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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 335771-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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IN RE

GEOFFREY T. MERRITT,

Respondent on Appeal,

vs.

HEIDI J. EHM

Appellant

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BRIEF OF RESPONDENT ON APPEAL

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Angel M. Base  
WSBA #42500  
Attorney for Geoffrey Merritt,  
Respondent on Appeal

Angel M. Base, MSW, J.D.  
Attorney at Law  
1312 N. Monroe St., STE 117  
Spokane, WA 99201  
(509) 328-1773

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## I. STATEMENT OF FACTS

This case began as a dissolution of marriage with children, filed 07/30/2008 and finalized 12/19/2008. CP 200. The Final Order Child Support was entered pursuant to Decree of Dissolution on June 8, 2009. CP 6-16. At the time the Final Order Child Support of 2009 was entered the parties lived about 50 miles apart; Ms. Ehm was living in Pasco, WA, and Mr. Merritt was living in the Walla Walla area. CP 7-8. Ms. Ehm was not current in support obligations and back child support and attorney fees were reserved on the court's initial final order of child support in this case. CP 6, 15. Ms. Ehm has a long history of failure to defend in this matter, and continues in that regard with her current counsel. CP 35-36, RP 2, 11-14.

Mr. Merritt petitioned to modify the parenting plan in 2010, and a modified final order parenting plan was entered in December, 2010, which required Ms. Ehm to complete certain evaluations prior to petitioning the court herself for a modification of parenting plan. CP 35-36.

Following her failure to meaningfully participate in litigation with the Mr. Merritt, and subsequent to frequent relocations of Ms. Ehm without notice to Mr. Merritt and without subsequently providing addresses for service to Mr. Merritt, in June, 2011 Mr. Merritt filed for contempt of the parenting plan because of Ms. Ehm's disruptive behavior at the children's

school event. CP 34-36, 255-58. Ms. Ehm defended against the contempt and then as of October, 2011, she sought through her current counsel to vacate prior parenting and restraining orders which had been entered concurrent with her lack of participation and issues of mental health and substances. CP 34-36, 255-56. Ms. Ehm also filed a Summons and Petition for Modification of Parenting Plan on 10/25/2011. CP 36, 200. Ms. Ehm's motions to vacate the prior parenting plan and a prior restraining order were denied on January 5, 2012. CP 36.

Of note, the court found that Ms. Ehm's counsel provided an inaccurate assertion of facts to the court regarding the chronology in how Mr. Merritt had obtained the 2010 parenting plan final order. CP 36. On January 5, 2012, the court reserved a finding of adequate cause on Ms. Ehm's Petition for Modification of Parenting Plan, but suspended the restraining order and the terms of the December 2010 parenting plan on the condition of permitting the parties to agree to mediate the parenting plan issues [without being ordered to mediate the parenting plan issues]. CP 37. The court had first mentioned mediation previously on July 11, 2011, stating that the parties may "move the Court for participation in the dispute resolution process" for the parenting plan enforcement issues, but this was prior to the Ms. Ehm's petition to modify the parenting plan and in regards to issues of enforcement of the parenting plan. CP 235. The court further

encouraged mediation of the parenting plan issues by January 5, 2012, yet still did not order mediation for any issue. CP 36-37. The parties scheduled mediation but Ms. Ehm cancelled mediation and refused to participate in mediation. CP 39-43, 291, 293. The court did not sanction Ms. Ehm for her failure to participate in mediation, instead ruling on March 16, 2012, regarding Ms. Ehm's refusal to mediate, "that is her choice" indicating mediation was not required [for any issue] and that a lack of agreement to mediate was sufficient to avoid any penalty. CP 41.

At the time of the filing of her Petition for Modification of Parenting Plan, Ms. Ehm was several thousand dollars behind on her child support payments and Mr Merritt and the children were receiving public assistance. CP 247-53, 268-69, 280, 285-86. Notably, in her parenting plan modification, Ms. Ehm was requesting a proportional cost-share [at the 2009 proportions] for evaluations she had previously been ordered to participate in due to her issues with substances and for her mental health disruptions. CP 35-36, 289. Ms. Ehm provided her income information (financial declaration and paystubs) with her Petition for Modification of Parenting Plan, so Mr. Merritt was able to evaluate the substantially changed incomes on both parties upon receiving that. CP 236-46.

Mr. Merritt filed a Summons and Petition for Modification of Child Support on 12/07/2011 with a motion regarding temporary child support

and incorporating previously filed documents. CP 17-33, 200. The incomes of both parties had changed substantially such that Mr. Merritt's net income decreased from the 2009 amount of \$2913.34 at 63% of the parties' income to \$1700.00 at 38.3% of the parties' income; meanwhile, Ms. Ehm's income increased from the 2009 amount of \$1698.58 at 37% of the parties' income to \$2339.95 at 61.7% of the parties' income. CP 2, 24. Essentially, in her Petition for Modification of Parenting Plan, Ms. Ehm was asking for Mr. Merritt to have to fund the majority of her ordered substance abuse and mental health evaluations, even though Mr. Merritt and the children were on public assistance at that time and even though the incomes of both parties had substantially changed such that Ms. Ehm was making nearly twice as much money as Mr. Merritt and while she was not consistently paying the ordered amount of monthly child support. CP 24, 236-53, 268-69, 280, 285-86.

With his initial pleadings on his Petition for Modification of Child Support, Mr. Merritt incorporated previously filed narrative declarations and Ms. Ehm's financial declaration and previously filed financial documents supporting his petition, and included his proposed child support worksheets and then-current financial declaration. CP 22, 24-32, 242-53. Mr. Merritt had filed sealed financial information pertaining to himself in November, 2011, consisting of household food benefits from Division of

Social and Health Services, his 2010 tax return, a 2011 income report for his business, and a Department of Child Support payment report showing child support arrearage from Ms. Ehm. CP 247-253.

Mr. Merritt's Petition for Modification of Child Support alleged a substantial change in circumstances with substantial changes in incomes since the final order had been entered more than 24 months prior. CP 19-22. Issues affected by the substantial changes in incomes as known to the parties and to the court at that time were as follows: the frequent relocations of Ms. Ehm which ultimately resulted in her taking residence in Estacada, Oregon (some 250 miles from Mr. Merritt and the children); requests by Ms. Ehm made in her parenting plan modification petition with potential changes to allocation of proportional financial responsibility for evaluations ordered for Ms. Ehm to complete; visitation changes and the financial implications of those changes (including transportation implications, reunification counseling services for the children, and the potential reallocation of proportional expenses thereof); and changes to funding of private schooling for the children. CP 27, 34-37, 40-41, 289, Supp.RP 5.

In his Petition for Modification of Child Support, Mr. Merritt further alleged that whether or not there was a substantial change in circumstances, that the previous order had been entered more than a year prior and worked a substantial hardship, that a child has changed age categories, and that an

automatic adjustment should be added pursuant to RCW 26.09.100. CP 20. RCW 26.09.100 points to the standards of RCW 26.19 and RCW 26.09.170. RCW 26.09.100. RCW 26.09.100 and .170 allow for an automatic adjustment for a child changing age categories. RCW 26.09.100, .170.

Mr. Merritt requested the following notable provisions in his Petition for Modification of Child Support: a start date for a modified child support order to be the date that the petition was filed; attorney fees and costs for Mr. Merritt; child support to be ordered according to the Washington State child support statutes with proposal filed therewith; payment of underpaid child support since the date of the filing of the petition or the entry of judgment in that amount; payment of child-related expenses of day care, educational, long distance transportation, and uninsured medical; and for tax exemptions to be allocated to the father (as previously ordered). CP 14, 20-21.

The court issued letter rulings and/or temporary orders regarding parenting and child support on 01/06/2012, 02/03/2012, 02/17/2012, 03/16/2012, and 08/22/2012. CP 34-43, 200. During that time, Mr. Merritt repeatedly requested for the court to address the issue of a temporary order of child support. CP 17-33, 269, 287, 290, 292, 294. Instead of ruling on child support temporary orders, the court was silent at least twice in declining to address or rule upon the issue of child support. CP 34-39. The

court acknowledged Mr. Merritt's repeat requests for that issue to be addressed by the court but the court orally stated on 01/30/2012 that the court wanted to handle "one thing at a time" – the parenting plan issue. Supp.RP 20. The court declined again on 03/16/2012 to rule on the child support issue or issue temporary orders "until hearing" but then at hearing on August 22, 2012, the court specifically reserved child support issues. CP 41-43. Ms. Ehm did not answer discovery requests, and Ms. Ehm cancelled mediation and refused to participate in mediation. CP 40-43, 291, 293. The court did not sanction Ms. Ehm for her failure to participate in mediation, instead ruling "that is her choice" indicating that mediation was not required [for any issue] and that a lack of agreement to mediate was sufficient to avoid any penalty. CP 41.

Ms. Ehm did not submit a Response to the Petition for Modification of Child Support. CP 17-193, 200. Ms. Ehm did not submit any updated financial evidentiary information or any financial declaration following the Petition for Modification of Child Support. CP 17-193. However, Mr. Merritt incorporated previously filed narrative declarations and Ms. Ehm's financial declaration and previously filed financial documents (including documents filed by Ms. Ehm directly prior to his Petition) which supported his petition, and Mr. Merritt included his proposed child support worksheets and then-current financial declaration. CP 22, 24-32. Mr. Merritt was unable

to obtain a temporary order of child support while the child support modification was pending, though the court acknowledged his requests and specifically reserved those issues when issuing temporary rulings. CP 34-43, 200, Supp.RP 20. Mediation was not ordered for any issue, and Ms. Ehm was not sanctioned for her refusal to mediate the parenting plan issues as there was no requirement to mediate any issue. CP 34-43, Supp.RP 20.

Both parties awaited resolution of their parenting issues while the children attended counseling for reunification with the mother and while visits developed consistency with the mother. CP288-95.

Mr. Merritt acquired new counsel on July 16, 2014, for the limited purpose of representation in settlement negotiations for the parenting plan issues to include entry of final orders if by agreement. CP 44, 201. The parties with counsel mediated successfully regarding the parenting issues on July 31, 2014, and signed a final order parenting plan that same day. CP 161, 168, 174, 201. Mr. Merritt's new counsel entered a general notice of appearance on September 30, 2014. CP 45, 201. Ms. Ehm's counsel declares that he understood the child support issues to remain an outstanding issue at that time. CP 169, at lines 1-2.

Mr. Merritt's counsel made several attempts to resolve any case issues by agreement; Mr. Merritt's counsel emailed the Order on Modification of Parenting Plan to Ms. Ehm's counsel for review and

signature on 09/29/2014, 10/01/2014, 10/08/2014, and 10/21/2014. CP 139-141, 201. Additionally, Mr. Merritt's counsel inquired in person of Ms. Ehm's counsel several times at the Spokane County Courthouse regarding the status of his review of that order; on 10/03/2014 Ms. Ehm's counsel stated that he would get back to Mr. Merritt's counsel the following week, and several other times in person subsequently at the Spokane County Courthouse Ms. Ehm's counsel made various commitments to timeframes for review of the order over the following four months, and stated specifically that counsel would be able to get it done without having to schedule a hearing and go back to court over it. CP 201. Mr. Merritt's counsel called Ms. Ehm's counsel on 10/21/2014 and left a voicemail inquiring about the status of his [Ms. Ehm's counsel's] review of the order. CP 201. Mr. Merritt's counsel inquired in person with Ms. Ehm's counsel that same evening (10/21/2015) after the family law section meeting, and Mr. Merritt's counsel provided Ms. Ehm's counsel with a hard copy of the order [in person] at that time. CP 201. Ms. Ehm's counsel declined to review or sign at that time, stating that he needed to review the order with the casefile of his client. CP 201. The order is a 3-page document containing mostly standard mandatory language that doesn't affect implementation of a parenting plan other than to delay its entry if not approved and entered. CP 119-123, 201.

Mr. Merrit's counsel filed a Motion for Order re Parenting Plan and Child Support with a Notice of Hearing for 02/09/2015, and served Ms. Ehm's counsel on 02/02/2015 along with Declaration of Geoffrey Merritt and updated Proposed Child Support Worksheets as well as updated income information for both parties. CP 47-49, 60-64, 65-104, 108, 125-41, 128-130, 201, 212-221. The pleadings were served with the proposed Order on Modification of Parenting Plan. CP 105-107, 132, 201-202, 212-221. The caption of the pleading indicated Walla Walla County Superior Court and all counsel have understood this case to be in Walla Walla, but the address of the court was erroneously listed as Spokane and so that minor scrivener's error was corrected by the county clerk before filing and by notice to Dinenna by "Notice of Hearing of Motion re Parenting Plan and Child Support" [corrected] which was delivered on 02/05/2015. CP 108, 125, 128-129, 202, 212-221.

Mr. Dinenna erroneously reports that he received only one day of notice on the original motion setting when he received an entire week as documented with the received stamps for the pleadings as well as by the declaration of messenger also filed herein. CP 125-38, 161-62, 212-21. All of the proofs of service are documented in the court file by the evidence of coversheets of each document indicating the dates of delivery for the specific documents [all noted either by Dinenna's date received stamp or by

notation of messenger with date delivered], and also the proofs of service are documented by a narrative declaration of the messenger delivery person with attached messenger delivery sheets filled out by Mr. Merritt's counsel directing the delivery of the documents. CP 125-38, 212-21. The plethora of evidence of proof of service show that Mr. Merritt's hearing notice and supportive pleadings as served on Ms. Ehm through counsel on 02/02/2015 were served seven calendar days prior to hearing on 02/09/2015, or five court days prior to hearing, pursuant to the local rule, WWCSCLR 4(A). CP 125-38, 212-21. The hearing notice as filed on 02/04/2015 in Walla Walla Superior Court, with case caption noting the case in Walla Walla County Superior Court, shows that the notice was timely filed by the Wednesday before the Monday hearing docket, also pursuant to the local rule. WWCLSR 4(G). CP 108.

Mr. Merritt's counsel was contacted by phone by Mr. Dinenna's associate attorney Jennifer Wofford on 02/05/2015, requesting continuance of the hearing scheduled for 02/09/2015. CP 202. Mr. Merritt's counsel agreed to a continuance, contingent upon Mr. Dinenna's review of the Order on Modification of Parenting Plan which had languished for more than six months while Mr. Dinenna had avoided even merely review and comment for the proposed three-page standard order. CP 139-141, 161, 199-200, 202. Mr. Dinenna finally reviewed the order on 02/06/2015, and requested some

unnecessary changes with no effect to the pattern language in section 2.5. CP 106, 120, 127. Those changes were agreed to and made and Mr. Dinenna returned the signed order via email at 3:50 p.m. on 02/06/2015 (late Friday afternoon before the scheduled Monday hearing). CP 106, 120, 127, 202. The Modification of Parenting Plan was completed on 02/11/2015 via mailed orders to Walla Walla with ex parte action. CP 111-123, 202. On that same date (02/11/2015) the court received for filing and the counsel for Ms. Ehm received for notice the amended notice of hearing of the child support matter for March 9, 2015, the date for hearing as agreed by both counsel. CP 110, 125-127, 212-221.

Notably, a reservation regarding child support was included in the Order Re Modification of Parenting Plan, listed as follows on the signature page signed by Mr. Dinenna: "Child support modification is reserved for determination under separate petition for modification; this order does not affect the separate petition for modification of child support which has been filed under this cause number." CP 121-22.

In the course of communications between Mr. Merritt's counsel and Jennifer Wofford of Dinenna's office on 02/05/2015 and 02/06/2015, discussions were had regarding a date for resetting of the motion regarding the remaining issue of child support. CP 127, 202. It is known among all counsel that Walla Walla schedules motion hearings only on Mondays by

local court rule, and every other week between the rotating judges. CP 202, WWCLSR 1(D)(1). Thus, an agreement to move a hearing is an agreement to move a hearing for at least two weeks to another Monday. CP 202, WWCLSR 1(D)(1). With a hearing set on February 9, 2015, the next available date for hearing with the judge assigned to this matter was February 23, 2015, but Ms. Wofford related that Mr. Dinenna would be leaving on vacation on that day, to return on 03/06/2015. CP 202-203. Mr. Merritt's counsel pointed out that if the agreement were made to move the hearing to the next available following Monday, to 03/09/2015, that a response would be needed before Mr. Dinenna left for vacation otherwise Mr. Merritt's counsel would not be able to review a response before hearing nor be able to prepare a reply in that timeframe. CP 203. Ms. Wofford assured Mr. Merritt's counsel that efforts would be made to prepare and deliver a response regarding child support before Mr. Dinenna would leave on 02/23/2015. CP 203. The only communication from Mr. Dinenna directly was his email response of 02/06/2015, with the signed Order on Modification of Parenting Plan in response to the email of Mr. Merritt's counsel of the same date which explained that the order was edited to the language requested by Mr. Dinenna [through Ms. Wofford] and that there would be agreement to continue [the remaining child support hearing for 4 weeks as requested through Ms. Wofford] upon receipt of Mr. Dinenna's

signature on the Order on Modification of Parenting Plan. CP 127. The email contains no other communication subsequently claimed by Mr. Dinenna; there was no other direct communication between counsel for Ms. Ehm and counsel for Mr. Merritt, and no other agreements. CP 127, 169-70, 202-03.

An Amended Notice was mailed to the court and filed on 02/11/2015 for a hearing on 03/09/2015, as agreed, and was served that same date. CP 110, 125-127, 212-221. Of note, the Notice was originally drafted as "Monday, March 6, 2015" but was corrected to "Monday, March 9, 2015" by the Walla Walla County Clerk before filing and after calling this counsel to clarify (as that Monday was not March 6, and March 6 was not a Monday). Mr. Merritt's counsel immediately issued a corrected Amended Notice to Paul Dinenna's office, which was delivered to Mr. Dinenna that same date (02/11/2015) and which listed "Monday, March 9, 2015" as the date for hearing. The hearing was scheduled for Monday, March 9, 2015, and not scheduled on any other day; it was properly noted and Ms. Ehm's counsel had proper notice of the hearing. CP 110, 125-127, 212-221.

Mr. Dinenna's office had notice of the hearing for Monday, March 9, 2015, by telephonic agreement on 02/06/2015, more than one month before the hearing. CP 125-127, 203, 212-221. Mr. Dinenna had formal

written notice of the hearing for Monday, March 9, 2015, by “Notice of Hearing of CS (Amended)” as delivered to him on 02/11/2015, three and a half weeks before the hearing and at least 12 days before he left on vacation. CP 110, 125-127, 203, 212-221. The notice as required by WWCSCLR 4(A) was more than adequate.

Mr. Dinenna failed to respond to the child support motion, before he left for vacation or after he returned, and he did not communicate the status of the matter to Ms. Ehm, his own client. CP 168-171, 176, 204. Besides having the office phone number and address of Mr. Merritt’s counsel, Mr. Dinenna has email access and has previously communicated with Mr. Merritt’s counsel in that manner for other purposes, and Mr. Dinenna has the cell phone number of Mr. Merritt’s counsel and has previously communicated with Mr. Merritt’s counsel in that manner for other purposes, but Mr. Dinenna did not communicate any information to Mr. Merritt’s counsel whatsoever from 02/06/2015 and forward; the pleadings received on April 27, 2015, were the first that Mr. Merritt’s counsel heard back from Mr. Dinenna’s office or from anyone on Ms. Ehm’s behalf. CP 204.

Mr. Dinenna did not bring responsive pleadings to hearing on March 9, 2015, for review and consideration, and Mr. Dinenna did not call the morning of the hearing on March 9, 2015, to request continuance; Mr. Dinenna did not show to the wrong hearing date or to any hearing date in

March, 2015. CP 168-171, RP 11-12. Mr. Dinenna did not communicate any extenuating circumstances in his personal or professional life nor did he request more time to respond when he did not complete the response before leaving on vacation; Mr. Dinenna did not even call opposing counsel after notification of entry of orders in his absence with his failure to appear at hearing on 03/09/2015. CP 205, RP 11-12.

On April 22, 2015, over six weeks after entry of the orders at hearing of 03/09/2015, Ms. Ehm, through her counsel Mr. Dinenna, submitted a motion with supportive pleadings to vacate the orders entered on 03/09/2015, with show cause hearing set for May 4, 2015. CP 160-93. The pleadings were served on Mr. Merritt's counsel on April 27, 2015, *seven weeks* after the March 9, 2015, orders were entered which Ms. Ehm sought to vacate, though Mr. Dinenna was served with the orders the day after they were entered. CP 125-141, 142-159, 168-171, 199-205, 212-221, RP 1-15. The pleadings received by Mr. Merritt's counsel on April 27, 2014, was the first since 02/06/2015 that Mr. Merritt's counsel received any communication from Mr. Dinenna whatsoever regarding this case, and Mr. Dinenna made no effort to coordinate a date for hearing in advance with Mr. Merritt's counsel. CP 204. Mr. Merritt's counsel contacted Mr. Dinenna the following morning (on 04/28/2015) with notification regarding unavailability for hearing on May 4, and Mr. Merritt's counsel drafted and

entered the order by agreement for continuance to May 18, with Mr. Merritt's counsel paying the ex parte fee for the continuance. CP 194-97, 204-05, RP 12.

Ms. Ehm based her request to vacate the orders of March 9, 2015, on CR 60(b)(1)(5)(11), and RCW 26.19.001. CP 160. Ms Ehm claims the orders were entered by default against her. CP 160-67.

Ms. Ehm argues under CR 60(b)(1) that mistake, inadvertence, or excusable neglect prevented attendance of her counsel to court on the date of the hearing of March 9, 2016. CP 165. However, Ms. Ehm's counsel (Mr. Dinenna) acknowledges the mistake is his own, stating that he did not appreciate the difference in the dates of the original and corrected hearing notices he received. RP 8-9. Mr. Dinenna further admits that he is "primarily responsible for the mistake at issue." RP 9. Mr. Dinenna doesn't deny that he was the one who requested a four-week continuance to March 9, 2016, and admits he requested the continuance because of his vacation schedule. CP 169-70. Neither Ms. Ehm nor Mr. Dinenna makes a claim that either of them showed up on the wrong hearing date, and no claim is made that they showed up on any hearing date leading to the entry of the orders on March 9, 2016. CP 168-71, 174-78, RP 11-12. Mr. Dinenna erroneously claims that he moved to vacate the orders less than one month from the date of their entry, when in fact the record reflects that he took six weeks to bring a

motion to vacate and seven weeks to notify Mr. Merritt's counsel. CP 125-41, 142-93, 199-205, 212-21, RP 1-15.

Ms. Ehm argues under CR 60(b)(5) that the orders entered on March 9, 2015, are void because of a judgment granted greater than the relief requested; Ms. Ehm argues that Mr. Merritt did not request a judgment for back interest on child support nor an automatic increase in support beginning in February, 2017. CP 160, 162-63, 165-66.

However, Mr. Merritt requested the court to order underpaid child support since the date of the filing of the petition, or to enter judgment in that amount. CP 21. A judgment of simple interest accrued for each underpayment was then calculated according to the methods of child support interest calculation allowed by RCW 4.55.110 and RCW 26.23.030, as demonstrated by the spreadsheet of calculations attached to the order presented on March 9, 2015. CP 152, RP 13-14.

Further, Mr. Merritt alleged in his Petition for Modification of Child Support that whether or not there was a substantial change in circumstances, that the previous order had been entered more than a year prior and a child changed age categories, and an automatic adjustment should be added pursuant to RCW 26.09.100. CP 20. RCW 26.09.100 points to the standards of RCW 26.19 and RCW 26.09.170 to be used in determinations of automatic adjustments. RCW 26.09.100. RCW 26.09.100 and .170 allow

for an automatic adjustment for a child changing age categories. RCW 26.09.100, .170. The youngest child of the parties, C.M., turns age 12 in February, 2017, and an automatic adjustment was added to the order to begin at that time and for that purpose, as pled by the father in his Petition. CP 20, 146.

Ms. Ehm argues under CR 60(b)(11) that the orders entered on March 9, 2015, should be vacated for any other reason justifying relief from judgment, and under RCW 26.19.001 that the child support ordered on March 9, 2015, is not equitably apportioned. CP 160, 163-65. Ms. Ehm states that Mr. Merritt's income is in question, that she must provide all of the transportation between Estacada, Oregon, and Walla Walla, Washington, once per month, and that Mr. Merritt waited over four (4) years before pursuing his Petition. CP 165, 174-77.

To the income question, the record reflects that Mr. Merritt provided his income information in November, 2011, consisting of household food benefits from Division of Social and Health Services, his 2010 tax return, a 2011 income report for his business, and a Department of Child Support payment report showing child support arrearage from Ms. Ehm. CP 247-253. In December 2011, in drafting his proposed child support worksheets to equitably apportion the child support burden, Mr. Merritt used Ms. Ehm's financial declaration and previously filed financial documents supporting

his petition, and included his proposed child support worksheets and then-current financial declaration along with his petition. CP 22, 24-32, 242-53. The record reflects that in early February, 2015, Mr. Merritt provided updated income information in the form of his income tax returns for 2012 and 2013, and updated income information for Ms. Ehm in the form of an income information report obtained from the Division of Child Support for the purpose of modification of a child support order. CP 65-104.

In regards to equitable apportionment of long-distance transportation, Ms. Ehm acknowledges that the visitation between herself that the children is more than once per month, and that in fact the visitation is every other weekend. CP 175. The parenting plan entered by agreement states that the visitation is every other weekend, and the parenting plan provides for shared transportation duties between the parents in an equitable manner with meeting locations rotating between Arlington, Oregon and Biggs, Oregon for the visits which take place in Estacada, Oregon. CP 112, 114.

In regards to the time between pleading the child support modification and the issuance of modified final orders, Ms. Ehm and Mr. Dinenna claim that Mr. Merritt waited over four (4) years. CP 162, 165, 176. However, the record reflects that slightly more than three years passed between the time from the filing of the Petition for Modification of Child

Support in December, 2011, to the filing of Mr. Merritt's notice in February, 2015, for setting a hearing on final orders regarding the modification of child support. CP 17-33, 47-49, 60-104, 108. In that time, as reflected in above paragraphs, Mr. Merritt did not fail to pursue his request for relief in modified child support and repeatedly requested for the court to address the issue of a temporary order of child support. CP 17-33, 269, 287, 290, 292, 294. The court issued letter rulings without ruling on the issue of temporary support but reserving the child support issue, stating the court wanted to deal with "one thing at a time" – the parenting plan issue. CP 34-43, 200, Supp.RP 20. Both parties awaited resolution of their parenting issues at that point, while the children attended counseling and visits developed consistency with the mother. CP 288-95.

As the parenting plan modification was drawing to a close, leaving the court with only one thing left to rule on (the child support modification), Mr. Merritt pursued his final order of child support. CP 47-108.

In the course of pleading the motion to vacate the orders of March 9, 2015, and in arguing the motion on June 1, 2015, neither Ms. Ehm nor Mr. Dinenna pled or argued that there was any condition precedent to the litigation of child support or to the entry of child support orders in this matter. CP 160-93, 223-33, RP 1-15. Regardless, Ms. Ehm herself initially cancelled and refused to participate in mediation for the parenting issues

and the court ruled “That is her choice” and did not sanction her; mediation was not a requirement for the parties to attend for any issue and was not a condition precedent to litigation of child support issues. CP 34-43, 235, 291, 293, Supp.RP 20.

Mr. Merritt’s responsive pleadings to the motion to vacate were served on 05/17/2016, the Friday before the Monday hearing, according to WWCSCLR 4(A) which requires opposing affidavits to be served [on opposing counsel] one day before the hearing. RP 4, WWCSCLR 4(A). On May 18, 2016, the court continued the hearing for the court’s opportunity to review the opposing materials, and reserved fee for both parties. RP 5-6.

On June 1, 2016, the court denied the motion to vacate the orders of March 9, 2016, after reviewing the court file and the pleadings submitted by the parties, and after consideration of argument by counsel. CP 232-33, RP 7-15. The court based its order on findings that there was no basis to vacate the orders re child support, that the court had entered the orders re child support based on review of the file and the pleadings and that the judgment was taken on the merits based on the facts as considered by the court. CP 232. The court found the notice provided [for the March 9, 2016 hearing] to be adequate and sufficient facts were [provided to grant a judgment on the factual basis for the case. CP 232. The court denied Ms.

Ehm's request for fees, and reserved Mr. Merritt's request for attorney fees and costs. CP 233.

## **II. STANDARD ON APPEAL**

The Respondent agrees with Appellant's description of the standard of review on appeal of this matter being abuse of discretion. Respondent disagrees with Appellant's assertion that the court abused its discretion. Respondent argues that the court used appropriate discretion in denying Ms. Ehm's motion to vacate the child support orders.

## **III. AUTHORITY AND ARGUMENT**

### **A. THE COURT'S DECISION ON ENTRY OF THE CHILD SUPPORT ORDERS WAS MADE ON THE MERITS AND NOT BY DEFAULT AND NO LIBERAL STANDARD TO VACATE APPLIES**

In our jurisdiction, "...it is well settled Washington law and also the view of the federal courts that if one side fails to appear on a date set for trial, a single-party trial can proceed and the outcome of the trial will be a judgment on the merits, not a judgment by default." *In re Marriage of Olsen*, 183 WnApp 554 (2014) (*review denied*, 182 Wn2d 1010 (2015)). There is a distinction between how Washington and the minority federal view handles this issue, with most federal circuit courts allowing default under FRCP 55 "against a party who has been shown to have 'failed to

plead or otherwise defend.’ FRCP 55(a) (emphasis added).” *Olsen* at 553-554. In Washington, however, the court found CR 40(a)(5) as “remov[ing] absence of an adverse party as an impediment to trial,” quoting its language that either party, after notice of trial, may bring the issue to trial, “ ‘and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with [the] case.’ ” *Olsen*, at 554-555 (quoting *Tacoma Recycling, Inc. v. Capitol Material Handling Co.* 34 Wn.App. 392, 394–95 (1983) (quoting CR 40(a)(5))).

In Washington, “When a tribunal considers evidence, the resulting judgment is not a default even if one party is absent.” *Stanley v. Cole*, 157 Wn.App. 873, 880 (2010). However, as in comparative federal jurisdictions, the moving party must still prove the case. “[S]ee e.g., *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir.1949) (if a default judgment is not available and the opposing party and his lawyer fail to appear, “[t]he plaintiff might proceed, but he would have to prove his case”); and *Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc.*, 803 F.2d 1130, 1134 (11th Cir.1986) (“If the defendant has answered the complaint but fails to appear at trial, ... the court can proceed with the trial. If the plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial”).” *Olsen*, at 555.

The requirements of the procedure for “proving a case” can be found in court rules and state law. RCW 26.19.071 provides the standards for determination of income, including consideration and verification of income with submission of certain pieces of evidence, and RCW 26.19.035 requires the completion of child support worksheets and written findings (such as those in the pattern forms for the order on modification of child support and the child support order) to enter an order of child support. Pertinent to this case is RCW 26.09.175(6), (7), which read as follows:

(6) Unless all parties stipulate to arbitration or the presiding judge authorizes oral testimony pursuant to subsection (7) of this section, **a petition for modification of an order of child support shall be heard by the court on affidavits, the petition, answer, and worksheets only.**

(7) A party seeking authority to present oral testimony on the petition to modify a support order shall file an appropriate motion not later than ten days after the time of notice of hearing. Affidavits and exhibits setting forth the reasons oral testimony is necessary to a just adjudication of the issues shall accompany the petition. The affidavits and exhibits must demonstrate the extraordinary features of the case. Factors which may be considered include, but are not limited to: (a) Substantial questions of credibility on a major issue; (b) insufficient or inconsistent discovery materials not correctable by further

discovery; or (c) particularly complex circumstances requiring expert testimony.

RCW 26.09.175(6), (7) (emphasis added).

Here, Mr. Merritt submitted a Petition for the Modification of Child Support, 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. Ms. Ehm submitted her own paystubs and a financial declaration which Mr. Merritt incorporated into his Petition for Modification and his motion for temporary orders. Mr. Merritt updated the court and Ms. Ehm with further income tax returns and he 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. Mr. Merritt submitted updates child support worksheets proposing a monthly support obligation for Ms. Ehm of \$5.00 less per month than he had originally proposed for her.

Mr. Merritt prepared findings and orders according to his pleadings and the orders were substantiated. The court considered the written pleadings and the case file and no oral testimony was necessary or allowed. The statute doesn't even mandate that oral argument be given, but only that the court consider the written pleadings. RCW 26.09.175(6). Mr. Merritt proved his case in the absence of Ms. Ehm or her attorney as

required by the laws of Washington for child support modification proceedings and judgement was granted on the merits based on the income provided to Ms. Ehm and to the court.

**B. THE CHILD SUPPORT ORDERS WERE ENTERED IN CONFORMITY WITH THE REQUEST FOR RELIEF AND ARE NOT VOID**

Ms. Ehm complains of irregularities in the pleading and judgment regarding the judgement taken as back child support and interest from the date of the Petition, and in an automatic adjustment occurring as the children change age groups. However, the complaint is frivolous, as the Petition for Modification of Child Support states the following at paragraph 1.4: “An automatic adjustment should be added consistent with RCW 26.09.100.” That provision of the statute states in relevant part as follows: “The court may require automatic periodic adjustments or modifications of child support.” RCW 26.09.100(2). Additionally, the Petition also requests the following at paragraph 1.5: “The starting date of the modified child support order should be the date on which the petition was filed.”

Mr. Merritt requested the court to order underpaid child support since the date of the filing of the petition, or to enter judgment in that amount. CP 21. A judgment of simple interest accrued for each

underpayment was then calculated according to the methods of child support interest calculation allowed by RCW 4.55.110 and RCW 26.23.030, as demonstrated by the spreadsheet of calculations attached to the order presented on March 9, 2015, with prorated amount for December, 2011, for only the days in December subsequent to the filing of the Petition. CP 152, RP 13-14. Child support payments are due the month they accrue, and accrue interest as of the date that they are due; therefore, interest is properly calculated as of the date each payment was due and a table was provided to the court to illustrate those calculations at the time of entry of the judgment. RCW 4.55.110, RCW 26.23.030.

It should also be noted that the child support worksheets submitted by Mr. Merritt in December, 2011, calculated that Ms. Ehm would have a monthly support burden for the children of \$711.00 per month, while the worksheets submitted with the final support order in March, 2015, calculate that her support burdern is \$706/month. It can hardly be said that the amount of support that Mr. Merritt was requesting was any sort of surprise when it's actually \$5.00 less per month than originally calculated.

Mr. Merritt did not abandon his Petition or the bases for bringing it to the court. From the time of the filing of his Petition Mr. Merritt repeatedly requested for the court to address the issue of a temporary order of child support. CP 17-33, 269, 287, 290, 292, 294. Instead of ruling on

child support temporary orders, the court was silent at least twice in declining to address or rule upon the issue of child support. CP 34-39. The court acknowledged Mr. Merritt's repeat requests for that issue to be addressed by the court but the court orally stated on 01/30/2012 that the court wanted to handle "one thing at a time" – the parenting plan issue. Supp.RP 20. The court declined again on 03/16/2012 to rule on the child support issue or issue temporary orders "until hearing" but then at hearing on August 22, 2012, the court specifically reserved child support issues. CP 41-43. Both parties awaited resolution of their parenting issues at that point, while the children attended counseling for reunification with the mother and while visits developed consistency with the mother. CP 288-95. 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.

Inasmuch as Ms. Ehm now raises the issue of adjustment versus modification, Mr. Merritt incorporates herein the discussion and citation of authority from Section D, below, barring Ms Ehm raising an issue for the first time on appeal. However, it is frivolous for Ms. Ehm to claim that Mr. Merritt's Petition for Modification actually should be considered a request for adjustment while Ms. Ehm in the same breath requests latent

consideration and accommodation for herself in the modification of child support allocation and apportionment between the parties.

Regarding the shared transportation burden, the court can note that the Parenting Plan entered herein by agreement actually shares the transportation burden already in proportion to their shares of the total net incomes of the parties. Ms. Ehm is performing about two thirds of the transportation, while Mr. Merritt is performing about one third, which is a fair comparison of their proportional incomes as calculated in the only child support worksheets that were ever submitted to the court during the pendency of the child support modification.

If Ms. Ehm thought that Mr. Merritt was calculating the incomes incorrectly, or that the sources of income were not analyzed properly, she certainly had plenty of time to offer her own proposals and evidence to dispute Mr. Merritt's claims but she failed to do so. However, Mr. Merritt declared under penalty of perjury as to his income situation in 2011 and again when he updated the court in 2015 with his tax returns for 2012 and 2013.

Again, Mr. Merritt well-proved his case with respect to the child support calculations, providing child support worksheets with similar calculations to Ms. Ehm twice and submitted orders in accordance with his

requests in the Petition; there was no irregularity in the judgment he obtained. Ms. Ehm could not have been surprised by the relief granted, as she was provided with the Petition and supportive documents with updates and with worksheets proposals two times. Ms. Ehm sat on her hands failing to defend herself for over three years while Mr. Merritt repeatedly brought requests for relief to court regarding the issue only to have the court instruct him to allow the parenting plan issues to be sorted out before obtaining orders on his child support Petition.

**C. NO ABUSE OF DISCRETION MAY BE FOUND WHERE ORDERS WERE ENTERED IN CONFORMITY WITH REQUEST FOR RELIEF AND WITH JUDGMENT TAKEN ON THE MERITS**

In the *Olsen* case, similar to the case herein, Mr. Mickey as counsel for Mr. Olsen failed to submit evidence on his behalf or to show up for scheduled court dates, requesting continuances on the eve or day of trial and even called the morning of a continued trial date to report that he was outside the court room suffering from chest pains and was going to the hospital; the court advised Mr. Mickey that unless he provided documentation from a healthcare provider that a health issue prevented him from attending trial then the trial would commence that afternoon. *See Olsen* at 550. Mr. Olsen did not appear for trial that morning or that

afternoon, and trial proceeded without him. The rest of the story is as follows:

¶ 12 Attorney Jason Nelson substituted as counsel for Mr. Olsen not long thereafter and moved for relief from the trial court's order of default and its later-entered findings and conclusions, order for support, child support worksheet, and order re dissolution issues. He relied on CR 60(b)(1) and asserted an irregularity in Ms. Olsen's obtaining of the judgment. As support for the motion, Mr. Olsen testified by declaration that he had been a diligent client, had provided Mr. Mickey with information and evidence needed to present his position on disputed issues, and had not been told by Mr. Mickey about the April 16 trial date. He testified that he *had* been told about the May 16 trial date and had traveled to the courthouse for trial on that date, but was informed by Mr. Mickey that the trial was going to be continued due to Mr. Mickey's heart issues and that he should not enter the courtroom. He testified that he was unaware that trial had gone forward that afternoon until \*552 told by Mr. Mickey long after the fact. Mr. Olsen's declaration asserted, "I do not believe the court would have made the same findings and orders if it had all of the information," and then recounted facts that Mr. Olsen believed undercut the trial court's findings on disputed issues. CP at 155.

¶ 13 The trial court conducted a hearing on the CR 60(b) motion and issued an order denying it several days later. Mr. Olsen appeals the court's denial of his motion for relief from the final orders reflecting the

outcome of the trial.

*Olsen* at 551-552.

Here, Mr. Dinenna candidly admits that he “forgot about the March 6<sup>th</sup> hearing” and provided reasons of his vacation and makes vague references to health issues of his mother’s husband without providing timelines of reasons for his failure to communicate about any of those issues for SEVEN (7) WEEKS) after the entry of the orders on the merits in his absence. Mr. Dinenna makes no claim that he showed up on the wrong date, but he in fact admits he did not show up on any date, despite being the attorney who had requested the four (4) week continuance. Mr. Dinenna, and Ms. Ehm by rules of agency, were properly informed regarding the hearing for Monday, March 9, 2015, and simply failed to attend to the hearing or submit any pleadings in defense.

**D. NO CONDITION PRECEDENT WAS PLED OR ARGUED TO THE TRIAL COURT AND NO CONDITION PRECEDENT EXISTED FOR ENTRY OF THE CHILD SUPPORT ORDERS**

A party may generally not raise an issue for the first time on appeal. RAP 2.5(a), *State v. Scott*, 110 Wn2d 682, 685 (1988), citing *State v. Coe*, 109 Wn2d 832, 842 (1988); *State v. Peterson*, 73 Wn2d 303, 306 (1968). 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. *Scott*, at 685, *Citing Seattle v. Harclaon*, 56 Wn2d 596, 597, (1960). Issues which may be raised for the first time on appeal are issues of jurisdiction, failure to bring a proper claim, or manifest error affecting a constitutional right. RAP 2.5(a).

Here, Ms. Ehm raises the issues for the first time on appeal whether or not mediation was a requirement or condition precedent to litigation of the child support issues. Ms. Ehm attempts to analogize *In re Marriage of Cummings*, 101 WnApp 230, 234 (2000), to this case in support of her argument that a precedent condition must be satisfied prior to child support litigation herein. In the *Cummings* case, the mother was required to provide her tax returns to the father as a condition precedent to a child support adjustment; the mother failed to provide her tax returns for twelve (12) years, leaving the father in that case with no notice of his anticipated adjusted obligation. *Cummings* at 233-34. The *Cummings* court also noted that the father had always been current in his support obligations. *Id.*

Here, the court issued letter rulings and/or temporary orders regarding parenting and child support on 01/06/2012, 02/03/2012, 02/17/2012, 03/16/2012, and 08/22/2012, and did not order mediation or any other condition precedent for child support during all of that time. CP 34-43, 200. Also contrary to the *Cummings* case, Ms. Ehm had a long history of failure remain current in her child support obligation and was not only in arrears at the time the final orders were entered in 2009 but was still in arrears at the time the Petition for Modification of Child Support was entered in 2011. Additionally, the parties scheduled mediation but Ms. Ehm cancelled mediation and refused to participate in mediation. CP 39-43, 291, 293. The court did not sanction Ms. Ehm for her failure to participate in mediation, instead ruling on March 16, 2012, regarding Ms. Ehm's refusal to mediate, "that is her choice" indicating mediation was not required [for any issue] and that a lack of agreement to mediate was sufficient to avoid any penalty. CP 41. There was no condition precedent to litigation of child support issues in this matter, Ms. Ehm did not raise that issue in her pleadings or argument for hearing on her motion to vacate, and she not only improperly raises that issue now on appeal but she raises the issue in bad faith as she is well aware of her cancellation

and refusal to participate in voluntary mediation and of her obstruction in the litigation of this case in general.

**E. THE COURT DID NOT ERR IN FAILING TO CONSIDER REQUESTS OR DEFENSES WHICH MS. EHM FAILED TO PLEAD PRIOR TO ENTRY OF THE CHILD SUPPORT ORDERS**

Ms. Ehm claims that she should be entitled to an equitable defense regarding her motion to vacate, and cites the doctrine of laches. As above, Mr. Merritt incorporates herein the discussion and citations to authority which bar Ms. Ehm from raising an assignment of error for the first time on appeal. RAP 2.5(a). Ms. Ehm did not raise the defense of laches in her pleadings or argument on her motion to vacate the child support orders.

However, if the court of appeals considers her arguments for relief below to be sufficiently related to the doctrine of laches, that doctrine does not apply in this case. Ms. Ehm brought a motion to vacate orders which she claims were entered in default. Even if the court considered the orders to have been entered in default instead of on the merits, 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. To support a motion to vacate a default, Ms. Ehm must demonstrate 1) substantial evidence of prima facie defense, 2) her failure to defend was excusable, 3) she acted with due diligence after notice of

default judgement; 4) the opposing party will not suffer substantial hardship if the default is vacated. *White v. Holm*, 73 Wn2d 348, 352 (1968). The child support orders were entered on the merits, so the court did not analyze the motion under a default standard. Ms. Ehm could have raised an equitable defense if she had defended against the child support action prior to the orders being entered, but the court rightly found that it was not appropriate to go through an analysis of equity on a motion to vacate. RP 10.

Ms. Ehm cites two child support cases where laches was applied as an equitable defense, both of which are not analogous herein, and the court should not consider laches as a defense in support of Ms. Ehm's motion to vacate orders which were entered on the merits.

In *State v. Base*, the father had no idea that he had a child with that mother; the mother never contacted him about a child and neither the state nor the mother pursued paternity for nearly five years. *State v. Base*, 11 WnApp 207 (2006). *State v. Base* is not a case where any motion was brought to vacate an order, but rather Mr. Base defended himself against the state's request for support dating back to the birth of the child from the time he was notified of the request and throughout the litigation. *Id.* The court found that Mr. Base had no ability to prepare for the obligation because the state "sat on its hands" and failed to notify him. *Id.* The father

in *Watkins* was not pursued for a similar amount of time, and he likewise did not allow an order to be entered against him without participating in the litigation. *In re Marriage of Watkins*, 42 WnApp 371 (1985).

Here, Ms. Ehm failed to participate and defend and allowed orders to be entered on the merits of the case in her absence. She knew of the claims, and Mr. Dinenna candidly admits that he understood the child support orders to be outstanding and he signed an order reserving the child support issues in 2015. Mr. Merritt repeatedly brought the issue to court for relief for nearly a year, and then both parties focused for a time on resolving the parenting issues before resolving the child support issues. Laches does not apply to this case as a factual matter, and should not apply to this case as a matter of law. Ms. Ehm was properly denied consideration of her arguments for equitable defense.

#### **IV. FEES SHOULD BE GRANTED TO MR. MERRITT**

Mr. Merritt has properly requested an award of fees and costs since the filing of his Petition for Modification of Child Support. Mr. Merritt has submitted his financial declaration herein and updated financial information for both parties to support an award of fees and costs to him after considering the financial conditions of the parties under RCW 26.09.140. Mr. Merritt incorporates herein the statements of fact

referenced above regarding the comparison of the financial conditions of the parties, with Ms. Ehm's statements within her declaration that she at best is paying 25% of her income to child support (well short of the statutory 45% maximum short of good cause). Mr. Merritt carries just under a third of the income for the parties, while Ms. Ehm increases the costs of litigation by her failure to participate and defend and then her subsequent motions to vacate orders. Mr. Merritt also continues to request an award of fees under CR 60, which allows an award of fee under such terms as may be just. Mr. Merritt continues to incur financial obligation for litigation while Ms. Ehm deliberately fails to respond and to participate only to bring motions to vacate later (this being her second in a row pertaining to the most recent two petitions for modification). Mr. Merritt further requests sanctions under CR 11 for Mr. Dinenna's neglect in defending his client and then bringing this frivolous appeal for his failure to fulfill his duty and show up to court.

## **V. CONCLUSION**

The relief granted herein was a judgement granted on the merits by virtue of written pleadings worksheets, and written evidence in accordance with RCW 26.09.17, and the merits were well-proved by Mr. Merritt. There

was no irregularity in obtaining the judgment based on the pleadings, and the judgment was taken at equal to or lesser than the relief requested.

There is no excuse or exigent circumstances which would excuse Ms. Ehm from defending this action for over three years, despite repeated requests by Mr. Merritt for the issue to be addressed and despite multiple notifications that the matter would be addressed and despite the acknowledgment by Mr. Dinenna that he knew the child support issues to be outstanding.

There is no excuse for Ms. Ehm or Mr. Dinenna failing to show up to the court date requested by her attorney. Ms. Ehm's claim is between herself and her attorney, and not against Mr. Merritt.

The order of the Walla Walla Superior Court should be affirmed, with fees granted to Mr. Merritt. Mr. Merritt requested attorney fees in his Petition for Modification of Child Support and did not take judgment at entry of final orders; fees should be granted herein in favor of Mr. Merritt under RCW 26.09.140 and/or CR 60 and/or under any other authority for grant of fees including under CR 11 or for the intransigence of Ms. Ehm and Mr. Dinenna in having to defend against the motion to vacate in these proceedings.

Dated: May 27, 2016

Respectfully submitted,  
ANGEL M. BASE  
ATTORNEY AT LAW

By:   
Angel M. Base  
WSBA #42500  
Attorney for Respondent herein