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Division II  
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Court of Appeals No. 50907-5-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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MARILYN LOUISE MILLER,

Appellant

v.

JACK DEAN MILLER,

Respondent

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

The superior court erred in this case by denying Marilyn McCormick's request for reasonable attorney's fees as the prevailing party in an action to enforce spousal maintenance upon a finding of contempt against Mr. Miller. RCW 26.18.160 makes an award of such reasonable attorney's fees and costs mandatory. This Court should reverse the decision below regarding fees and award fees to Ms. McCormick on this appeal.

## **II. ASSIGNMENTS OF ERROR**

1. The superior court erred by denying Marilyn McCormick's request for attorney's fees and costs as the prevailing party in an action to enforce a maintenance order pursuant to RCW 26.18.160.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Must attorney fees and costs be awarded to the prevailing party in a proceeding involving the enforcement of a spousal maintenance order?
2. Should this Court award fees on appeal?

## **IV. STATEMENT OF THE CASE**

After a contested trial dissolving the 14 year marriage of Jack Miller and Marilyn Miller, Jack Miller was ordered to pay \$2,500 per month in spousal maintenance to Marilyn McCormick (Marilyn Miller at the time)

due by the first of the month, starting May 1, 2015 for 48 consecutive months. CP 14. Mr. Miller began to refuse to pay this obligation starting January 1, 2017. CP 323. Therefore, Marilyn McCormick did not receive this mandatory \$2,500 per month in spousal maintenance for the first few months of 2017. CP 323. Ms. McCormick filed a contempt motion in April, 2017 and a hearing was held on May 9, 2017, before a court commissioner. CP 45–57.

During the contempt proceedings, Mr. Miller paid \$5,335 in late April 2017 to alleviate some of the spousal maintenance arrears (as of the time of the hearing, 5 months had accrued = \$12,500). CP 45–48, 60, 284–86, 323, 368–69. At the contempt hearing, the court commissioner found that Mr. Miller did not obey the support order, but that he was not able to pay and his failure to do so was not intentional; however, the court commissioner left the explanation section of the order blank. CP 333–39, 379–91.

Following this contempt hearing, Ms. McCormick filed for revision of the commissioner's ruling to a superior court judge under RCW 2.24.050 and local rules, and another hearing was held on June 2, 2017. CP 320, 421–47. The Superior Court granted the request to review the commissioner's order on the issue of contempt and specifically found that Mr. Miller was in fact in contempt, that he was able to follow the spousal maintenance order,

and that he elected to use his income and resources to pay other bills instead of spousal support. CP 412–20. The Superior Court also found that Mr. Miller “did willfully violate the order re: maintenance.” CP 418. The court allowed Mr. Miller until September 1, 2017 to pay \$7,500 to purge his contempt. CP 419.

Ms. McCormick incurred a significant amount of attorney’s fees and costs in having the pursue the contempt finding, including the revision motion -- \$432.50 in costs and \$5,715 in attorneys’ fees. CP 400–02. In her motion for revision, Ms. McCormick included a specific request for an “award [of] sanctions/fees/costs and enter a money judgment.” CP 322. As part of her request for relief, Ms. McCormick also proposed an order, which sought “entry of a money judgment . . . for sanctions, any unpaid spousal maintenance, plus interest on unpaid amounts, and all legal fees and costs.” CP 345. However, the Superior Court ultimately denied Ms. McCormick’s request for attorney’s fees and costs on the basis of its belief that a fee award was a matter of discretion. CP 412–20.

Ms. McCormick filed a motion for reconsideration on June 12, 2017, requesting that the Superior Court reconsider its decision to deny attorney’s fees and costs, arguing that such fees and costs are mandatory. CP 421–47. The Superior Court denied Ms. McCormick’s request for

reconsideration, ultimately awarding no attorney's fees and no costs. CP 452–54; 2RP 6. This appeal timely followed. CP 457–62.

## V. ARGUMENT

### A. Standard of Review

The issue on appeal is one of statutory interpretation of RCW 26.18.160. Issues of statutory interpretation are reviewed de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014); *Hayfield v. Ruffier*, 187 Wn. App. 914, 918, 351 P.3d 231 (2015). If the plain language of the statute is unambiguous, the Court enforces it according to its plain meaning. *Life Care Ctrs. of Am., Inc. v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 370, 375, 254 P.3d 919 (2011). The plain meaning of an undefined statutory term may be determined from its dictionary definition. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009).

### B. Ms. McCormick is Entitled to Attorneys' Fees and Costs For Prevailing on a Motion for Contempt.

In a proceeding involving enforcement of support or maintenance, attorney's fees and costs must be awarded to the prevailing party. RCW 26.18.160 provides that “[i]n **any** action to enforce a support or maintenance order under this chapter, the prevailing party **is entitled to** a recovery of costs, including an award for reasonable attorney fees.” (emphasis added).

The words “is entitled to” mean the decision is mandatory. The definition of “entitle” is “to grant a legal right to or qualify for.” *Entitle*, Black’s Law Dictionary (10th ed. 2014). This definition leaves no room for discretion. In fact, this Court has previously held that “[t]he phrase ‘is entitled to’ makes an award of attorney fees to the prevailing party mandatory rather than permissive.” *Hayfield*, 187 Wn. App. at 919–21 (discussing the use of “is entitled to” in the context of various attorney’s fees provisions, including RCW 26.18.160, and finding this language makes attorney’s fees mandatory) (emphasis added).

“RCW 26.18.160 mandates an award of reasonable attorney fees to the prevailing party in an action to enforce child support or spousal maintenance.” *Lee v. Kennard*, 176 Wn. App. 678, 691, 310 P.3d 845 (2013). Numerous Washington courts have confirmed that RCW 26.18.160 provides for mandatory attorney’s fees. *See In re Matter of Paternity of M.H.*, 187 Wn.2d 1, 13, 383 P.3d 1031 (2016); *In re Marriage of Dicus*, 110 Wn. App. 347, 359, 40 P.3d 1185 (2002); *In re Marriage of Capetillo*, 85 Wn. App. 311, 320, 932 P.2d 691 (1997); *In re Marriage of Hunter*, 52 Wn. App. 265, 273–74, 758 P.2d 1019 (1988).

The only requirement for the party seeking an award of attorney’s fees and costs is proof of the amount incurred. *In re Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997); *In re Marriage of Sanborn*, 55 Wn.

App. 124, 130, 777 P.2d 4 (1989). Attorney fees shall be awarded to a “prevailing party” for purposes of attorney fees under RCW 26.18.160 regardless of whether attorney fees were specifically requested in the pleadings. *See State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929–30, 959 P.2d 1130 *review denied*, 136 Wn.2d 1031 (1998). Finally, as alternative and additional authority, the Pierce County Local Rules also authorize attorney’s fees—PCLR 7(a)(12) authorizes the revising court the “right to award reasonable costs or attorney’s fees where allowed on all motions for revision without the necessity of a written motion.”

In this case, Ms. McCormick sought revision and the superior court found Mr. Miller was in contempt, that he could have followed the spousal maintenance order, and that he chose to use his income to pay other bills instead of spousal support. CP 412–20. The Superior Court ultimately found Mr. Miller acted willfully. CP 418. Therefore, Ms. McCormick was the prevailing party in this action to enforce spousal maintenance and should have been awarded fees and costs. The only issue was whether she provided proof of her fees and costs, which she did without any objection or response by Mr. Miller. CP 400–02. However, the Superior Court reasoned that the word “is” gives the trial court discretion, contrary to the statute and case law. 2RP 6.

Additionally, although it was not required, Ms. McCormick included a specific written request in the motion for revision for an award of attorney's fees and costs, and in her original motion, had sought for Mr. Miller to "[p]ay my lawyer fees and costs, if any." CP 47, 322. Therefore, Ms. McCormick was and is entitled to a recovery of her reasonable attorney's fees and costs in enforcing the spousal maintenance order.

This Court should reverse the superior court's decision to deny mandatory attorney's fees and costs, and either award the amount on appeal or remand to the superior court judge to enter an order/judgment consistent with the request.

**C. Ms. McCormick is Also Entitled to Attorneys' Fees and Costs on Appeal.**

Ms. McCormick is also entitled to and requests attorney's fees and costs incurred as a part of this appeal. RAP 18.1(a) provides that "[i]f 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." The applicable law in this case is RCW 26.18.160. It applies to attorney's fees and costs on appeal. *M.H.*, 187 Wn.2d at 13; *Effert v. Kalup*, 45 Wn. App. 12, 18, 723 P.2d 541 (1986); *Dicus*, 110 Wn. App. at 359 ("entitled to an

award of costs and attorney fees at both the trial and appellate level”); *Capetillo*, 85 Wn. App. at 320; *Hunter*, 52 Wn. App. at 273–74.

Therefore, Ms. McCormick should be awarded her fees and costs on appeal.

## VI. CONCLUSION

RCW 26.18.160 requires attorney fees and costs to be awarded to the prevailing party in an action to enforce spousal maintenance. Numerous courts in this state have confirmed that interpretation of the statute. Ms. McCormick requested the attorney’s fees and costs that she is entitled to under this statute. The superior court erred when it denied her request. Accordingly, this Court should REVERSE the decision of the Superior Court to deny reasonable attorney’s fees and costs and should award Ms. McCormick’s reasonable attorney’s fees and costs incurred as a result of the action to enforce spousal maintenance and on this appeal.

DATED this the 19 day of December, 2017.



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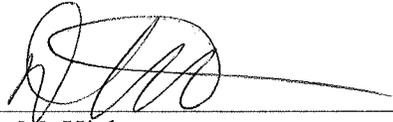
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**CERTIFICATE OF SERVICE**

I certify that on December 19, 2017, I caused a copy of the foregoing document to be served on the following party of record via first class mail and email as follows:

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Diane M. Hickman

**VAN SICLEN STOCKS FIRKINS**

**December 19, 2017 - 11:37 AM**

**Transmittal Information**

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