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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:
LORI VAN DE GRAAF,
Respondent,
and
ROD D. VAN DE GRAAF,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
COMMISSIONER ELISABETH M. TUTSCH

BRIEF OF RESPONDENT RE: SUIT MONEY FOR APPEAL

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I. INTRODUCTION

This Court should affirm on the merits¹ the trial court's wholly discretionary award of suit money to respondent Lori Van de Graaf, to assist her in responding to appellant Rod Van de Graaf's appeal to this Court of the final orders dissolving the parties' marriage and various other post-decree orders under Cause No. 35133-5-III. In awarding additional suit money to respondent, the trial court properly recognized that by refusing to comply with and staying enforcement of over \$1.2 million in judgments owed to respondent under the dissolution orders, appellant deprived respondent of funds that she would otherwise have available to her to defend his appeal and meritless motions practice in the appellate courts, while appellant retains not only the benefit of the awards to him under the dissolution orders, but apparently limitless funds from his family to further harass respondent and delay receipt of her share of the

¹ An order awarding suit money is neither a final order nor any other appealable order under RAP 2.2, and this "appeal" should be subject to dismissal on that basis. Review as a matter of right of such an order would defeat suit money's purpose of providing funds to a party deprived of her property award pending appeal. Nevertheless, respondent does not challenge this Court's review of this order on accelerated review, pursuant to Commissioner Wasson's October 24, 2018 ruling, because to do so will either further delay consideration of the dissolution appeal or be used by appellant and his counsel as an excuse to instigate another round of expensive and unnecessary motions practice.

marital estate. This Court should affirm the trial court's award of suit money to the respondent and award attorney fees to respondent against appellant and his appellate counsel for having to respond to this meritless appeal.

II. RESTATEMENT OF FACTS

A. In March 2017, the husband appealed a property award that left him with most of the parties' \$5.5 million estate and an obligation to pay an equalizing judgment to his wife of 26 years.

The parties' 26-year marriage was dissolved after a 7-day trial on February 17, 2017. (Disso. CP 759, 763)² Each party was awarded half of the \$5.5 million marital estate. (Disso. CP 763, 770-75, 786) Among the assets awarded to appellant Rod Van de Graaf was a one-third interest, valued at \$2 million, in Midvale Cattle, a business owned by him outright with his siblings, and the \$1.42 million family home, owned free and clear. (Disso. CP 770-71, 784, 786) Rod was also awarded his one-third interest in separate real property that he owns outright through an LLC with his siblings, valued at \$300,000. (Disso. CP 784) Not included in the value of the marital estate was

² In an effort to avoid needless duplication of the records relevant to appellant's multiple pending appeals in this Court, respondent is filing with this brief a motion to allow citation to the Clerk's Papers and Verbatim Report of Proceedings in Cause No. 35133-5. See RAP 9.1(d). The record from Cause No. 35133-5 is cited in this brief as "Disso. CP ___" and "Disso. RP ___".

Rod's "inchoate" interest in Van de Graaf Ranches, a business owned by Rod's family that the trial court found Rod would "soon be the co-owner of." (Disso. CP 785, 787)

To equalize the property division, the trial judge, Yakima County Superior Court Judge Michael McCarthy, awarded respondent Lori Van de Graaf a \$1,171,200 judgment. (Disso. CP 763, 772-73, 786-87) The trial judge also awarded her lifetime monthly maintenance of \$6,000, based in part on Rod's monthly historical income of \$14,441. (Disso. CP 788) The trial judge found as a matter of fact, based on substantial evidence, that "[c]onservatively, [his] expected income in the near term will be at least \$200,000 per annum, which translates to almost \$17000 per month." (Disso. CP 788) In awarding Lori \$58,675 in fees that remained unpaid after a 7-day trial – a fraction of the fees she had incurred battling Rod's post-separation divorce planning – the trial court faulted Rod's "scorched earth" litigation tactics. (CP 829, 967; RP 1033)

Rod's appeal of the decree ("the dissolution appeal") is being considered by this Court under Cause No. 35133-5. (Disso. CP 830) On October 24, 2018, Commissioner Monica Wasson accelerated review of the dissolution appeal and directed the Clerk "to place it on

the next available docket space.” (Sub No. 775, Supp. CP __) The dissolution appeal is currently scheduled to be heard in this Court on March 12, 2019.

B. In August 2017, after the husband failed to comply with any aspect of the decree until found in contempt multiple times, the trial court awarded the wife partial suit money of \$30,000.

On April 14, 2017, Judge McCarthy, who had presided over the dissolution trial, issued a bench warrant for Rod’s arrest for his repeated “willful failure to pay spousal maintenance,” and set bail at \$15,000. (Disso. CP 974-75) Three days later, and despite repeated (and repetitive) claims that he did not have the ability to pay, Rod paid the arrears on his maintenance obligation. (Disso. CP 969-70) When Rod was again found in contempt for failing to pay spousal maintenance on May 31, 2017, the trial court ordered “5 days jail suspended on condition that Rod pays \$6000 owed for June 2017 by June 27, 2017.” (Disso. CP 1559) Rod once again came into (temporary) compliance with his maintenance obligation. (Disso. CP 1628-29)

Without staying enforcement (or even responding to inquiries about what steps he intended to take to comply with or stay enforcement of his other obligations under the decree), Rod also refused to pay the equalizing judgment or trial court fee award.

(Disso. CP 1626) Because Lori as a consequence was being deprived of property that she could have used to pay attorney fees on appeal, on June 27, 2017, she asked the trial court for an award of \$65,000 in suit money to defend the appeal, relying on *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936 (1959). (Disso. CP 1602-05)

On August 28, 2017, Yakima County Superior Court Commissioner Elizabeth Tutsch (“the trial court,” or “Commissioner Tutsch”), who had heard Lori’s May 2017 motion for contempt, and had found Rod in contempt for failing to pay spousal maintenance (Disso. CP 1559), considered Lori’s motion for suit money. Commissioner Tutsch granted Lori’s motion in part, awarding her \$30,000 in suit money – less than half her original request of \$65,000, premised on the estimated cost of filing only a response brief, with no motions practice – and ordered Rod to pay the award by October 27, 2017. (Disso. CP 1747)

Review of this August 2017 suit money order is being considered as part of the dissolution appeal.

C. The husband failed to pay the partial suit money award, and was found in contempt once again in December 2017.

On November 14, 2017, Lori filed a contempt motion for Rod's failure to pay suit money by October 27, 2017, as previously ordered. (Disso. CP 1852-56) On December 7, 2017, Commissioner Tutsch found Rod in contempt for failing to pay suit money, and assessed terms of \$1,000. (Disso. CP 1881) Commissioner Tutsch ordered that Rod could purge his contempt by paying the "\$30,000 suit money within 15 days, to wit by the close of business on December 22, 2017." (Disso. CP 1881-82) Rod paid only \$10,000 of the \$30,000 in suit money awarded to Lori, on December 22, 2017. (Disso. CP 1909)

D. In January 2018, the husband stayed enforcement of more than \$1.2 million in judgments awarded to the wife. Having paid only \$10,000 of the suit money awarded to her, he was once again found in contempt.

On December 22, 2017, Rod filed a motion to stay enforcement of both the equalizing judgment awarded to the wife in the decree and the judgment for attorney fees, a total of more than \$1.2 million, asserting he should be able to use the family residence awarded to him (at his request) as alternate security. (Sub No. 603, Supp. CP ___) In response, Lori asked the court to condition any stay

on payment in full of the partial award of suit money, and requested an additional award of \$45,000 in suit money, noting that the original estimate of \$65,000 to respond to Rod's appeal had not taken into consideration the efforts that had already been necessary to compel his compliance with appellate perfection deadlines. (Sub No. 610, Supp. CP ___) Lori also filed a motion for additional suit money and additional sanctions, including incarceration, because Rod still had not paid the total amount of suit money awarded to her. (Disso. CP 1885)

On January 23, 2018, Commissioner Tutsch considered Rod's motion to stay enforcement of the judgment and Lori's motion for additional sanctions to coerce Rod's compliance with the earlier suit money order. Commissioner Tutsch approved Rod's request to use the family residence awarded to him as alternate security, but ordered him to additionally post a bond of \$361,240 to stay enforcement of the judgments. (Disso. CP 2128-30) Commissioner Tutsch did not address Lori's request for additional suit money, stating that she was "going to delay on that until we see what happens with the course, course of issues" (Disso. RP 1177), but found Rod "in continued violation of the court's orders regarding payment of suit money, currently owing \$20,000 [and] the court finds that Mr. Van

de Graaf had the ability to comply with those orders and continues to have such ability. His violations are willful.” (Disso. CP 1942-43) The trial court imposed a suspended 5-day sentence “on condition that Mr. Van de Graaf pay the remaining balance of \$20,000 to Mr. Hazel by January 31, 2018. If not, a bench warrant shall issue for his arrest on February 5, 2018.” (Disso. CP 1944-45)

Rod filed a notice of appeal from this January 2018 order under Cause No. 35839-9 in this Court, the “enforcement appeal.” (Disso. CP 1940) Commissioner Wasson stayed that appeal pending this Court’s decision in the dissolution appeal. (Sub No. 775, Supp. CP __)

E. The husband filed eight motions in this Court and in the Supreme Court seeking a stay of the contempt order, while continuing to refuse to pay the suit money.

Rod filed a series of “emergency” motions in this Court, and in the Supreme Court, seeking a stay of the order holding him in contempt for failing to comply with the August 2017 suit money award. After granting an “interim stay” on February 1, and after Lori was forced to file a response to Rod’s motion on an expedited basis, Commissioner Wasson, after hearing argument from appellate counsel, denied Rod’s motion for a stay on February 14, 2018. (Sub No. 699, Supp. CP __) In her February 14 ruling, Commissioner Wasson noted Rod’s “pattern” of

borrowing funds from his parents for other obligations, which raises an “inference that he could do so again. His decision not to do so leads to an inference that he does not want to fund Ms. VandeGraaf’s response to his appeal, despite the superior court’s order.” (Sub No. 699, Supp. CP ___)

On February 23, 2018, Commissioner Wasson denied Rod’s motion to “clarify” her February 14 ruling. On March 19, 2018 (the last possible day), Rod filed a motion to modify Commissioner Wasson’s February 14 ruling, and another “emergency” motion for stay in this Court. (Sub No. 665, Supp. CP ___) Without waiting for a ruling from this Court, Rod then filed an “emergency” motion for stay of the contempt order on March 21, 2018 in the Supreme Court, which immediately rejected it as premature due to the pending motion in this Court. (Sub No. 665, Supp. CP ___)

The next day, March 22, 2018, Commissioner Tutsch found Rod in continuing contempt of the August 2017 suit money order. (Disso. CP 2146) Commissioner Tutsch noted that “Rod provided a declaration to the court that he does not have the ability to pay, and relies on the same evidence this court found unpersuasive at the January 22, 2018 hearing. The Court finds Mr. Van de Graaf does have the ability to pay, and that he is willfully refusing to comply with a court order.” (Disso.

CP 2146) Commissioner Tutsch ordered Rod to pay the suit money owed by March 30, 2018, or report to jail on that day. (Disso. CP 2146) Also on March 22, 2018, this Court denied Rod's second "emergency" motion to stay, and his motion to modify.

On March 26, 2018, Rod filed an "emergency" motion for discretionary review in the Supreme Court of this Court's denial of his requested stay. (Sub No. 699, Supp. CP ___) On March 29, 2018, Supreme Court Commissioner Michael Johnston denied the motion for stay, noting that the record supported the trial court's finding that Rod had the ability to pay the partial suit money award. Commissioner Johnston also recognized that, due to Rod's "excessive litigiousness," it was likely that the actual cost to respond to his appeal would exceed the \$65,000 that Lori had originally estimated would be the cost. (Sub No. 698, Supp. CP ___)

Although Commissioner Johnston denied Rod's motion, he granted a temporary stay of 30 days to allow Rod to file a motion to modify of his decision. (Sub No. 698, Supp. CP ___) Sure enough, and once again on the last day possible, Rod filed a motion to modify Commissioner Johnston's ruling. The Supreme Court extended the temporary stay until it decided Rod's motion to modify, which was finally denied on July 11, 2018. (Sub No. 699, 716, Supp. CP ___)

F. The additional suit money award was made in light of this procedural history: While claiming he cannot pay a \$20,000 suit money award to defend against his dissolution appeal, the husband has paid his appellate attorneys over \$230,000.

Rod's costly litigation strategy in the appellate courts, while ultimately not successful, did achieve a temporary stay of the contempt order for six months. During this period, while Rod was pleading poverty and refusing to pay Lori suit money, he had paid *his* appellate attorneys over \$180,000. (Sub No. 684, Supp. CP ___) By June 2018, when he finally exhausted his "suit money" motions practice in the appellate courts, Rod had paid his appellate counsel over \$230,000. (See Sub No. 775, Supp. CP ___) As Commissioner Wasson noted, Rod's "excuse" for failing to pay suit money is "that his parents have paid for the \$350,000 supersedeas bond and his appellate attorney fees in the amount of \$230,000, but they won't pay the 'suit money' he has been ordered to pay." (Sub No. 775, Supp. CP ___) The partial suit money award of \$30,000, of which only \$10,000 was paid, had been consumed answering Rod's "incessant efforts to defeat [the award] and to economically bludgeon Lori into submission." (Sub No. 699, Supp. CP ___)

After Rod finally exhausted all avenues to avoid paying the partial suit money award that had been awarded to Lori nearly a year

earlier, the parties once again appeared before Commissioner Tutsch (for the sixth time on the issue of suit money), on July 18, 2018. (CP 4) By then, Rod had filed four additional notices of appeal since filing his initial notice challenging the orders dissolving the parties' marriage (he would file two more notices of appeal a month later). (Disso. CP 973, 1651, 1940) Lori asked the court to finally incarcerate Rod, in the hopes of compelling him to comply with the August 2017 partial suit money award. She detailed Rod's appellate motions practice, and renewed her request for additional suit money, of \$100,000. (CP 1-3; Sub No. 699, Supp. CP __) Lori also noted that despite Rod's continued claims of poverty, Rod had a cash surplus of over \$140,000, after paying Lori's maintenance and his own attorney fees, between March 2017 and June 2018. (Sub no. 699, Supp. CP __)

In deciding whether Rod was in continued contempt of the partial suit money award, Commissioner Tutsch considered Rod's declaration repeating his claims he did not have the ability to pay the award. (CP 16) Commissioner Tutsch once again found that the basis for his claims of inability to pay were "unpersuasive," and that Rod "does have the ability to pay, and that he is willfully refusing to comply with a court order." (CP 16) Commissioner Tutsch ordered Rod to provide proof of payment of the partial suit money award by July 26,

2018. (CP 17) If he failed to pay suit money by July 26, Rod was ordered to report to jail on July 27, 2018, where he was to remain for five days - unless he paid the suit money, in which case he could be released earlier. (CP 17)

Commissioner Tutsch also granted Lori's motion for additional suit money in part, awarding her an additional \$80,000. (CP 43) Commissioner Tutsch, who had originally ordered the partial suit money award, stated: "the basis for that is, essentially, what was before the Court when I made the last order, with the addition of the Court of Appeals' decisions, the litigation at the Supreme Court, and then back to the Court of Appeals so I can see that more litigation costs were expended than were anticipated when I made the first order, and there hasn't been any evidence that anybody's financial situation is different than when I made the first order. I did make the finding that Mr. Van De Graaf had the ability to pay at that time, and I still think he has the ability to pay on the same basis." (RP 10-11) Commissioner Tutsch ordered Rod to pay the additional suit money award within 90 days of her ruling. (CP 43)

Rod filed a notice of appeal from this order (CP 41) – his sixth notice of appeal since the parties' marriage was dissolved in February

2017. (Disso. CP 973, 1651, 1940)³ This is the order at issue in this “appeal.” Pursuant to Commissioner Wasson’s October 24, 2018 ruling, this review of the second suit money award is being considered on an accelerated basis.⁴ (Sub No. 775, Supp. CP ___)

III. RESPONSE ARGUMENT

A. The trial court did not abuse its discretion in awarding the wife additional suit money to defend the husband’s dissolution appeal and appellate motions practice.

1. The wife’s motion gave notice to the husband of the relief sought.

Rod primarily challenges the trial court’s award of suit money to Lori based on the “form” of the motion, complaining that it “failed to specify the grounds for the relief sought ‘with particularity.’” (App. Br. 15, quoted source omitted) This argument is so frivolous as to be sanctionable. “[T]he purpose of a motion under the civil rules is to give the other party notice of the relief sought.” *Pamelin Industries, Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981)

³ Rod has filed the following notices of appeal: March 17, 2017 Notice, under Cause No. 351333-5; May 12, 2017 Notice, under Cause No. 35292-7; August 7, 2017 Notice, under Cause No. 35499-7; January 30, 2018, under Cause No. 35839-9; June 14, 2018 Cause No. 36122-5; August 16, 2018 Notice, under Cause No. 36282-5; and August 17, 2018 Notice, under Cause No. 36283-3.

⁴ Respondent is also filing a motion asking the Court to consider this review on the merits, without oral argument, on March 12, 2019, in conjunction with the dissolution appeal.

(emphasis omitted, cited at App. Br. 16, 20). To “constitute a motion, it must state with sufficient particularity the relief . . . sought.” *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 101–02, 743 P.2d 811 (1987). “Motions are to be construed as to do substantial justice, with substance controlling over form.” *Neal v. Wallace*, 15 Wn. App. 506, 508, 550 P.2d 539 (1976) (citing CR 7(b)(2); CR 8(f)).

Here, there is no doubt that Lori’s motion gave Rod notice “of the relief sought,” and stated it with “sufficient particularity.” The motion states that the relief requested is an order requiring Rod “to pay additional suit money in the amount of \$100,000.00 which is in excess of the amount currently owed of \$20,000.00.” (CP 2)

In *City of Kennewick*, for instance, the issue was whether defense counsel’s letter objecting to a new trial date was a “motion” within the meaning of the speedy trial rule, which requires that a criminal defendant objecting to a trial date on the ground that it is not within the time limits prescribed by the rule must “move that the court set a trial date within those time limits.” 109 Wn.2d at 101 (quoting JCrR 3.08). The Supreme Court concluded the letter met the requirements for a motion because it made “abundantly clear” the relief sought:

[T]he letter to the clerk mentioned the case, the file number, and contained a specific reference to the justice court rule at issue. While the letter did not contain the word ‘motion’, and did not ask for any specific relief, it is abundantly clear in this case that the relief sought was an earlier trial date. The letter was sufficiently explicit to constitute a motion.

City of Kennewick, 109 Wn.2d at 102. See also *Colorado Nat’l Bank of Denver v. Merlino*, 35 Wn. App. 610, 614, 668 P.2d 1304 (letter that “contained the name of the court on the inside address, the title of the action and the file number, identification of the nature of the paper, and concluded explicitly, ‘[W]e, . . . wish you to hear a motion for reconsideration’” was sufficient to meet the requirements for a motion) (alterations in original), *rev. denied*, 100 Wn.2d 1032 (1983).

Even though the motion that resulted in the order on “appeal” here clearly stated the relief sought, and even though it followed nearly a year of litigation and six motions before Commissioner Tutsch over Lori’s right and Rod’s obligation to pay suit money, Rod complains that Lori’s motion failed to “state[] ‘with particularity the grounds therefor.’” (App. Br. 16, quoting *Pamelin*, 95 Wn.2d at 402.) *Pamelin* does not, as Rod claims, stand for the proposition that “without that statement of grounds with particularity, the trial court was without jurisdiction to grant the relief requested.” (App. Br. 16)

It is absurd to claim that motions practice is “jurisdictional,” as Rod does in making this argument.⁵

In fact, the Supreme Court in *Pamelin* reversed a Court of Appeals decision that a default order was void on the grounds “that the court had exceeded its jurisdiction” by granting relief that was not within the scope of the motion. 95 Wn.2d at 401. In doing so, the Supreme Court held that the Court of Appeals construed “plaintiffs’ motion too narrowly,” and that the plaintiffs were not required to “analyze” CR 37 (the basis for their motion) in order to obtain relief under its provisions: “It is enough to state the relief sought and the grounds justifying the relief.” *Pamelin*, 95 Wn.2d at 401-02. Because the trial court had jurisdiction over the matter, the Supreme Court concluded that the default judgment was “not void,” reversing the Court of Appeals. *Pamelin*, 95 Wn.2d at 403.

Essentially, Rod complains of procedural defects in Lori’s motion for additional suit money. But “[j]urisdiction does not

⁵ As Division One noted in *Parentage of K.D.*, 179 Wn. App. 1007, 2014 WL 234666, at *3, fn.6 (2014), the argument that a superior court lacked jurisdiction because of a “failure to bring a written motion in accordance with CR 5 and CR 7 is meritless.” Respondent cites *K.D.* not as precedent, but pursuant to GR 14.1(a) as persuasive authority that it is beyond peradventure that standard family law motions practice of the sort complained of here could create a *jurisdictional* defect of the sort appellant purports to assert.

depend on procedural rules.” *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003) (cited source omitted). “Elevating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice.” *Dougherty*, 150 Wn.2d at 319 (quoted source omitted). Instead, as this Court held in *Neal*, substance controls form in construing motions. 15 Wn. App. at 508; *see also First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979) *aff'd*, 93 Wn.2d 777, 613 P.2d 129 (1980) (“the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form”).

Here, while it cannot be disputed that Lori’s motion clearly states the relief sought, Rod complains that its statement “[s]ee files and records herein” was not an adequate statement of grounds justifying the relief. (App. Br. 6) Contrary to Rod’s assertion, the motion did not require “counsel and the court to go on a ‘fishing expedition.’” (App. Br. 15) The grounds for Lori’s motion for additional suit money, heard in July 2018, were largely the same as the grounds for the original request for suit money, heard by the same decision-maker (Commissioner Tutsch), in August 2017,

informed only by another 11 months of senseless motions practice by Rod and his trial and appellate counsel. (*See* Disso. CP. 1602-24)

This same decision-maker (Commissioner Tutsch) had heard (and decided) nearly every superior court motion filed by the parties (six in all) after the original motion for suit money, including Rod's motion to stay enforcement of Lori's equalizing judgment and the judgment for her award of attorney fees in the trial court in January 2018, and the contempt motions and review hearings for Rod's failure to pay Lori's spousal maintenance award and partial suit money award in August 2017, September 2017, December 2017, January 2018, March 2018, and June 2018. This same decision-maker (Commissioner Tutsch), was also aware of the number of motions filed by Rod in the appellate courts, to which Lori had been required to respond, and the appellate courts' rulings. (*See* Sub No. 699, Supp. CP __)

That Rod was not forced to go on a "fishing expedition" to know why Lori sought additional suit money is evident from the fact that in granting the motion, the trial court specifically relied on the bases for its original order awarding suit money, its knowledge of the appellate court litigation, which had needlessly increased Lori's litigation costs, and the lack of evidence from Rod of *any* changes in

the parties' financial situations. (RP 10-11) Rod was well aware of Lori's financial situation from the multitude of motions *he* filed in both the superior court and appellate courts, including a declaration filed by Lori in this Court in which she described her current financial situation and the toll on it by Rod's incessant motions in the appellate courts and refusal to comply with the partial suit money award. (*See* 2/8/2018 Dec. Lori Van de Graaf, filed in Cause No. 35133-5) Due to discovery sought by *his* trial counsel, Rod also had current information regarding how much was owed by Lori to her appellate counsel. (Sub No. 698, Supp. CP _)

It is "well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party." *Marriage of Morris*, 176 Wn. App. 893, 903, ¶ 23, 309 P.3d 767 (2013) (quoted source omitted). It simply beggars belief that Rod complains that he did not know the "factual basis" for Lori's motion for additional suit money. Rod's challenge to the order awarding additional suit money based on his complaints with the form of Lori's motion is wholly meritless, and should be sanctioned.

- 2. The trial court properly found that the wife was in need of an award of suit money, and the husband had the ability to pay.**
 - a. The husband cannot meet his burden of showing the trial court abused its discretion in awarding suit money.**

It also was wholly within the trial court's discretion to award Lori additional suit money to defend Rod's appeal pursuant to *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 333 P.3d 936 (1959). The "very purpose" of suit money is to allow a party without the available resources "to prepare and prosecute, or else defend, the action. Without them, a destitute or impecunious wife could not establish or obtain her rights at all. She would be remediless." *State ex rel. Hettrick v. Long*, 183 Wash. 309, 312, 48 P.2d 224 (1935). "The rule is clear that the allowance of attorney's fees on appeal from a divorce proceeding is a matter well within the discretion of the trial court." *Baker v. Baker*, 80 Wn.2d 736, 748, 498 P.2d 315 (1972). A party challenging a trial court's award of attorney fees bears the burden of proving the trial court's exercise of discretion was clearly untenable or manifestly unreasonable. *Walsh v. Reynolds*, 183 Wn. App. 830, 856-58, ¶¶ 53-59, 335 P.3d 984 (2014).

In awarding additional suit money to Lori, the trial court, which had considered nearly every post-decree motion since first

awarding partial suit money to Lori, did not abuse its discretion in finding that she still had the need for suit money. (RP 11) The trial court properly recognized that her need had increased since the first award because “more litigation costs were expended than were anticipated.” (RP 11) Lori’s need had also increased because, at the time of the initial partial suit money award, there was at least a chance that Rod (having at that point initially ignored her inquiry about staying the award) would pay the judgments awarded to her while the appeal was pending. By the time Lori requested an additional award of suit money a year later, Rod had stayed enforcement of the judgments awarded to Lori, depriving her of almost half of her property award, including the vast majority of liquid assets to which she was entitled, and left her to cash out retirement funds, with concomitant taxes and penalties, to pay trial attorney fees that Rod had been ordered to pay.

“[W]here a husband has maneuvered himself, however lawfully, into possession and control of all of the income-producing property of the community and practically all of its liquid assets,” he should be required to adequately support the wife pending appeal, including by an award of suit money. *Stringfellow*, 53 Wn.2d at 360-61; *see also Baker*, 80 Wn.2d at 749 (“Where, as here, all of the

income producing property of the community and practically all of the parties' liquid assets are controlled by the former husband, the defendant is entitled to an award of attorney's fees on appeal.”).

b. The cases relied on by the husband do not support his claim that the trial court “committed reversible error.”

Not one of the cases that appellant relies upon to argue that the trial court “committed reversible error by awarding Lori suit money” (App. Br. 8-14) support his arguments. For instance, those cases do not address the type of suit money award addressed in *Stringfellow*, where the party seeking suit money, like Lori, has been deprived of access to the property awarded to them while the appeal is pending as a result of the other party staying enforcement of the decree on appeal. The only case dealing with suit money on appeal affirmed the award when the husband was awarded more of the marital estate and the wife was awarded an equalizing judgment, which was to be paid over time. See *Baker*, 80 Wn.2d at 748-49 (App. Br. 8, 10). The other cases deal with awards of temporary attorney fees pending a final determination in the trial court. *Stibbs v. Stibbs*, 38 Wn.2d 565, 567, 231 P.2d 310 (1951) (App. Br. 9 n.6); *Hettrick*, 183 Wash. at 311-12 (App. Br. 9 n.6); *State v. Superior*

Court of King County, 55 Wash. 347, 351-52, 104 P. 771 (1909) (App. Br. 9).

The other cases addressing final attorney fee awards in the trial court, based on need and ability to pay, are also inapposite. These cases do not deal with awards of suit money on appeal under *Stringfellow* at all. In particular, consideration of the amount of property awarded to the requesting spouse is irrelevant in ascertaining her “need” for suit money, because the property is not available to her. *See e.g. Marriage of Nicholson*, 17 Wn. App. 110, 120, 561 P.2d 1116 (1977) (vacating an award of attorney fees because the wife “received well over half the property and slightly more than half the cash assets”) (App. Br. 8, 11); *Coons v. Coons*, 6 Wn. App. 123, 126, 491 P.2d 1333 (1971) (affirming on wife’s cross-appeal challenging only a partial award of attorney fees because “it appears that the wife’s need could be fully met from the assets awarded to her by the decree”) (App. Br. 10); *Cleaver v. Cleaver*, 10 Wn. App. 14, 22, 516 P.2d 508 (1973) (vacating award of attorney fees because based on the property division, the wife “is in as good a position to pay her attorney fees as is appellant”) (App. Br. 11).

Equally inapposite are those cases denying attorney fees on appeal based on a determination that the requesting party does not

have the need. *See e.g. Bryant v. Bryant*, 68 Wn.2d 97, 102, 411 P.2d 428 (1966) (App. Br. 8-9 & n.5); *Bang v. Bang*, 57 Wn.2d 602, 611, 358 P.2d 960 (1961) (App. Br. 11); *Thompson v. Thompson*, 9 Wn. App. 930, 937, 515 P.2d 1004 (1973) (App. Br. 11-12). As Rod acknowledges, an award of suit money for appeal is not “to determine in advance that the requesting spouse will receive a fee award at the end of the appeal.” (App. Br. 9)

Even if this Court were to determine that Lori’s need for attorney fees is alleviated by her share of the property once she has full access after the appeal is concluded, Lori’s request for attorney fees on appeal is also based on Rod’s intransigence and the frivolousness of his appeal. “The financial resources of the parties need not be considered when intransigence by one party is established.” *Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999).

c. Without her full property award, the wife had the need for suit money to defend the husband’s appeal.

In any event, Rod is wrong when he claims Lori did not (or was required to) show a “genuine need” for suit money. (App. Br. 10) The trial court was well aware, contrary to Rod’s assertions otherwise, that Lori had not *received* “substantial liquid assets” in

the divorce. (App. Br. 4, 13) The most significant liquid asset awarded to Lori was the money judgment of \$1,171,200, which Rod avoided paying by staying enforcement of the judgment. Other than the judgment, the only other significant asset awarded to Lori was a retirement annuity account, which was not liquid. (Disso. CP 2124: “I would be heavily penalized and taxed due to my age if I were to withdraw from those retirement accounts now and I would also lose death benefits and retirement.”) Lori had already had to draw from her retirement fund because of Rod’s delays in paying spousal maintenance. (Sub No. 662, Supp. CP ___)

Lori withdrew from the account, again with substantial taxes and penalties, to pay her trial attorney, after Rod refused to pay the judgment for his fees. But each time Lori draws from the account, she is assessed taxes and penalties. (Sub No. 662, Supp. CP ___) Under the circumstances, an award of suit money to Lori was wholly proper so that she is not forced to further liquidate retirement funds in order to defend Rod’s appeal.

Lori’s need for suit money to be paid relative to Rod’s ability to pay suit money, is also clear. (App. Br. 14) His choice to sit in jail for five days rather than pay the original partial suit money award does not prove that he lacks the ability to pay her attorney fees (App.

Br. 7), but rather that he has a stronger desire to avoid providing Lori any funds to assist her in defending his appeal. This is proven no less by his decision to spend at least *four times* the \$20,000 he refused to pay for Lori's partial suit money award in his attempt to avoid paying it. (See Sub no. 698, 699, Supp. CP __) There could not be any stronger evidence that the whole point of this exercise was to spend Lori into submission.

That Rod's refusal to pay suit money to Lori is due to the fact that he does not want to, rather than due to a lack of ability to pay, has been recognized *as a matter of fact* by every decision-maker who has considered this issue:

I think that he has contemptuously, willfully disregarded the orders that had been entered to this date. I don't accept that he is unable to pay those orders for all the evidence that has been filed in the case and that was the basis for the decree that was entered earlier this year.

(Yakima County Court Commissioner Tutsch; Disso. RP 1176)

His decision not [to borrow funds to pay the suit money award] leads to an inference that he does not want to fund Ms. VandeGraaf's response to his appeal, despite the superior court's order.

(Court of Appeals Commissioner Wasson; Sub No. 699, Supp. CP __)

Mr. VandeGraaf refuses to pay the remaining suit money because he states he has no money to do so. The superior court does not believe him and has held him in contempt multiple times for his failure to pay. Mr.

VandeGraaf's excuse is that his parents have for the \$350,000 supersedeas bond and his appellate attorney fees in the amount of \$230,000, but they won't pay the "suit money" he has been ordered to pay.

(Court of Appeals Commissioner Wasson; Sub No. 775, Supp. CP __)

But the purpose of the suit money is to allow Ms. Van de Graff to pay the initial costs of her appeal pending a final determination and property distribution. That purpose would be defeated if Mr. Van de Graaf were able to supersede the "suit money" order, depriving Ms. Van de Graff of access to it for the duration of the appeal.

Further, Mr. Van de Graaf's excessive litigiousness makes it unlikely that the \$65,000 bond will cover the ultimate attorney fee award.

(Supreme Court Commissioner Michael Johnston, Sub No. 698, Supp. CP __)

While Lori was left with only half the property awarded to her, and a debt to her trial attorney that Rod had been ordered to pay, Rod has had full use of 100% of the assets awarded to him, including the income-producing community business, and apparently unlimited access to family funds to harass Lori and delay her portion of the receipt of the marital estate. As Lori stated: "I need the suit money to pay my mounting attorney fees to defend myself in the appeal. The financial burden of the appeal and all of the add-ons do not seem to deter Rod one bit. He does not seem to be concerned about the financial burden of the appeal, in the least. I, however, am

very concerned about the mounting cost and how I am going to be able to continue to defend myself in this process.” (Disso. CP 1909)

Finally, Rod’s argument that Lori failed to show a “present need” for suit money because her counsel had already filed her response brief in the dissolution appeal when she sought an additional award is baseless, mendacious, and offensive to both Lori and her counsel. (App. Br. 12-13) Counsel’s willingness to represent a party who is being subjected to financial abuse by her ex-spouse, in an effort to spend her into submission, is not grounds to deny suit money. As Lori asserted, “[u]nless I receive the suit money awarded me, I will not be able to pay my appellate attorney fees.” (Disso. CP 1898) Meanwhile, the fees continue to mount, with no end in sight. (Disso. CP 1909)

As a matter of public policy, an award of attorney fees based on financial need should not depend on the requesting party proving that her chosen counsel will not work unless paid up front. It is particularly pernicious to make such an argument when it is clear that the other party is willing to pay his own counsel (and his own counsel is willing to be paid) many multiples of a suit money award repeating meritless arguments to avoid pay anything to the other party.

3. Because the wife's motion for additional suit money was grounded in law and fact, the trial court did not abuse its discretion in denying the husband's request for CR 11 sanctions.

For the same reasons that the trial court did not abuse its discretion in granting Lori's request for additional suit money due to the "form" of her motion, it also did not err in not sanctioning Lori or her trial counsel under CR 11. (App. Br. 17-20) "Complaints which are 'grounded in fact' and 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' are not 'baseless' claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219-20, 829 P.2d 1099 (1992) (emphasis in original).

As addressed above, an award of additional suit money was "warranted by existing law" under *Stringfellow*. It was also "grounded in fact": by refusing to pay and then staying enforcement of the judgments awarded to Lori, Rod left her without the liquid assets to fund her defense of the appeal. Further, Rod's "excessive litigiousness" increased both Lori's need for, and the amount of, suit money.

Appellant does not cite a single case reversing a trial court's decision not to award CR 11 sanctions. There was nothing "frivolous" about Lori's motion for additional suit money. (App. Br. 20) The only thing frivolous about this motion was Rod's objection that the motion denied him "his due process rights 'notice' and 'opportunity to respond and be heard'" (CP 10), when the motion clearly provided him notice of what was requested, he received the motion a month before it was heard, and he was given notice of when the motion would be heard. (CP 2, 4)

This argument, too, is utterly meritless.

B. This Court should award the wife fees against the husband and his appellate counsel.

The awards of suit money were for Lori to defend the dissolution appeal. They have never been paid. Now she has been forced to go even further in debt responding to this meritless "appeal." This Court should award Lori attorney fees for having to respond to this appeal, based on her need and Rod's ability to pay, and based on the utter lack of merit of this "appeal," which cites no relevant authority to support appellant's baseless arguments. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). To the extent not addressed in the dissolution appeal, this Court should sanction both

Rod and his counsel for their abuse of the appellate rules under RAP 18.9: in first seeking to avoid the partial award of suit money, making nine “emergency” motions in this Court, the superior court, and the Supreme Court, and now challenging the additional award of suit money in this “appeal.”

To be clear what this “appeal” is about, and why this request for fees against appellate counsel is being made: **While refusing to pay Lori’s appellate attorneys \$20,000 in suit money, Rod has paid his appellate counsel over \$230,000.** (Sub No. 775, Supp. CP ___) That Lori needed additional suit money was entirely due to counsel’s litigation tactics, in first facilitating Rod’s refusal to pay the partial suit money award, and then forcing Lori to respond to his non-stop “emergency” motions in the appellate courts, while at the same time depriving her of her full property award.

RAP 18.9 was designed to prevent precisely the type of abuse of the appellate process in which appellant, his family, and his counsel have engaged over the past two years, continuing a campaign of economic bullying that began when the parties separated in July 2011. Rod’s refusal to comply with suit money orders has already been fully documented in this Court. (*See* Sub. No. 698, Supp. CP ___) Rod’s misuse of judicial resources, abetted by his appellate

counsel, not only forced Lori’s counsel to immediately respond to a host of “emergency” motions; the courts have been forced to decide on minimal notice whether to grant an interim stay, set briefing deadlines, and then make room on already-crowded dockets to address the claimed “emergencies” of both Rod and his counsel on the “merits.” See *Guardianship of Cobb*, 172 Wn. App. 393, 406-07, ¶ 23, 292 P.3d 772 (2012) (imposing RAP 18.9(a) sanctions because appeal “has absorbed the efforts and time of both the appellate court and [respondent], for indiscernible benefits to [appellant]), *rev. denied*, 177 Wn.2d 1017 (2013).

Sanctions therefore should be imposed not only against Rod, but his appellate counsel as well. As this Court has recognized, “[c]ourts may order parties and their attorneys to be jointly and severally liable for attorney fees,” based on intransigence. *Marriage of Wixom*, 190 Wn. App. 719, 728, ¶ 19, 360 P.3d 960, 964 (2015) (affirming order making both client and counsel jointly several for attorney fees for intransigence in a parenting plan modification action), *rev. denied*, 185 Wn.2d 1028 (2016). Both Rod and his appellate counsel should be sanctioned for “appealing” the additional suit money award that Rod has not paid, and has made clear that he will not pay. *Bryant*, 119 Wn.2d at 223-24 (like trial

courts, appellate courts have authority to sanction appellate counsel under CR 11; affirming Division One's sanction against respondent's appellate counsel for his unwarranted attempt to disqualify appellant's counsel on appeal). There was no need to "appeal" that award, which will be ultimately decided in the dissolution appeal. Regardless whether this Court grants or denies Lori attorney fees on appeal, the order awarding her additional suit money will be moot. In the likely event that Lori is awarded attorney fees on appeal, the award will be reduced to judgment, rendering the suit money order moot. In the less likely event that Lori is denied attorney fees on appeal, the suit money order will likewise be moot. To the extent that Rod paid any suit money to Lori on that additional award (which he has not), it could be repaid to him by reducing the amount of the judgments owed to Lori. Appealing the additional suit money award unnecessarily caused Lori to incur attorney fees to respond, for which both Rod and his appellate counsel should be responsible.

The response to this request for fees against appellate counsel will likely be, as it has been in motions practice, that Lori simply should not have resisted Rod's motions, and accepted his baseless pleas of poverty. It is Rod's counsel who could have *at any time* refused to continue with their "emergency" motions and

unwarranted claims, advising their client (and his family) that any suit money award could be credited against Lori's share of the marital estate once the appeal was completed. Instead, appellate counsel lined their pockets, on an almost monthly basis, making motion after motion designed to wear Lori and her counsel (and this Court) down. And they were, in large part, successful. Lori still doesn't have her suit money award, her attorneys still have not been paid, and Rod's appellate counsel continues to file meritless "appeals," and meritless briefs in those "appeals."

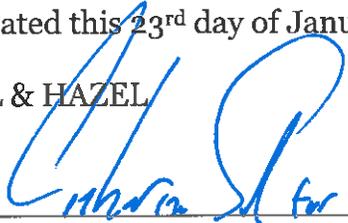
"[A]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop. Sanctions, therefore, are appropriate for lawyers who do not know when to stop." *Wixom*, 190 Wn. App. at 728, ¶ 20 (internal quotation marks and citations omitted). In this case, Rod's appellate counsel should have simply "stopped." Both parties had already fully briefed and addressed whether Lori should be entitled to attorney fees for responding to his appeal as part of the dissolution appeal. In the unlikely event that Lori is denied attorney fees on appeal, there would be no harm to Rod in complying with the additional suit money award because the stayed judgments are a source of repayment to him. Thus, Rod's appeal of the additional suit money

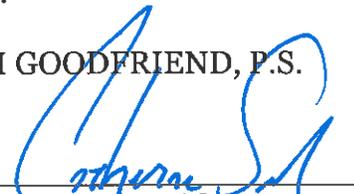
award provides him with no benefit, but only another excuse to wear down his former wife of over 25 years. This Court should put an end to this shameful abuse of the appellate rules.

IV. CONCLUSION

This Court should affirm the trial court’s decision, and award attorney fees on appeal to the respondent.

Dated this 23rd day of January, 2019.

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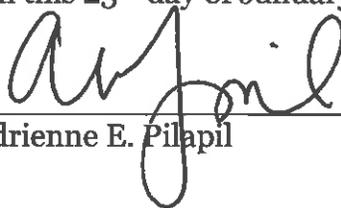
DECLARATION OF SERVICE

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

That on January 23, 2019, I arranged for service of the foregoing Brief of Respondent Re: Suit Money for Appeal, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of January, 2019.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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