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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO. 31365-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JONATHAN S. STEINBACH,)
)
Appellant,)
)
vs.)
)
JANE E. STEINBACH,)
)
Respondent.)
)
)
)
_____)

Court of Appeals No. 34325-1-III
Sup. Ct. No. 11-03-02519-3

RESPONSIVE BRIEF OF THE RESPONDENT

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A. RESPONDENT'S STATEMENT OF THE ISSUES

Ms. Steinbach's statement of issues and the case as follows:

Issue #1: Whether the trial court properly applied principles of *res judicata* to Mr. Steinbach's September 24, 2015 petition for modification of child support, given the facts that (a) he raised the same issues in the September 2015 petition that he had raised in his November 2014 petition, (b) the court already ruled on those issues in the previous petition, and (c) he presented no evidence of a substantial change in circumstances since final orders were entered on his previous petition?

Issue # 2: Whether the trial court properly ordered Mr. Steinbach to pay Ms. Steinbach's attorney fees after he filed and adjudicated a petition for modification of child support that was barred by *res judicata*?

Issue #3: Whether this Court should order Mr. Steinbach to pay Ms. Steinbach's attorney fees for having to defend against this appeal?

B. RESPONDENT'S STATEMENT OF THE CASE

Ms. Steinbach presents this Counter Statement of the Case to provide this Court with a clear recitation of proceedings below.

On June 21, 2012, after a trial, judgment was entered that dissolved the parties' marriage. It is undisputed that Mr. Steinbach's net income was calculated at that time to be **\$14,398.73**. It is undisputed that at the end of trial, Ms. Steinbach's had an income imputed to her in the amount of **\$2,714.00**. Lastly, it is also undisputed that Ms. Steinbach was awarded primary placement of the parties' four children. She was to have the

children 54 percent of the time, and was designated the parent to receive child support of **\$3,195** a month.

1. **The First Petition**: On November 21, 2014, Mr. Steinbach filed a petition to modify child support based on his allegation of a substantial change in financial circumstances due to the loss of his primary employment at Intuitive Surgical. CP 123-153. In conjunction with his petition to modify child support, Mr. Steinbach filed an incomplete financial declaration and pay statements from July 24, 2014 through November 14, 2014. CP 141-153. Mr. Steinbach also filed a narrative declaration on November 21, 2014 in support of his petition to modify child support. CP 001-005. In this declaration, Mr. Steinbach specifically requested that the Court impute Ms. Steinbach at **\$35.62** per hour, instead of her current rate of **\$22** an hour. CP 003. He alleged that **\$35.62** per hour most accurately reflected what an RN in Spokane, WA could earn at that time. Id. Also in his November 21, 2014 declaration, Mr. Steinbach asserted that Ms. Steinbach should be declared the parent paying support to him (even though Ms. Steinbach was the primary parent with 54 percent of the residential time). *“My intention for presenting this evidence to the Court, [i.e., his Exhibit 7-Share transfer statement, See CP 38-41], is merely to demonstrate that [Ms. Steinbach] has the ability to pay support...”* CP-004. In his November 21, 2014 declaration, Mr. Steinbach

made other allegations and requests for relief which were not relevant to this appeal. CP 001-005. He alleged that he then earned a gross monthly income of \$2,107.00. CP 136. Also on November 11, 2014, Mr. Steinbach filed copies of his pay statements from July 25, 2014 through November 14, 2014. CP 147-153.

On December 19, 2014 Ms. Steinbach filed her response to the petition to modify child support in which she agreed that child support should be modified, but also asked the Court to address the issue of post-secondary support for the parties' oldest child, Brittany. CP 159-160.

On January 6, 2015, Mr. Steinbach filed a motion for a temporary child support. CP 162-164. In his January 6, 2015 motion, Mr. Steinbach reiterated his request for the Court to require Ms. Steinbach to be designated the obligor parent, for him to be designated obligee parent and for Ms. Steinbach to be required to pay child support to him. CP 162. *"Jane has the ability to pay from her \$270,000 divorce settlement. I service all of the community debt and bills on the family home solely. I will be bankrupt in a matter of months. **The support I'm requesting does not pay all of the bills.**" [Emphasis added]. CP 162.*

On January 22, 2015, Mr. Steinbach supplemented his filings with copies of the previously filed pay statements from July 25, 2014 through November 14, 2014, and one additional pay statement for December 19,

2014. CP 42-51. Also on January 22, 2015, Mr. Steinbach filed an amended child support worksheet indicating that his gross monthly income increased to **\$2,132.00**. CP 170-174. Also on January 22, 2015, Mr. Steinbach filed an amended financial declaration, asserting that his net monthly income was **\$1,838.67** and that his gross monthly expenses amounted to **\$6,752.96**. CP 110-115. In conjunction with this financial declaration, Mr. Steinbach filed a spreadsheet he created, entitled "Exhibit 4 Amended 1-21-15." Appears to be CP 116 [No actual clerk's page designated].

On February 13, 2015 Ms. Steinbach filed her proposed child support worksheet in which she adopted the gross monthly income of **\$2,107.00**, and FICA, (\$161.18), that Mr. Steinbach incorporated into his initial worksheet filed on November 21, 2014. CP 183-189. She disagreed with, and challenged, Mr. Steinbach's calculation of the federal tax deductions in his child support worksheet. Id., and CP 5. In her February 13, 2015 child support worksheet, Ms. Steinbach agreed to be imputed with income, but calculated her income using **\$22** per hour, (not Mr. Steinbach's proposed rate of **\$35.62** an hour); which was her current rate of pay at that time, resulting in a gross monthly income for her of **\$3,784.00** and for a net monthly income for her of **\$3,143.00**. CP 53, 183.

Also on February 13, 2015, Ms. Steinbach filed a narrative declaration, her completed financial declaration, and a copy of her 2014 1099. CP 52-68. Ms. Steinbach's financial declaration set forth an imputed net monthly income for her at **\$3,413.00** and a total for her monthly expenses in an amount of **\$5,022.00**. CP 58-65. In her February 13, 2015 narrative declaration, Ms. Steinbach asked the Court to impute to her a full-time income based upon a wage of **\$22** per hour, address the post-secondary support issue for the parties' oldest child, Brittany, requested an order requiring the parties to notify each other in the future if their incomes exceed those found by the court pursuant to the November 21, 2014 petition to modify child support, and expressly accepted Mr. Steinbach's proposed gross monthly income for himself that was reflected in his proposed child support worksheet. CP 53-54. Additionally, in her February 13, 2015 narrative declaration, Ms. Steinbach informed the Court that pursuant to informal discovery after the November 21, 2014 petition for modification of child support was filed, that Mr. Steinbach provided documentation to her attorney to show that in 2014, Mr. Steinbach's work-related income and income from his former employer and ETrade account amounted to approximately \$857, 000. CP 54 and CP 78-95.

A hearing on the petition to modify the parties' June 2012 order of child support went forward with Commissioner Chavez on February 23,

2015. CP 250-261. At that hearing, Mr. Steinbach asked the Court to adopt his child support worksheet filed on January 22, 2015, CP 170-174; which calculated his net monthly income at \$1,838.67, and Ms. Steinbach's based on an hourly rate of \$35.62 resulting in a net monthly income of \$4,784.73. Ms. Steinbach asked the Court to adopt her proposed child support worksheet filed on February 13, 2015; which calculated his Mr. Steinbach's net monthly income at \$1,945.82, and her net monthly income at \$3,413.99, (based upon a \$22 wage). CP 183. The difference between the parties' proposed net monthly incomes for Mr. Steinbach was a mere \$107.15. CP 170 and 183.

On February 23, 2015, Commissioner Chavez granted Mr. Steinbach's petition to modify child support, adopted Ms. Steinbach's proposed child support worksheet; which incorporated Ms. Steinbach's imputed full-time income at \$22 per hour, and declined to address the issue of post-secondary support for the parties' oldest child, but retained jurisdiction to address the post-secondary support for the oldest child to June of 2015. CP 250-261. **Commissioner Chavez addressed Mr. Steinbach's request for imputation of Ms. Steinbach's income at \$35.62 versus imputing her actual hourly rate of \$22 in detail at the February 23, 2015 hearing. CP 252-253. Moreover, Commissioner Chavez addressed Mr. Steinbach's request to change the designations**

of obligee/obligor parents by naming him the obligee and naming Ms. Steinbach the obligor parent. *“When it comes to who is the obligor and obligee that is set when the parenting plan was set. And the only significant change here is the income piece. And that doesn’t change, again, what you to agreed to in regards to the previous parenting plan. It doesn’t change who the obligor and obligee are in regards to that parent.” “... and at least for the last two years everybody was operating under the assumption that sir you were the obligor and she—or obligee and obligor in regards to who’s paying who child support, and that piece hasn’t changed. The incomes have significantly changed but it’s not unusual for the lesser earning parent to owe an obligation of support to a higher earning parent.” CP 254.* Despite the fact that Mr. Steinbach filed what he designated as being a “Final Order of Child Support,” there was no child support worksheet or order of child support entered by the Court at the time of the February 23, 2015 hearing with Commissioner Chavez. CP 192-198.

On March 3, 2015, Mr. Steinbach filed a motion to reconsider the February 23, 2015 rulings, in which he asked the Court **FOR THE FIRST TIME** asked the Court to require the parties to pay for the children’s health care coverage in proportion to their child support obligations. CP 190-191. That request for relief was not set forth in Mr. Steinbach’s

November 21, 2014 Petition for Modification of Child Support. CP 125-126. In fact, Mr. Steinbach, in his November 21, 2014 narrative declaration, where he set forth the relief requested, specifically asked that the prior court order of child support requiring him to pay for the children's health care coverage remain in effect. CP 004. "*According to our current parenting plan, I am required to pay for healthcare. I am not asking for that requirement to change, but I'd like the insurance premiums any uncovered costs to be taken into account when calculating child support.*" (Exhibit 4). *I'd like any future uncovered medical costs to be shared equally and each share to be paid to either the biller or to each other...*" Nor did Mr. Steinbach ask the Court to require both parties to share in paying for the children's health care coverage in his January 6, 2015 Motion for Temporary Orders Re Child Support. CP 162-164. Addressing this portion of the record is of importance because it clearly shows that Mr. Steinbach, in addition to filing numerous frivolous pleadings, consistently sought additional relief that differed from the relief he initially requested. Engaging in that type of litigation caused Ms. Steinbach to incur additional legal costs for having to respond to requests not properly before the Court.

On March 12, 2015, Mr. Steinbach filed a second motion for reconsideration of the February 23, 2015 rulings and, **FOR THE FIRST**

TIME, asked for a deviation downwards in his child support obligation pursuant to RCW 26.19.075(1)(c)(i)-Extraordinary debt not voluntarily incurred; (1)(c)(ii)-A significant disparity in the living costs of the parents due to conditions beyond their control, and (1)(d)-Residential schedule.

CP 199. On March 17, 2015, Mr. Steinbach filed a narrative declaration that appears to be in support of his March 3, 2015 motion for reconsideration; as it primarily addressed medical and dental costs he allegedly previously paid for the parties' children. CP 202-210.

On April 7, 2015, the court entered Findings of Fact and Conclusions of Law, Order re Modification of Child Support, a Child Support Worksheet for a three-child family, a Child Support Worksheet for a four-child family, and a Final Order of Child Support. CP 211-231. The child support worksheets entered on April 7, 2015 adopted a gross monthly income for Mr. Steinbach of **\$2,107.00** and a net monthly income for him of **\$1,945.85**. The worksheets adopted for Ms. Steinbach a gross monthly income of **\$3,784.00**, (imputed full-time income based upon a **\$22** hourly wage rate), and a net monthly income of **\$3,413.99**. The worksheets set forth each party's proportionate share of the total monthly child support obligation, (Mr. Steinbach 36.3% and Ms. Steinbach 63.7%). The four-child family worksheet resulted in a monthly transfer payment from Mr. Steinbach to Ms. Steinbach amounting to **\$576.94**, CP 219-223,

and the three-child family worksheet resulted in a monthly support amount of **\$491.44**; which would become the transfer payment beginning July 2015 (i.e., once the oldest child aged out). CP 214-218. The Final Order of Child Support entered on April 7, 2015 reflected the same calculations set forth in the two worksheets discussed above. CP 225-226. Section 3.8 of the April 7, 2015 Order of Child Support stated, “*A deviation was not requested.*” CP 227. The newly ordered child support payments were to commence as of January 1, 2015; which resulted in an overpayment by Mr. Steinbach amounting to \$4,900.36. Terms for repayment to Mr. Steinbach were reserved by the Court pending the parties’ submissions of repayment plans. CP 226-227. Ms. Steinbach’s request for post-secondary support for the oldest child was denied, but the ability to re-address that issue was reserved until the Court lost jurisdiction in June of 2015, in case the parties’ financial circumstances changed. CP 228. The allocation of child dependency exemptions awarded one exemption to the mother, one to the father, and alternation of the third child every other year. CP 228. Mr. Steinbach was required to provide health care coverage for the children; as it was available to him at \$240 per month. Ms. Steinbach was not ordered to share in the payment for the children’s health care coverage costs as it was calculated in the child support worksheets adopted by the Court and acted as an offset already. CP 229-

230. The parties were ordered to pay their proportionate shares for the children's uninsured medical expenses. CP 232.

On April 15, 2015, Mr. Steinbach filed another motion for reconsideration, this time seeking reconsideration of the April 7, 2015 orders. CP 233-236.¹ In Mr. Steinbach's April 15, 2015 motion for reconsideration, he reiterated his request for a deviation downward in his support obligation; which was not raised in his November 21, 2014 petition for modification of child support, nor his January 6, 2015 motion for temporary child support orders. CP 125-126, CP 162-164. Mr. Steinbach also sought reconsideration of the award of the dependency tax exemptions, and requested the repayment of the overpaid child support be made in a single lump sum. CP 233. Mr. Steinbach did not move for reconsideration of the reservation of post-secondary support for any of his children in the April 7, 2015 order of child support. However, Mr. Steinbach filed a "FINAL ORDER OF CHILD SUPPORT" with his April 15, 2015 motion for reconsideration, in which he inserted the following language in paragraph 3.14 Post Secondary Educational Support- "*No post-secondary educational support shall be required.*" CP 240.

¹ It appears from the JIS that there was some type of hearing on April 6, 2015 resulting from a continuance of a presentment hearing initially set for March 31, 2015, but no documents of that hearing were designated for this appeal.

On April 17, 2015, Ms. Steinbach filed a motion to revise the April 7, 2015 orders, challenging the commissioner's: (1) denial of post-secondary support for the parties' child, Brittany; (2) failure to require the parties to advise each other as to any prospective change in their incomes; and (3) order that the modified support obligation commence on January 1, 2015. CP 246-247.

Mr. Steinbach also moved for revision of the April 7, 2015 orders on April 17, 2015. CP 248-249. In his motion for revision, he sought the same relief he previously sought in his April 15, 2015 motion for reconsideration of the very same orders, i.e.: (a) a deviation downward in his support obligation; (b) to restore child dependency exemption awards set forth in the June 2012 order of child support; and (c) to require overpayments for child support to be made in one lump sum.

Mr. Steinbach did not seek revision of his request for the Court to impute to Ms. Steinbach a full-time income based upon a **\$35.62** hourly rate, rather than her actual hourly rate of **\$22.00**. CP 248-249. Mr. Steinbach did not file an appeal of the April 7, 2015 Order of Child Support within thirty days of the April 7, 2015 order of child support that based Ms. Steinbach's income upon her hourly wage of \$22.00. CP 001-352. Therefore, Commissioner Chavez the April 7, 2015 Final Order of

child support adopting \$22 per hour as the wage for imputation of income to Ms. Steinbach became the final order of the Court.

On April 30, 2015, both parties' motions for revision were heard by the Honorable Maryann C. Moreno, and an oral ruling was made. CP 262 and CP 287-294. No verbatim report of those oral rulings was incorporated into the record for this appeal, other than an excerpt; which primarily addressed the calculation of overpaid child support. CP 288-294. At the April 30, 2015 hearing with Judge Moreno, May 8, 2015 was set for the presentment of final orders. CP 291. However, Judge Moreno did not sign final orders until May 18, 2015. CP 264, 266, 271, 276, and 285. Those final documents were filed with the clerk of the court on May 19, 2015, and included the following documents: Findings of Fact and Conclusions of Law on Revision, Order on Modification of Child Support on Revision, copies of the two previously entered child support worksheets, (but both signed by Judge Moreno), and a Final Order of Child Support-on Revision. CP 264-285.

In the May 19, 2015 order of child support, the amount for overpayment for child support by Mr. Steinbach was amended to \$5,164.84. CP 279. That amount was to be paid by Ms. Steinbach to Mr. Steinbach by June 1, 2016. (This 2016 was later determined to be inconsistent with the oral ruling; which had been 2015.) Id. Mr.

Steinbach's request for a deviation downward in his child support obligation was denied because "*[t]he court considered the extent of Petitioner's debt and expenses as well as the Respondent's debt and expenses affected by reduction in support.*" That language was handwritten by Judge Moreno; as verified by her initials thereafter. CP 280. Mr. Steinbach's motion to revise the previously ordered award of the dependency tax exemptions was granted. CP 281. Mr. Steinbach did not file an appeal of Judge Moreno's denial of his request for a deviation downwards in his support obligation within thirty days of the entry of the May 19, 2015 order of child support. CP 001-350. Therefore, Judge Moreno's denial of Mr. Steinbach's request for a deviation downward in his child support obligation; which was raised for the first time in a motion to reconsider Commissioner Chavez's February 23, 2015 oral ruling on child support must stand.

On June 26, 2015, Mr. Steinbach filed another Motion for Order of Child Support which, in essence, appeared to be a motion for reconsideration of the May 19, 2015 order of child support. CP 286-287. In this motion, Mr. Steinbach alleged errors in the May 19, 2015 order of child support, but only addressed one error, the date upon which Ms. Steinbach was to pay back his overpaid child support amounts set forth in paragraph 3.5. CP 286. For reasons unknown to this drafter, an Amended

Final Order of Child Support, correcting the date for reimbursement of the overpaid child support to June 1, 2015, was not entered until August 14, 2015. CP 295-303.

2. **The Second Petition**: On September 24, 2015, Mr. Steinbach filed another Petition for Modification of Child Support and Summons. CP 304-307. In his Petition, Mr. Steinbach asked for modification of the August 14, 2015 Order of Child Support. CP 306. Mr. Steinbach claimed that the substantial change in circumstances as being: *“There has been a change in the parties’ income. The order recently signed was based on income data from one year ago. Since that time, circumstances for Mr. Steinbach have declined significantly.”* CP 307. Mr. Steinbach made the same requests for relief previously addressed by the Court pursuant to his November 21, 2014 petition for modification of child support and subsequent motion for revision heard by Judge Moreno. CP 307. Specifically, Mr. Steinbach requested that the order of child support should be modified by ordering: (1) repayment or credit for overpaid child support since the date of filing this petition; (2) payment of underpaid child support since the date of filing this petition or entering a judgment in that amount; and (3) the reversal of the designations of “obligee” and “obligor parents.” CP 307. Mr. Steinbach did not file any current pay statements or other documents verifying his

income at the time of filing his September 24, 2015 petition to modify child support. CP 001-352. Also on September 24, 2015, Mr. Steinbach filed a copy of his **2014** federal income tax form 1040, which showed that his total income for 2014 amounted to **\$544,277.00**. CP 79-81. He also filed a statement from the IRS showing outstanding taxes on the **\$544,277.00** 2014 income in the amount of **\$40,374.67**. CP 82. In addition to the 2014 tax return and IRS notice of outstanding taxes due, Mr. Steinbach re-filed copies of his pay statements from a **single** employment source dated November 14, 2014 through December 19, 2014. CP 84-85. Additionally, he filed pay statements from that single employment source for from January 30, 2015 to May 15, 2015. CP 85-95. Mr. Steinbach did not file any updated income verification documentation with the Court thereafter. CP 96-352. This is very important for this Court to note for two reasons: (1) Mr. Steinbach, pursuant to his November 21, 2014 petition for modification of child support, disclosed that he had four jobs, which logically meant he had four sources of income, CP 002-003, and (2) Mr. Steinbach's failure to file pay statements from only one of those income sources does not constitute proper verification of income in compliance with RCW 26.19.071(2) or the Spokane County Superior Court Local Rule 94.04(5)(c) and (d); and (2). In his September 24, 2015 petition for modification of child support,

Mr. Steinbach specifically requested modification of the **August 14, 2015** Order of Child Support only. CP 306. Yet, Mr. Steinbach failed to file any income verification documentation from any income sources from May 5, 2015 through December 21, 2015, the date upon which Commissioner Pelc heard both Mr. Steinbach's petition to modify and Ms. Steinbach's motion to dismiss the September 24, 2015 petition to modify child support. CP 95-352. This fact goes to the heart of Mr. Steinbach's appeal because he argued in his opening brief to this Court that, "*The Superior Court erred in dismissing the motion to modify child support on the lack of evidence, despite the record containing eleven (11) months of pay stubs.*" Appellant's Opening Brief, page 2, II. Assignment of Error.

On October 20, 2015, Ms. Steinbach filed a response to Mr. Steinbach's September 24, 2015 Petition to Modify Child Support. CP 308-309. Ms. Steinbach asserted that there had not been a substantial change in the parties' incomes. CP 308. Ms. Steinbach also asked the Court to deny Mr. Steinbach's September 24, 2015 petition for modification of child support, and to require Mr. Steinbach to pay her attorney fees for having to respond to this new petition for modification based upon Mr. Steinbach having engaged in intransigence by re-raising the same issues in his September 24, 2015 petition which were previously raised in his November 11, 2014 petition to modify child support and

addressed by the court, (Commissioner Chavez and Judge Moreno). CP 308. Lastly, Ms. Steinbach asked the Court to order Mr. Steinbach to pay her attorney fees on a need versus ability to pay basis, claiming she had financial need for Mr. Steinbach to pay her attorney fees and that, based upon Mr. Steinbach's 2014 tax return showing a 2014 wage income of \$503,600, plus capital gain income of \$49,629, Mr. Steinbach had the ability to pay. CP 308-309.

On December 8, 2015, Ms. Steinbach filed a motion to dismiss Mr. Steinbach's September 24, 2015 petition for modification of child support, a narrative declaration in support of that motion to dismiss, and verification of her income as of November 27, 2015 including a copy of her 2014 federal income tax return. CP 311-320.

In her December 8, 2015 motion to dismiss the September 24, 2015 petition to modify child support, Ms. Steinbach moved for an award of attorney fees pursuant to Civil Rule 11. CP 320.

In her December 8, 2015 declaration submitted in support of her motion to dismiss Mr. Steinbach's September 24, 2015 petition to modify child support, Ms. Steinbach directed the court's attention to the fact that Mr. Steinbach's new requests for the court (a) to impute her income based upon what he thought an RN in Spokane, WA would earn at that time (i.e., \$35.62 per hour instead of her actual hourly rate of \$22), and (b) to reverse

the obligee/obligor titles for the parties were both previously raised and addressed by the court, (Commissioner Chavez on February 23, 2015, and Judge Moreno on April 30, 2015). CP 316. Ms. Steinbach pointed out that Mr. Steinbach was relying upon an “*equal protection*” argument to support his request for child support to be paid to him. Id. Ms. Steinbach informed the court that Mr. Steinbach failed to file his 2014 federal income tax return in advance of the February 23, 2015 hearing on his November 21, 2014 petition to modify child support. Id. That was significant information because Mr. Steinbach’s 2014 federal income tax return and other documents filed with it showed that his income for 2014 was \$544,277. Id. Ms. Steinbach went on to tell the court that Mr. Steinbach’s allegedly “new debt” was taxes he incurred, “*federal income tax liability*” from the substantial income **he earned in 2014; which he had failed to disclose during the pendency of the 11/21/14 petition to modify child support action.** Id. She discussed the other “debts” reported by Mr. Steinbach were actually debts related to the mortgage on his home, which existed in 2012 and were already incorporated into his pleadings in support of his November 21, 2014 petition to modify child support. CP 316-317. Equally important was Ms. Steinbach’s reporting of the fact that Mr. Steinbach, in conjunction with his November 21, 2014 modification action, did not file verification of his income from his one

employer (DFAS) for 2015 in the amount of \$9,908. CP 317. As stated above, Mr. Steinbach informed the Court on November 21, 2014 that he had four jobs. CP 002-003. Ms. Steinbach reminded the court that in conjunction with Mr. Steinbach's November 21, 2014 petition to modify the parties' June 2012 order of child support, he filed declarations from highly successful occupational peers who all praised his education and past success in the medical sales arena, stated that his current employment circumstances were temporary, and expressed confidence that his future success in that field was imminent. CP 129-135. Ms. Steinbach correctly pointed out that Mr. Steinbach's voluntary unemployment, by itself, is not a substantial change of circumstances warranting a modification of a prior order of child support. CP 317. Lastly, Ms. Steinbach argued that *res judicata* should apply, and that CR 11 sanctions were warranted because Mr. Steinbach's September 24, 2015 petition to modify child support had no basis in law or fact and merely repeated arguments previously made and rejected by the Court. CP 317.

On December 18, 2015, Mr. Steinbach submitted a narrative declaration in which he provided rebuttal arguments to some of the statements Ms. Steinbach made in her December 8, 2015 declaration. CP 96-97.

On December 21, 2015, Commissioner pro tempore Julia Pelc presided over hearing Mr. Steinbach's September 24, 2015 petition to modify child support, and Ms. Steinbach's motion to dismiss the September 24, 2015 petition. CP 326-350. Ms. Steinbach, through counsel, provided Commissioner Pelc with a detailed history of the case leading up to that December 21, 2015 hearing date. CP 327-331 and 342-344.

Of significance for this appeal is that, at that December 21, 2015 hearing, Ms. Steinbach, through counsel, recited the following historical and relevant information to Commissioner Pelc:

- (1) That, at the February 23, 2015 hearing with Commissioner Chavez to address Mr. Steinbach's November 21, 2014 petition to modify child support, Mr. Steinbach asked Commissioner Chavez to reverse the obligor/obligee positions;
- (2) That, at the hearing with Commissioner Chavez, Mr. Steinbach asked that income be imputed to Ms. Steinbach at an hourly rate of \$35.62, and that Commissioner Chavez (and Judge Moreno) did impute full-time income to her, but it was based on her current \$22 hourly rate instead of the hourly rate of the \$35.62 rate that Mr. Steinbach proposed from the onset of the November 21, 2014 modification action;

(3) That Judge Moreno ordered the parties to notify each other if their incomes increased from the net incomes incorporated into the order for child support and two child support worksheets arising from the April 7, 2015 hearing with Judge Moreno. Through counsel, Ms. Steinbach correctly pointed out that Mr. Steinbach did not comply with that notice requirement;

(4) That on September 24, 2015, Mr. Steinbach filed a second petition to modify an August 14, 2015 order of child support, but failed to provide any recent or concurrent income verification documentation and that, instead, Mr. Steinbach asked the Court to rely on his pre September 24, 2015 pay statement from May 5, 2015 that showed earnings at that time **FROM ONE INCOME SOURCE ONLY**, and find that constituted compliance with the statutory verification requirements;² and

² There appeared to be confusion by the parties below as to which final order of child support should be found to be the final order of child support pursuant to Mr. Steinbach's 11/21/14 petition to modify child support. Commissioner Chavez made oral rulings on February 23, 2015, but no orders were immediately entered pursuant to that hearing. The parties' motions for revision of Commissioner Chavez's 2/23/15 rulings were then heard by Judge Maryann Moreno on 4/7/15 and final orders were entered pursuant to that hearing on 5/19/15. CP 264-285. Thereafter, on 6/26/15, 2015, Mr. Steinbach motioned for an order of child support. CP 286. In that motion he asked the Court to correct the date for the reimbursement of overpaid child support from 6/1/15 to 6/1/16. Id. Mr. Steinbach did not request amendments to any of the other final documents entered on 5/19/15. An amended order of child support, correcting the June date to 2015 was entered on 8/14/15. CP 295-303. None of the other final documents entered on 5/19/15 were amended. In Mr. Steinbach's 9/24/15 petition modification of child support, Mr. Steinbach expressly asked for modification of the 8/14/15 order of child support. CP 306.

(5) That Mr. Steinbach's alleged "substantial change in circumstances"³ were previously submitted to Commissioner Chavez and Judge Moreno and ruled upon by those judicial officers, thus precluding Mr. Steinbach from raising those same issues again in a subsequent petition to modify child support. CP 326-331 and 341-344.

Also at the December 21, 2014 hearing, Commissioner Pelc afforded Mr. Steinbach the opportunity to address in oral argument both Ms. Steinbach's motion to dismiss his September 24, 2015 petition to modify child support and his September 24, 2015 petition to modify child support. CP 331. Mr. Steinbach began by presenting argument against the motion for dismissal. Id. However, Mr. Steinbach did not address the issue of whether *res judicata* precluded him from reasserting claims in a subsequent (i.e., his September 24, 2015) petition to modify child support that he previously asserted in his November 21, 2014 petition to modify child support if those issues were previously addressed and ruled upon by the Court. CP 331-341. Mr. Steinbach did make an argument in support of his claimed substantial change by stating that the data the court relied

³ As counsel spelled out during the hearing, these allegations were (a) that there were changes in parties' incomes, (b) that the order recently signed was based on income data from one year ago and that, since that time, circumstances for Mr. Steinbach had declined significantly and he needed additional relief, (3) that he needed an order for repayment of underpaid or overpaid child support, and (4) that he sought a reversal of the "obligee" and "obligor" designations.

upon in his prior petition was from a year ago. CP 333. (“*So, again, the data we’re talking about is more than a year old and it is substantially different. My income was going down while we were arguing. It was a very awkward situation where I was arguing \$1,900 a month when, in fact, I was already and had been for months earning less than \$1,900 per month. All of this is in the record.*”) Mr. Steinbach then went on to corroborate one of the basis for the dismissal of his September 24, 2014 petition ultimately relied upon by the Court – that he failed to provide any verification of his income after May 5, 2015 to support his petition to modify child support; which was not filed until September 24, 2015. Specifically he stated, “*There are 12 months of paystubs in the record. Not a few months, not one month. June 2-14 through May of 2015, that’s what’s on the record. 12 months of paystubs and they show exactly what I’m saying.*” CP 333. “*The data used in the order is more than a year old and it’s substantially different than the data used in the current order.*” CP 337. Those statements clearly support the court’s conclusion that Mr. Steinbach failed to verify his current income at the time of filing his September 24, 2015 petition to modify child support, or at any time between the filing of that petition and the December 21, 2015 hearing with Commissioner Pelc. Mr. Steinbach went on to reiterate arguments he previously made in support of his November 11, 2014 petition to modify

child support: “*I’ve requested that Jane be ordered to pay me child support...*,” and a subsequent “*equal protection argument.*” CP 337. “*I’ve demonstrated a need for support.*” Id., and CP 339, 341. “*Jane has hundreds of thousands of dollars in the bank and a highly employable nursing license.*” CP 338. He also reiterated arguments about the dissolution trial judge’s, (Judge Triplet), distribution of their assets and debts back in 2012. CP 338. He made numerous other arguments previously made to support his 11/21/14 petition to modify child support. CP 339-341. Mr. Steinbach did make a new argument related to the exercise of stock options that resulted in most of the substantial 2014 income to him. He argued that the money from the transaction was “gone,” but failed to verify or explain that claim. CP 345. Mr. Steinbach then turned his focus to personal attacks on the character of Mr. Gauper, Ms. Steinbach’s attorney. CP 346.

Commissioner Pelc granted Ms. Steinbach’s motion to dismiss Mr. Steinbach’s September 24, 2015 petition to modify child support and ordered Mr. Steinbach to pay \$1,000 of Ms. Steinbach’s attorney fees. CP 349. She based her ruling on the following findings: (1) From the commencement of this case on January 4, 2011, Ms. Steinbach has been the primary custodian of the parties’ children, and the obligee parent for receipt of child support. That issue was addressed at trial by Judge

Triplet, and again addressed by Commissioner Chavez and Judge Moreno pursuant to Mr. Steinbach's November 21, 2014 petition to modify child support; (2) Mr. Steinbach has made the same arguments over and over again at, "*almost every, single, solitary hearing;*" (3) The order of child support from April 7, 2015 stated "*transfer payment from Mr. Steinbach to Ms. Steinbach with these exact same arguments that are being made today;*" (4) Mr. Steinbach's September 24, 2015 petition to modify child support contains incomes that were very similar to what the incomes were when this matter came before Commissioner Chavez and Judge Moreno, at which time Mr. Steinbach's requests were denied; (5) The history of this case is for Mr. Steinbach to take every step possible, revision or reconsideration "*...to argue against the court orders,*" (6) Mr. Steinbach filed his September 24, 2015 petition to modify child support almost immediately after the entry of the August 14, 2015 final order of child support; which was pursuant to Mr. Steinbach's November 21, 2014 petition to modify child support, (7) Even if Commissioner Pelc had accepted Mr. Steinbach's numbers for incomes, the difference between the transfer payment ordered on August 14, 2015 and the present transfer payment would only be \$53.00, which is not a substantially changed circumstance, and (8) Attorney fees in the amount of \$1,000 were warranted. CP 347-349. An order granting Ms. Steinbach's motion to

dismiss the September 24, 2015 petition to modify child support and for CR 11 sanctions was entered on December 21, 2015, wherein Mr. Steinbach was ordered to pay \$1,000 of Ms. Steinbach's attorney fees. CP 98-99. Commissioner Pelc incorporated the following handwritten statement into the "Findings" section of that order – that the ruling was based on the finding and holding that Mr. Steinbach's "*arguments [were] previously made and denied by prior courts.*" CP 89.

On December 30, 2015, Mr. Steinbach moved to revise Commissioner Pelc's December 21, 2015 rulings. CP 100-101. On January 25, 2016, Mr. Steinbach filed another motion to revise Commissioner Pelc's December 21, 2015 rulings. CP 321-322.

On February 25, 2016, Judge Julie McKay presided over the hearing on Mr. Steinbach's motion for revision of Commissioner Pelc's December 21, 2015 orders. RP 1-33. At that hearing, Mr. Steinbach reiterated the "*equal protection*" argument he submitted below. RP 2, 5-7, 9. Mr. Steinbach then addressed what he perceived as being "*confusion*" in Commissioner Pelc's December 21, 2015 ruling. RP 3. Mr. Steinbach conceded that he had raised the arguments re obligee/obligor status changes from the filings he submitted pursuant to his November 21, 2014 petition for modification of parenting plan through that day. "*And the fact is that—and the fact is that we are both arguing our respective positions*

consistently with regard to the obligee/obligor designation, but only in the filings from 2014 and the motion here today.” RP 3. Mr. Steinbach went on to state that, “...*we have the children equally.*” RP 3. However, Mr. Steinbach later conceded that Ms. Steinbach had the children 54% of the time and he had the children 46% of the time, as was designated in the original 2012 final parenting plan. RP 4. Mr. Steinbach argued that, “...*today’s motion should be decided on today’s circumstances.*” RP 4.⁴ Mr. Steinbach went on to argue that his net income had dropped from \$1,945.82 at the time Commissioner Chavez (and, thereafter, Judge Moreno) addressed his November 21, 2014 petition to modify child support, but that since then, his net income had decreased to \$1,371.68. RP 5. The problem is that Mr. Steinbach did not file any income verification documentation concurrent with, or following, the filing of his September 24, 2015 petition to modify child support. CP 001-352.

Mr. Steinbach went on to argue that, in RCW 26.18.020 (defining what “obligee” means), there is no “*statement of exclusivity for any of these,*” that RCW 26.19.001 requires an equitable apportionment of child support obligations, and that the law, “...*does not connect the designation of obligee/obligor to a percentage of parenting,*” and that “[t]he

⁴ However, as noted previously, the last income verification document Mr. Steinbach had filed with the Court was a pay statement from May 5, 2015 – **four and a half months prior to the date of filing his 9/24/15 second petition for modification of child support.**

designation of obligee is not permanent and there is no language in the law that can be construed to imbue permanence. The designation follows a determination of who will receive support to meet a child's basic needs.”

RP 6-9. Other than citing RCW 26.10.020 for the definition of “obligee” and RCW 26.19.001 for the premise that child support should be equitably apportioned to ensure children’s basic needs are met, Mr. Steinbach failed to cite to any legal authority to support his argument that the designation of obligee is not permanent or that the designation of “obligee” should go to the parent who receives support to meet the child’s basis needs. CR 001-352. RP 1-33. That being said, Mr. Steinbach clearly admitted that he had requested a change in the obligee/obligor status in his September 21, 2014 petition to modify child support action, that those arguments were considered and denied by both Commissioner Chavez and Judge Moreno, and that he did not appeal those rulings to the Court of Appeals:

The Court: So let me ask you a question. Did you argue switching the obligor/obligee to Commissioner Chavez?

Mr. Steinbach: Yes, your honor.

The Court: Did she grant it?

Mr. Steinbach: No, your honor.

The Court: Did you argue it to Judge Moreno?

Mr. Steinbach: Yes, your honor.

The Court: Did she grant it?

Mr. Steinbach: No, your honor.

The Court: That's *res judicata*. You're now arguing it to me again.

Mr. Steinbach: Yes, your Honor.

The Court: A judge, same level as Judge Moreno, not an appeals judge but to the same level, you're asking me to overturn what she's already determined.

RP 17.

Judge McKay then asked Mr. Steinbach questions regarding the request by Mr. Steinbach for the Court to impute wages to Ms. Steinbach based upon **\$35** per hour, rather than her current income of **\$22** per hour:

The Court: Okay. Now let me ask you a couple more questions.

Mr. Steinbach: Yes, your honor.

The Court: Did you argue in front of Commissioner Chavez that full-time RN wages should be imputed to your ex-wife?

Mr. Steinbach: Yes I did, your honor.

The Court: And was it granted?

Mr. Steinbach: No, your honor.

The Court: And did you argue that same argument to Judge Moreno?

Mr. Steinbach: Yes, your honor.

The Court: And did she grant it?

Mr. Steinbach: No, your Honor.

The Court: But full-time impute at **\$22** an hour is being used in that order, correct?

Mr. Steinbach: But not as an RN. She's working in a testing agency, not as a registered nurse. I argued for **\$35**.

The Court: And were denied that, correct?

Mr. Steinbach: Well to clarify, your honor, I argued for a full-time wage, the medium income for a registered in this market, which is **\$35** an hour. I was not granted that.

The Court: And you argued that in front of Judge Moreno?

Mr. Steinbach: I did.

The Court: Okay. And you did not appeal that decision to the Court of appeals.

Mr. Steinbach: No, your honor.

The Court: So you're here on another motion to modify child support making the same argument that's already been decided.

Mr. Steinbach: Based on a change—a significant change of circumstances. The confusion about when things were filed—

The Court: My question to you is: What are her changes in circumstances that would cause me to impute her?

Mr. Steinbach: That she is not employed full-time as a registered nurse, she is employed part-time as a testing agent.

The Court: That which you already argued at the previous modification which was not granted.

Mr. Steinbach: Correct, your honor.

RP 18-20.

Mr. Steinbach finally began to argue that the date the Court considered pursuant to his September 24, 2015 petition to modify child support, “*was put before the court in 2014.*” RP 21. He then argued, “*And it changed, as my income went down even before the first hearing.*” *So at signature on a correct document that reflected her ruling, [the August 14, 2015 order of child support], it was wrong immediately... And now, had things gone in a timely fashion like I wished for them, then where would we be right now? But the data they relied upon was through September of 2014.*” RP 22. Mr. Steinbach and the Court discussed Mr. Steinbach’s income from 2014 of \$544,000, and the Court informed Mr. Steinbach that the Court could have based his child support obligation on that amount. RP 22-23.

After consideration of an unnamed WAC, statutes Mr. Steinbach cited, and the modification statutes, the Court issued its oral ruling. RP 24. The Court asked Mr. Steinbach if he had filed any of his paystubs with the Court beyond the paystub for May of 2015, “*In other words, your September, August, July, June 2015 pay stubs?*” RP 24-25. Mr. Steinbach responded, “*No, your honor. I filed the financials I completed in May.*” Id. The Court went on to state:

This is the perspective the court is looking at this matter from. There must be a substantial change in circumstances from April of 2015 to September of 2015.⁵ This is the period of time where this court has to find a substantial change. RCW 26.09.170(5)(a) states: A party to an order of child support may petition for modification based upon a showing of substantially changed circumstances at any time. An obligor's voluntarily unemployed or voluntary unemployment by itself is not a substantial change in circumstances. This order was entered, in essence, in April of 2015.

Very frankly, sir, I'm giving you the benefit of the doubt with that because if I use August 2015, there would have to be a change in circumstances from August 2015 to September of 2015. You understand the difference?

RP 26.

Mr. Steinbach responded, "I do, your honor." Id.

Judge McKay went on to state that there was no basis to modify the order of child support "*where a year has passed or two years have passed.*" Id. "*Thus my question for what's the income from April through September 2015.*" Id. "*I have documents filed with no updated or current financials. As I sit here today in February of 2016, I have no updated financials.*" Id. "*I'm not seeing any income evidence that would apply to the September 2015 modification request, which is where I have to find it based upon a short period of time.*" RP 27. Judge McKay went on to say, "*I don't have any current information from you, sir, to base this decision*

⁵ The order of child support pursuant to Mr. Steinbach's 11/21/14 petition to modify child support was initially entered on May 19, 2015. CP 277-285. It was subsequently modified in part and re-entered on August 14, 2015. CP 295-303.

upon. It is your duty, as the petitioning party, to prove your case. I don't have sufficient information from you to establish whether there's been any substantial change in circumstances to grant the petition that you filed in September of 2015." RP 27. The Court also stated that she looked at the numbers for child support in Commissioner Pelc's ruling and determined there was not a substantial change in those numbers from the numbers incorporated into the final order of child support entered in April of 2015. RP 27.

With regard to the issues of changing the obligee/obligor designation and imputing Ms. Steinbach full time at **\$35** per hour instead of her current hourly rate of **\$22**, the Court stated, "*I looked at the declaration you filed in 2015. The majority of the arguments go to issues that have already been decided by this Court. One, the imputing of income at an RN level to Ms. Steinbach. Previous courts have dealt with it, they've denied that. I am not going to change that ruling. That decision wasn't appealed."* RP 27-28. Judge McKay also addressed the obligee/obligor change request, and stated,

The only evidence I have is that Ms. Steinbach is the primary parent ... and the obligation of support runs from you to her. Your arguments with regards to equal protection because "I make less money than she does in this current circumstances, I therefore should be the obligee in the state of Washington," based upon my view of the statute, is an argument that is not founded in the law.

* * *

You made that argument to Commissioner Chaves, she did not accept it. You did what you had the ability to do, which was revise that issue to Judge Moreno. She did not change the obligor/obligee designation. You have acknowledged the prior decisions to this court. Yet you stand here before this court asking this court to decide the same issues again.

RP 28-29.

Judge McKay went on:

I don't see any difference in the argument that you made in front of Judge Moreno, as the one you're making here today.... You are attempting to have a second and third bite at the apple... Your remedy was to go to the court of appeals if you didn't like the interpretation and the ruling that Judge Moreno made.

RP 29.

Not only did Mr. Steinbach fail to file any proof of income from April 7, 2015 through September 24, 2015, he did not provide any evidence to support his income had decreased during that period of time. Judge McKay addressed this when she said, *"I don't have any evidence of that. There is only one line as evidence to support your not being employed above minimum wage. That is, 'I am picking up a much work I can with the Army and I have applied to dozens of jobs.' That's the one line I have as evidence."* RP 30.

With regards to attorney fees Mr. Steinbach was ordered to pay, Judge McKay addressed that issue too:

Your remedy was to go to the Court of Appeals if you didn't like the interpretation and the ruling Judge Moreno made. But to then

file another modification, and come back to this court and ask for the same thing that you've been denied twice, is the basis for the terms that were ordered. I'm not going to overturn the terms that were ordered by Commissioner Pelc because they were appropriate under those circumstances based upon the fact that it had been ruled on and was, at that point in time, res judicata."

* * *

I'm going to uphold the terms because this is not the third time, actually the fourth time, that you've argued to change the obligor/obligee designations. This is the fourth time you've asked to have Ms. Steinbach imputed as an RN at a different rate. You did not appeal that finding so we are now here for the fourth time with you asking for the same relief. This is the basis for the prior terms. I am also going to grant \$500 for today's hearing for Mr. Gauper's time today.

RP 29-31.

The record clearly shows that Commissioner Pelc and Judge Julie McKay awarded attorney fees on the basis of intransigence and Rule 11 sanctions and that, therefore, no method for calculation of those fees was required.

This appeal followed.

C. LEGAL ARGUMENT

Issue # 1: There was no evidence presented of a substantial change in circumstances, and the trial court properly applied principles of *res judicata* when dismissing the petition to modify child support.

Standard of Review: Whether *res judicata* bars an action is a question of law that an appellate court reviews de novo. Darlington

Ofuasia Et Al, v Dana William Smurr Et Al., 198 Wn. App. 133, 142

(2017). The party asserting the defense of *res judicata* bears the burden of proof. Id. “*The threshold requirement of res judicata is a final judgment on the merits in a prior suit. Once the threshold requirement is met, res judicata requires the sameness of subject matter, cause of action, people and parties, and the quality of the persons for or whom the claim is made.*” Id.

Under Washington law, *res judicata*, or claim preclusion, prohibits the re-litigation of claims and issues that were litigated or could have been litigated in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn. 2d 759, 763, 887 P.2d 898 (1995). “*The res judicata doctrine curtails multiplicity of actions and harassment in the courts.*” Eugster v. Washington State Bar Ass’n, No. 34345-6-III, 2017 Wash. App. LEXIS 1024, at *35(Wn. Ct. App. May 2, 2017) (citing Bordeaux v. Ingersoll Rand Co., 71 Wn. 2d 392, 395, 429 P.2d 207 (1967)). Once a judgment is final, a court may reopen it only when specifically authorized by statute or court rule. Lejeune v. Clallam Cy., 64 Wn. App. 257, 269, 823 P.2d 1144, review denied, 119 Wn. 2d 1005 (1992).

Under *res judicata*, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against

whom the claim is made. Eugster, supra (citing Berschauer Phillips Construction Co. v. Mutual of Enumclaw Insurance Co., 175 Wn. App. 222, 227-28, 308 P.3d 681 (2013); Rains v. State, 100 Wn. 2d 660, 663, 674 P.2d 165 (1983)).

The term *res judicata* has been used by Washington courts to mean both claim preclusion and issue preclusion. See Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 328, 941 P.2d 1108 (1997). “[F]or example ... *res judicata* refers to the preclusive effect of judgments, including the re-litigation of claims and issues that were litigated, or might have been litigated, in a prior action.” Id., 87 Wn. App. at 320 (quotation omitted). “On the other hand, the court has also used *res judicata* to mean claim preclusion only, saying, for example, that *res judicata* acts to prevent re-litigation of claims that were or should have been decided among the parties in an earlier proceeding.” Id. (quotation omitted).

When *res judicata* is used to mean claim preclusion, it encompasses the idea that when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be re-litigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.

Kelly-Hansen, 87 Wn. App. at 328-29.

This court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is

granted is variously referred to as *res judicata* or splitting causes of action.

Sanwick v. Puget Sound Title Ins. Co., 70 Wn. 2d 438, 441, 423 P.2d 624 (1967), quoted with approval in Kelly-Hansen, 87 Wn. App. at 329-30, and n.23.

Although many tests have been suggested for determining whether a matter should have been litigated in a prior proceeding, there is no simple or all-inclusive test. Kelly-Hansen, 87 Wn. App. at 330. The controlling factors actually echo the factors reviewed when determining if the two suits entail the same cause of action. Eugster, supra, at *40. When determining if an argument should have been raised before, courts consider a variety of factors, including whether the present and prior proceedings arise out of the same facts, whether they involve substantially the same evidence, and whether rights or interests established in the first proceeding would be destroyed or impaired by completing the second proceeding. Kelly-Hansen, 87 Wn. App. at 330. A matter should have been raised and decided earlier if it is merely an alternate theory of recovery or an alternate remedy. Id. at 331. A plaintiff may not reinstitute, against the same parties, the same cause of action based on the same array of facts merely by changing legal theories and sovereignties.

See Howe v. Brouse, 422 F.2d 347, 348 (8th Cir. 1970), cited with approval in Eugster, *supra*.

Standard of Review: An appellate court reviews a trial court's decision regarding child support for abuse of discretion, but recognizes that such decisions are seldom disturbed on appeal. In re Marriage of Pollard, 99 Wn. App. 48, 51, 991 P.2d 1201 (2000).

Washington statutes do allow a party to file a petition to modify child support. See RCW 26.09.170. But such a petition can be filed only after two years have passed, or if there has been a substantial change in circumstances since the previous order. RCW 26.09.170(5), (7). If these prerequisites are not met, the petition is not a viable claim.

To sustain a claim of a "*substantial change in circumstances*," as defined by RCW 26.09.170(5), the petitioning must present evidence of this claimed substantial change. Materials must be filed prior to hearing, including a petition, a proposed child support worksheet, a financial declaration, and proof of income (including pay stubs and tax returns). See RCW 26.09.175 (petition and worksheets, as "prescribed" by the court administrator, must be filed to initiate action, which includes mandatory financial declaration, see RCW 26.18.220, and LSPR 94.04(f)(5)(D), (local Spokane County rules require, *inter alia*, pay stubs to "*be made available to the court at the time of the hearing and to the opposing party*

and/or counsel at least seven days prior to the hearing”). Because Mr. Steinbach is the party asserting that his income had decreased, he has the burden of proving that. See e.g., In re the Marriage of Gainey, 89 Wn. App. 269, 274-275, 948 P.2d 865 (1997).

And a substantial change of circumstances must be something that was not contemplated at the time that the last child support order was entered. In re Marriage of Moore, 49 Wn. App. 863, 865, 746 P.2d 844 (1987). This is so because the court views a petition as “*significant in nature and anticipates making substantial changes and/or additions to the original order of support.*” In re Marriage of Morris, 176 Wn. App. 893, 901, 309 P.3d 767 (2013) (quotation omitted).

“*Events prior to the entry of the last order or decree are generally irrelevant because the question is what has changed since that time.*” 20 K. Weber, Washington Practice: Family and Community Property Law § 35.19 (2013). Where a trial court excludes evidence in a proceeding to modify support “*because it is a mere reiteration of the evidence at the divorce trial,*” the appellate court “*will be slow to disturb its ruling.*” Brim v. Struthers, 44 Wn. 2d 833, 836, 271 P.2d 441 (1954), cited with approval in In re Marriage of Timmons, 617 P.2d 1032, 1035, 94 Wn. 2d 594 (1980) (“*We held under this statute that res judicata principles generally applied to bar reconsideration of conditions existing at the time*

of the decree”). “This is also true regarding evidence which could and should have been offered at the previous trial.” Brim, 44 Wn. 2d at 836. “If the evidence does not establish that a material change of circumstances has occurred, the court must deny the request for modification.” 20 K. Weber, Washington Practice: Family And Community Property Law § 35.19.

In this case, Mr. Steinbach met none of these requirements in his petition for modification which required proof of a substantial change in circumstances, given that it was filed shortly after finalization of the most recent child support order (i.e., after just a month or, at a minimum, within about five months, depending on how finalization is calculated).

First, he failed to file pay stubs, or other evidence of income since May 2015 (the date that the last child support order had been signed). This contradicts the law on proving a substantial change in circumstances.

Second, the only pay stubs he *did* file showed an average monthly income of \$2,202 in the first months of 2015, which is an income higher than the amount that was calculated in the May 2015 child support order.

Third, his allegation of increased debt was due to owing taxes for 2014 income and to a mortgage for the home granted to him in 2011, in the dissolution action. Neither debt was new (nor was the tax bill a “debt”

insofar as it was that portion of the money that he had received as wages that was actually owed to the IRS).

Thus, he failed to show a “substantial change in circumstances.”

Mr. Steinbach argues that he provided 11 months of pay stubs. But the months were from July 2014 to mid-May 2015, according to him. See Opening Brief at p. 5. The record reflects that his first petition was filed in November 2014, with the first modification order issuing in April 2015. There is no scenario under which pay stubs from July 2014 through April 2015 should be considered 11 months of pay stubs when an intervening modification order already has been entered, as he claims. And as noted above, those specific pay stubs justify a higher income, not a lower one.

The revision court correctly ruled that Mr. Steinbach failed to provide any evidence to support his claim of a substantial change in circumstances other than his one sentence that he was “picking up as much work I can with the Army and I have applied to dozens of jobs.” See RP 30; CP 71. Mr. Steinbach accepted the commissioner’s ruling that even his numbers resulted in only a \$53 difference; thus, on its face, there was no support for the allegation of a substantial change in circumstances.

The revision court correctly and astutely observed that the bulk of Mr. Steinbach’s argument regarding his new petition was based on his previous arguments that (a) he should be the obligee and (b) Ms.

Steinbach should be imputed a wage of \$35 an hour instead of \$22 an hour. The revision court also correctly and astutely observed that these two issues already were resolved by three former judicial officers, with her being the fourth – as she observed, “*For no reason other than you didn't like the answers that you got.*” RP 30. The court further noted, “*I certainly understand you saying that you have to come back to court for relief as your only option. You are in the wrong court. Your legal option was to appeal what was ordered by Judge Moreno. That did not happen.*” Id. (emphasis added). Indeed, Mr. Steinbach was so focused on trying to prove his earlier arguments were correct that he failed to provide recent pay stubs. This appropriately resulted in dismissal.

Issue # 2: The trial court acted within its discretion when it ordered Mr. Steinbach to pay Ms. Steinbach's attorney fees.

Standard of Review: An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. A trial court abuses its discretion when it exercises discretion on untenable grounds or for untenable reasons. Chuong Van Pham v. Seattle City Lights, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) .

As early as possible, Ms. Steinbach alerted Mr. Steinbach to the fact that his modification petition in September 2015 was improper and

subject to an order of attorney fees. In her Response, she asked for fees based on intransigence and under RCW 26.09.140. CP 308-309. In her Motion to Dismiss, she asked for Rule 11 sanctions. CP 320. Her declaration gave detailed reasons why this was a repeat of previous litigation and how Mr. Steinbach had failed to show any substantial change in circumstances. CR 315-319. The order of fees for “*terms*” was appropriate for intransigence as well as for a frivolous filing under CR 11. Mr. Steinbach cannot excuse his violation of legal principles on the basis that he represents himself. As a *pro se* litigant, he is held to the same standard as an attorney. Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981).

As to intransigence: It is well settled that a trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis and that, because the basis of such an award is necessarily factual, the review of such an award is abuse of discretion. See In re Marriage of Wixom, 190 Wn. App. 719, 725, 360 P.3d 960 (2015); In Re Marriage of Bobbitt, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). When intransigence is established, the financial resources of the spouse seeking the award are irrelevant. In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

Intransigence includes foot dragging, frivolous motions, failure to appear at deposition, refusal to read correspondence, obstruction, making unsubstantiated allegations that cause one party to incur unnecessary legal fees, bringing excessive motions, discovery abuses, making trial unduly difficult, and unnecessarily increasing legal costs. See Bobbitt, *supra*; In re Marriage of Burrill, 113 Wn. App. 863, 873, 56 P.3d 993 (2002) (“*unsubstantiated, false, and exaggerated allegations*” against one parent which caused the parent to “*incur unnecessary and significant attorney fees*”); In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002) (litigious behavior, bringing excessive motions or discovery abuses); In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997) (fees justifiably based on intransigence where husband filed numerous frivolous motions, refused to show up for his deposition, and refused to read correspondence); Chapman v. Perera, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (intransigence where grandparents’ lawsuit seeking custody of grandchild “*should have ceased sometime ago*”).

Here, the trial court built a solid record explaining Mr. Steinbach’s intransigence and how his motion was barred by *res judicata*. He filed this new petition because he did not like the first answer he received. It cost Ms. Steinbach attorney fees to respond to this unsupportable motion, for which he did not even provide pay stubs. Fees were appropriate.

Under CR 11: Fees also can be ordered under CR 11. A trial court imposes sanctions if it finds that (1) a pleading lacks a factual or legal basis and was not a good faith argument for a change in the law, and (2) the party who signed and filed the pleading failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 217-20, 829 P.2d 1099 (1992). Just because a pleading is not successful on its merits does not make it sanctionable; instead, a trial court should impose sanctions only when it is “*patently clear that a claim has absolutely no chance of success.*” MacDonald v. Korum Ford, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (quotations omitted). A party should have notice of a request for sanctions. See e.g., Biggs v. Vail, 124 Wash.2d 193, 196, 876 P.2d 448 (1994) (notice and opportunity to be heard, or to withdraw the document, should be afforded an attorney perceived to have violated CR 11).

Here, Ms. Steinbach put Mr. Steinbach on notice that fees under CR 11 were requested, CP 320, while supporting her CR 11 allegations with a declaration and documents. Despite this notice, Mr. Steinbach moved forward. He continued to litigate even after the commissioner ordered him to pay \$1,000 to Ms. Steinbach as terms. Each step of the way, he raised arguments that were *res judicata* or were unsubstantiated. Rule 11 sanctions are appropriate.

Under RCW 26.09.140: In addition, fees can be ordered under RCW 26.09.140, which provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter. . .

An award of attorney fees under this section “*rests with the sound discretion of the trial court, which must balance the needs of the spouse requesting them with the ability of the other spouse to pay.*” Kruger v. Kruger, 37 Wn.App. 329, 333, 679 P.2d 961 (1984).

Although both the commissioner and revision court ordered Mr. Steinbach to pay Ms. Steinbach’s fees as “*terms*” (i.e., for intransigence and under CR 11), Ms. Steinbach had provided sufficient evidence in the file of her need as well as Mr. Steinbach’s ability to pay (given his 2014 income of about \$550,000, as he reported on his taxes). See LaMon v. Butler, 112 Wn. 2d 193, 200-01, 770 P.2d 1027 (1989) (appellate court may affirm a trial court’s ruling if it is supported by any ground in the record, even if the trial court did not rely upon that ground in its ruling). Under the circumstances of this case, the “*terms*” awarded should be affirmed because of Mr. Steinbach’s filing of a frivolous petition and the repetitious nature of the filing was intransigent. However, an order of attorney fees under RCW 26.09.140 is an alternative remedy.

Issue #3: This Court should require Mr. Steinbach to pay Ms. Steinbach's attorney fees for having to defend against this appeal.

This is a frivolous issue, as stated above, and thus is a frivolous appeal. Ms. Steinbach asks that the Court order fees under RAP 18.9. Where a party files an appeal without reasonable cause, this Court may require him to pay the prevailing party expenses, including fees that party incurred in opposing the action. RCW 4.84.185. "*An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.*" Chapman v. Perera, 41 Wn. App. 444, 455-56, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985). See also Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980) (in determining frivolous nature of appeal, court should consider that: (1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal). Here, the record is clear that this was a frivolous petition below and Mr. Steinbach has no legitimate appeal. He should be ordered to pay fees.

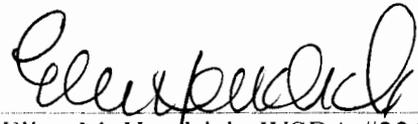
Ms. Steinbach also asks for fees for the expense of responding to Mr. Steinbach's continuing intransigence below and on appeal under RAP 18.1. Intransigence is a basis for awarding fees on appeal. In re Mattson, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). A party's intransigence at the trial court can support an award of attorney fees in the appellate court. Mattson, 95 Wn. App. at 606. An appellate court need not consider the financial resources of the party when awarding fees for intransigence. Id. The intransigence below supports an order of fees here.

Finally, Ms. Steinbach asks for fees pursuant to RCW 26.09.140 and RAP 18.1. To make such an order, the Court of Appeals will examine the arguable merit of the issues on appeal as well as the financial resources of the respective parties. In re Marriage of CMC, 87 Wn.App. 84, 89, 940 P.2d 669 (1997). Ms. Steinbach will provide a financial affidavit in a timely manner, as required by RAP 18.1, to demonstrate her need for her fees to be paid. The merits of her defense of Mr. Steinbach's appeal are set forth above, and justify an order of fees at this level.

D. CONCLUSION

Ms. Steinbach asks that this Court to deny Mr. Steinbach's appeal and to order him to pay her attorney fees and costs as requested above and pursuant to RAP 14.1, 14.2, and 14.3.

DATED: 5/12/17



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FILED

MAY 12 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO. 31365-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JONATHAN S. STEINBACH,)	
)	
Appellant,)	
)	Court of Appeals No. 34325-1-III
vs.)	Sup. Ct. No. 11-03-02519-3
)	
JANE E. STEINBACH,)	
)	
Respondent.)	
)	
)	
_____)	

CERTIFICATE OF SERVICE

I, Ellen Hendrick, do hereby certify, swear and affirm that the following is true and correct:

1. On May 12, 2017, I caused to be hand-delivered the original and a copy of this Response Brief to the Court of Appeals, Division III, 500 North Cedar Street, Spokane, 99201.
2. Also on May 12, 2017, I mailed via U.S. Mail First Class a copy of this Response Brief by upon Appellant, Jonathan S. Steinbach, at 2944 W. 21st Ave., Spokane, Washington 99224.
3. I certify that the foregoing is true and correct.

DATED: 5/12/17 Ellen Hendrick

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