



COURT OF APPEALS
 DIVISION THREE
 STATE OF WASHINGTON
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No. 335771

**IN THE COURT OF APPEALS
 DIVISION THREE
 OF THE STATE OF WASHINGTON**

In re)	
)	COA No: 335771
GEOFF MERRIT ,)	
)	Walla Walla Sup. Ct.
Petitioner/Respondent)	No. 08-3-00202-5
vs.)	
)	
HEIDI EHM,)	
)	
Respondent/Appellant)	

APPELLANT'S REPLY BRIEF

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II. ARGUMENT

A. THE FINAL CHILD SUPPORT PLEADINGS WERE BY DEFAULT, AND NOT ON THE MERITS THEREFORE MS. EHM SHOULD BE ALLOWED A LIBERAL STANDARD ON APPEAL.

Mr. Merrit, through counsel, argues that the Final Child Support Order and worksheet, which were both entered in Walla Walla County Superior Court in March 2015, as well as other final child support pleadings, were entered on the merits of the evidence and were not default orders in substance, thus proffering the position that the Walla Walla County Court correctly denied Ms. Ehm the application of a liberal standard in its decision denying her motion to vacate. *Respondent's Brief*. Mr. Merrit submits that the final child support orders were entered on the merits because he “proved his case” when the Walla Walla County Court considered evidence he submitted in support of his petition for a child support modification. Yet, Mr. Merrit does not cite to any record substantiating what evidence the Walla Walla Court considered when it entered final pleadings on March 9, 2015 and furthermore, the financial information he did submit does not comply with the statutory requirements of a child support modification.

Mr. Merrit is correct insofar as he acknowledges that he had the burden to prove his petition for a child support modification: “The

petitioner bears the burden of showing substantially changed circumstances on a petition to modify child support.” *In re Marriage of Bucklin*, 70 Wn. App. 837, 840, 855 P.2d 1197, 1199 (Wn. App. Div. 3 1993). In his Petition for a Child Support Modification, Mr. Merrit plead in part that substantial changes to the Mother and Father’s incomes was a substantial change in circumstance warranting a modification. CP 17-21. Mr. Merrit thereafter identified that there have been substantial changes reported in the incomes of both parties within the Findings of Fact and Conclusions of Law entered March 9th. CP 142-143.

“In all proceedings which determine or modify child support, the uniform child support schedule applies.” *Bucklin* at 840, 855 P.2d 1199 citing RCW 26.19.035(1); *In re Marriage of Wayt*, 63 Wn. App. 510, 512, 820 P.2d 519 (1991); *In re Marriage of Lee*, 57 Wn. App. 268, 274 n.3, 788 P.2d 564 (1990). “The schedule bases the child support obligation on the combined monthly net incomes of both parents.” *Bucklin* at 841, 855 P.2d 1199 citing RCW 26.19.020. “It allocates each parent’s burden according to his or her share of the combined monthly net income.” *Id* citing RCW 26.19.080. “Thus, whether a change in circumstance is substantial depends on its effect on a parent’s monthly net income. Monthly net income, in turn, can only be determined in relation to monthly gross income.” *Id* citing RCW 26.19.071(5).

“A parent’s monthly gross income is determined by considering all income.” *Id* citing RCW 26.19.071(1). “A trial court’s failure to include all sources of income not excluded by statute is reversible error.” *Bucklin*, at 840, 855 P.2d 1199 citing *In re Marriage of LaDouceur*, 58 Wn.App. 12, 16, 791 P.2d 253 (1990). “Income shall be verified by tax returns from the preceding 2 years and current pay stubs; income not appearing on tax returns and pay stubs must be verified by ‘other sufficient verification’.” *Id* citing RCW 26.19.071(2).

In his Responsive Brief, Mr. Merrit states that he provided “income information for himself by way of tax returns for several years, public benefits information for his household, a business income printout, a financial declaration, and proposed child support worksheets.” *Respondent’s Brief*, pg. 26. Mr. Merrit stated that this information was submitted together with his Petition for Modification of Child Support, which was filed in December, 2011. *Id*. Mr. Merrit also states that he “updated the court with further income tax returns” and “provided income information for Ms. Ehm as obtained from the Division of Child Support after requesting income information available to them from the Employment Security System.” *Id*. Lastly, Mr. Merrit states, “Ms. Ehm submitted her own paystubs and a financial declaration which [he] incorporated into his Petition for Modification and his motion for

temporary orders,” which Ms. Ehm filed in October, 2011. *Id.*; CP 236-241, 242-246.

Ms. Ehm submitted paystubs for the period between August 31st and September 30th, 2011 and a financial declaration to the Walla Walla County Superior Court on October 25, 2011, the information Mr. Merrit “incorporated into his Petition for Modification” in 2011. *Respondent’s Brief*, pg. 26; CP 236-241, 242-246. Ms. Ehm reported a net income of \$2,739.95 in her financial declaration submitted to the Walla Walla County Court that same day in 2011. CP 236-241. Despite his statement that he submitted tax returns for several years when he filed his Petition, Mr. Merrit filed an incomplete tax return for only 2010. CP 247-253. Mr. Merrit did not sign the return. *Id.* He did not file an up to date, or end of year pay stub when he filed his Petition in December, 2011 despite being employed, only an unauthenticated, “business printout.” *Respondent’s Brief*, pg. 26; CP 247-253.

At the time Mr. Merrit filed his Motion for Child Support in February, 2015, he filed only his 2012 and 2013 personal tax returns. CP 67-104. He did not file an end of year pay stub for 2014 despite reporting \$33,764 in income from ACP Construction in 2013. *Id.* Although he states that he is self-employed by February, 2015, Mr. Merrit provides no other “sufficient information,” [See RCW 26.19.071(2)], such as his

quarterly filings with the Washington State Department of Revenue as a self-employed individual. *Id.* Therein his 2013 tax return, Mr. Merrit identifies rents received in the amount of \$3,500 and generated a tax refund of \$5,525.00, which are both in addition to the employee income in the amount of \$33,764 from ACP Construction noted above. CP 174-178. Mr. Merrit, furthermore, does not report taxes paid in 2013. CP 67-104. Despite the ample income generated in 2013, Mr. Merrit reported a net income of \$1,623. CP 144-157.

Additionally, Mr. Merrit stated that he substantiated Mr. Ehm's income through the Employment Security Data obtained from the Division of Child Support, which he filed in February, 2015 concurrently with his Motion for Child Support. *Respondent's Brief*, pg. 26; CP 65-66. However, a closer review of the DCS record will evidence that there was no income reported for Ms. Ehm for the 3rd or 4th quarter in 2014. *Id.* Furthermore, it evidences an income to Ms. Ehm in the amount of \$93.56 for the 4th quarter of 2013. *Id.* This submission would and could not substantiate a substantial change in income for Ms. Ehm. Had the court reviewed this information at the time it signed the final child support orders in March, 2015, it is more likely that the court should have concluded that Ms. Ehm was unemployed in February, 2015 since the

evidence Mr. Merrit submitted on her behalf reported no income to her for the 3rd and 4th quarters of 2014, or made less.

Mr. Merrit, for his part, did not meet the statutory requirement of RCW 26.19.071(2). He did not verify his income with tax returns for the “preceding two years” or through any other “sufficient verification required for income and deductions which do not appear on tax returns of paystubs.” RCW 26.19.071(2). Mr. Merrit did not submit any financial information for 2014. CP 67-104. Also, he made no allegation and provided no reason why he was no longer employed in his position of employment evidenced by his 2013 tax return, much less why he was allegedly earning less in 2015 than he was when the original order of child support was entered in 2009. CP 6-16, 48-51. His 2013 tax return evidences substantially greater income than he reported to the court. CP 48-51, 67-104, 144-157.

“The uniform child support schedule requires the court to make written findings of fact which must be supported by the evidence and in turn support the court’s conclusion.” *Bucklin* at 840, 855 P.2d 1199 citing *In re Marriage of Sacco*, 114 Wn.2d 1, 3-4, 784 P.2d 1266 (1990); *In re Marriage of Wayt*, 63 Wn. App. 513, 820 P.2d 519.

It is unclear what information or evidence the court considered at the time it signed the final child support pleadings in March, 2015. The

Law and Docket Minutes, submitted as Exhibit A to the Appellant's Opening Brief, substantiate that the court only considered Mr. Merrit's "Motion re: Child Support." Both the Order Denying Ms. Ehm's motion to Vacate and transcript suggest that the court "reviewed the file and the pleadings" at the time it signed the final order of child support in March. RP 8; CP 232-233. However, based on the information therein at that time, Mr. Merrit did not prove that a substantial change in circumstance occurred, nor substantiated his income as well as income to Ms. Ehm. The Findings of Fact and Conclusions of Law entered by Mr. Merrit do not support what evidence the court considered and in turn, do not support the court's conclusion.

Instead, the record evidences that the court erred by not considering all of Mr. Merrit's sources of income. CP 48-51, 67-104, 144-157. Although Ms. Ehm attempted to raise issue with Mr. Merrit's income calculation at the time the Walla Walla Court heard argument on Ms. Ehm's Motion to Vacate, the court refused to consider it because neither counsel, nor Ms. Ehm, were present in court to argue income calculation at the time the final child support orders were entered in March. RP 10.

Because the Walla Walla County Court only determined liability in favor of Mr. Merrit without requiring him to meet his burden of proof, in

combination with Ms. Ehm's failure to plead or otherwise defend against Mr. Merrit's motion in March, when the final pleadings were signed, the judgment Mr. Merrit obtained was a judgment by default and not one on the merits. Ms. Ehm should therefore have been afforded a liberal standard on appeal.

B. MR. MERRIT FAILED TO ESTABLISH MS. EHM HAD AN UNPAID CHILD SUPPORT OBLIGATION AT THE TIME THE INTEREST JUDGMENT WAS ENTERED, WITHOUT PROIOR REQUEST FOR THAT SPECIFIC RELIEF; THEREFORE THE INTEREST JUDGMENT IS VOID.

In her opening brief, Ms. Ehm argued against an interest calculation, specifically Mr. Merrit calculating and establishing a judgment for interest that accrued on the underpaid child support, or difference between Ms. Ehm's original support obligation (\$395) and modified child support obligation (\$705) beginning in December, 2011. Ms. Ehm cited to *In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989) for the proposition that this judgment should be void because Mr. Merrit never requested a judgment for interest in his Petition for a Child Support Modification, thus denying Ms. Ehm her procedural due process. Ms. Ehm also argued from *State v. Base*, 131 Wn.App. 207, 126 P.3d 79 (Wn.App. Div. 3 2006) and *In re Marriage of Shoemaker*, 128 Wn.2d 116, 904 P.2d 1150 (1995) for the proposition that the Walla Walla County Court should have applied "traditionally recognized equitable principles to

mitigate the harshness of claims for back support when doing so did not work an injustice to either the custodial parent or child.” Appellant’s Opening Brief, pg. 23-27. Mr. Merrit responded and argued that his Petition did include a request that the Walla Walla Court “order underpaid child support since the date of the filing of the petition, or to enter judgment in that amount” He thereafter established a “simple interest” accrual for each underpayment. Responsive Brief, pg. 27.

“Each installment of alimony or child support, *when unpaid*, becomes a separate judgment and bears interest from the due date.” *Roberts v. Roberts*, 69 Wn.2d 863, 866, 420 P.2d 864 (1966) (emphasis added). “Any money paid to the custodial parent for past due support operates to reimburse the custodian for monies actually expended.” *Hartman v. Smith*, 100 Wn.2d 766, 674 P.2d 176 (1984) citing *Miller v. Miller*, 29 Or.App. 723, 565 P.2d 382 (1977). “The cause of action lies with the custodial parent - - not with the child.” *Id* citing *Stapel v. Stapel*, 4 Kan.App.2d 19, 601 P.2d 1176 (1979); *Miller*, 29 Or. App. 723, 565 P.2d 382; *Baker v. Baker*, 22 Or.App. 285, 538 P.2d 1277 (1975). Therefore, interest is appropriate only when a child support obligation is not paid and in such situations, the obligee parent has the burden to enforce an existing obligation while acting as the “trustee of the child or

children's support money". See *Fuqua v. Fuqua* 88 Wn.2d 100, 105, 558 P.2d 801 (1977).

For Mr. Merrit to justifiably establish an interest judgment on top of the underpaid child support obligation he obtained against Ms. Ehm, Mr. Merrit must have established that Ms. Ehm had an existing obligation, did not pay it, and did so intentionally or purposely. Interest would be appropriate had Mr. Merrit moved the court pursuant to a contempt action or motion to enforce an existing support obligation combined with a request for interest, and the court found Ms. Ehm liable for unpaid child support. See *RCW 7.21, 26.09, or 26.18*.

Mr. Merrit, however, did not move the court to enforce a child support obligation, he moved to modify one. CP 17-21. When he moved the court for child support in February 2015, he also did not request enforcement of an outstanding child support obligation in existence for Ms. Ehm, nor did he allege that Ms. Ehm even had an arrearage. CP 47; CP 48-51. Although Mr. Merrit argues that Ms. Ehm was not current on her support obligation in 2011 [*Responsive Brief, pg. 35*], Ms. Ehm was current when Mr. Merrit filed his motion in February 2015. Indeed, Mr. Merrit's own interest calculation included in the Order of Child Support entered in March 2015 substantiates that Ms. Ehm was current by 2015 since her underpayment of child support only accounts for the difference

between the original and modified amount of child support beginning December, 2011. It does not identify an underpayment for child support not actually paid prior to the Walla Walla County Court entering Mr. Merrit's child support order in March, 2015. CP 147-157. At the time the court signed the Order, only then did Ms. Ehm have a back child support obligation in the amount of \$12,333.90 and interest in the amount of \$2,514.79 beginning December, 2011, despite a reported monthly net income to Ms. Ehm in the amount of \$2,696.00. *Id.*

Despite Mr. Merrit's assertion that the interest judgment he obtained against Ms. Ehm resulted from a simple accrual of unpaid child support, he didn't obtain the judgment until March 2015. Since Ms. Ehm was current on her obligation prior to, no interest should have been accumulated before March 2015 according to the *Roberts* case identified above, when interest runs beginning from the due date. *Roberts*, at 866, 420 P.2d 864. Yet, in order to establish a liability against Ms. Ehm for interest on an unpaid child support obligation, he must have first proved that Ms. Ehm had such an obligation and purposely did not pay it. Because Mr. Merrit never moved the court for this relief or met any burden in relation to an interest calculation, while obtaining this relief without pleading the appropriate legal basis for relief, this interest

judgment should be void according to the *Leslie* case identified in the appellant's opening brief.

C. FINALIZING THE PARENTING PLAN WAS THE CONDITION PRECEDENT TO MR. MERRIT'S MOTION FOR ADJUSTMENT OF CHILD SUPPORT.

Mr. Merrit, through counsel, argues that the Walla Walla County Superior Court "did not order mediation or any other condition precedent for child support" between January and August, 2012. (Respondent's Brief, pg. 35). At the time Mr. Merrit filed his Petition for a Child Support Modification in December 2011 Ms. Ehm had already filed her Petition for a Modification as well as Motion to Vacate Mr. Merritt's highly restrictive parenting plan and order restraining Ms. Ehm from her children which was obtained by default in 2010. CP 34-37. Mr. Merrit's new, restrictive parenting plan modified the final parenting plan entered pursuant to the dissolution in December, 2009, which afforded Ms. Ehm fairly liberal and standard visitation. CP 34-37. Despite Mr. Merrit's Petition for a Child Support Modification, the court addressed issues concerning Ms. Ehm's parenting plan modification first, which accounts for the direction the Walla Walla Court established in its clarified ruling of January 30, 2012, "Let's do one thing at a time." Supp. RP 20. The Walla Walla County Court wanted Ms. Ehm to first have in person, physical

contact with her children before addressing child support. *Supp. RP 17*, 20.

As such, the Walla Walla County Superior Court thereafter issued written rulings pursuant to the various motions between counsel, which allowed Ms. Ehm to reunite with her children, designated unsupervised visitation, and then increased, overnight visitation. CP 34-37, 40-41, 42-43. The Walla Walla County Court then “reserved” child support in its written ruling dated August 22, 2012, when it afforded Ms. Ehm overnight visitation with her children. CP 42-43. Despite Mr. Merrit stating that the Walla Walla County Court did not order mediation, it recommended mediation in its January 5, 2012 and August 22, 2012 Written Rulings. CP 34-37, 42-43. It also stated that mediation results “may provide a faster resolution of the visitation issues” in its March 16, 2012 Written Ruling. CP 40-41. While the Walla Walla County Court did not directly order the parties mediate, both Mr. Merrit and Ms. Ehm understood that mediating the parenting plan issues was necessary.

Ms. Ehm did refuse to mediate subsequent to the court’s written ruling in January, 2012. She did so because Mr. Merrit continued to refuse her visitation with the children despite the court’s January 6, 2012 Written Ruling. *Supp. RP 17*. After visitation commenced, Ms. Ehm agreed to mediate, which resulted by the acknowledgment of both parties

in July 31, 2014. (*Opening Brief*, pg. 2; *Responsive Brief*, pg. 8). The parties then agreed to a final parenting plan.

However, the Walla Walla County Court consistently maintained that the parenting plan issues must first be resolved prior to it entertaining Mr. Merrit's Petition for a Child Support Modification. Yet, subsequent to each request between December, 2011 and June, 2012, the Walla Walla County Court refused Mr. Merrit this relief before finally reserving the issue in August, 2012. In so doing, it made clear its position it initially asserted in January, 2012 and again in August, 2012: It wanted to first see Ms. Ehm have contact with her children. *Supp. RP 17*. As such, mediation, or first resolving issues concerning the parenting plan in this matter, was indeed a condition precedent to the child support modification.

Mr. Merrit acknowledges that "Both parties awaited resolution of their parenting issues at that point [in August, 2012]...." (Respondent's Brief, pg. 29). Mr. Merrit also states that "Neither party can be said to have abandoned their respective Petitions during that same amount of time for while the litigation was on hold for both Petitions." *Id.* Litigation, however, was on hold until Mr. Merrit motioned for child support in February, 2015. Furthermore, Mr. Merrit cannot and should not rely on the court "reserving" child support in its August, 2012 written ruling. "When a trial court has refused to rule, or has made a tentative ruling on a

matter, the party is obligated to again raise the issue at an appropriate time to insure that a record of the ruling is made for appellate purposes.” *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991). Here, Mr. Merrit waited nearly three years and three months to adjust his child support obligation, after resolving the parenting plan issues in mediation with Ms. Ehm.

The Washington State Supreme Court ruled, “To allow a ‘reservation’ of final residential placement to extend indefinitely runs contrary to the overriding policy considerations identified in RCW 26.09.002.” *In re the Parentage of C.M.F.*, 179 Wn.2d 411, 427, 314 P.3d 1109, 1116 (2013). Here, the biological father moved the Spokane County Court for a parenting plan, the implementation of which had been ‘reserved’ in the Judgement and Order determining Parentage. See generally, *C.M.F.*, 179 Wn.2d 411, 314 P.3d 1109. The Judgment and Order also designated the biological mother custodian solely for the purpose of other state and federal statutes. *Id.* The father thereafter sought and obtained custody from the Mother one and a half years after the Judgment and Order determining Parentage had been entered when he moved the trial court for a parenting plan that designated him the custodial parent. *Id.* The Mother appealed, arguing that the Father was first required to establish adequate cause and a substantial change of circumstance for

modification of the custodial designation. *Id.* The Washington State Supreme Court agreed holding that the Court did not waive the adequate cause and modification requirements by ‘reserving’ a parenting plan. *Id.* The Court reasoned that, “[b]ecause the court’s reservation of a residential schedule was open ended in this case”, the court exceeded its common law, statutory authority, and policy consideration that custodial changes are viewed as highly disruptive to children, and a strong presumption in favor of custodial continuity exists against modifications. *Id.*

While the Ehm appeal does not address parenting plans or parenting plan modifications, an “open-ended” reservation for Mr. Merrit’s petition for child support modification should be as inappropriate here as it was in *C.M.F.* Policy considerations exist for child support modifications: “Under RCW 26.09.170, a retroactive child support modification is highly disfavored except in certain unusual instances.” In *re Marriage of Cummings*, 101 Wn.App. 230, 234, 6 P.3d 19 (Wn. App. Div. 1 2000).

Furthermore, RCW 26.09.170 affords the moving party a basis to modify child support and identifies the appropriate procedure based on the time that has accrued since entry of the existing, final order of child support and whether the moving party is required to show a substantial change in circumstance. *See RCW 26.09.170(5)-(7).*

An “open-ended” reservation, like the one issued from the Walla Walla County Court in August, 2012, would exceed the court’s statutory authority since the court could reserve determination for an extended, open-ended period of time, rather than apply the statutory requirements mandated by the State Legislature. Furthermore, an “open-ended” reservation would also breach the court’s policy against retroactive modifications, which unfortunately occurred here.

The Walla Walla County Court was clear with the direction it outlined for the parties in its written ruling as it relates to child support: It was subsidiary to the issues that affected the parenting plan. Mr. Merrit understood, as evidenced by his conduct and the procedure in the case. He filed a motion to adjust child support only after issues concerning the parenting plan were resolved in July, 2014. A condition precedent did certainly exist in the case and Mr. Merrit should not benefit from an open-ended reservation, which allowed him to establish nearly \$16,000.00 in back child support and interest beginning December, 2011. The Walla Walla County Court should have limited Ms. Ehm’s liability for back child support without interest to the time Mr. Merrit filed his motion for adjustment in February, 2015.

D. THE WALLA WALLA COURT SHOULD HAVE MITIGATED THE ARREARAGE

Mr. Merrit argues that Ms. Ehm should be estopped from raising an ‘adjustment v. modification’ and laches argument citing to *State v. Coe* for the proposition that “a party may generally not raise an issue for the first time on appeal.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492, 494 (1988) citing *State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988). However, Mr. Merrit neglects to include the court’s reasoning:

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Id. citing *Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).

Ms. Ehm, however, moved the court to vacate the March, 2015 final child support pleadings because it denied her “traditionally recognized equitable principles” which should have mitigated the harshness of a claim for back child support and interest for a three and a quarter year arrearage. *In re Marriage of Shoemaker*, 128 Wash.2d 116, 904 P.2d 1150 (1995).

Specifically, Ms. Ehm cited to RCW 26.19.001 in her motion to vacate for the Legislative policy which in relevant part states, “The legislature also intends that the child support obligation should be equitably apportioned between the parents.” *RCW 26.19.001*. CP 160-167.

Ms. Ehm specifically requested a more equitable start date. Additionally, Ms. Ehm argued, “There is no prejudice to Mr. Merrit considering he moved the court to set an appropriate amount of child support commensurate with the state support schedules. Without appropriate consideration on the issues, support will not be equitable between the parties or appropriately set.” *Id.* Ms. Ehm also based on her motion to vacate, in part, on CR 60(11), “Any other reason justifying relief from the operation of the judgment.” *Id.*

Ms. Ehm submitted a declaration addressing issues with the implemented child support obligation, arrearage, and interest calculation. CP 6-16. Therein, she requested that “the modified amount of support begin in April, 2015.” She asked the Walla Walla County Court “redress the situation” stating, “[e]stablishing accurate income figures and accounting for my long-distance transportation are at issue, as well as an equitable allocation of support....” *Id.* Furthermore, she requested “only an equitable allocation of child support given the facts and circumstances in this case” as well as a “new [support] amount beginning in April 2015 since any arrearage above my obligation will create an undue hardship on me....” *Id.*

When Mr. Merrit filed his Petition for a Child Support Modification, he incorporated RCW 26.09.170 into the reasons he

identified for modifying child support: “There has been the following substantial change of circumstances since the order was entered: Substantial changes in the mother’s and father’s income have been reported.” CP 17-21; See RCW 26.09.170(7).

Whether or not there is a substantial change of circumstances, the previous order was entered more than a year ago and: The order works a severe economic hardship; the child has moved to a new age category for support purposes; and an automatic adjustment of support should be added consistent with RCW 26.09.100

CP 17-21; RCW 26.09.170(6). Both legal basis’ Mr. Merrit plead afforded him the opportunity to proceed via a petition or motion for adjustment. Mr. Merrit filed both a petition and a motion, three years and three months apart. CP 17-21, 47. RCW 26.09.170(1) directs the court to set arrearages “(a) only to installments accruing subsequent to the petition for modification or motion for adjustment...” RCW 26.09.170(1)(a).

Mr. Merrit also supplemented the record to evidence that he “filed a motion to amend child support and to enter temporary orders premised upon his own and the Respondent’s stated wages” in January, 2012. CP 288-290. Mr. Merrit must have understood that the Walla Walla Court had discretion to set a new start date for a modified child support obligation since he based his motion and petition on the same statute that affords the court its discretion. Because the court had subject matter

jurisdiction of a child support modification, it too understood its discretion and authority, especially given that Ms. Ehm specifically requested an equitable start date in April 2015. The Walla Walla Court was absolutely give the “opportunity the opportunity to correct an error” and did not do so. *Scott* at 687, 757 P.2d 494 citing *Seattle v. Harclon*, 56 Wn.2d 597, 354 P.2d 928.

When Ms. Ehm cited to *In re Marriage of Scanlon and Witrak* in her opening brief, she did so to clarify the procedure Mr. Merrit employed in this pending matter, and also establish that the Walla Walla Court had the legal authority to comply with her specific request for a more equitable start date of April 2015 for her modified support obligation. CP 174-178. This request, as well as her request to vacate the arrearage and interest calculation, is not a new claim, which were raised for the first time on appeal. *Id.*

As it concerns Ms. Ehm’s laches argument, she always maintained that Mr. Merrit waited unreasonably for years before pursuing this support modification, the result of which caused her monetary damages and economic hardship. CP 174-178. Ms. Ehm does not raise laches for the first time on appeal. Yet, Mr. Merrit does not argue that Ms. Ehm should be denied equitable defenses: He does not challenge the case law Ms. Ehm cited in her Opening Brief, “Washington Courts are allowed in some

contexts to apply traditionally recognized equitable principles to mitigate the harshness of claims for back support.” *Base*, 131 Wn.App. 216, 126 P.3d 79. Instead, Mr. Merrit only argues, “the primary standard of inquiry is not whether or not there are equitable defenses but whether or not Ms. Ehm presents substantial evidence of a prima facie defense.”

Respondent’s Brief, pg. 36.

Mr. Merrit cites to the same legal authority Ms. Ehm provided in her Motion to Vacate, *White v. Holm*, the four factors the moving party must demonstrate for the court for it to decide whether to vacate – two primary and two secondary factors:

- 1) whether there is substantial evidence to support a prima facie defense to the claim asserted by the opposing party; 2) the moving party’s failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; 3) that the moving party acted with due diligence after notice of the default judgment; and 4) that the opposing party will not suffer substantial hardship if the default judgment is vacated.

CP 160-167; *Johnson v. Cash Store*, 116 Wn.App. 833, 841, 68 P.3d 1099 (2003) citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Ms. Ehm plead these same four factors in her declaration submitted to Walla Walla Court on April 22, 2015. Prima facie defense: Mr. Merrit’s income was incorrectly calculated. CP 174-178. He should have been imputed to a significantly higher wage. *Id.* Failure to Appear:

Ms. Ehm's counsel committed a mistake. CP 168-173. Acted with Due Diligence: Ms. Ehm moved the court to vacate in a matter of 6 weeks after discovering final pleadings had been entered. CP 174-178. Of note, Mr. Merrit's counsel took six months to submit his Responsive Brief, citing many of the same factors and reasons Ms. Ehm's counsel provided for his mistake. Substantial Hardship on the Opposing Party: Mr. Merrit did not plead that he had increased expenses for the children as a result of a change of their age. He provided no basis why the court should have established an arrearage with interest for a modified support obligation beginning in December 2011. CP 48-51.

III. CONCLUSION

At the time Mr. Merrit filed his motion for adjustment in February, 2015, Ms. Ehm was current on her child support obligation. CP 174-178. Between December 2011 and March 2015, Ms. Ehm paid \$15,800 in child support for her two minor children. CP 144-157. She also came current on her \$395 monthly obligation when the original order of support was entered in June 2009, paying an additional \$11,445.00 in support as well. *Id.* Given Ms. Ehm paid her obligation while generating a net income of \$2,785 (CP 179-184) evidences her commitment to her children. Given the standard on appeal in this case, it is "manifestly unreasonable and outside the range of acceptable choices, given the facts and applicable

legal standard” for the Honorable M. Scott Wolfrom with the Walla Walla County Superior Court to saddle Ms. Ehm with a judgment for back child support in the amount of \$12,333.90 and interest judgment in the amount of \$2,514.78 because she failed to appear and contest. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362, 1366 (1997).

Judge Wolfrom should have afforded Ms. Ehm a liberal standard on appeal, which he should have applied in vacating final child support pleadings in this case. Instead, Judge Wolfrom refused to do so based on what he thought was “adequate notice,” (RP 8) despite Ms. Ehm’s Motion to Vacate wherein she identified *Dloughy v. Dloughy*, “balancing the equitable principle that controversies are best determined on the merits rather than default, against the necessity of having a responsive and responsible judicial system which mandates compliance with judicial summons.” *Dloughy v. Dloughy*, 55 Wn.2d 718, 721, 349 P.2d 1073, 1075 (1960). Judge Wolfrom should have exercised his authority ‘liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done,’ but did not. *Id.* citing *White*, 73 Wn.2d 351, 438 P.2d 581.

The court also abused its discretion when it failed to afford Ms. Ehm traditionally recognized equitable principles that should have mitigated the harshness of the arrearage and interest judgment, failed to

consider mediation and resolution of the parenting plan issues as a condition precedent before modifying child support, afforded Mr. Merrit a judgment interest on a child support arrearage, which he never requested, and allowed a back child support arrearage and interest judgment to stand despite Ms. Ehm being current on her support obligation.

Finally, Ms. Ehm's counsel does not attempt to minimize his mistake in any way in failing to appear and contest at hearing in March 2015. However, Mr. Merrit's counsel was also complicit in causing his confusion since she sent him two identical notices with different dates. Ms. Ehm should not be solely required to shoulder the burden for a mistake that was jointly committed between both counsels.

For all the reasons and arguments made herein and in Ms. Ehm's opening brief, she respectfully requests the court vacate the final child support pleadings entered in Walla Walla County Court in March, 2015. Ms. Ehm respectfully request the Court of Appeals, Division 3, denies fees in this matter also.

Respectfully submitted this 15th day of July, 2016.



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For Heidi Ehm