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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH A. BUNDY,

Respondent,

v.

PAMELA J. RUSH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KARENA KIRKENDOLL

BRIEF OF RESPONDENT

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I. INTRODUCTION

The mother appeals the trial court's child support order, which does not impute income to the father after the trial court found he was not voluntarily underemployed, but retired after 32 years in law enforcement because he could no longer meet the inherent physical, mental, and emotional demands of his "high-risk profession." Contrary to the mother's claims, a trial court has discretion to find that a parent is not voluntarily underemployed even if that parent is not "disabled" as defined by statute; the trial court's findings regarding a parent's income must only be supported by substantial evidence. The trial court did not abuse its discretion in using the father's full-time retirement benefits, plus rental income he receives, to calculate his child support obligation, or in declining to order either party to pay a proportional share of extracurricular activities each chooses for the child.

II. RESTATEMENT OF FACTS

A. **The parties divorced in 2008 after six years of marriage. Their son is now 12.**

Respondent Joseph Bundy, age 57, and appellant Pamela Rush, age 48, were married for six years before separating on September 24, 2008. (CP 549, 562) The parties have one son together, now age 12. (CP 189) When the parties divorced, both

worked as police officers for the City of Tacoma Police Department, earning the same monthly net income of \$4,662.83. (CP 188, 549-50, 557) The trial court entered final orders dissolving the marriage and requiring the father to make a \$619.50 transfer payment on January 13, 2010. (CP 548-55, 568-71)

B. The father retired in July 2017 after 32 years in law enforcement. The mother, who is nearly 10 years younger, continues to work as a police officer.

The father worked in law enforcement for 32 years, first as a security guard for a school district and then for a corrections facility. (CP 258, 288) In 1996, the father became a police officer with the Tacoma Police Department. (CP 188, 288) The father suffered many work-related injuries and health problems throughout his career. He was involved in three shootings, hospitalized with over 100 stitches and staples for a head injury incurred in pursuit of a criminal, and suffered a heart attack from job-related stress. (CP 258) He has ongoing physical problems from a severe motorcycle accident in August 2013, and a pituitary gland injury leaves him chronically fatigued. (CP 258) The father “worked as long as [he] could in law enforcement” before retiring in July 2017, at age 56, when the “toll on [his] health” became “too much” and “prevented [him] from keeping up with the physical

demands of the job.” (CP 258, 279) The father receives full retirement benefits of \$2,873 in gross monthly income. (CP 280)

The mother is nearly 10 years younger than the father and continues to work as a police officer with the Tacoma Police Department, earning \$8,258 gross per month. (CP 243, 404-05, 599)

On October 16, 2017, the mother petitioned to modify the 2010 child support order to increase the father’s obligation based on her claim that his monthly net income had increased to a total of \$12,266.16. (CP 160-63, 167) The mother claimed that the father earned \$3,000 per month “flipping” houses with his brother (although she subsequently reduced this estimate to \$1,299.22), \$3,000 per month from a rental property he owned, and \$500 per month in Voluntary Employee Beneficiary Association (“VEBA”) out-of-pocket medical benefits. (CP 167, 170, 214-16) Although he was retired, the mother also asked that the father’s income be set at “his estimated earnings as a police office[r] of \$110,000.” (CP 167, 170)

On March 6, 2018, the father sought to adjust child support, based on his actual retirement income. (CP 185-92) The father noted that he receives \$1,100 per month in rental income (not

\$3,000, as the mother initially claimed) and does “not see any net profit from [the] rental house” because the mortgage payments are more than the rent. (CP 268, 280, 282) The father estimated that he would receive only \$6,000 in profits from fixing and selling a single house with his brother in 2016 and 2017. (CP 260, 574) The father does not plan to “flip” another house given his ongoing physical problems. (CP 260)

C. The trial court found the father was not voluntarily underemployed and calculated support based on his actual full-time retirement income.

Following a hearing on April 27, 2018, Pierce County Superior Court Judge Karena Kirkendoll (“the trial court”) issued a May 2, 2018 letter ruling granting the father’s motion to revise a commissioner’s ruling increasing his support obligation. (CP 329-31, 333-56, 418-19) Upon considering all “relevant factors” under RCW 26.19.071(6), the trial court found that the father was not voluntarily underemployed or unemployed because he was no longer able to meet the “inherent physical and emotional risks” associated with his “high-risk profession,” and that the father’s “full retirement benefits is the equivalent of full-time gainful employment.” (CP 418) The trial court rejected the mother’s arguments that the father’s income should include his out-of-pocket

medical benefits, the “one-time” \$6,000 LLC profit, and any rental income in excess of \$311.42 per month. (6/1 RP 8-9)

The trial court entered its final order of child support on June 1, 2018. (CP 420-40) Using the father’s actual net monthly income of \$3,042.35 and the mother’s actual net monthly income of \$5,672.73, the trial court ordered the father to pay \$424.73 per month effective October 1, 2017, increasing to \$521.41 when the son turned 12 in September 2018. (CP 424, 431) Because the father had overpaid child support by \$1,558.16 between October 1, 2017 and May 31, 2018, the trial court reduced the father’s monthly obligation by \$150 per month “until overpayment is captured.” (CP 428) The trial court did not order the parties to pay for extracurricular activities. (CP 427-28)

The mother appeals. (CP 415)

III. ARGUMENT

A. The trial court did not abuse its discretion in refusing to impute income to the father at his pre-retirement historical rate of pay.

When a parent moves to modify or adjust a child support order based on “[c]hanges in the income of the parents,” RCW 26.09.170, the trial court must first determine whether a parent is “voluntarily unemployed” or “voluntarily underemployed” based on the “parent’s work history, education, health, age, and any other

relevant factor.” *Marriage of Peterson*, 80 Wn. App. 148, 153, 906 P.2d 1009 (1995), *rev. denied*, 129 Wn.2d 1014 (1996); RCW 26.19.071(6). Income must be imputed to a parent the trial court finds to be voluntarily unemployed or underemployed. RCW 26.19.071(6). However, if a parent is voluntarily underemployed but “gainfully employed on a full-time basis,” the trial court may not impute income unless it also finds “that the parent is purposely underemployed to reduce the parent’s child support obligation.” RCW 26.19.071(6).

The trial court exercises broad discretion in modifying child support provisions, and its decisions “will seldom be changed on appeal.” *Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). There is no basis for a “change” here. The mother’s challenge to the trial court’s finding that the father is not voluntarily underemployed in light of the “inherent physical and emotional risks” associated with law enforcement boils down to the mother’s frustration that she, at age 48, must continue to work for at least another five years in what she *concedes* is an inherently high-risk and dangerous job that has also left her injured and with ongoing pain. (App. Br. 7, 13-14) But the *mother’s* ability to work has no bearing on the father’s inability to do the same.

The trial court carefully considered all “relevant factors” under RCW 26.19.071(6) in finding that the father retired because he is incapable of meeting the inherent dangers of his high-risk profession. (CP 418) The mother’s reliance on her own “self-serving allegation[s]” (App. Br. 14 n.5) to the contrary are not grounds for reversal where substantial evidence supports the trial court’s factual resolution of the parties’ conflicting evidence. *Bale v. Allison*, 173 Wn. App. 435, 458, ¶ 36, 294 P.3d 789 (2013) (cross-appellants’ “remaining contentions fail” where “they attempt to refute the trial court’s findings with contrary evidence . . . that was rejected by the trial court”; appellate courts will “not reweigh or rebalance competing testimony and inferences even if we may have resolved the factual dispute differently”). Nor did the trial court abuse its discretion in finding the father’s full retirement benefits under these circumstances to be “the equivalent of full-time gainful employment.” (CP 418) This Court should affirm.

a. The father retired because he could no longer meet the physical and emotional demands of his “high-risk profession.”

The trial court was well within its discretion in finding the father was not voluntarily underemployed where he retired because he could no longer meet the physical, mental, and emotional

challenges of his “high-risk profession.” (CP 418) The mother concedes that the father “experienced the emotional and physical toll of policing, including on-the-job injuries” (App. Br. 14) in his 21 years as a police officer with the City of Tacoma. During that time, the father was “involved in three shootings,” “suffered a stress related heart attack because of the job,” and received “over 100 stitches and staples in [his] head” after being injured in pursuit of a criminal. (CP 258)

In addition to these work-related injuries, the father was involved in a serious motorcycle accident in August 2013 that has left him with “ongoing physical problems,” and a pituitary gland injury that “creates constant fatigue” and leaves him unable “to make it through the day without multiple naps.” (CP 258; *see also* CP 289: mother confirming that “Joseph has always needed a nap or two a day”) Along with his physical health problems, the father attested to the emotional and mental anguish he unsurprisingly faces as a result of his two decades as a police officer. Not only was his heart attack stress-induced, he has suffered the loss of “many co-workers and friends killed in the line of duty,” and understandably fears “being killed on the job.” (CP 258)

The mother complains that the father did not “provide any medical or documentary evidence” to “substantiate” his heart attack or “poor health” (App. Br. 4-5, 14), but the father’s affidavits *are* “documentary evidence.” See RCW 26.09.175 (“petition for modification of an order of child support shall be heard by the court on affidavits, the petition, answer, and worksheets only”). The mother did not provide any medical evidence to “substantiate” her claims of “significant pain” and disability from job-related injuries either. (App. Br. 13) The trial court had before it, and considered, the mother’s contrary claims, including that the father suffered an “anxiety attack” (App. Br. 13-15); it did not abuse its discretion in finding the father’s evidence to be more credible. *Parentage of G.W.-F.*, 170 Wn. App. 631, 637, ¶ 17, 285 P.3d 208 (2012) (this Court “will not substitute its judgment for that of the fact finder ‘even though it [may] have resolved a factual dispute differently’”) (alteration in original) (quoting *Sunnyside Valley Irrigation District. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003)).

Nor was the trial court’s finding that the father was a law enforcement officer for 32 years incorrect. (App. Br. 11-12) The mother admits that the father “was a security guard for a school district and for a corrections facility” before he became a police

officer in 1996. (CP 288) The father never claimed, and the trial court did not find, that all 32 years of his law enforcement experience were with the Tacoma Police Department. (See CP 188, 257, 418) Rather, the father “retired after twenty-one years in law enforcement with the City of Tacoma Police Department (and over 31 years total).” (CP 188, 258) This is not “inconsistent” (App. Br. 11-12 & n.3) with the trial court’s findings that he gave “almost 32 years of service to his community” in law enforcement. (CP 418)

Even if the father was not “shot three times in the line of duty” (CP 418; App. Br. 12), being “involved in three shootings” (CP 258) supports the trial court’s findings that the father could no longer meet the “inherent physical and emotional risks” of being a police officer. (CP 418) The trial court was well within its discretion to believe the father’s testimony that he “worked as long as [he] could in law enforcement,” and that his health challenges now “prevented [him] from keeping up with the physical demands of the job.” (CP 258, 418) The trial court did not err in finding the father was not voluntarily underemployed.

b. The father did not have to prove that he was “disabled” under his pension plan in order to retire.

The father was not voluntarily underemployed because, as the trial court recognized, he had “earn[ed] the right to full retirement benefits.” (CP 418) As police officers, both parties are members of the Law Enforcement Officers’ and Firefighters’ Retirement System (“LEOFF”). (CP 170) LEOFF Plan 2 members with at least five years of service credit are eligible to retire and receive a “normal retirement” allowance at age 53. RCW 41.26.430(1). A member who is at least 50 years old with 20 years of service credits is eligible for “early retirement” or “alternate early retirement” at a reduced retirement allowance. RCW 41.26.430(2), (3).

Here, the father indisputably retired at the age of 56 on a “normal” retirement under RCW 41.26.430(1) after 21 years of service. (CP 192, 279, 288, 549) The mother’s insinuation that the father retired “early at age 56,” despite having only six months more experience than her as a police officer, entirely disregards that, at age 48, she is not yet eligible for normal *or* early retirement. (App. Br. 3, 11-12)

The father's retirement was not "early" simply because the mother "continues to work full-time" after suffering duty-related injuries. (App. Br. 13) That the mother continues to work is irrelevant in determining the father's ability to do the same because, unlike her, he could retire for his health and injuries without having to first prove a disability to a "governmental agency." (App. Br. 4) Under RCW 41.26.470, a LEOFF member "who becomes totally incapacitated for continued employment by an employer as determined by the director shall be eligible to receive an allowance." If not yet retirement age and not disabled in the line of duty, a member "shall have such allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three." RCW 41.26.470(1). Because the mother cannot retire on her service credits under RCW 41.26.430, *she* would have to seek a disability allowance and prove to a "governmental agency" that her injuries prevented her from performing her job, but the father could (and did) retire on his service credits alone because he was over 53.

The father did not have to establish, and the trial court did not have to find, that he was "totally incapacitated" under RCW 41.26.470. For this reason, it is immaterial whether the father was

unable to work as a result of injuries that “occurred at work,” that were unrelated to his job, or both. (App. Br. 12)

Trial courts have broad discretion in determining whether a parent is voluntarily underemployed; the trial court does not need a “governmental agency or medical provider” to “deem” the parent disabled. (App. Br. 4) The trial court was well within its discretion in finding the father was not physically or mentally capable of meeting the inherent risks of the law enforcement profession.

2. The trial court was well within its discretion in finding the father’s full retirement income to be the equivalent of full-time gainful employment.

Even if the father were underemployed, the trial court correctly declined to impute income to him where his full retirement benefits served as “the equivalent of full-time gainful employment” and there is no evidence that the father is “purposefully under employed to reduce the parent’s child support obligation.” (CP 418, citing RCW 26.19.071(6))

Left undefined by the child support statute, Division One recognized two permissible definitions of “gainful employment” in *Marriage of Peterson*, 80 Wn. App. 148, 153-54, 906 P.2d 1009 (1995). The first definition turns on “whether the employment is compensated by a salary or wage,” while the second focuses on the

“nature of the employment” and whether it is the parent’s “usual or customary occupation.” *Peterson*, 80 Wn. App. at 153.

The trial court found the father in *Peterson*, who earned \$18,000 annually as legal counsel and a bail bond agent, voluntarily underemployed after “comparing his income, age, and education to national averages.” 80 Wn. App. at 154. The Court of Appeals disagreed, concluding instead that the father was “gainfully employed” under either of its two definitions where his job and salary were “consistent with his work history.” 80 Wn. App. at 154. Because the lower court’s decision was “not consistent with either definition of gainful,” Division One reversed the trial court’s imputation of income to the father. 80 Wn. App. at 154-55.

Here, finding the father has “full-time gainful employment” where he receives \$3,042 in retirement (and rental) income was well within the trial court’s discretion because, consistent with *Peterson*, the father is indisputably “compensated by a salary or wage.” 80 Wn. App. at 153. *Peterson* is in fact an “analogous published case[] that support[s] the trial court’s conclusion.” (App. Br. 21) Perhaps for this reason, the mother does not even address *Peterson*’s rule, instead relying exclusively – and impermissibly – on a 2009 unpublished Division One case, *Marriage of Alwin*, No.

63832-7-I, 2009 WL 3260912 (Oct. 12, 2009) (App. Br. 21-22). Unpublished Court of Appeals opinions “have no precedential value and are not binding on any court.” GR 14.1. While a party may cite to unpublished opinions of the Court of Appeals filed on or after March 1, 2013 as “nonbinding authorities, if identified as such by the citing party,” as a 2009 unpublished opinion *Alwin* not only has “no precedential value” but cannot be relied upon even for “persuasive value.” GR 14.1.

Regardless, *Alwin* is distinguishable. In *Alwin*, the Court of Appeals rejected the father’s argument that an imputation of income “denies him any eventual retirement” because he could always seek retirement and a modification of child support “[w]hen age or health justifies it.” 2009 WL 3260912, at *5 (emphasis added). Unlike in *Alwin*, the trial court here *did* find the father’s retirement justified where his age and health prevented him from meeting the “inherent physical and emotional risks” of law enforcement. (CP 418)

Because the father is gainfully “compensated” by his full-time retirement “wages,” *Peterson*, 80 Wn. App. at 153, the trial court properly refused to impute income to him where there is *no* evidence in the record that he is “purposefully under employed to

reduce [his] child support obligation.” (CP 418) While the mother cites to the correct legal standard (App. Br. 16-17, 21), she does not argue on appeal that the father is “purposefully” trying to avoid or reduce his child support obligations. This Court does not consider issues unsupported by authority or reasoned argument. *State v. Mason*, 170 Wn. App. 375, 384, ¶ 18, 285 P.3d 154 (2012) (“We do not consider conclusory arguments unsupported by citation to authority.”), *rev. denied*, 176 Wn.2d 1014 (2013); *West v. Thurston County*, 168 Wn. App. 162, 187, ¶ 43, 275 P.3d 1200 (2012) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”) (alteration in original, quoted source omitted).

Regardless, nothing in the record suggests that the father is attempting to reduce his child support obligation. The father did not retire the moment he turned 53; he worked “as long as [he] could” before the “toll on [his] health was too much.” (CP 258) The father “never intended to get [his] child support lowered,” and did not even realize he was overpaying child support based on his pre-retirement income until the mother sought to modify the 2010 child support order. (CP 268)

Indeed, the father has always paid child support “religiously and on time.” (CP 268) Even while the mother’s motion to modify the 2010 child support order was pending between October 2017 and May 2018, the father continued to stay current with his payments and in fact overpaid more than \$1,500 during that time. (CP 428) The trial court properly held that it “can make no such finding” that the father is purposefully trying to avoid his child support obligations. (CP 418; *see also* CP 268: father has never taken issue with “the fact of needing to pay child support” and plans on selling his rental house for the son’s college education)

B. The trial court properly calculated the father’s income in computing child support.

In calculating child support, the trial court determines a parent’s monthly gross income “from any source.” RCW 26.19.071(3). But “[i]ncome, or lack thereof, is only one factor” in setting support; the court “considers all factors bearing upon the needs of the child and the parent’s ability to pay.” *Marriage of Blickenstaff*, 71 Wn. App. 489, 498, 859 P.2d 646 (1993). The trial court correctly calculated the father’s monthly gross income of \$3,184.45 by including \$311.42 in rental income in addition to his \$2,873.03 in retirement. (CP 457)

The trial court's use of \$311.42 is a "proper amount of rental income" (App. Br. 25), because the property actually produces a "negative cash flow" to the father.¹ (CP 189) The rental property "provides no income" to the father: he receives \$1,100 in rent, but pays a monthly total of \$1,246.19 on the property's two separate mortgages. (CP 189; *see* CP 280, 282, 573-74) The father also spends an additional \$2,000 per year on maintenance and repairs on the property. (CP 189, 574) Because the property is actually a loss to the father, the trial court did not abuse its discretion in "leaving it at [\$]311.42" (6/1 RP 8) instead of the \$419.83 three-year "average" the mother calculated. (App. Br. 25; CP 215)

The trial court also properly recognized the father's profit from fixing up and selling a house with his brother as a "one-time investment," as opposed to regular income. (6/1 RP 8) The father, his wife, and his brother sold one house in early 2017 for \$31,000 in pre-tax profits; the father estimated his net share would be approximately \$6,000. (CP 159, 260, 574; 6/1 RP 7-8) However, the house took ten months to complete because of the father's

¹ At the revision hearing, the father's counsel misstated that the father made a "small amount" on the rental property. (4/27 RP 14) However, counsel clarified at the hearing on the mother's motion for reconsideration that "there's a negative of [\$]146.19" generated from the rental income. (6/1 RP 6-7)

physical problems, with his wife having to undertake more than half of the work. (CP 260) Because the “amount of time that was put in against the risk of profits is not worth it,” the father is “not able nor willing to do this again.” (CP 260) This evidence is sufficient to support the trial court’s finding that the house sale “was a one-time investment” and was not “ongoing” income that should be included in the father’s support calculation. (6/1 RP 8-9)

Nor did the trial court err in declining to include the father’s VEBA medical benefits in his income. Like the trial court, the commissioner did not include the father’s VEBA benefits in setting its April 11, 2018 child support order. (CP 319; 6/1 RP 6) On revision, the mother failed to ask the trial court to use the father’s VEBA benefits as a source of income until her motion for reconsideration. (6/1 RP 6: trial court recognizing that the VEBA “is not an issue that was argued before me previously, and I didn’t see this on the temporary orders”) The trial court was well within its discretion in refusing to consider an argument raised for the first time on reconsideration. *River House Development Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, ¶ 23, 272 P.3d 289 (2012).

Regardless, there is no error because the VEBA is not “income.” (CP 267: father’s accountant does not include VEBA as income) VEBA merely pays for the father’s qualified out-of-pocket medical expenses; the father does not receive any cash. (CP 267) It certainly does not qualify as “Business Income” or “Interest and Dividend Income,” as the mother included on her child support worksheets. (CP 233, 389) The trial court properly excluded this medical benefit from the father’s income.

C. The trial court did not abuse its discretion in not ordering the parents to pay for extracurricular activities chosen by the other parent.

The trial court did not err in refusing to order the parties to pay their proportionate share of extracurricular activities because although the trial court “*may* exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation,” it is not *required* to. RCW 26.19.080(4) (emphasis added). These “special child rearing expenses” include extracurricular activities. RCW 26.19.080(3).

The mother involves the child in numerous (and expensive) extracurricular activities without the father’s consent. (CP 259, 264-66, 576-77) For instance, the child has been in private baseball lessons since he was nine. (CP 264) His baseball bats cost between

\$300 to \$400 each, his uniforms are \$400 (and he is on multiple teams), and his away games often require one or two nights of lodging. (CP 264-65, 576-77)

It is not at all reasonable, nor even remotely necessary, for a child to own baseball bats that cost hundreds of dollars. Nor does *Marriage of McCausland*, 159 Wn.2d 607, 621, ¶ 29, 152 P.3d 1013 (2007) (App. Br. 26), require a trial court to indulge the mother's excessive and expensive nonessential expenses. *McCausland* held only that a "trial court has *discretion* to set the basic child support obligation at an amount that exceeds the economic table." 159 Wn.2d at 621, ¶ 29 (emphasis added). The trial court here did not abuse its discretion by deciding not to order additional child support to pay for extraordinary expenses the mother chooses to incur.

D. This Court should award the father his fees on appeal.

This Court should award the father his fees on appeal based on his need and the mother's ability to pay. RCW 26.09.140; RAP 18.1(a); *Marriage of Sheffer*, 60 Wn. App. 51, 59, 802 P.2d 817 (1990) (awarding attorney fees to wife "[b]ecause of the disparity in income" between the parties). The father is retired and must live off his \$2,873 (pre-tax) retirement income for the rest of his life.

(CP 280, 431; *see* CP 262: father will not receive social security; his pension “is all I have for the rest of my life”) The mother earns \$8,258 gross per month. (CP 394, 452) This Court should award the father his fees on appeal based on his need, the mother’s ability to pay, and the meritless nature of the challenges made by the mother on appeal to the trial court’s discretionary decisions.

IV. CONCLUSION

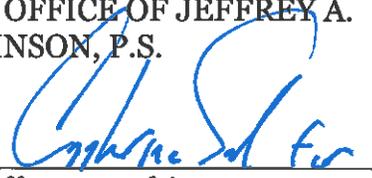
This Court should affirm the trial court’s child support order.

Dated this 11th day of December, 2018.

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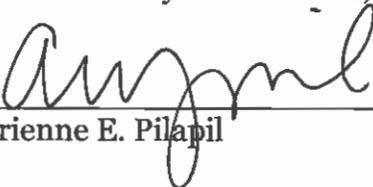
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 11, 2018, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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