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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

LISA MORGAN,

Respondent,

and

PAUL HERRMANN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
THE HONORABLE MARYANN C. MORENO

BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court properly vacated an August 2014 child support order that was entered without the mother's consent and which absolved the father of all of his child support obligations despite the mother having "virtually 100%" custody of the children. Because the mother had never authorized her attorney to enter the August 2014 order and the only issue before the court at the time it was entered was parenting, the trial court in 2016 properly vacated the order under CR 60(b)(5) and 60(b)(11), finding it void both as a matter of public policy and for granting more relief than the mother sought in her petition to modify the parenting plan. The father's appeal of this discretionary decision by the trial court is simply a continuation of his use of "the legal process as harassment" of the mother that he has perpetrated over the last 13 years.

This Court should affirm the trial court's wholly discretionary decision finding relief was warranted under CR 60(b) and grant the mother her attorney fees on appeal, based on her need and the father's ability to pay, and because she is once again forced to defend against the father's harassing litigation tactics.

II. RESTATEMENT OF FACTS

A. Over the last 13 years, the father has repeatedly sought to reduce his child support obligation for the parties' two children.

Respondent Lisa Morgan filed for divorce from appellant Paul Herrmann in November 2004. The final parenting plan, entered on February 13, 2006, designated the mother as primary residential parent of the parties' two children, then ages 2 and 4. (CP 348, 354) The parenting plan, which required the father to undergo therapeutic counseling, limited his visitation with the children to supervised visits every other weekend. (CP 350) The child support order, entered on March 31, 2006, required the father to pay \$1,000 per month, based on his monthly net income of \$7,215.41 and the mother's net income of \$2,200. (CP 379-80)

Over the next five years, the father sought to reduce his child support obligation three times. The first time was only two weeks after entry of the final child support order. (CP 387) After the trial court granted the mother's motion to dismiss his petition, the father appealed the trial court's ruling to this Court. (CP 387) This Court rejected the father's appeal and awarded attorney fees to the mother. (*See* CP 387; Court of Appeals Cause. No. 257304)

Even while that appeal was still pending before this Court, the father filed a *second* petition to modify the March 2006 child

support order in April 2007. (CP 387, 391) On September 10, 2009, the trial court once again rejected his petition, finding that the father “failed to make a legal basis for modification,” and ordering that the March 2006 child support order “remain in full force and effect.” (CP 386-90) On June 14, 2010, the trial court denied the father’s motions for reconsideration and to re-open the support modification action. (CP 391-93)

On February 11, 2011, the trial court granted the father’s *third* petition to modify the March 2006 child support order because the previous order had been entered more than two years prior. (CP 103-10) The trial court acknowledged that the father’s income had decreased since the last child support order was entered, and imputed to him a monthly income of \$3,448.00, and to the mother an income of \$2,693.00. (CP 104-05) The trial court determined that the total child support obligation was \$1,360, and ordered the father to pay \$765 per month, effective January 1, 2010. (CP 105-06) Under the order, the monthly support was to increase to \$850 on December 1, 2012, when the daughter moved into a new age category. (CP 106, 108)

B. In October 2012, the mother sought to modify the parenting plan only. Although the father had not sought to modify child support in this proceeding, an order was entered in 2014 as part of the mother's parenting plan modification completely nullifying the father's child support obligations.

On October 22, 2012, the mother filed a petition to modify the parenting plan, seeking an "antiharassment protection order/restraining order suspending all contact with the father and the children and adjusting any non residential provisions for the best interests of the children." (CP 321-25) The mother did not seek a child support modification; the petition specifically stated under child support: "Does not apply." (CP 322) The father appeared through counsel, but never filed an answer to the mother's petition, nor did he file a petition to modify child support. (See CP 203)

The parties' attorneys appeared in court on August 27, 2014, without their clients present, ostensibly to reach an agreement on the mother's requested parenting plan modification. (CP 120) Having not seen any final agreement, the mother authorized her attorney only "to fully present [her] position to Mr. Geissler on a number of issues and get clarification of others." (CP 120) The mother left her counsel a voicemail expressly "instructing her not to sign the final documents" as the mother "did not get the

clarifications [she] requested, did not get any verification that the disputed issues were addressed in accordance with [her] requests, and did not agree with Mr. Geissler's proposal for claiming the dependency exemptions." (CP 120)

On August 27, 2014, a parenting plan was entered, reducing the father's residential time to only one supervised visit per year that would last at most six hours. (CP 327) And despite there being no pending petition to modify child support, the trial court also entered a child support order "under a petition for modification of a custody decree or parenting plan" without the mother's "consent or signature," which totally relieved the father of any child support obligation. (CP 338-47, 120) Although the parenting plan and child support order was not signed by either party, the orders stated that the parties "stipulate entry into a settlement is in their best interests and the best interests of the children," and that the "child support order calling for no transfer payment is fair and reasonable." (CP 73)

The order stated the father's monthly net income as \$3,000, which was purportedly "agreed to by [the] parties," and imputed \$2,000 to the mother. (CP 339-40) Despite the standard

calculation being \$850,¹ the order waived the father's monthly transfer payment in its entirety. (CP 340) The order "justified" the zero transfer payment because the father, who lived in Texas, had "to pay all transportation, including but not limited to, lodging, rental expenses, meals, etc. to exercise visitation in Washington" – despite having only one supervised visit per year. (CP 327, 341)

In addition to granting the father a downward deviation, the child support order also required the mother to pay all health insurance for the children (CP 343-45) and awarded a dependency tax exemption to the father. (CP 342) The order also relieved the \$2,465 in back support the father owed (CP 100, 244) by erroneously stating that "[n]o back child support is owed at this time." (CP 346)

Finally, the orders inexplicably state that "[s]hould *either* party bring any future action in bad faith which is not legally based in fact and in law the *mother* shall be responsible for *father's* attorney fees and costs." (CP 73) (emphasis added)

¹ The monthly transfer payment had automatically increased from \$769.20 to \$850 on December 1, 2012, when the daughter aged into a new category. (CP 108)

C. The trial court vacated the August 2014 child support order under CR 60(b)(5) and 60(b)(11), finding it void for violating public policy and for granting more relief than the mother originally requested in her petition to modify the parenting plan.

On September 18, 2015, just over a year after entry of the order, the mother moved to vacate the August 27, 2014 order of child support and reinstate the February 2011 child support order. (CP 76-95) The mother sought relief under both CR 60(b)(5) and CR 60(b)(11) because she had never petitioned to modify child support in her October 2012 petition to modify the parenting plan, never authorized her attorney to enter into a stipulation entirely relieving the father of his child support obligations, and the father had likewise never petitioned to modify the February 2011 child support order as required under RCW 26.09.175. (CP 85-88, 119-24)

At a June 17, 2016 hearing on the motion to vacate, the trial court agreed that “there’s so many irregularities” in the file leading up to entry of the August 2012 child support order: in particular, the mother did “not ask[] for any changes whatsoever” to child support in the “motion to modify the parenting plan,” and no adequate cause “was determined prior to the matter being assigned to a trial judge.” (CP 203) Instead, the court in 2014 had “signed

the order of adequate cause at the time [it] signed the final documents.” (CP 203) The trial court was troubled that the motion had “proceed[ed] through the court system at a trial level without an order on adequate cause.” (CP 203, 216)

The trial court also found inconsistencies in the August 2014 child support order itself: “[W]e go from [\$]761 to nothing” in monthly support, despite the “order of child support ha[ving] both parties making decent incomes.” (CP 204) The trial court recognized that “[e]ven if you get no visitation, you still have a duty to pay child support”; yet, there was “nothing in the file to look at” to justify a zero transfer payment. (CP 205) In addition, despite the case file being “replete with garnishment actions against Mr. Herrmann,” there was “back support that was extinguished with this order which should not have been extinguished.” (CP 208) The trial court concluded that the record “support[s] what Ms. Morgan is saying, that ‘I didn’t – I didn’t agree to this, that I didn’t sign off on changes to child support and that my lawyer had no authority to do that’”:

I believe Ms. Morgan when she says, ‘I did not give my attorney – my attorney authority to agree to no child support,’ because it doesn’t make any sense [S]he was the one who was the petitioner in this trying to change the parenting plan because of issues that had arisen through no conduct of hers. And that

ultimately resulted in her, I believe, getting a parenting plan that was in the best interests of the [children] but also blind-sided her by totally eliminating all support for those kids. And that, to me, is an extreme irregularity in obtaining the judgment which does justify vacating the order of child support.

(CP 205-07)²

The trial court found “extremely unusual circumstances” surrounding entry of the August 2014 order, concluding it was “one of those situations that doesn’t neatly fit within any of these” provisions of CR 60(b)(1) through 60(b)(11). (CP 206) Nevertheless, the trial court vacated the order pursuant to CR 60(b)(1). (CP 210)

Both parties moved for reconsideration on October 10, 2016, challenging the trial court’s authority to vacate the order under CR 60(b)(1) where the mother had “filed her motion more than one year after entry of the order.” (CP 247-70, 305) As she had in her original motion to vacate, the mother again sought relief pursuant to CR 60(b)(5) or 60(b)(11). (CP 247-66, 305) In a November 9, 2016 letter ruling, the trial court conceded that it had erred and had

² The father has never disputed the mother’s version of events leading up to entry of the August 2014 order. (See CP 149-58, 267-70, 285-94, 300-04) He claims only that “the parties agreed through counsel to the entry of orders establishing a new arrangement,” and that the mother’s counsel had authority to enter into such stipulations on her behalf. (See, e.g., CP 149, 290, 292)

no “discretion to extend [the] time” in which to bring a motion to vacate under CR 60(b)(1), and granted the mother’s motion for reconsideration upon “finding that the order modifying child support in this case is void.” (CP 305-07)

The trial court incorporated its letter ruling into its final order and findings, entered on January 24, 2017, vacating the August 2014 order under both CR 60(b)(5) and 60(b)(11).³ (CP 315-18) The trial court reinstated the 2011 child support order, entered judgment for \$22,015 in back child support (\$19,550 from August 2014 through July 2016, in addition to the \$2,465 owed as of August 2014), plus interest, and awarded the mother attorney fees under RCW 26.09.140. (CP 93-94, 221-23, 315-18) On February 23, 2017, the father appealed the trial court’s January 24, 2017 order on the parties’ cross motions for reconsideration.

³ The father claims that although the trial court “never discussed CR 60(b)(11)” and “vacated the orders pursuant to CR 60(b)(5)” in its letter ruling, the final orders included a handwritten reference to both CR 60(b)(11) and 60(b)(5). (App. Br. 8) This is irrelevant. Letter rulings are “preliminary or tentative decisions subject to change before a final decision.” *Marriage of Tahat*, 182 Wn. App. 655, 672, ¶ 44, 334 P.3d 1131 (2014); *Fogelquist v. Meyer*, 142 Wash. 478, 481, 253 Pac. 794 (1927).

D. In retaliation for prevailing on her CR 60 motion, the father filed a baseless objection to the mother's request to relocate the children within the same school district, resulting in the trial court imposing sanctions against him and his attorney.

Following the trial court's ruling granting relief from the August 2014 order, the father renewed his more than decade-long tactic of using litigation to harass the mother. When the mother sought to relocate within the same school district, the father – who lives in Texas – objected, seeking discovery of the children's medical records and urging the court to “have a look at the parenting plan and go from there” to determine if an “adjustment to [the] parenting plan” was warranted. (RP 11, 22-23) The mother spent “an enormous amount of time . . . in responding to the objections” and “providing “discovery of the children's mental health records.” (RP 15) Noting that “within a week and a half or two weeks of the entry of [the] CR 60(b) order, all of this litigation commenced,” the mother sought attorney fees as a CR 11 sanction for the “retaliatory, concerted effort by Mr. Herrmann to get back at [her] for prevailing on that motion.” (RP 7, 15-16)

The trial court dismissed the father's objection to relocation as frivolous, finding absolutely “no reason an objection should . . . have been filed in this case, period.” (RP 22-23) Noting that the

parties' dissolution proceeding had "been the subject of a lot of litigation over the past 13 years," with "1214 or so pleadings in a 21 volume file," the trial court imposed CR 11 sanctions against the father for "harassment with the use of litigation" and forcing "Ms. Morgan [to] incur[] thousands of dollars of attorney's fees for just this motion." (RP 22, 24)

I am granting the request . . . to find CR 11 sanctions. As I stated there wasn't any reasonable grounds to believe that there was a basis to make this motion. It wasn't factually or legally defended or justified. And a CR 11 sanction . . . is meant to dissuade those who are trying to use the legal process as a harassment. This case is very evident that that's what this matter was all about, was a legal form of harassment against Ms. Morgan.

(RP 24-25)

The trial court awarded \$4,000 to the mother, ordering the judgment to be "jointly and severally liable by Mr. Geissler and his client," in addition to imposing a \$150 sanction against the father's attorney personally. (RP 25)

III. ARGUMENT

A. This Court reviews the trial court's order granting relief under CR 60(b) for an abuse of discretion.

The trial court properly granted the mother relief from the August 2014 child support order, which not only absolved the father of all of his support obligations, it relieved him of thousands of

dollars that he owed in back support for the children and granted him a tax exemption for one of the children – despite the fact that he lives in Texas and sees the children for at most only six hours per year. Meanwhile, the mother was left to provide for all of the children’s expenses, including their health insurance. The trial court was well within its discretion to vacate the August 2014 order, which deprived the children of support from the father and which the mother had expressly forbade her attorney from entering, to avoid this manifest injustice.

“Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally ‘to preserve substantial rights and do justice between the parties.’” *Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) (quoted source omitted). “The granting of a motion to vacate a judgment is directed to the discretion of the trial court, and will not be reversed in the absence of a manifest abuse of that discretion.” *Gustafson v. Gustafson*, 54 Wn. App. 66, 70, 772 P.2d 1031 (1989). “A court abuses its discretion when its decision is based on untenable grounds or reasoning.” *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003). Thus, if the “discretionary judgment of the trial court is based upon tenable grounds and within the bounds of

reasonableness, it must be upheld.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *rev. denied*, 116 Wn.2d 1009 (1991).

B. The mother properly brought her motion to vacate under CR 60(b)(11) and CR 60(b)(5) within a “reasonable time.”

The mother’s motion to vacate was timely because a party may bring a motion under either CR 60(b)(5) or CR 60(b)(11) even after a year following entry of the order. (App. Br. 12, 14-15) The father’s reliance on *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 305, 971 P.2d 581 (1999) (App. Br. 12) to claim that the mother’s motion was untimely is unpersuasive. In *Briggs*, the father filed a motion to vacate a child support order more than one year after its entry, claiming the order was void. The Court held that while the order may be voidable, it was not void; therefore, the father had to bring his motion within one year under CR 60(b)(1) or “within a reasonable time” under CR 60(b)(11). *Briggs*, 94 Wn. App. at 305. The Court affirmed the trial court’s denial of the father’s motion to vacate because the father neither demonstrated a meritorious defense “nor argued that he brought his motion within one year *or* a

reasonable time.” *Briggs*, 94 Wn. App. at 305-06 (citing CR 60(e)(1)).⁴

Here, in contrast, the trial court found that the modified child support order was indeed void. (CP 305-07) “Motions to vacate under CR 60(b)(5) may be brought at *any* time after entry of judgment” on grounds that the “judgment is void.” *Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988) (emphasis added); CR 60(b)(5). Therefore, because the order the mother sought to vacate was void, her motion was indisputably timely.

The trial court also vacated the modified order under CR 60(b)(11), which allows a trial court to vacate an order or judgment for “[a]ny other reason justifying relief from the operation of the judgment” under CR 60(b)(11). “Unlike motions brought pursuant to CR 60(b)(1)-(3), which must be brought within one year after the order or judgment was entered,” a CR 60(b)(11) motion need only be brought within a “reasonable time.” *Marriage of Thurston*, 92 Wn. App. 494, 499-500, 963 P.2d 947 (1998), *rev. denied*, 137

⁴ Under CR 60(e)(1), a party seeking relief for a voidable order under CR 60(b) must set forth “facts constituting a defense to the action or proceeding” *only* “if the moving party be a defendant,” which neither party is in this dissolution proceeding. Regardless, the trial court found “no rational reason for relieving Mr. Hermann of the duty of support,” clearly demonstrating the mother’s “meritorious defense.” In any event, “[t]here is no need for the demonstration of a meritorious defense to vacate a void order.” *Briggs*, 94 Wn. App. at 305.

Wn.2d 1023 (1999). “[W]hat constitutes a reasonable time depends on the facts of the case.” *Thurston*, 92 Wn. App. at 500.

Here, the mother’s motion to vacate the August 2014 order was brought 13 months after the order was entered, which was a “reasonable time.” In light of the irregularities in entry of an order that absolved the father of his obligation to support his children, and the manifest injustice if the order were allowed to stand, the trial court properly exercised its discretion in vacating the order.

C. The August 2014 child support order is void against public policy because it waived all of the father’s support obligations.

1. The 2014 order is void because it “totally eliminated” the father’s child support obligations for “no rational reason.”

“[A] contract or agreement that violates public policy or law is void or unenforceable.” *Marriage of Hammack*, 114 Wn. App. 805, 811, 60 P.3d 663, *rev. denied*, 149 Wn.2d 1033 (2003); *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 454, 298 Pac. 705 (1931) (“an agreement to waive rights involving a question of public policy is void”). In Washington, it is “well settled that an agreement to waive child support is against public policy.” *Hammack*, 114 Wn. App. at 811; *see also Marriage of Burke*, 96 Wn. App. 474, 477, 480, 980 P.2d 265 (1999) (portion of prenuptial agreement prohibiting award of attorney fees incurred in parenting plan

litigation unenforceable because it violates public policy by “adversely impact[ing] the interests of children”). Because a “custodial parent has no personal interest in the support funds collected and expended on behalf of his or her child, but rather acts as trustee for the child’s benefit,” *Hartman v. Smith*, 100 Wn.2d 766, 768, 674 P.2d 176 (1984), “parents have no right to waive their children’s right to that support.” *Hammack*, 114 Wn. App. at 808.

The legislative intent underlying the child support statutes is “to insure that child support orders are adequate to meet a child’s basic needs and to provide additional child support commensurate with the parents’ income, resources, and standard of living.” RCW 26.19.001; *Hartman*, 100 Wn.2d at 769 (child support exists “to assist in meeting the current expenses of child care”). It is the intent of the legislature that child support be “equitably apportioned between the parents.” RCW 26.19.001. In other words, *both* parents must provide support for the child. *See also Parentage of A.L.*, 185 Wn. App. 225, 236, ¶ 23, 340 P.3d 260 (2014) (“a parent’s obligation for the care and support of his or her child is a basic tenant recognized in this state without reference to any particular statute”). Thus, an order that relieves one parent of

his obligation to provide support to his children violates the legislative intent set forth in RCW 26.19.001.

Indeed, the father concedes that it “has long been recognized that parents cannot agree to prospectively terminate either parent’s obligation to support their children.” (App. Br. 10) *See State ex rel. Lucas v. Superior Court for King County*, 193 Wash. 74, 78, 74 P.2d 888 (1937) (father has “common-law obligation to support his child during its minority”; parents “could not stipulate away the right of the child to such support”). Yet, he contends that the trial court erred in vacating the order because “there is no *absolute* prohibition” against child support agreements “as long as the agreement does not seek to foreclose the right of either party to seek modification or reinstatement of the obligation.” (App. Br. 10) (emphasis added) The father entirely ignores that the trial court did not find the order “facially void” based on an “absolute prohibition” (App. Br. 10-11); in contrast, the trial court properly recognized that “not all waivers of child support are void.” (CP 306) The trial court then concluded that, based on “the facts of this case,” “[c]onsideration of the entire file supports a finding that the order modifying child support in this case is void.” (CP 306) Indeed, the trial court found “no rational reason” and “nothing in the file to

look at” to justify “totally eliminating all support for those kids.”
(CP 205, 207, 306)

The lack of consideration for the mother to enter into any such agreement here is in stark contrast to the cases the father cites. (App. Br. 10-11) In *Holiday v. Merceri*, 49 Wn. App. 321, 742 P.2d 127, *rev. denied*, 108 Wn.2d 1035 (1987), the Court affirmed the parties’ agreement waiving the wife’s child support responsibilities in exchange for the husband receiving \$23,000 more in the property division. The Court concluded that the wife’s child support obligation was satisfied because the \$23,000 awarded to the husband, when invested at 10% interest, provided “a reasonable amount of support” to the children. *Holiday*, 49 Wn. App. at 326-27.

In comparison, the wife in *Hammack* agreed to a disproportionate property settlement “based on an oral agreement exempting [her] from any future child support obligations.” 114 Wn. App. at 807. In reaching their agreement, the parties never calculated “an appropriate child support sum” or “quantif[ied] the value of the property that [the wife] relinquished in lieu of paying future child support.” *Hammack*, 114 Wn. App. at 811. The trial court subsequently found the parties’ oral child support agreement invalid and ordered the wife to pay support. Division Two affirmed

the trial court's vacation of the property settlement under CR 60(b)(11), holding that because "the basis of the property division agreement was a term that violates public policy, the agreement was void and unenforceable from its inception." *Hammack*, 114 Wn. App. at 811.

Here, the August 2014 "agreement" is more like the agreement in *Hammack* than the agreement in *Holaday*. Unlike *Holaday*, the August 2014 agreement lacked any sort of consideration ensuring that the children would still receive "a reasonable amount of support" despite the father's zero transfer payment. Thus, like the agreement in *Hammack*, the August 2014 order of child support was "void ab initio." 114 Wn. App. at 810.

Allowing the father a zero transfer payment despite the mother having 100% of the residential time, extinguishing the father's back child support obligation, and requiring the mother to pay for all of the children's expenses and medical insurance is "contrary to the public morals," *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993), and eviscerates the fundamental "basic tenet" of Washington law that a parent is obligated to provide support "to meet a child's basic

needs.” *A.L.*, 185 Wn. App. at 236, ¶ 23; RCW 26.19.001. The trial court therefore properly found the order void and vacated it.

2. Regardless whether the mother could petition for modification of child support, the 2014 order was void.

Because an order waiving child support is “void and unenforceable from its inception,” *Hammack*, 114 Wn. App. at 811, that the mother could have sought modification of the August 2014 order (App. Br. 11) does not change the fact that the underlying order itself remained void and unenforceable. The father’s reliance on *Pippins v. Jankelson*, 110 Wn.2d 475, 754 P.2d 105 (1988) (App. Br. 10) to claim otherwise is misplaced.

The Court in *Pippins* did not address a void order waiving child support as is the case here. Instead, the issue in *Pippins* was the court’s ability to modify an agreed amount of child support. The parties in *Pippins* entered a stipulated order requiring the father to pay a set amount of monthly child support. The trial court subsequently granted the mother’s petition to modify the child support, increasing the father’s obligation. The father challenged the trial court’s authority to do so, arguing that the parties’ agreement “precludes any subsequent modification of the monthly

child support payments agreed to in the stipulated order.” *Pippins*, 110 Wn.2d at 478.

On appeal, the *Pippins* Court held that the trial court had authority to modify the child support even without requiring substantially changed circumstances where there was “no indication” that the trial court “independently examined the reasonableness of the child support payments when entering” the stipulated order. 110 Wn.2d at 482. This is because “courts are particularly solicitous of a minor child’s interest in receiving the financial resources needed to live and to grow.” *Pippins*, 110 Wn.2d at 479. *Pippins* recognizes that trial courts are not bound by parties’ agreements; courts have an “independent equitable power” regarding any “judgment or order pertaining to child support payments” and may exercise that power “when the needs of the child so require.” 110 Wn.2d at 478-79.

To the extent *Pippins* is relevant, the trial court’s decision here is entirely in accord; the trial court could disregard the parties’ “agreement” waiving child support because it created a manifest injustice as it did not meet “the needs of the child,” 110 Wn.2d at 478, and absolved the father of his “common-law obligation to support his child[ren].” *Lucas*, 193 Wash. at 78.

Further, in rejecting the father's contention that the ability to seek modification somehow validated the order, the trial court recognized that the mother "can't just modify." (CP 207) In order to modify a child support order, a party must show a "substantial" and "*uncontemplated* change of circumstances occurring since the former decree." *Marriage of Burch*, 81 Wn. App. 756, 761, 916 P.2d 443 (1996) (emphasis in original) (quoted source omitted); RCW 26.09.170(1). As the trial court noted, "[t]here has to be a change of circumstances. How can she go in with this child support order and argue there's been a change of circumstances when realistically what she's argu[ing] is . . . 'I want to go back to where I was.'" (CP 207)

Even if the mother could have sought modification without demonstrating a "substantial change of circumstances," a modification to a child support order is not retroactive prior to the date of filing the petition to modify. RCW 26.09.170(1)(a). Thus, the mother could not have recouped the \$22,015 in back child support that the children were deprived of while the August 2014 order was in effect. (CP 93-94, 221-23, 316-17) The court properly exercised its equitable powers in finding the August 2014 order void and unenforceable, and in reinstating the February 2011 child

support order to ensure that the children would receive “the financial resources needed to live and to grow.” *Pippins*, 110 Wn.2d at 479.

D. The August 2014 child support order is void for granting more relief than the mother sought in her petition to modify the parenting plan.

The trial court’s decision vacating the August 2014 order is not only void as a matter of public policy, but void because it granted more relief than sought in the petition to modify the parenting plan. *Marriage of Hardt*, 39 Wn. App. 493, 693 P.2d 1386 (1985).

In *Hardt*, this Court affirmed the trial court’s vacation of a dissolution decree as void under CR 60(b)(11) where the decree provided greater relief than the petition requested.⁵ The mother in *Hardt* “prepared a do-it-yourself dissolution petition in which [the father] joined.” 39 Wn. App. at 495. “Although the petition expressly omitted a child support provision,” the court entered the dissolution decree ordering the father to pay child support. *Hardt*, 39 Wn. App. at 495. The father subsequently brought a motion to vacate the dissolution decree under CR 60(b)(11), claiming that two

⁵ Although this Court relied on CR 60(b)(11) to uphold the trial court’s order vacating the dissolution decree, it could have also relied on CR 60(b)(5) as it found the decree void.

irregularities justified relief: “that the decree was void since it provided more relief than the petition requested,” and that the mother had “fraudulently entered the child support amount in the do-it-yourself decree” to which the father had joined. *Hardt*, 39 Wn. App. at 496.

The trial court granted the motion to vacate “because the dissolution decree awarded relief in excess of the petition request” and “did not conform to the parties’ stipulation.” *Hardt*, 39 Wn. App. at 494, 496. This Court affirmed, agreeing that the “dissolution decree was void because it provided greater relief than the petition request” and “void judgments have long been recognized as that type of irregularity justifying a motion to vacate.” *Hardt*, 39 Wn. App. at 496.

Similar to *Hardt*, the order at issue here absolved the father of all of his support obligations despite the mother’s “Petition for Modification address[ing] only the issue of parenting” with “no request to change support.” (CP 306) Indeed, at no point in the nearly two years from when the mother petitioned to modify the parenting plan in October 2012 to entry of the August 2014 child support order did either party seek modification of the existing child support order; the father never even answered the mother’s

petition. (CP 216, 306) The mother sought only “a parenting plan that was in the best interests of the [children].” (CP 206-07) Yet, the August 2014 child support order “blind-sided [the mother] by totally eliminating all support for those kids” and modifying child support without any “rational reason.” (CP 207, 306) The trial court was well within its discretion in finding such an order void and vacating it.

E. The trial court properly vacated the August 2014 order because the mother never agreed to waive the father’s child support obligations, and there was no “rational reason” to justify waiving the father’s child support obligation.

1. The trial court properly vacated the order, which waived a substantial right, to which the mother had not agreed.

Even if the August 2014 order was not void, it was nevertheless voidable under CR 60(b)(11) because the mother’s former attorney entered into a stipulation without her authority that entirely waived all of the father’s child support obligations.⁶ “Orders entered without client authority are voidable and may be vacated . . . under certain circumstances listed in CR 60(b)(1) . . .

⁶ Although the trial court vacated the order as being void as opposed to voidable (CP 306), this Court may affirm on any grounds supported by the record. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002) (reviewing court “may affirm a trial court on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds”).

or “[a]ny other reason justifying relief from the operation of the judgment.” *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 305, 971 P.2d 581 (1999) (citing CR 60(b)(11)) (emphasis added); *see also Marriage of Furrow*, 115 Wn. App. 661, 678, 63 P.3d 821 (2003) (vacating voidable order terminating parental rights under CR 60(b)(11)). (App. Br. 11-15)

The mother’s attorney here did not “simply fail[] to protect [her] interests” as a result of “excusable neglect or mistake” (App. Br. 14) (quoting *Bergren v. Adams County*, 8 Wn. App. 853, 857, 509 P.2d 661, *rev. denied*, 82 Wn.2d 1009 (1973)). Counsel impermissibly “surrender[ed] a substantial right of [her] client without special authority granted by the client.” *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 447, ¶ 25, 332 P.3d 991 (2014), *rev. denied*, 182 Wn.2d 1006 (2015); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980) (“an attorney is without authority to surrender a substantial right of a client unless special authority from his client has been granted him to do so”) (quoted source omitted); *Morgan v. Burks*, 17 Wn. App. 193, 200, 563 P.2d 1260 (1977) (“Absent express authority or an informed consent or ratification, attorneys may not waive, compromise or bargain away a client’s substantive rights.”).

Courts have found substantial rights compromised “by surrendering property without securing a rescission of the contract to purchase,” “settlement of a tort cause of action,” “not recording the testimony necessary for review in a parental deprivation proceeding,” and “stipulating to a contingent consent judgment.” *Graves*, 94 Wn.2d at 304-05. In *Morgan*, the trial court vacated a settlement dismissing the plaintiffs’ cause of action where “the dismissal order resulted from serious misunderstandings between attorney and client” and the plaintiffs “did not in fact authorize their attorneys to bind them to the settlement and dismissal; nor did they give their informed consent thereto.” 17 Wn. App. at 199. The Court of Appeals affirmed, finding these facts “reason enough to vacate the dismissal order under CR 60.” *Morgan*, 17 Wn. App. at 199.

Here, the mother sought to modify only the parenting plan to suspend the father’s visitation. (CP 306) In negotiating the parenting plan, the mother authorized her attorney only to “fully present [her] position” to the father “on a number of issues and get clarification of others.” (CP 120) When counsel for both parties met at the courthouse on August 27, 2014, without either party present, the mother left a voicemail expressly “instructing her

[attorney] not to sign the final documents”: “I did not get the clarifications I requested, did not get any verification that the disputed issues were addressed in accordance with my requests, and did not agree with Mr. Geissler’s proposal for claiming the dependency exemptions.” (CP 120) Yet, without the mother’s “consent or signature,” the trial court entered the final documents that day. (CP 120)

Contrary to the father’s claim, *State ex. re. Turner v. Briggs*, 94 Wn. App. 299, does not require “proof that [an] order was procured by fraud” for relief to be warranted under CR 60(b)(11). (App. Br. 12) In fact, *Briggs* acknowledges that “consent by an attorney contrary to his client’s instructions may be ground for vacating such a judgment.” 94 Wn. App. at 305-06. While, the Court went on to state that “as a general rule courts are loathe to act upon this ground alone unless fraud appears,” 94 Wn. App. at 306, the treatise on which the Court relies states that an agreement can be set aside if “obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing.” 3 E. Tuttle, *A Treatise of the Law of Judgments* § 1352 at 2776-77 (5th ed. rev. 1925).

Here, “consent was not in fact given” by the mother for entry of the modified child support order. The “entire file” supports the mother’s contention and the trial court’s finding that she “didn’t agree to this,” “didn’t sign off on changes to child support,” and that her “lawyer had no authority to do that.” (CP 205, 306) Just as in *Morgan*, there is no evidence in the record that the mother “expressly authorized” her attorney “to agree to the settlement”; “nor did [s]he expressly approve, consent or ratify such action in open court.” 17 Wn. App. at 200. Under these circumstances, the trial court properly vacated the August 2014 order.

2. There was no “rational reason” to grant the father a downward deviation to a zero transfer payment based on the residential schedule, when the mother has “virtually 100%” custody.

The trial court properly vacated the August 2014 child support order for all of the reasons already stated, but also because there was “no rational reason for relieving Mr. Herrmann of the duty of support,” given that the mother had “virtually 100%” custody of the children and should have been entitled to an upward deviation in support. (CP 206-07, 306) The father was not even entitled to a downward deviation of the standard calculation, let alone a complete waiver of *all* obligations. “Agreement of the

parties is not by itself adequate reason for any deviations from the standard calculation.” RCW 26.19.075(5); *see also Marriage of Oakes*, 71 Wn. App. 646, 652 n.4, 861 P.2d 1065 (1993) (a deviation from the standard child support calculation is “the exception to the rule and should be used only when it would be inequitable to do otherwise”). “If the court considers a deviation based on residential schedule, it *must* follow a specific statutory analysis” under RCW 26.19.075(1)(d). *A.L.*, 185 Wn. App. at 237, ¶ 26 (emphasis added).

The father’s downward deviation in the August 2014 child support order was inexplicably based on the residential schedule – in particular, the father having to “pay all transportation,” “lodging, rental expenses, meals, etc. to exercise visitation in Washington” – despite the parenting plan allowing him only one supervised visit of up to six hours with the children per year. (CP 341) As the trial court correctly recognized, the August 2014 parenting plan “placed the children virtually 100% of the time with their mother, which could be grounds for granting an *upward* deviation in *her* favor.” (CP 306) (emphasis added); *see* RCW 26.19.075(1)(d) (“court may deviate from the standard calculation *if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment*”) (emphasis added) Yet, “Mr.

Herrmann was granted the deviation” despite “[t]here being no grounds for such a deviation.” (CP 306)

Because the August 2014 order of child support was defective as a matter of law and as a matter of fact, the trial court properly vacated the 2014 order and reinstated the 2011 order of child support. This Court should affirm.

F. This Court should award the mother her attorney fees on appeal based on her need, his ability to pay, and for the father’s harassing litigation conduct.

This Court should award the mother her attorney fees on appeal based on the father’s ability to pay and the mother’s need, as well as because of the father’s intransigence and harassing litigation techniques before the trial court. RAP 18.1(a); RCW 26.09.140.

“Based on the financial information before [this Court],” the father has the resources to pay the mother’s attorney fees and costs on appeal. *Marriage of Choate*, 143 Wn. App. 235, 246, ¶ 23, 177 P.3d 175 (2008). The mother clearly has the need, as her monthly expenditures far exceed her income.⁷ (CP 22-28) The father, in contrast, had an imputed net income of \$3,448 in the February

⁷ The mother submitted her most recent financial declaration to the trial court in September 2015. She will submit a new financial declaration to this Court in support of her fee request under RAP 18.1.

2011 child support order.⁸ (CP 61; Supp. CP 398) Relative to the mother, the father has the ability to pay.

Regardless, “the financial resources of the spouse seeking the award are irrelevant” when attorney fees are sought for intransigence. *Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (quoted source omitted), *rev. denied*, 120 Wn.2d 1002 (1992). “Intransigence is a basis for attorney fees in dissolution proceedings,” and “may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party,” “and any other conduct that makes the proceeding unduly difficult or costly.” *Marriage of Wixom*, 190 Wn. App. 719, 725, ¶¶ 10, 12, 360 P.3d 960 (2015), *rev. denied*, 185 Wn.2d 1028 (2016).

This case has been ongoing for 13 years. The 21 volumes of over 1,200 pleadings clearly demonstrates that the father refuses to cooperate with the mother and engages in “conduct that makes the proceeding unduly difficult or costly,” such as filing frivolous motions and failing to pay his support obligations. Indeed, the trial court has expressly found that the father uses litigation as a “legal

⁸ The vacated August 2014 child support order imputed the mother’s monthly income at \$2,000, and imputed the father’s monthly income at \$3,000 by “agree[ment].” (CP 339-40) Yet, neither party submitted financial declarations prior to entry of the August 2014 child support order. (See CP 87) This Court should disregard those figures.

form of harassment” against the mother. (RP 24-25) This Court should award the mother her fees on appeal.

IV. CONCLUSION

This Court should affirm the trial court’s wholly discretionary rulings and award the mother her attorney fees on appeal.

Dated this 20th day of November, 2017.

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DECLARATION OF SERVICE

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

That on November 20, 2017, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 20th day of November,
2017.



Peyush Soni

SMITH GOODFRIEND, PS

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