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No. 50392-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

KIMBERLY HALME,

Respondent/Cross-Appellant,

and

NATHAN KYSAR,

Appellant/Cross-Respondent.

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

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

The father's appeal of wholly discretionary decisions made by the trial court is frivolous. Although he challenges the trial court's award of \$10,000 in attorney fees to the mother – half of what she incurred – he does not challenge the basis of the fee award – her need and his ability to pay – nor does he challenge the reasonableness of the fees that she requested. Instead, the father's appeal is based on his false claim that the award was not “supported by evidence,” when in fact the award was based on detailed billing statements submitted by the mother.

The father also challenges the trial court's award of suit money to the mother to assist her in defending against his baseless appeal of the attorney fee award. However, the father failed to designate the suit money order or any of the underlying pleadings, all of which support the trial court's ruling, as part of the record on appeal. This alone warrants rejection of his challenge to this order. In any event, the trial court's award was well within its discretion in light of the disparity in the parties' financial circumstances, made worse by the father's refusal to pay the attorney fees awarded to the mother.

Finally, the father raises an untimely challenge to an order of child support that was entered more than 30 days before the father filed his notice of appeal, premised on his claim that the trial court should have imputed income to the mother based on median income, even though there was no evidence that the mother ever earned or had the ability to earn that much income. Even if the father had timely challenged this order, it is without merit because the trial court properly followed the statute in imputing income to the mother.

If the trial court committed any error, it was in excluding from its attorney fee award those fees the mother incurred in this Court to answer the father's unsuccessful motion for discretionary review. This Court should affirm the trial court's orders on the father's appeal, and remand solely for the trial court to enter a supplemental judgment for the attorney fees the mother incurred in this Court in responding to the father's motion for discretionary review. To the extent the suit money awarded to the mother does not cover the fees actually incurred to defend the father's appeal, this Court should award her additional attorney fees. Regardless, this Court should sanction the father for bringing this frivolous appeal.

## **II. CROSS-APPEAL ASSIGNMENT OF ERROR**

The trial court erred in excluding the attorney fees the mother incurred to defend against the father's unsuccessful motion for discretionary review in this Court from its award of attorney fees at the conclusion of the case. (CP 835-36; RP 5)

## **III. CROSS-APPEAL ISSUE STATEMENT**

In denying the father's motion for discretionary review of a temporary order of child support, a commissioner of this Court declined to rule on the mother's request for attorney fees under RCW 26.09.140 and RAP 18.1, after determining that RAP 18.1 does not apply if review is not accepted. At the conclusion of the case in the superior court, the trial court found that an award of attorney fees to the mother was warranted under RCW 26.09.140, and the fees requested by the mother, including those fees incurred in this Court, were reasonable. Did the trial court err in excluding the fees incurred in this Court from its award of attorney fees, based on its conclusion that it was precluded from doing so by this Court's ruling denying review?

#### IV. RESTATEMENT OF FACTS

- A. In seeking to reduce his child support obligation, the father unsuccessfully sought discretionary review of a temporary child support order, forcing the mother to defend against his modification action in both the trial court and in this Court.**

Respondent Kimberly Halme and appellant Nathan Kysar divorced on April 20, 2007. (CP 867) The final parenting plan designated the mother as primary residential parent of the parties' four children, then ages 9, 6, 5, and 3. (CP 838, 843) For purposes of child support, the mother's monthly net income was set at \$3,200, based on spousal maintenance she was then receiving from the father. (CP 227, 850) The father's monthly net income was set at \$5,600, after paying spousal maintenance. (CP 849) The father was ordered to pay child support of \$1,500 for the parties' four children. (CP 850)

In 2011, the 2007 child support order was modified. (CP 884-93) By then, the mother's award of spousal maintenance had terminated. (*See* CP 869) However, the mother was still not working outside the home because she was caring for the parties' four children, who lived primarily with her, as well as her daughter and two stepsons from her new marriage. (CP 181-82) The parties agreed to impute monthly net income of \$2,693 to the mother, based on the median net monthly income established by the United

States Bureau of Census. (CP 227, 886) The father's net monthly income was set at \$8,750. (CP 885) The father was ordered to pay child support of \$2,553.57 for the parties' four children. (CP 887)

On November 24, 2015, the father petitioned to modify the parenting plan, seeking to have the eldest child, then 17, reside primarily with him. (CP 7-14) Because he asked that one of the four children reside primarily with him, the father sought to reduce his transfer payment to the mother. (CP 1-6, 8)

While his action was pending, the father sought a temporary order to reduce his transfer payment to the mother because the son had been residing with him since the petition was filed. (CP 178-79) The father asked the court to impute median income of \$2,714 to the mother because she was "voluntarily unemployed" and "has always been imputed at median income." (CP 172-77, 179) The mother asked "the court to impute [her] income based upon minimum wage" because she was a stay-at-home mother and had never earned more than minimum wage. (CP 180-85, 188)

On August 26, 2016, Clark County Superior Court Judge James E. Rulli ("the trial court") entered a temporary order of child support on revision. (CP 361-70) The trial court revised the commissioner's ruling, which had imputed income to the mother

based on the median income (CP 257), and imputed to her a monthly net income of \$1,516, the minimum wage. (CP 362, 364) The trial court adopted the father's proposed monthly net income of \$8,778, with the understanding that his actual income would need to be determined before a final child support order was entered. (CP 425; *see* CP 239)

The father sought discretionary review of the temporary child support order in this Court on September 6, 2016, challenging the imputation of the mother's income at minimum wage. (CP 395-400) This Court denied the father's motion for discretionary review (CP 731-36), concluding that the trial court had not committed "probable error when it exercised its discretion in determining to no longer use median income to calculate the mother's imputed income" because "the mother's historical earnings and financial records" were before both the commissioner and the trial court, and "median income is the lowest-priority method for calculating imputed income" under RCW 26.09.071(6). (CP 735-36) This Court declined to consider the mother's motion for attorney fees "pursuant to RCW 26.09.140 and RAP 18.1" on the basis that "RAP 18.1 . . . does not apply because neither party prevails on review when this court refuses to accept review." (CP 736)

On January 13, 2017, the trial court entered final orders on the father's petition for modification. (CP 706-15) In the final child support order, the trial court imputed a monthly net income of \$1,515.93 to the mother, based on minimum wage. (CP 707) The trial court found that the father's actual monthly net income was \$11,807.88. (CP 707) As the eldest son had reached the age of majority while the modification action was pending, the trial court established the father's child support obligation for the younger three children at \$3,160.29. (CP 709) The trial court reserved ruling on the mother's request for attorney fees, and directed that she file a motion on the trial court's regular motion docket. (CP 714)

The father did not appeal the January 13, 2017 modified order of child support, which he would have had to file by February 13, 2017.

**B. The trial court awarded attorney fees to the mother to defend the father's modification action based on her need and the father's ability to pay, but excluded those fees incurred in this Court.**

The mother filed her motion for attorney fees on February 23, 2017. (CP 749-56) The mother had previously been awarded a total of \$2,750 for attorney fees under temporary orders, "[b]ased

on the disparity of income of the parties.”<sup>1</sup> (CP 362) The mother asked the trial court to order the father to pay her additional attorney fees under RCW 26.09.140, based on her need and his ability to pay. (CP 749)

In total, the mother had incurred \$19,035.86 in attorney fees and costs answering the father’s petition for modification in the superior court and his unsuccessful motion for discretionary review in this Court. (CP 750) In support of her request, she submitted a declaration from her counsel setting forth the hourly rates of her attorney and paralegal, the total attorney fees incurred, and the amount of attorney fees already paid by both the father and mother. (CP 745-47, 750) Thus, contrary to the father’s contention that “[t]here was also no indication in the record that the mother had actually paid any fees” (App. Br. 15), this declaration provided the amounts paid by both the mother and the father and the dates that those payments were made. (CP 747, 750) The mother offered to submit a detailed exhibit to the trial court of “[t]he number of hours and services rendered in this matter . . . upon request.” (CP 745)

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<sup>1</sup> The trial court awarded the mother \$1,500 in fees on September 30, 2016. (CP 475, 706) On August 26, 2016, the trial court entered judgment for \$500 in fees to the mother “[b]ased on the disparity of income of the parties.” (CP 362, 378, 703, 705; RP 14) The trial court awarded an additional \$750 in attorney fees on January 13, 2017. (CP 703-05)

The mother asked the trial court to order the father to pay only a portion of the total attorney fees and costs that she incurred. The mother proposed that the father pay 88.6% of the total, which was his proportionate share of the parties' combined net income under the final child support order. (CP 707, 750) Contrary to the father's claim that the mother "failed to credit [the father] for all of the fees he paid" (App. Br. 15), the mother asked the court to deduct from its award those attorney fees the father had already paid under temporary orders. (CP 750)

The father did not deny that the mother had the need for her fees to be paid and that he had the ability to pay. (CP 769-75) Instead, he objected to the mother's request for fees incurred in defending against his motion for discretionary review, claiming the mother could not recover these "appellate" fees that had already been "denied." (CP 774-75; RP 2)

Before ruling on the mother's request for attorney fees, the trial court ordered the mother's counsel "to submit his itemized statements." (CP 901) Three days later, the mother submitted 17 pages of invoices detailing the billing from her attorney, which included all of the fees incurred in defending the father's petition

for modification in both this Court and the superior court. (CP 782-98)

The trial court awarded attorney fees to the mother after taking “into consideration the financial resources of both parties” (CP 835), including the fact that it had already found the father’s monthly net income was nearly \$12,000 and the mother was not working. (CP 707) The father does not challenge this finding on appeal. The trial court found that the attorney fees requested by the mother were reasonable, after applying “the Lode Star factors and find[ing] these factors have been met as far as the reasonableness of the fees requested.” (CP 835) The father also does not challenge this finding on appeal. The trial court ordered the father to pay his proportionate share of the mother’s attorney fees based on their incomes, less the amounts the father already paid under temporary orders,<sup>2</sup> less \$984.50 for “everything that [father’s counsel] indicated as excessive costs,” and less \$3,065 for fees incurred in responding to the motion for discretionary review, based on the father’s claim that the Court of Appeals had already denied the mother’s request. (CP 835-36; RP 5-6, 15, 17-18)

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<sup>2</sup> By the time the trial court entered its order awarding attorney fees, the father had paid all of the fees previously awarded to the mother, in the amount of \$2,750. (RP 15, 17)

On May 5, 2017, the trial court entered a judgment awarding attorney fees to the mother in the amount of \$10,066.27. (CP 835-36) The father filed a notice of appeal of this order on May 30, 2017. (CP 902) The mother filed a notice of cross-appeal on June 12, 2017. (Supp. CP 931-33)

Despite not staying enforcement of the judgment awarding attorney fees to the mother, the father refused to pay the amounts owed to the mother. (See CP 906-09) Without funds to defend the father's appeal, the mother sought \$10,000 in advance "suit money" to respond to the father's appeal. (CP 906) The mother's request was premised on the trial court's authority under RAP 7.2 and RCW 26.09.140, based on her demonstrated need and the father's demonstrated ability to pay, as previously found by the trial court. (CP 906-09) The trial court awarded \$7,500 in suit fees on September 8, 2017. (CP 925-26)

## V. ARGUMENT

**A. The amount awarded to the mother by the trial court for attorney fees incurred in the superior court is supported by substantial evidence. However, the trial court erred in excluding from its final award the fees incurred in this Court to answer the father's unsuccessful motion for discretionary review. (Includes Cross-Appeal Argument)**

**1. Substantial evidence supports the trial court's judgment for attorney fees incurred by the mother in the superior court.**

A trial court has "complete discretion over the amount of attorney fees to award." *Marriage of Firchau*, 88 Wn.2d 109, 115, 558 P.2d 194 (1977). The party challenging an award of attorney fees "bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable." *Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995).

Here, the father completely fails to meet his burden of proving that the trial court abused its discretion in awarding the mother her attorney fees incurred in the superior court. The father does not challenge the trial court's finding that an award of attorney fees to the mother was warranted based on her need and the father's ability to pay under RCW 26.09.140. (*See App. Br. 6-7; CP 835*) Nor does the father challenge the trial court's finding that the amount of attorney fees requested by the mother was reasonable

under the lode star method.<sup>3</sup> (See App. Br. 6-7; CP 835) Therefore, that an award of attorney fees was warranted and the reasonableness of the amount requested are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002) (“Unchallenged findings are verities on appeal.”).

The father’s appeal is therefore premised on two baseless claims: (1) the trial court “failed to credit the father with the payments he had already made” (App. Br. 13); and (2) it was an “impossible task” for the trial court to distinguish between the fees incurred by the mother in the superior court and the fees incurred in this Court to respond to the father’s unsuccessful motion for discretionary review. (App. Br. 15)

First, it is absolutely untrue that the father was not credited for the payments he made towards the mother’s attorney fees under temporary orders. The trial court plainly credited the father for the \$2,750 he had paid in fees. The father’s proportionate share of the

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<sup>3</sup> The father could not in any event challenge the reasonableness of the attorney fees incurred by the mother since he had not provided any information about the attorney fees that *he* incurred. *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 354, ¶ 47, 279 P.3d 972 (a comparison of fees incurred by one party is probative of the reasonableness of the attorney fees requested by the party awarded fees), *rev. denied*, 175 Wn.2d 1027 (2012); *Miller v. Kenny*, 180 Wn. App. 772, 821, ¶ 124, 325 P.3d 278 (2014) (“the fees and costs claimed by the opposing party challenging the request are also appropriate to consider for comparative purposes.”). Further, the trial court had already reduced the mother’s fee award for the “excessive costs” claimed by the father. (CP 835-36)

mother's attorney fees was \$16,865.77. (CP 750) In ordering the father to pay only \$10,066.27 of that amount, the trial court credited the father \$2,750 for his previous payments, \$984.50 for "excessive costs," and \$3,065 for fees incurred in this Court. (CP 835-36; RP 5-6, 15, 17-18)

Second, notwithstanding the mother's cross-appeal discussed *infra*, it was not an "impossible task" for the trial court to segregate the amount incurred by the mother in this Court from the amount incurred in the superior court. The father asserts that the mother "ha[d] the burden of submitting billing records with enough detail to establish that the numbers of hours it has requested are reasonable and were spent on the litigation for which fees are sought." (App. Br. 14) The mother clearly met her burden by providing detailed billing statements. (*See* CP 783-98) And in doing so, the trial court was able to determine that \$3,065 of the fees requested by the mother had been incurred in this Court by "review[ing] all the entries" and going "over everything." (RP 1)

The required documentation for attorney fees "need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work."

*Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The mother submitted detailed, itemized billing records that provided exactly that information. (CP 783-98) Therefore, the trial court was not required to “engage in guesswork to determine an arbitrary amount of fees to be awarded to the mother.” (App. Br. 15) Each entry in the mother’s billing statements adequately described the work performed to allow the trial court to segregate between the fees incurred in the superior court and appellate court. (*See, e.g.*, CP 790: “Prepare response to Motion for Discretionary Review”; CP 798: “Draft Final Order of Child Support”)

Nevertheless, the father preposterously claims that the information provided by the mother “contained no detail of any kind of what the hours billed were for.” (App. Br. 14) This baseless claim is apparently premised on the initial declaration filed by the mother in seeking her attorney fees, which she later supplemented upon the trial court’s request. (CP 745-47, 782-98, 901)

In allowing the mother to supplement her motion, the trial court did not “impermissibly . . . allow[ ] counsel for the mother, to re-write his bill.” (App. Br. 15) First, the father cites no authority for his incredulous proposition that the trial court lacks authority to

allow a party to submit additional documentation in support of a fee request. (App. Br. 13-15) Second, there “is no per se rule . . . that permitting an attorney to rely on reconstructed time records is an abuse of discretion.” *Miller v. Kenny*, 180 Wn. App. 772, 822, ¶ 128, 325 P.3d 278 (2014).<sup>4</sup> Finally, there is no evidence that the mother’s counsel “re-wrote his bill” in submitting detailed billing statements to support the summary previously provided.<sup>5</sup>

Nevertheless, the father complains that the mother initially “reported paying” \$3,940.63 in fees for the “appeal,” which she later “allocated . . . down to \$3,065.” (App. Br. 13) Even if there were a discrepancy in the mother’s statements, the trial court itself reviewed the mother’s billing records and determined the amount to be excluded from its fee award. In any event, the trial court is not required to calculate its award with mathematical precision. *See Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509 (“primary considerations” for an award of attorney fees under RCW

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<sup>4</sup> Although in this case, the mother did not have to “reconstruct” time records. Instead, she provided the actual time records, rather than a summary.

<sup>5</sup> For instance, the father complained that some fee entries were “out of order[.]” (RP 1; see App. Br. 15) However, the mother’s counsel explained that “[t]hat’s just how the billing statement printed it out,” but “that doesn’t prevent the court from saying that they were reasonable and properly incurred.” (RP 3) By including those entries in its fee order, the trial court clearly agreed with, and accepted, the mother’s explanation.

26.09.140 are equitable), *rev. denied*, 130 Wn.2d 1019 (1996). The “overriding considerations are the need of the party requesting the fees, the ability to pay of the party against whom the fee is being requested, and the general equity of the fee.” *Van Camp*, 82 Wn. App. at 342.

The father’s appeal over **\$875** is baseless in the extreme, as the attorney fee award is supported by substantial evidence and is well within the trial court’s discretion. This Court must therefore affirm the trial court’s award of attorney fees incurred in the superior court, and remand solely for the trial court to enter a supplemental judgment for the attorney fees previously incurred in this Court, as addressed in the mother’s cross-appeal.

**2. The trial court was not precluded from awarding the mother attorney fees incurred in answering the motion for discretionary review before this Court. (Raising Cross-Appeal)**

The mother recognizes that appealing a decision on attorney fees epitomizes the idiom “throwing good money after bad,” which is the reason she did not independently appeal the trial court’s exclusion of those attorney fees incurred in this Court answering the father’s unsuccessful motion for discretionary review from its fee award. But as the father has nevertheless forced the parties into further litigation in this Court, the mother asks this Court to review

the trial court's exclusion of the attorney fees incurred in this Court from its fee award.

Unlike the father's appeal, in which he makes fact-based challenges to the trial court's discretionary award of attorney fees, the mother's cross-appeal raises a singular legal issue: if a trial court finds that an award of attorney fees to one party is warranted at the conclusion of the case, is the court precluded as a matter of law from awarding attorney fees incurred by that party in the appellate court, while the superior court action was pending, to defend against the other party's unsuccessful motion for discretionary review?

Here, the trial court denied the mother attorney fees incurred in this Court based on the father's argument that a commissioner of this Court had already denied her request for those fees, thus precluding the trial court from awarding those fees at the conclusion of the case. *See State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929, 959 P.2d 1130 (If "fees were requested and denied by a higher court, that is the final determination on that issue. A superior court cannot override a higher court's determination of an appealed, decided issue, including the denial of attorney fees."), *rev. denied*, 136 Wn.2d 1031 (1998). Whether a trial court has

authority to award attorney fees to a party is reviewed de novo by this Court. *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn. App. 711, 736, ¶ 64, 357 P.3d 696 (2015), *rev. denied*, 185 Wn.2d 1004 (2016).

In this case, the mother's request for attorney fees under RCW 26.09.140 was not in fact denied by this Court. Instead, this Court simply did not reach the question of whether the mother should be awarded attorney fees because it denied review. As the commissioner recognized, the mother's request for attorney fees was based on RAP 18.1, which does not apply unless review is accepted. (CP 736: "The mother requests attorney fees both because the motion was frivolous and pursuant to RCW 26.09.140 and RAP 18.1. RAP 18.1, however, does not apply because neither party prevails on review when this court refuses to accept review."); *see* RAP 18.1(a), (b) ("If applicable law grants to a party the right to recover reasonable attorney fees or expenses on *review* before the Court of Appeals" "[t]he party must devote a section of its opening brief to the request for the fees") (emphasis added).

Therefore, to the extent the commissioner "ruled" on attorney fees, it was not by its nature a "final determination" of "an appealed, decided issue" precluding the trial court from awarding

attorney fees incurred in this Court. *Grenley*, 91 Wn. App. at 929. Accordingly, once the trial court determined that the mother was entitled to an award of attorney fees under RCW 26.09.140 and that the amount of attorney fees requested were “reasonable,” including those fees incurred in this Court, it should have included the attorney fees incurred to answer the father’s unsuccessful motion for discretionary review in its award. *See Emerick*, 189 Wn. App. 711.

In *Emerick*, the appellate court had, in an earlier appeal, reversed a summary judgment order, which had found a provision in a non-compete agreement unenforceable and awarded attorney fees to the plaintiff as the prevailing party. 189 Wn. App. at 718, ¶¶ 5, 7. In reversing, the Court vacated the attorney fee award to plaintiff, as he was no longer the prevailing party under the non-compete agreement, and remanded for further proceedings. *Emerick*, 189 Wn. App. at 718, ¶ 7. Although the Court awarded the defendant statutory attorney fees as the prevailing party on appeal under RCW 4.84.080, it was silent on an award of attorney fees to the defendant under RAP 18.1 as the prevailing party under the non-compete agreement. *Emerick*, 189 Wn. App. at 736-37, ¶ 65.

The defendant prevailed on remand and was awarded attorney fees by the trial court as the prevailing party in its enforcement of the non-compete agreement. *Emerick*, 189 Wn. App. at 719, ¶ 9. However, the trial court refused to include in its award those attorney fees incurred by defendant in the earlier appeal, based on its belief that this Court had already denied the defendant's request for attorney fees. *Emerick*, 189 Wn. App. at 719, ¶ 9.

The Court reversed the trial court's order excluding from its award those fees incurred by the defendant in the earlier appeal. The Court held that at the time of the earlier appeal, a determination of an award of attorney fees to the defendant under RAP 18.1 was premature, as the defendant had not yet been determined the prevailing party in the dispute over the non-compete agreement. *Emerick*, 189 Wn. App. at 738, ¶ 72. The Court reasoned that by not awarding fees to the defendant in the earlier appeal, it had just "delayed that determination pending resolution of the underlying action on remand." *Emerick*, 189 Wn. App. at 738-39, ¶ 72. However, once the trial court determined that the defendant was the prevailing party in its enforcement of the non-compete agreement and entitled to attorney fees, the trial court

was required to include in its award those fees incurred in the earlier appeal. *Emerick*, 189 Wn. App. at 739, ¶ 73.

Likewise here, a determination on attorney fees incurred in answering the motion for discretionary review had been premature at the time this Court denied review. However, once the trial court determined that the mother was entitled to attorney fees under RCW 26.09.140 and the attorney fees requested were reasonable, it should have included those fees incurred by the mother in this Court in its award. This Court should therefore remand and direct the trial court to enter a supplemental judgment awarding the \$3,065 in attorney fees that it had previously excluded.

**B. The trial court properly exercised its broad discretion in awarding the mother suit money to defend against the father's appeal of her attorney fee award.**

**1. This Court should decline to review the father's challenge because he failed to provide an adequate record on review.**

This Court should disregard the father's challenge to the order awarding suit money to the mother entered after his notice of appeal was filed because he failed to designate this order as part of the record on appeal. Although the father was not required to file a separate notice of appeal of this order under RAP 7.2(i), this does not relieve him of his obligation to provide an adequate record for

review. As appellant, the father had the burden of providing an adequate record on appeal, and his failure to satisfy this burden means the trial court's decision "must stand." *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

At a "minimum," the appellant must designate "any written order or ruling not attached to the notice of appeal, of which a party seeks review." RAP 9.6(b)(1)(D). The father not only failed to designate the order awarding suit money, but he failed to designate any of the relevant pleadings. Accordingly, his opening brief is not supported by the record and violates RAP 10.3. RAP 10.3(a)(5), (6) ("Reference to the record must be included for each factual statement," and an appellant must cite to "relevant parts of the record" in argument). "The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court." *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271 & n.9, 792 P.2d 545, *rev. denied*, 116 Wn.2d 1021 (1990). This Court should not reward the father's disregard of the appellate rules and should decline to review the suit fee award.

**2. The trial court was well within its discretion to award the mother, whose imputed income is seven times less than that of the father, suit money to defend against his appeal.**

Although appellant failed to provide an adequate record for review of his challenge to the award of suit money, the respondent has nevertheless designated the appropriate record in the event that this Court chooses to decide the issue on its merits.

Contrary to the father's claim otherwise (App. Br. 16-17), the trial court "has authority to award attorney fees and litigation expenses for an appeal in a marriage dissolution . . . or an action to modify a decree in any of these proceedings," pursuant to RAP 7.2(d). The trial court's broad discretion in awarding attorney fees in dissolution cases is clear: "The family court shall have jurisdiction and full power in all pending cases to make, alter, modify, and enforce all temporary and permanent orders regarding . . . child support, . . . and orders for attorneys' fees, suit money or costs as may appear just and equitable." RCW 26.12.190. "Trial courts have authority to award attorney fees and expenses in marriage dissolution proceedings both at trial *and* on appeal." *Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989) (emphasis added); *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936 (1959) (affirming trial court's award of suit

fees to enable wife to respond to husband's appeal); *Marriage of Bernard*, 165 Wn.2d 895, 907-08, ¶¶ 29-31, 204 P.3d 907 (2009) (affirming award of suit "fees in advance of this appeal pursuant to *Stringfellow*").

The father's reliance on RAP 18.1 to claim that only this Court can award attorney fees for an appeal is misplaced. RAP 18.1 "governs the claim for attorney fees" (App. Br. 17) only when a party seeks an award from *this* Court. See 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."). But in light of RAP 7.2(d), RAP 18.1 does not, as the father argues, preclude the trial court from awarding advance attorney fees for an appeal.

The trial court here thus had the authority to award the mother suit money to defend the father's appeal, and properly exercised its discretion in doing so under RCW 26.09.140 in light of the disparate financial resources of the parties. It was not necessary for the mother to provide financial documents in support of her request (App. Br. 17), as the trial court had already considered the

parties' financial resources in entering the modified child support order and awarding attorney fees incurred in the superior court only a few months earlier. Indeed, the record contains substantial evidence of *both* parties' "financial situation[s]." (App. Br. 17) (*See, e.g.*, CP 130-33: mother's financial declaration; CP 135-62: mother's 2013 and 2014 income tax returns; CP 181-83: mother's declaration of work history; CP 205: mother's social security earnings record; CP 439-66: father's 2015 tax returns, pay stubs, and profit and loss statement; CP 489-538: father's detailed profit and loss report) The father has a net monthly income of \$11,807 while the mother has an imputed income of \$1,515.<sup>6</sup> (CP 707) Given that the father makes well over seven times that of the mother, the trial court was squarely within its discretion to award the mother attorney fees to respond to the father's appeal. Even had the father paid the attorney fees awarded to the mother, she should not be required to use those funds to defend the award, nor should be required to use the child support.

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<sup>6</sup> The mother uses the incomes from the January 2017 final child support order that the father did not appeal. Even if the trial court had adopted the father's position and imputed the mother's monthly income at the median wage of \$2,714 (CP 264), the court still would have been well within its discretion to award the mother suit fees given the disparity between the parties' incomes of \$2,714 and \$11,807.

Nor does a lack of formal findings and conclusions of law require reversal of the suit money award. (App. Br. 18) In *Parentage of J.M.K.*, 155 Wn.2d 374, 395-96, ¶ 41, 119 P.3d 840 (2005), the Court upheld an attorney fee award under RCW 26.26.140 which, like RCW 26.09.140, gives the trial court broad discretion to “order that all or a portion of a party’s reasonable attorney’s fees be paid by another party.” In *J.M.K.*, the trial court failed to enter formal findings of fact or conclusions of law in support of its fee award. However, “[g]iven the sufficient record and the broad discretion granted to trial courts to award attorney fees in parentage actions,” the Court affirmed “the trial court’s award of attorney fees.” *J.M.K.*, 155 Wn.2d at 396, ¶ 41. Just as in *J.M.K.*, any lack of findings of fact and conclusions of law here does not prevent effective review or constitute reversible error, because the record supports the trial court’s broad discretion to award the mother \$7,500 in advance attorney fees.

Finally, the father cites no authority supporting his contention that “the court abused its discretion when it then refused to allow Mr[.] Kysar to file a supersedeas bond to stay the payment of the fees.” (App. Br. 17-18) The trial court expressly ruled that it “does not shut the door” on supersedeas and that

“Counsels can bring a motion before the Court on the matter.” (CP 924) This Court should affirm the suit money award to the mother.

**C. The January 2017 final child support order is not properly before this Court because the father failed to timely appeal it. Nevertheless, the trial court soundly exercised its discretion in imputing the mother’s income at minimum wage based on her historical earnings.**

**1. The father’s challenge to the child support order is untimely, and this Court should refuse to consider it.**

The father cannot challenge the order of child support, entered on January 13, 2017, because he failed to timely file a notice of appeal. A party must file a notice of appeal within “30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed.” RAP 5.2. The father’s notice of appeal was filed on May 30, 2017 (CP 902), 137 days after the child support order was entered.

The father’s timely appeal of the May 5, 2017 judgment awarding attorney fees to the mother does not bring up for review the order of child support. It is well settled that “[a] timely notice of appeal of a trial court decision relating to attorney fees and costs *does not bring up for review* a decision previously entered in the action that is otherwise appealable . . . unless a timely notice of appeal has been filed to seek review of the previous decision.” RAP

2.4(b) (emphasis added); *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 825, ¶ 6, 155 P.3d 161 (2007) (“RAP 2.4(b) allows a timely appeal of a trial court’s attorneys’ fees decision but makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e., it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision.”) (emphasis in original); *Bushong v. Wilsbach*, 151 Wn. App. 373, 376-77, ¶ 6, 213 P.3d 42 (2009) (“an appeal from an attorney fee decision does not bring up for review a separate judgment on the merits unless a timely notice of appeal is filed from that judgment”). Therefore, the January 2017 order is not before this Court for review and it should decline to consider the father’s challenge.

**2. As this Court found in denying discretionary review, the trial court was well within its discretion to impute the mother’s income at minimum wage.**

In the event that this Court does consider the final child support order, it should conclude, as it did in denying discretionary

review, that the trial court did not abuse its discretion in imputing the mother's income at minimum wage.<sup>7</sup>

This Court reviews a trial court's imputation of a party's income for abuse of discretion. *Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 735 (1995). In calculating the parents' child support obligations, the trial court "shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed." RCW 26.19.071(6). When imputing income, the court "shall impute a parent's income in the following order of priority": 1) "the current rate of pay," 2) "the historical rate of pay," 3) "earnings at a past rate of pay," 4) "earnings at minimum wage," and 5) "[m]edian net monthly income." RCW 26.19.071(6).

The trial court did not "arbitrarily select[] minimum wage as the mother's wage" in entering the January 2017 final child support order. (App. Br. 12) Contrary to the father's contention, the trial

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<sup>7</sup> This Court should not consider the father's insufficiently briefed argument – consisting of one sentence and no citation to authority – that the trial court "erroneously decreased mother's contributions to the childrens' [sic] support obligation when it arbitrarily reduced her income to minimum wage." (App. Br. 13) "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *Hood Canal Sand and Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, ¶ 22, 381 P.3d 95 (2016) (quoted source omitted). In any event, because the trial court did not abuse its discretion in imputing the mother's income at minimum wage, it properly decreased the mother's support obligations accordingly.

court in fact “follow[ed] the statutory priority order” (App. Br. 12) by imputing the mother based on her historical earnings. The mother demonstrated that her historical earning rate *was* minimum wage because “she has never, ever earned really more than minimum wage when you look at her last twenty years of employment.” (CP 205, 229) Indeed, the mother’s historical earnings showed a peak income of \$21,212 in 1994, \$23,040 in 1995, \$24,737 in 1996, and \$21,103 in 1997. (CP 205) In 1998, the year the parties’ eldest son was born, the mother worked part-time earning \$2,773. (CP 181-82, 205) Since then, her income has not exceeded \$16,299; in 2006, the last year that she worked, the mother earned only \$1,333. (CP 205) The mother has not worked since 2007. (CP 205)

The father provided no contrary evidence of the mother’s historical earnings, aside from a conclusory statement that “[s]he has worked at \$20.00 as [] an assistant food and service manager at Royal Oaks.” (CP 175) The trial court was well within its discretion to reject this statement in light of the mother’s evidence of her historical earnings. The trial court did not abuse its discretion in finding the mother to be voluntarily unemployed and imputing her income “based on full-time pay at minimum wage in the area where

the parent lives because this parent has not worked outside of the home since divorce.” (CP 707)

**D. This Court should award the mother her attorney fees for having to respond to the father’s frivolous appeal, and based on her need and the father’s ability to pay.**

This Court should award the mother her attorney fees on appeal to the extent that the trial court’s \$7,500 suit money award does not cover all of the mother’s reasonable attorney fees incurred on appeal based on her need and the father’s ability to pay. RCW 26.09.140; RAP 18.1(a); *Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998) (awarding attorney fees to the wife “[g]iven the disparity in income and assets between the two” parties, and the husband’s ability to pay), *rev. denied*, 137 Wn.2d 1003 (1999).

In any event, attorney fees to the mother or sanctions to this Court are warranted due to the frivolousness of this appeal. Under RAP 18.9(a), this Court may order a party who “files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages.” An appeal is frivolous and an award of attorney fees is appropriate “when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court’s decision.”

*Settlement/Guardianship of A.G.M.*, 154 Wn. App. 58, 83, ¶ 57, 223 P.3d 1276 (2010).

All of the father's challenges to the trial court's orders are entirely devoid of merit: he failed to timely appeal the final child support order, which is thus not properly before this court; he failed to provide an adequate record on review for the suit fee award, in violation of the rules on appeal; and he does not challenge the trial court's findings in its attorney fee award that the mother had the need, the father had the ability to pay, and the fees requested were reasonable. Yet, despite there being "no debatable issues on which reasonable minds could differ," *A.G.M.*, 154 Wn. App. at 83, ¶ 57, the mother was nevertheless forced to defend against this appeal.

Regardless of the frivolousness of the father's appeal, the mother has the need and the father has the ability to pay her attorney fees, including those incurred to address her cross-appeal, which is both meritorious and warranted in light of the father's appeal.

## **VI. CONCLUSION**

This Court should affirm the trial court's suit fee award, affirm the judgment awarding the mother her attorney fees incurred in the superior court, remand for the trial court to enter a

supplemental judgment awarding the mother her fees incurred in answering the father's motion for discretionary review, and reject the father's untimely challenge to the final order of child support. This Court should also award the mother additional attorney fees incurred on appeal and sanction the father for bringing this frivolous appeal.

Dated this 15 day of December, 2017.

SMITH GOODFRIEND, P.S.

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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 December 15, 2017, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 15<sup>th</sup> day of December, 2017.

  
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Peyush Soni

**SMITH GOODFRIEND, PS**

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