

FILED  
Court of Appeals  
Division II  
State of Washington  
7/17/2019 11:59 AM

No. 522136-II

IN THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Matter of:

Michael O. Moeller,

Appellant,

vs.

Debbie J. Moeller, n/k/a Debbie J. Schultz,

Respondent.

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**OPENING BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

This appeal stems from the Pierce County Superior Court's Order on Mr. Moeller's Motion for Revision (CP 178-179), the Revised Contempt Hearing Order entered on June 29, 2018, which found the Appellant, Michael O. Moeller, in contempt (CP 576-580), and the Order Re: Reconsideration entered on July 13, 2018 (CP 581).

## **II. STATEMENT OF ISSUES**

The Appellant, Michael Moeller, has assigned error to the trial Court's rulings, as follows:

1. Finding of contempt for failure to pay back child support.
2. Application of a portion of reduced arrearages to interest.
3. Court's modification of language in the June 29, 2018 Revised Contempt Hearing Order.
4. Denial of Appellant's Motion for Reconsideration.

## **III. STATEMENT OF THE CASE**

1. The parties were divorced on May 13, 2004. (CP 247-254). On May 13, 2004 the Pierce County Superior Court entered an Order of Child Support for Elayna Moeller (DOB: 5/30/97) and Janessa Moeller (DOB 5/16/01). Mr. Moeller's child support obligation was \$782.27 through January 31, 2007 (See 2/5/07 Order on

Modification of Child Support (CP 255-259)).

2. On February 5, 2007, the Pierce County Superior Court entered an Order on Show Cause Re: Contempt/Judgment. Judgments for back support from November 1, 2003 to September 1, 2006, in the sum of \$19,675.83, interest to date of Judgment of \$3,047.57, and for attorney's fees and costs of \$636.00 were entered as part of the Order on Show Cause. (CP 255-259).

3. On February 5, 2007, the Court also entered an Order on Modification of Child Support. (CP 260-261). Mr. Moeller's child support for obligation for Elayna and Janessa was reduced to \$500, per month, effective February 1, 2007.

4. Pursuant to the Order on Show Cause Re: Contempt/Judgment, the Judgment for back child support was calculated through September 1, 2006. (CP 255-259). Child support was reduced to \$500 effective February 1, 2007.

5. On June 6, 2013 the Office of Administrative Hearings entered a Final Order regarding child support for Cali (DOB: 8/26/08). (CP 497-534). Mr. Moeller's child support obligation was determined to be \$251, per month for Cali, effective July 1, 2013. A past support obligation for Cali was ordered in the sum of \$1,423.21, through June 30, 2013.

6. On November 4, 2013, the Department of Social and Health Services, Division of Child Support, entered a Conference

Board Decision directed to Michael O. Moeller (CP 339). As noted in the Conference Board Decision, Michael Moeller had asked for a conference board because he wanted the Division of Child Support to reduce the back support. The decision of the Division of Child Support was as follows:

DCS may assess child support for the parties in question. You have not proved that you lived with and supported your family during that time. (CP 339). Emphasis added.

7. On March 5, 2018, Mr. Moeller filed a Motion for Order to Show Cause to Vacate Judgments/Order. (CP 328-329). The relief requested by Mr. Moeller was that the Order of Child Support entered on May 13, 2004 (CP 484-494) and the Order on Show Cause Re: Contempt/Judgment, entered on February 5, 2007, (CP 255-259) be vacated/modified. Subsequently, on May 24, 2018, Michael Moeller filed an Amended Motion for Order to Show Cause and to Vacate Judgment/Order (CP 389-390). The Amended Motion reiterated Mr. Moeller's request to modify/vacate the 2004 Order of Child Support and the 2007 Order on Modification of Child Support and the 2007 Order of Contempt. The Amended Motion now included the Division of Child Support's Final Order entered on June 6, 2013. Mr. Moeller did not request reconsideration or revision of any of the orders, nor did he appeal any of the orders that he requested to be modified or vacated.

8. On March 30, 2018, Debbie Schultz filed a Motion for Contempt Hearing (CP 8-21). Debbie Schultz' Motion requested that Mr. Moeller be found in contempt for failing to pay child support, update the Judgment for back child support, entered on February 5, 2007, enforce child support as ordered on February 5, 2007, and enforce the Final Order enter by the Office of Administrative Hearings, entered June 6, 2013. Ms. Schultz' Motion for Contempt Hearing attached the Case Payment History from the Division of Child Support.

9. On April 13, 2018, Ms. Schultz filed a Declaration in Support for Contempt (CP 22-59).

10. On April 13, 2018, Mr. Moeller filed a Motion to Adjust Child Support (CP 535-546).

11. On April 25, 2018, Ms. Schultz filed a Declaration in Response to Motions Filed by Mr. Moeller. (CP 330-339). In the Declaration, Ms. Schultz stated that a permanent Order of Protection had been entered against Mr. Moeller under Pierce County Cause No. 12-2-04409-6. The Order for Protection was entered to protect Ms. Schultz and her three children. Mr. Moeller had not had any residential time with the children from January 4, 2013 through the date of her Declaration.

12. On May 7, 2018, Mr. Moeller filed a Motion for Contempt, claiming that Ms. Schultz was in violation of the Parenting

Plan. On May 29, 2018, an Order Denying Mr. Moeller's Motion for Contempt was entered. (CP 574-575).

13. On May 29, 2018, a Final Child Support Order was entered, establishing Mr. Moeller's child support obligation for Janessa and Cali. (CP 561-573).

14. On May 29, 2018, a Contempt Hearing Order was entered by Court Commissioner Adams, finding Mr. Moeller in contempt and awarding Judgments to Ms. Schultz in excess of \$118,000.

15. On June 1, 2018, Mr. Moeller filed a Motion for Revision of Commission's Order of Contempt (CP 121-124).

16. On June 15, 2018, the trial Court entered an Order on Mr. Moeller's Motion for Revision. (CP 178-179). Mr. Moeller's Motion for Revision was denied in part and granted in part. The Order on Revision provided that child support for Elayna would terminate as of her turning age 18 or graduating from high school, whichever was later. The Contempt Hearing Order entered on May 29, 2018, was to be modified appropriately. Additionally, Mr. Moeller was permitted to provide proof of support of the children during the alleged period of reconciliation, which will allow for adjustment of the child support owed by Mr. Moeller. Mr. Moeller was given eight months from the date of the Order to provide proof of payments. All other provisions of the May 29, 2018 Contempt Hearing Order were to remain in full

force and effect.

17. On June 15, 2018, Mr. Moeller filed Respondent's Motion for Reconsideration of Order of Contempt, dated June 15, 2018. (CP 180-196).

18. On June 29, 2018, the trial Judge entered a Revised Contempt Hearing Order (CP 576-580). The Final Court Order established that Michael Moeller owed past due child support from February 5, 2007 to May 1, 2018, in the sum of \$60,473.33. Interest had accrued on the past due child support totaling \$46,334.80. A Judgment was also awarded to Ms. Schultz in the sum of \$2,500 for lawyer's fees and costs. Mr. Moeller was found in contempt for having failed to pay child support and was given eight months from the date of the Revised Contempt Hearing Order to provide proof of support of the children during the period of the alleged cohabitation. Mr. Moeller could purge contempt by paying \$100, per month, for back support. All other provisions of the May 29, 2018 Contempt Hearing Order remained in full force and effect, and the trial Court retained exclusive jurisdiction over the case.

19. On July 13, 2018, the trial Court entered an Order in which the trial Court carefully considered the prior ruling of the Court. The Court makes no change in its prior ruling and Order. (CP 581).

20. On July 27, 2018, Mr. Moeller filed a Notice of Appeal to the Court of Appeals. (CP 231-244). The Notice of Appeal

specifically relates to the Revised Contempt Hearing Order entered on June 29, 2018. (CP 576-580) and the Order on Mr. Moeller's Request for Reconsideration, which was entered July 13, 2018. (CP 581).

21. Pursuant to the Revised Contempt Hearing Order entered June 29, 2018, Mr. Moeller had eight months from the date of the Order to provide additional proof of support for the three children. On April 5, 2019, the trial Court entered an Order on Motion for Credit to Child support Obligation. (CP 586-587). Mr. Moeller's Motion for an Equitable Credit against child support arrearages was denied. Mr. Moeller's Motion to Vacate the May 13, 2004 and February 5, 2007 Child Support Orders was dismissed, with prejudice. Ms. Schultz' Motion for attorney's fees was not previously addressed was to be heard on April 12, 2019.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

The Appellate Court begins its review by observing that trial court decisions in dissolution proceedings will seldom be changed on appeal. *In re Marriage of Booth (Griffin)*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); *In re Parentage of Jannot*, 110 Wn. App. 16, 21, 37 P.3d 1265 (2002), *affirmed* 149 Wn.2d 123, 65 P.3d 664 (2003). The party who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion. *In re Marriage of Landry*, 103

Wn.2d 807, 809, 699 P.2d 214 (1985). The Court will affirm the trial court's decision unless no reasonable judge would have reached the same conclusion. *Landry*, 103 Wn.2d at 809-10.

**B. Finding of Contempt.**

"Contempt of Court" means intentional disobedience of any lawful judgment, degree, order or process of the court. RCW 7.21.010(1)(b). If an obligor fails to comply with a support order, a petition may be filed to initiate a contempt action as provided in Chapter 7.21 RCW. RCW 26.18.050(1). Debbie Schultz filed a Motion for Contempt on March 30, 2018 (CP 8-21). The contempt hearing was scheduled several times and was finally heard by Court Commissioner Adams on May 29, 2018. (CP 391-394). At the hearing, the obligor, Michael Moeller, contended that he lacked the means to comply with the support order. Pursuant to statutory mandate, Michael Moeller was required to establish that he exercised due diligence in seeking employment, conserving assets, or otherwise rendering himself able to comply with the Court's order RCW 26.18.050(4) He failed to establish that he was seeking full-time employment. He did not provide evidence of his efforts to obtain or maintain employment after the entry of the February 5, 2007 Orders. There is nothing in the record as to his efforts to pay the existing Judgments entered on February 5, 2007. All payments for child support received by Ms. Schultz have been through the Division of

Child Support garnishment process. Both the Court Commissioner and Superior Court Judge determined that Michael Moeller did not obey the February 5, 2007 Court Orders and the Administrative Order from the Division of Child Support, dated June 6, 2013. The Court found, after receiving substantial evidence from both parties, that Michael Moeller's failure to comply with the child support orders was intentional and that Michael Moeller refused to pay child support as ordered. (CP 391-394 and CP 576-580).

Michael Moeller has not meet his burden by establishing that the trial Court's decision regarding contempt was a manifest abuse of discretion or based upon untenable grounds. *In re Marriage of Landry*, 103 Wn. 2d 807, 809, 699 P.2d 214 (1985). The trial Court's decision should be affirmed.

**C. Court's application of reduced arrearages to accrued interest on judgments.**

RCW 4.56.110(2) provides that all judgments for unpaid child support that have accrued under a superior court order or order entered under the administrative procedure act, shall bear interest at the rate of twelve (12%) percent. Delinquent child support payments become vested judgments as they fall due, bear interest from their due date and may not be retroactively modified. *In re Marriage of Abercrombie*, 105 Wn. App. 239, 19 P.3d 1056 (2001).

In a case where back child support is owed, payments received

from the obligor are applied first to current support. Any excess payment beyond current support is credited to the oldest unexpired obligation and the interest thereon. *In re Marriage of Maccarone*, 54 Wn. App. 502, 774 P.2d 53 (1989), *Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984). In applying the "United States Rule" of *State v. Trask*, payments in excess of the current month's child support obligation are applied to:

- (1) Interest on the oldest unexpired obligation until the interest is paid off, then
- (2) The oldest unexpired obligation itself, then
- (3) Interest on the next oldest unexpired obligation.

*State v. Trask*, 98 Wn. App. 690, 696, fn 13, 699, 990 P.2d 976 (2000). As stated in *Trask*, the judgment principal continues to draw post judgment interest, until paid in full, and the payment is applied first to interest and then to principal, while the remainder of principal continues to draw post-judgment interest. *State v. Trask*, 98 Wn. App. 690.

On June 26, 2018, Ms. Schulz provided an updated summary of back child support owed by Mr. Moeller. The summary was based upon Child Support Orders entered and all payments made by Mr. Moeller to the Division of Child Support. Simple interest was applied to the principal balance owed by Mr. Moeller for back support. (CP 197 - 215). As ordered, the revised summary reduced Mr. Moeller's

child support obligation to \$501, per month, as of July 1, 2015, in compliance with the Court's oral ruling. From that point forward, interest only accrued on the principal balance, which addressed the reduction in the child support amount from July 1, 2015 through May 31, 2018. Mr. Moeller only presented conclusionary statements as to how he calculated the back child support owed.

In its discretion, the trial Court approved and accepted Ms. Schultz' Summary of Back Child Support Owed, which outlined every payment made by Mr. Moeller. The Summary of Back Child Support Owed utilized the procedure outlined in *State v. Trask*, 98 Wn. App. 690. and case law establishing that child support payments first apply to current support owed, back interest and then principal balance. The trial Court did not abuse its discretion, and the trial Court Judge's decision should be affirmed.

**D. Language in Revised Contempt Hearing Order.**

On June 15, 2018, the Court entered an Order on Mr. Moeller's Motion for Revision (Appendix A). Among other things, the Order on Mr. Moeller's Motion for Revision included the following language:

The Respondent shall be permitted to provide proof of support of the children, during the alleged period of reconciliation, which will allow for adjustment of the child support owed by the Respondent. Respondent shall eight (8) months from the date of this order to provide proof of payments.

As noted above, the trial Court entered its revised Contempt Hearing Order on June 29, 2018. (CP 576 - 580). On Page 2 of the

Revised Contempt Hearing Order, the Court entered findings at Section 3(c)(2) stating that Respondent shall have eight months from the date of this Order to provide proof of payment of support paid for the children during the alleged cohabitation. Based upon the Court's findings, the Court entered the following Order at Section 13 (1):

The Respondent shall be permitted to provide proof of support of the children, during the alleged period of reconciliation, which will allow for adjustment of child support owed by Respondent. Respondent shall have eight months from the date of this order to provide proof of payments.

The language in the revised Contempt Hearing Order mirrors the language in the Order on Respondent's Motion for Revision. The issue presented by the Appellant has no merit and is frivolous.

**E. Appellant's Motion for Reconsideration.**

On June 25, 2018, Mr. Moeller filed Respondent's Motion for Reconsideration of Order of Contempt, Dated June 15, 2018. (CP 180-196). Respondent's Motion requested that the Court reconsider its finding of contempt, which indicated that Mr. Moeller did not follow the orders of the Court entered in February, 2007, and the Order entered by the Division of Child Support in June, 2013. The second request for reconsideration was that Mr. Moeller had not received an offset for the alleged period of cohabitation.

At the time of the June 15, 2018 hearing on Mr. Moeller's Motion for Revision, the trial Court had received all of Mr. Moeller's Declarations, and the trial Court had access to the entire dissolution

file and all materials presented by Ms. Schultz. In making his request for reconsideration, Mr. Moeller relied on his May 18, 2018 Declaration, his May 18, 2018 Memorandum of Law, his April 30, 2018 Declaration, his March 2, 2018 Declaration and the additional Declarations and Exhibits attached to his Motion.

The issue of Mr. Moeller's contempt is discussed in Section B above. The trial Court's finding and order of contempt, based upon the previously entered Orders of Child Support, was not a manifest abuse of discretion.

As provided in the Order on Respondent's Motion for Revision, the trial Court provided Mr. Moeller with an additional eight months to establish offsets for the child support owed, by including the following language:

The Respondent shall be permitted to provide proof of support of the children, during the alleged period of reconciliation, which will allow for adjustment of the child support owed by Respondent. Respondent shall have eight months from the date of this Order to provide proof of payments.

Identical language was included in the Revised Contempt Hearing Order, entered on June 29, 2018. (CP 576-580). Therefore, the trial Court permitted Mr. Moeller the opportunity to provide proof of any offset to back child support for the period of the claimed cohabitation. Mr. Moeller had until February 28, 2019, to provide proof of support of the children, during the alleged period of

reconciliation.

Two days prior to the February 28, 2019 expiration date for providing proof of support of the children during the alleged period of reconciliation, Mr. Moeller filed a Motion for credit to his child support obligation. On April 5, 2019, the trial Court entered an Order on Motion for Credit to Child Support Obligation. (CP 586-587). As provided in the Order on Motion for Credit to Child Support Obligation, Mr. Moeller's request for equitable credit against child support arrearages was denied. Additionally, Mr. Moeller's Motion to Vacate the May 13, 2004 and February 5, 2007 Orders of Child Support was dismissed, with prejudice. Therefore, the issue, regarding Mr. Moeller's claim that there was no offset for the period of alleged cohabitation is now moot. *State v. Walker*, 93 Wn. App. 382, 385, 967 P.2d 1289 (1998). The April 5, 2019 Order on Motion for Credit to Child Support Obligation was not appealed.

Pursuant to Pierce County Local Rule 59, counsel are directed to Pierce County Local Rule 7(c). PCLR 59. Pierce County Local Rule 7(c)(3) provides as follows:

Disposition of Motion for Reconsideration.  
No response to a motion for reconsideration shall be filed unless requested by the Court. No motion for reconsideration will be granted without such a request. If a response is called for, the reply may be filed within two (2) days of the response. Motions for reconsideration will be decided on briefs and affidavits only, unless the Court

requests oral argument. In that event, the Court will contact the parties to set a hearing date. PCLR 7(c)(3).

As provided in PCLR 7(c)(3), motions for reconsideration will be decided on briefs and affidavits only. All briefs and affidavits had previously been provided to the trial Court, and the Court did not request a response to the Motion for Reconsideration or oral argument. In the Order entered on July 13, 2018, the trial Court ruled as follows:

The Court carefully considered the prior ruling of the Court. The Court makes no change in its prior ruling and Order. (CP 581).

The Appellant has not shown that the trial Court's finding of contempt, after reviewing all of the information provided to the Court, was a manifest abuse of discretion. Additionally, the Appellant incorrectly addresses the Order on Respondent's Order for Revision, entered on June 15, 2018 (CP 178-179). Appellant was given an additional eight (8) months to provide proof of support provided to the children during the alleged period of reconciliation. Ultimately, on April 5, 2019, Appellant's request for an equitable credit and offset was denied, and Appellant's Motion to Vacate the prior Orders of Child Support was dismissed, with prejudice. The issue of offset is now moot. *State v. Walker*, 93 Wn. App. 382, 385, 967 P.2d 1289 (1998).

**F. Ms. Schultz should be awarded her reasonable attorney's fees on appeal.**

Ms. Schultz should be awarded her reasonable attorney's fees and statutory costs incurred in the course of the appeal, pursuant to RAP 18.1. RCW 26.09.140 provides in pertinent part:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

*Choate v. Choate*, 143 Wn. App. 235, 177 P.3d 175 (2008).

In determining whether to award attorney fees, the Court generally must balance the needs of the spouse request them against the ability of the other spouse to pay. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Ms. Schultz should be awarded her reasonable attorney's fees as a result of this appeal.

#### **V. CONCLUSION**

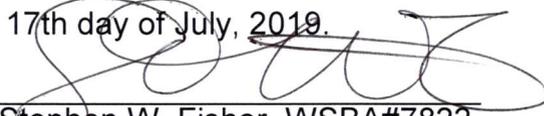
Ms. Schultz requests that the Court of Appeals decide as follows:

- (1) Affirm the trial Court's Findings and Order of Contempt.
- (2) Affirm the trial Court's ruling regard the reduction in the principal balance of the back child support owed and the then resulting accrual of interest.
- (3) Affirm the trial Court's Order on Reconsideration, entered on July 13, 2018.
- (4) Affirm that the language in the June 15, 2018 Order on Revision is precisely the language included in the June

26, 2018 Revised Contempt Hearing Order.

- (4) Affirm the trial Court's rulings as to Appellant's ability to provide proof of support for the children during the alleged period of cohabitation through February 28, 2019, which is now moot, based upon the trial Court's April 5, 2019 Order on Motion for Credit to Child Support Obligation.

Respectfully submitted this 17th day of July, 2019.



Stephen W. Fisher, WSBA#7822  
Attorney for Respondent,  
Debbie J. Schultz

#### VI. CERTIFICATE OF SERVICE

I certify that on the 17th day of July, 2019, I delivered via email a true and accurate copy of the foregoing Opening Brief of Respondent:

Jesse Froehling  
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Stephen W. Fisher, WSBA#7822  
Attorney for Respondent,  
Debbie J. Schultz

## APPENDIX A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

IN RE THE MARRIAGE OF:	)	NO. 03 3 03588 1
	)	
Debbie J. Moeller n/k/a,	)	ORDER ON RESPONDENT'S
Debbie J. Schultz,	)	MOTION FOR REVISION
	)	
Petitioner,	)	
	)	
Michael O. Moeller,	)	
	)	
Respondent,	)	
	)	

THIS MATTER having come on regularly before the above-entitled Court, the Petitioner appearing by and through her attorney, Stephen W. Fisher, and the Respondent, appearing by and through his attorney, Jared Varo, and the Court having reviewed the records and files herein and having heard argument of counsel, it is hereby

ORDERED that Respondent's Motion for Revision is hereby denied in part and granted in part.  
It is further

ORDERED: Child support for Elayna, in the sum of \$250, shall terminate as of turning age 18 or graduating from high school; whichever is later, The Contempt

ORDER ON RESPONDENT'S MOTION FOR REVISION - 1  
*Judgment*  
Hearing Order entered on 5/29/18 shall be modified appropriately.

STEPHEN W. FISHER  
A Professional Limited Liability Partnership  
ATTORNEY AT LAW  
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FIRCREST, WASHINGTON 98466  
(253) 565-3900; FAX: (253) 565-3988

6/19/2018 6175 0096

The Respondent shall <sup>be permitted to</sup> provide ~~verified~~ proof of support of the children, during the alleged period of reconciliation, which will allow for adjustment of the child support owed by Respondent. Respondent shall have 8 months, to ~~establish~~ <sup>provide verified proof of payments,</sup> ~~from the date of this order~~

The parties shall present a Revised Contempt Hearing Order on 6/22/18.

All other provisions of the 5/29/18 Contempt Hearing Order shall remain in full force and effect.  
DONE IN OPEN COURT this 15th day of June, 2018.

*Kathryn J. Nelson*  
Judge Kathryn J. Nelson

Presented by:

Approved for entry; notice of presentation waived:

STEPHEN W. FISHER, PLLP  
Attorney for Petitioner

By: *[Signature]*  
Stephen W. Fisher, WSBA #7822

By: *[Signature]*  
Jared Varo, WSBA #47968  
Attorney for Respondent

FILED  
DEPT. 13  
IN OPEN COURT  
JUN 15 2018  
By *[Signature]*  
DEPUTY

If parties do not agree on offset or motion for modification of judgment shall be set by Respondent on the Commissioner's docket, that motion shall be filed prior to the expiration of 8 months.

ORDER ON RESPONDENT'S MOTION FOR REVISION - 2

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**STEPHEN W. FISHER, PLLP**

**July 17, 2019 - 11:59 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52213-6  
**Appellate Court Case Title:** Debbie J. Moeller, Respondent v. Michael O. Moeller, Appellant  
**Superior Court Case Number:** 03-3-03588-1

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