gotcha.

**THE COURT: And see, that wasn't an argument that was made at the trial, or anything. And yes, I'm going to order exactly what I ordered.**

MR. BAUMANN: Okay.

THE COURT: And it's, it's, it takes him into age 23, or over age 23. And the reason is, and Mr. McFadden you can add this to 2.3 of the Findings. **The reasons that come to mind are that he, he graduated from high school at a later age and he's had medical issues during -- since he graduated from high school.** So that's the, that's the, um, basis for going beyond that age.

VRP at 12-13, (Emphasis added); See also CP at 813 where his honor discusses this issue in his memorandum opinion.

Mr. Baumann, in his statements above, misrepresented the child support order, when he stated "support goes 35 months past his 23<sup>rd</sup> birthday. VRP at 12. The child support order at CP 853, states Isaac is 21 years old. The order at CP 855 states:

Isaac Sheldon Jericho Lippincott Urner Starts Aug 2015 for 35 months; however, support is Suspended March 2016 to June 2016 as Isaac is in relief efforts for refugees and resumes as of July 2016 for the 2016-17 school year. Support for Isaac still ends July 2018, 35 months from Aug 2015.

*Id.* Thus, Isaac in 2018 will be 24 years of age.

In addition, Mr. Urner at CP 506-9 in his Response to Petition for Modification of Child Support, clearly lays out that: (1) there was no dispute to preserve Isaac’s right to support for post-secondary education; (2) That Isaac is a good student who had won scholarships. He never provided Ms. Urner with any clue that he was challenging this request.

Mr. Urner has not made any argument or analysis as to why he did not address this issue at trial. Further, this precise issue was raised at trial by Ms. Urner at CP 551, where she asked for the following:

In summary, we are requesting that Douglas Urner pay the following post-secondary expenses for Isaac:

Half of Post-secondary Expenses (fees, books, travel only) for Deep Springs College, Summer term 2013 and Fall/Winter term 2013-14	\$1325 (judgment)	Payable as a lump sum payment to Elizabeth Wennstrom to reimburse her for expenses already paid.
.67 of the parent’s 2/3 portion of Post-secondary Expenses for Evergreen State College, Winter term 2015 and Spring term 2015	\$5,403.32 (judgment)	Payable as a lump sum payment to Elizabeth Wennstrom to reimburse her for expenses already paid.
.67 of the parent’s 2/3 portion of Post-secondary Expenses for Leiden University, Aug 2015-June 2018	\$7,405.96 /year	<b>Payable as monthly payments of \$634.97, paid directly to Isaac Urner for 35 months 8/15-6/2018 for post secondary educational</b>

		<b>support.</b> 5 months in arrears (Aug-Dec 2015) for a lump sum of \$3174.85
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*Id.* (Emphasis added).

Mr. Urner was on notice of the request, for support past Isaac’s 23<sup>rd</sup> birthday and did not argue it at all. He should not now be allowed to raise an issue he ignored at trial.

Even without any opposition raised, Ms. Urner did offer the court some explanation for Isaac’s delay in completing college, stating: “After a serious case of pneumonia in November 2013, ongoing health issues led Isaac to take a medical leave from Deep Springs in April 2014. He remained on leave for Fall Semester 2014, living at home with his mother and working in a local café.” CP 547. Further, in the petition itself at CP 531, it was stated that Isaac took a medical leave from Deep Springs.

If Mr. Urner had bothered to challenge this request at the trial, then a better record, documenting Isaac’s physical and emotional problems in 2013 and 2014 could have been provided the court. He choose not to address the issue, even though it was squarely before the court.

Should the court allow Mr. Urner to proceed on this issue, even though he failed to argue it at trial and so prevented Ms. Urner from creating a better record, then she argues the following:

Findings of fact are viewed as verities, provided however, there is substantial evidence to support the findings. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313, (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644-47. As argued above the evidence on this issue is found at CP 531 and 547, and was undisputed at trial. Ms. Urner argues undisputed facts presented at trial, where she was found to be credible meet the substantial evidence standard.

Further, Mr. Urner does not explicitly challenge the court's findings of fact on this issue. He stated in his assignment of error number 3: "The trial court **erred in its application of RCW 26.19.090(5)** when it ordered payment of postsecondary educational expenses beyond age 23 for Isaac without a finding of exceptional circumstance. Mr. Urner's *Opening Brief* at 4; (emphasis added)<sup>7</sup>. The challenge is to the application of the statute, not the finding by the court that Isaac had health disabilities that delayed his completion of his degree program past age 23. Thus, this court should find that the health disability was proved, and that the statute

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<sup>7</sup> RCW 26.19.090(5) "The court shall not order the payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, such as mental, physical, or emotional disabilities."

was applied as written, with a factual finding of an exceptional circumstance in Isaac's health disabilities, meriting an extension past his 23<sup>rd</sup> birthday.

**V. Mr. Urner's assignment of error number 4, & argument at section E that Judge Harper was bound to follow a similar process for reimbursement of medical expense as was set up by the arbitrator in 2008, is without authority and should be not be considered by this court.**

*a. Standard of Review:*

First, an argument unsupported by citation to the record or authority will not be considered. RAP 10.3(a)(6) and *State v. Marintorres*, 93 Wn. App. at 452. Further a brief that is conclusory and does not identify any specific legal issues or cite any authority, comply with RAP 10.3 and 10.4 pertaining to the content of briefs will not have its arguments considered by the court of appeals. *State v. Marintorres*, 93 Wn. App. at 452.

*b. Argument.*

Mr. Urner does not cite to any authority or to any portion of the record in this request to return to the arbitrator's decision on medical reimbursement. See Opening Brief of Appellant, starting at section E, page 15 and continuing onto page 16.

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In addition, the issue of medical expense was addressed in Ms. Urner's brief at section III. To briefly recap, she testified she was spending approximately \$4,447.43 for 2013-14 on Rachel's uninsured medical costs. CP 537. Simple division of this yearly amount to a monthly amount results in \$370.61 average per month of uninsured medical costs per month. CP 537; *See also* CP 19-24, medical billing print out for Rachel for 2014. Ms. Urner, also testified that Mr. Urner had not paid for any of the uninsured costs. CP 537. The court had ample facts to find that Mr. Urner would simply delay and fight over every issue including medical expenses. Judge Harper stated the following:

And part of the reason why -- and this was at Mr. McFadden's request -- **part of the reason why I've set forth the college support and everything over a period of the next couple of years is to avoid exactly what's happened for the last four years. And that is that, I mean, in my view, Mr. Urner's going to litigate this to death at every opportunity.**

And so what I've tried to do here is exactly what Mr. McFadden suggested, and that is to try to fashion an order that places the burden on him. That if he wants to nitpick about something at some point in time he can file the motion. He can seek a modification, or something like that.

VRP at 10. (Emphasis added).

Based upon RAP 10.3 and *State v. Marintorres*, 93 Wn. App. at 452.

Ms. Urner requests the court not consider this argument.

**VI. Mr. Urner's argument is without authority or merit regarding the Order of Support, which states the Children shall stay in compliance with RCW 26.19.090; his claim is that this language is somehow deficient, and requires some additional language regarding the timeliness of said information to be provided.**

*a. Standard of Review:*

Once again, an argument unsupported by citation to the record or authority will not be considered. RAP 10.3(a)(6) and *State v. Marintorres*, 93 Wn. App. at 452. Further, a brief that is conclusory and does not identify any specific legal issues or cite any authority, comply with RAP 10.3 and 10.4 pertaining to the content of briefs will not have its arguments considered by the court of appeals. *State v. Marintorres*, 93 Wn. App. at 452.

*b. Argument.*

Mr. Urner's cites no authority suggesting that the language he has suggested in his brief at page 17 is required in any order of support. He provides no authority that an order requiring compliance with the RCW 26.519.090(3-4), is somehow deficient. The operable portions of the 26.519.090(3-4), state:

(3) The child must enroll in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and

must be in good academic standing as defined by the institution. The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.

(4) The child shall also make available all academic records and grades to both parents as a condition of receiving postsecondary educational support. Each parent shall have full and equal access to the postsecondary education records as provided in RCW 26.09.225.

*Id.*

Also, as noted in the previous section, the Judge Harper found Mr. Urner to be the essence of intransigent. Judge Harper found, “And that is that, I mean, in my view, Mr. Urner's going to litigate this to death at every opportunity. And so what I've tried to do here is exactly what Mr. McFadden suggested, and that is to try to fashion an order that places the burden on him.” VRP at 10.

Mr. Urner's request should not be considered as he cannot cite any authority that the court is in error, acted outside of its discretion, or that requiring the children to follow the 26.519.090(3-4) requires the additional language he suggests. This is merely another example of his intransigence and desire to continue to costs Ms. Urner fees, to punish her for seeking support for the children.

**VII. Mr. Urner should be required to pay Ms. Urner's attorney fees and costs in defending this appeal, based upon either their financial situations, or upon his intransigence.**

Under RCW 26.09.140 attorney fees should be awarded based on the need of one spouse and the ability of the other spouse to pay. The financial information before the court demonstrate that Ms. Urner still has a significant financial need. Further, Mr. Urner's financial information is also before the court, with the finding by Judge Harper on the child support worksheets, at CP 846-850 showing that Mr. Urner is netting some \$4,676.60 per month for last year's income<sup>8</sup>. Thus, Mr. Urner has substantially more financial income at this time and has the ability to pay at least portion of Ms. Urner's attorney's fees. Ms. Urner requests the court to have Mr. Urner pay all of the attorney fees she has incurred in the appeal as his income is substantially greater than hers.

Additionally if intransigence is demonstrated, the financial status of the party seeking the award is not relevant. *Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989). A party's intransigence can substantiate a trial court's award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy. *Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120 (1992).

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<sup>8</sup> See also CP 347-355, which include Mr. Urner's financial declaration of Jan., 2016, and CP 368 his 2015 December paystub showing a gross income of \$69,428.95.

Mr. Urner has done everything in his power to increase the costs and fees in this matter. He has repeatedly sought to delay matters, and Judge Harper found that he had caused the delays in this matter. Further the court found that he had sought to litigate everything to death.<sup>9</sup> His intransigence has at least doubled the cost to Ms. Urner and it is only fair that he pay all of fees and costs she incurred, in this appeal.

#### **F. CONCLUSION**

Based upon the foregoing analysis and facts, Ms. Urner respectfully requests this court to rule in her favor, uphold the trial court and grant her attorney fees and costs spent on this appeal.

Respectfully submitted this 11<sup>th</sup> day of Dec, 2016.

  
\_\_\_\_\_  
Alton B. McFadden WSBA #28861  
Attorney for Ms. Urner.

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And I think I said in here, in my view, Mr. Urner is the one that delayed this and delayed this, leading on Mrs. Urner thinking, oh gee, we can resolve this.

VRP 8.

I've set forth the college support and everything over a period of the next couple of years is to avoid exactly what's happened for the last four years. And that is that, I mean, in my view, Mr. Urner's going to litigate this to death at every opportunity.

And so what I've tried to do here is exactly what Mr. McFadden suggested, and that is to try to fashion an order that places the burden on him.

VRP 10.

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

In re the Marriage of:

DOUGLAS LIPPINCOTT URNER  
Appellant,

and

ELIZABETH URNER DOUGLAS nka  
Elizabeth Urner Wennstrom  
Respondent

CASE #. 49237-7-II

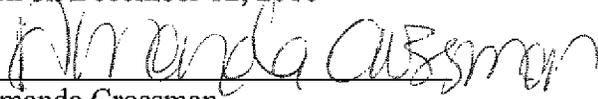
DECLARATION OF MAILING

On December 12, 2016, I placed a copy of the foregoing documents: **Brief of Respondent**  
via email, addressed to the following party:

Douglas Urner  
dlu@canishe.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Bainbridge Island, Washington on December 12, 2016

  
Amanda Crossman  
**OLSEN & McFADDEN, INC., P.S.**

DECLARATION OF PERSONAL SERVICE - 1

**OLSEN & McFADDEN, INC., P. S.**  
216 Ericksen Avenue, NE  
Bainbridge Island, WA 98110  
(206) 780-0240  
(206) 780-0318