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Court of Appeal No. 37263-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

VERITY BATISTA, Respondent,

v.

ALEX SAHA, Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT

Cause No. 14-3-01799-3

The Honorable Timothy J. Fennessy

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED AS ASSIGNMENTS OF ERROR

1. Was there an abuse of discretion by the judge in dismissing the petition?
2. Was there an abuse of discretion by the judge to conclude that Mr. Saha's petition was frivolous, thereby awarding attorney fees?
3. Was there an abuse of discretion by the judge to not revise?
4. Can a judge affirm a commissioner's orders?
5. Did the judicial officers need to find the petition was filed more than two years after the previous child support, and there was a change of incomes?
6. Was there a change in the mother's income, and if so would that alone support a modification of child support?
7. Was the 2016 decision relevant to the decision to dismiss?
8. Was there substantial evidence to find Mr. Saha's income had changed?
9. Was imputation of income required?
10. Did Mr. Saha provide sufficient information for verification of income?
11. Did Mr. Saha willfully fail to meet his burden of proof?
12. Was a finding on all causes for modification necessary to make a determination on dismissal and attorney fees?

B. STATEMENT OF THE CASE

The appellant, Alex Saha, filed a summons and petition to modify child support on November 27, 2018. CP 41-49. This petition requested to modify the child support order from January 15, 2016. CP 6-13.

The prior child support order was a result of a contested trial in 2015. CP 14-40. The respondent, Verity Battista, filed an amended response on December 18, 2018. CP 73-77. In her response, Ms. Battista requested that the petition be denied and indicated she did not agree to a modification in child support, “as Mr. Saha has not corrected the evidentiary deficiencies that caused Judge Moreno to impute income to him in 2016 at the time of trial.” CP 74.

The prior child support order imputed Mr. Saha’s income at \$10,000 per month, net. CP 6-7. The trial judge imputed to Mr. Saha due to his failure to provide adequate evidence verifying his income. CP 28. Mr. Saha was ordered to pay \$1,167.00 per month in child support. CP 9.

Mr. Saha’s Petition to Modify Child Support is based on (1) two years or more have passed and the parents’ income has changed; (2) a substantial change of circumstances since the order was signed asserting his income had substantially decreased and that he was no longer working overseas; (3) he now has to pay state income tax; (4) his child does not visit

him; and (5) the current child support amount caused grave hardship on his household. CP 44-47.

Ms. Battista filed a preliminary motion to dismiss petition pursuant to CR 12 and CR 56 on June 25, 2019. CP 78-111. Ms. Battista asserted that Mr. Saha's income remained unclear regarding what he was receiving from his business. CP 79. Ms. Battista addressed that there were no facts or documentation to support an hourly rate, number of hours worked, whether he is self-employed, or what the business income/expenses included. CP 115.

Ms. Battista asserted that Mr. Saha had failed to meet his burden in demonstrating a change in circumstances. CP 116. In making this motion, Ms. Battista asserted that that the Court should award attorney fees pursuant to CR 11 and/or because of Mr. Saha's ongoing intransigence on the topic of his actual income. CP 116.

The motion to dismiss was denied on August 7, 2019. CP 119-122. The Court found that neither party had provided sufficient information to verify income. CP 121. This order set a hearing on the petition and provided a timeline in which both parties were required to file and serve materials for the court's consideration. CP 122.

Prior to the hearing on child support, Ms. Battista again indicated that Mr. Saha had failed to provide adequate documentation to prove his

actual income. CP 342-367. For example, Mr. Saha failed to provide answers to discovery requests. CP 343. Mr. Saha did not provide paystubs or W-2s for 2018, 2017, or 2016. CP 343.

Ms. Battista asserted that the information she did receive demonstrated Mr. Saha travels repeatedly to Dubai and other parts of Europe. CP 344. Ms. Battista noted that Mr. Saha had transferred money into another account linked to his name and his wife's name. CP 344. Additionally, the tax returns provided by Mr. Saha were unsigned and undated. CP 345. These tax returns did not address any profit and loss statements. CP 345. Finally, Ms. Battista addressed a discrepancy in Mr. Saha's assertion that he was destitute and how Mr. Saha's financial information demonstrated that he rented a residence that offered "Resort Style Living." CP 346.

As to a deviation for another child, Mr. Saha failed to provide any support obligation that he actually pays child support for that child. CP 346.

On October 14, 2019, Spokane County Superior Court Commissioner Jacqueline High-Edwards issued an Order on Petition to Modify Child Support CP 444-449.

Commissioner High-Edwards found that Mr. Saha, as the petitioner party, has the burden to show a change of income of the parents. CP 446. Ultimately, the Court found "With all of these inconsistent statements, lack

of profit and loss statements, comingling of funds with the business and lack of basic expenses being paid from either account, the court cannot find that Mr. Saha has provided all the necessary information to verify his income or cured the issues that plagued him in 2016.” CP 448.

The Court found that it would be “inequitable to allow Mr. Saha to, once again, fail to provide verification of his income and modify child support based on Ms. Battista’s income alone. As such the court declines to do so.” CP 448.

In deciding to dismiss the petition, the court found that Mr. Saha’s continued failure to provide sufficient verification of his income for a second time and after, once again, being allowed to supplement the evidence by the court, the court finds that his petition was frivolous.” CP 448.

Mr. Saha filed a Motion to Revise Commissioner’s Ruling and Notice to Appear on October 23, 2019. CP 724-725. This motion regarded the Court Order on October 14, 2019. CP 724-725.

An Order on Fees was issued on November 13, 2019. CP 722-723. Mr. Saha sought revision of the Commissioner’s November 13, 2019 on that same day. CP 724-725.

On November 21, 2019 the Honorable Timothy B. Fennessy denied the request for revision of the October 14, 2019 Court Order; as well as the November 13, 2019 Court Order; and ordered that additional attorney fees

were appropriate for a continued pursuit of a frivolous petition. CP 727-729. A Judgment and Order Re: Attorney Fees was entered on December 11, 2019. CP 728-730.

C. ARGUMENT

1. Standard of review

Mr. Saha's request should be denied, and the trial court's decision on November 21, 2019 should be affirmed. An order on modification of child support is reviewed for an abuse of discretion, which occurs if the decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 174, 34 P.3d 877 (Div. I, 2001). Discretion is abused when it is based on untenable grounds, including a misunderstanding of law. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007).

A trial court's decision to dismiss an action is reviewed for abuse of discretion. *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 636, 201 P.3d 346 (Div. I, 2009).

Substantial evidence must support the trial court's findings of fact. *Schumacher v. Watson*, 100 Wn.App. 208, 212, 997 P.2d 399 (Div. I, 2000).

“The trial court’s determination regarding CR 11 violations is reviewed only for abuse of discretion.” *Suarez v. Newquist*, 70 Wn.App. 827, 836, 855 P.2d 1200 (Div. 3, 1993).

There was not an abuse of discretion by the trial court in dismissing Mr. Saha’s Petition for Modification of Child Support. There was not an abuse of discretion by the trial court in finding Mr. Saha’s petition as frivolous and awarding attorney fees. Mr. Saha willfully withheld relevant information. Mr. Saha failed to meet his burden to demonstrate a change of circumstances.

2. The petition for modification was properly dismissed.

Mr. Saha did not demonstrate a substantial change of circumstances. His income was unknown in 2015, and it is still unknown. Accordingly, Mr. Saha did not demonstrate a change of circumstance in verifying his income. Mr. Saha has the burden as the petitioning party. Mr. Saha’s petition was properly dismissed. Mr. Saha did not provide verification of income despite given ample opportunity.

The court was not required to impute Mr. Saha’s income. The court properly dismissed the action.

It is within the discretion of a superior court judge to affirm the decision of a court commissioner.

a. Mr. Saha has not met his burden

To prevail on a petition to modify the moving party bears the burden of showing substantially changed circumstances. *In re Marriage of Bucklin*, 70 Wn.App. 837, 839, 855 P.2d 1197 (Div. III, 1993); citing RCW 26.19.170(1)(b). “By contrast a party may adjust an order of child support every 24 months on a change of incomes, without showing a substantial change of circumstances.” *In re Marriage of Scanlon and Witrak*, at 173; citing RCW 26.19.170(8)(a).

Superior Court has broad discretion to modify child support when there has been a substantial change of circumstances. *Goodell v. Goodell*, 130 Wn. App. 381, 388, 122 P.3d 929 (Div. II, 2005). Mr. Saha has the burden to demonstrate a substantial change of circumstances since he initiated the petition to modify child support.

The trial court was correct in considering the prior child support order. A substantial change of circumstances is one that was not contemplated at the time the original order of support was entered. *In re Marriage of Scanlon and Witrak*, at 173. Whether a change of circumstances is substantial depends on its effect on a parent’s monthly net income.” *In re Marriage of Bucklin* at 840.

To prevail on his petition to modify child support Mr. Saha has the burden to demonstrate that there has been a substantial change of

circumstances. In contrast, for an adjustment of support, Mr. Saha still bears the burden to demonstrate a “change in incomes.” *Id.* In either situation, there must at least be a consideration of the prior child support order to determine whether a change has occurred.

Mr. Saha alleges in his petition that the monthly child support amount should be changed because two years or more have passed, and that the parent’s income has changed. CP 44. Further, Mr. Saha alleges that there has been a substantial change of circumstances because “My income has substantially decreased, when I am no longer working overseas. The present order of child support is creating a grave hardship on me.” CP 44. Mr. Saha also requests that he should be relieved from paying for medical insurance because of a substantial change of circumstances. CP. 45-46.

The prior Child Support Order was entered after a contested trial on January 15, 2016. CP 6-13. At that time, Mr. Saha’s income was imputed to \$10,000.00 a month net. CP. 7. Mr. Saha filed the petition to modify on November 27, 2018. CP. 41-49. More than two years have passed since the prior Child Support Order.

Mr. Saha’s assertion that the trial court was focused on the prior decision is wrong. (Appellant’s Brief, P. 11). Rather, it is Mr. Saha who appears preoccupied with the prior trial ruling. This was specifically addressed by the trial court in this matter when the judge questioned Mr.

Saha's counsel "Well, I don't want to get lost in this, but you certainly are not here to ask me to revise Judge Moreno." RP. 6.

Mr. Saha bears the burden to demonstrate that his monthly income has changed. Further, Mr. Saha bears the burden to demonstrate a substantial change of circumstances.

In response to Mr. Saha's petition to modify child support, Ms. Battista filed a Motion to Dismiss Petition to Modify Support. CP 78-111. Ms. Battista asserted that Mr. Saha failed to state a claim upon which relief can be granted by failing to provide verification of income. CP 78. Ms. Battista based this motion on CR 12.

CR 12(b)(6) indicates a defense or counterclaim for "failure to state a claim upon which relief can be granted. "Such motions should be granted 'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). This motion was denied by the Court Commissioner on August 7, 2019. CP 119-122).

In denying the motion to dismiss, the Court found that neither party had provided sufficient information to verify income pursuant to RCW 26.19.072(2). CP 121. Specifically, the Court found "While Mr. Saha's lack of action from November 2018 until the motion to dismiss was filed at

the end of June 2019 is concerning, the Court considering all facts in his petition to be true does not find that there is no basis upon which relief could be granted if Mr. Saha provides all required information.” CP 122.

The order denying the dismissal motion then set a hearing as well as specified timelines in which the parties were to file and serve all materials each party wanted the court to consider. CP 122. Essentially, Mr. Saha was given an opportunity to correct the evidentiary deficiencies to provide verification of income two months prior to the hearing on his petition on October 8, 2019.

Ultimately the Court Commissioner found that Mr. Saha had not provided sufficient verification of income to make a finding that there had been in his income. CP 448. As a result, the Court Commissioner found that the case would be dismissed. CP 448. Further, the Court Commissioner determined that “In addition, due to his continued failure to provide sufficient verification of income for a second time and after, once again, being allowed to supplement the evidence by the court, the court finds that his petition was frivolous.” CP 448.

On revision, the trial court agreed with the Court Commissioner’s decision. RP 32-33. The trial court specifically indicated “I just don’t know how to be more clear than the orders in Commissioner High-Edward’s findings.” RP 32. A superior court trial judge may adopt a commissioner’s

findings of fact as his own and is not required to enter separate findings and conclusions. *In re Dependency of B.S.S.*, 56 Wn.App. 169, 170-71, 782 P.2d 1100 (1989).

Dismissal of the petition was appropriate. CR 41(b) authorizes a trial court to dismiss an action for noncompliance with court orders. *Johnson v. Horizon Fisheries, LLC* at 638. “While dismissal is disfavored, it is justified when a party’s refusal to obey the trial court’s order was willful or deliberate and substantially prejudiced the other party.” *Id.*

Prior to dismissing the matter after a hearing, the court had previously denied such a request to provide further opportunity to Mr. Saha to provide verification of his income. Mr. Saha failed to do so. Mr. Saha’s failure to follow the prior court orders was willful, and substantially prejudiced Ms. Battista.

Mr. Saha filed his petition to modify child support on November 27, 2018. CP 41-49. When Mr. Saha failed to move his petition forward, Ms. Battista moved for a dismissal on June 25, 2019. CP 78-111. Rather than dismiss the action, the court commissioner allowed Mr. Saha to supplement the record. CP 122. Mr. Saha’s failure to provide sufficient verification of income resulted in the decision to dismiss his action after the October 8, 2019 hearing. CP 444-449.

Why does Mr. Saha continue to pursue review of the dismissal of the action? Modification for child support can relate back to installments accruing subsequent to the petition for modification. See RCW 26.09.170(1). Mr. Saha's continued pursuit of a reversal of the dismissal is simply an effort for him to try and relate back his request for a child support modification to November of 2018. The fact that Mr. Saha's litigation strategy ultimately proved unsuccessful does not now require that he receive a new hearing. See *In re Marriage of Lyle*, 199 Wn. App. 629, 633, 398 P.3d 1225 (Div. III, 2017).

Mr. Saha's failure to provide verification of income after having multiple opportunities to supplement the record is an omission of his own making. Mr. Saha should not be allowed to benefit from his deceptions to the court. See *In re Marriage of Dodd*, 120 Wn.App. 638, 645-46, 86 P.3d 801 (Div. III, 2004). RCW 26.09.170(1) "reflects long-settled law in this state that a modification of child support may not operate retroactively." *In re Marriage of Shoemaker*, 128 Wn.2d 116, 121, 904 P.2d 1150 (1995).

The trial court's decision to dismiss the case was appropriate, and the court's decision should be affirmed.

b. The decision was supported by substantial evidence

Mr. Saha's petition to modify child support was dismissed because he failed to provide verification of income. There is substantial evidence to support that finding and conclusion.

"A parent's monthly gross income is determined by considering all income." *In re Marriage of Bucklin* at 840; citing RCW 26.19.071(1). "Income shall be verified by tax returns from the preceding 2 years and current pay stubs; income not appearing on tax returns and pay stubs must be verified by 'other sufficient verification.'" *Id.*; citing RCW 26.19.071(2).

Here, like in *Bucklin*, Mr. Saha's income could not be verified by tax returns and pay stubs. *Id.* at 841. Mr. Saha was put on notice of his failure to provide sufficient verification of income by the Court Order on August 7, 2019. CP 119-122. As a business owner, Mr. Saha's verification of income required additional information for a determination on his income.

Mr. Saha provided no pay stubs. The trial court found that Mr. Saha failed to provide sufficient verification to demonstrate how much income he was receiving from his business. CP 448. Specifically, the court commissioner found: "With all the inconsistent statements, lack of profit and loss statements, comingling of funds with the business and lack of basic expenses being paid from either account, the court cannot find that Mr. Saha

has provided all the necessary information to verify his income or cured the issues that plagued him in 2016.” CP 448.

Mr. Saha was put on notice of these discrepancies as far back as 2016 in the trial court’s ruling. CP 24-29. Mr. Saha was put on notice of specific requests from Ms. Battista in her attempt to verify his income leading up to the hearing. CP 115. Mr. Saha was put on notice by the court that he had not provided sufficient verification of his income at the hearing on August 7, 2019. CP 121.

The court commissioner found that Mr. Saha had commingled his business income. CP 447. Mr. Saha did not provide evidence from his wife’s bank account. CP 446. Mr. Saha failed to provide any profit and loss statements. CP 447. Mr. Saha failed to provide the requested bank statements. CP 447. Mr. Saha indicates that he pays child support for a child in Russia, but failed to provide evidence of that support. CP 446.

The decision to dismiss the action was supported by substantial evidence, and should be affirmed.

c. The court was not required to impute Ms. Saha’s income

The court properly declined to impute Mr. Saha’s income. It is an abuse of discretion for a court to essentially guess at a parent’s income. *In re Marriage of Bucklin* at 841.

Mr. Saha asserts “when a parties income is not ascertainable or the court finds that a party lacks credibility and wants to avoid making findings on the data presented, then the parties’ income is to be imputed.” (Appellant’s Opening Brief, P. 14-15). In *Steele v. Steele*, Division II found that “the legislature has allowed imputation where income verification records have not been provided.” *Steele v. Steele*, 9 Wn.App. 1069 (Div. II, 2019), Unpublished nonbinding authority for persuasive argument only, GR 14.1.

In response to the petition, Ms. Battista specifically requested a dismissal of the action. CP 74. Ms. Battista eventually filed a motion to dismiss. CP 78-111. Ms. Battista did not request that the court impute to Mr. Saha by guessing at his income.

Again, Mr. Saha as the petitioning party has the burden to demonstrate a change of circumstances, and verify his income. Yet, Mr. Saha asserts in his opening brief: “Here, since no past earning data for Mr. Saha is reliable, the only imputation category that could be applied to Mr. Saha is (e), net income at the U.S. medial full time worker level.” (Appellant’s Opening Brief, P. 17-18; citing RCW 26.19.071(6)). This is not a change of circumstances. The same lack of reliable earning information existed in 2015/2016. CP 14-40.

The trial court correctly refused to allow Mr. Saha to file a petition to modify child support and decrease his monthly transfer payment by failing to verify his income. Likewise, the trial court was correct to not allow the petition to move forward when Ms. Battista requested a dismissal of the action rather than allow for a guessing of Mr. Saha's income through an imputation. This decision to dismiss was within the discretion of the trial court.

The January 15, 2016 Child Support Order requires that Mr. Saha pay a transfer payment of \$1,167.00 a month. CP 8. This calculation was based on Mr. Saha having an imputed monthly net income of \$10,000.00, and Ms. Battista having an actual monthly net income of \$2,786.00. CP 7-8.

In preparation for the October 8, 2019 hearing, Ms. Battista provided a Child Support Worksheet in which she had a monthly net income of \$3,966.71. CP 157. Since Ms. Battista could not verify a change of income from Mr. Saha, her Child Support Worksheet provided that Mr. Saha remain at the imputed amount of \$10,000.00. CP 157. This proposal by Ms. Battista provided Mr. Saha with a proportional share of .716, and Ms. Battista with a proportional share of .284. A standard calculation for a one child family resulted in Mr. Saha's monthly child support transfer being reduced to \$1,126.27 a month. CP 158. See RCW 26.19.020.

Ms. Battista proposal has an imputation for Mr. Saha at “Full-time earnings at a past rate of pay where information is incomplete or sporadic.” RCW 26.19.071(6)(c). Rather than allow for Mr. Saha to have a nominal decrease from \$1,167.00 to \$1,126.27, Ms. Battista continued with her request that Mr. Saha’s petition be dismissed due to his failure to meet his burden of a change of circumstances.

In determining not to modify based on Ms. Battista’s income, the court found “it would be inequitable to allow Mr. Saha to, once again, fail to provide verification of his income and modify child support based on Ms. Battista’s income alone. As such the court declines to do so.” CP 448. “The burden of proof establishing the equitable nature of the circumstances is upon the one who has the obligation to pay.” *Schafer v. Schafer*, 95 Wn.2d 78, 82, 621 P.2d 721 (1980). Mr. Sah has not met his burden.

A change of income alone, if large enough, may be adequate basis for a modification of child support. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. At 173-174.

The trial court was not required to impute Mr. Saha’s income. The trial court was not required to move forward on the petition on a nominal change in Ms. Battista’s income alone. The decision to dismiss the action when Mr. Saha had the burden of proof was within the trial court’s decision.

3. The petition to modify child support was frivolous and attorney fees were appropriate.

“In any civil action, a court may award attorney fees if the action was frivolous and advanced without reasonable cause.” *In re Recall of Piper*, 184 Wn.2d 780, 786, 364 P.3d 113 (2015); citing RCW 4.84.185. “Under CR 11, sanctions are available against a litigant for filing a claim for an improper purpose, or if the claim is not grounded in fact or law and the signing litigant failed to conduct a reasonable inquiry.” *Id.* at 787.

A finding of a frivolous claim is to “discourage frivolous lawsuits and to compensate the targets of such lawsuit for fees and expenses incurred in fighting meritless cases.” *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (Div. II, 1999); citing *Biggs v Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). Attorney fees are available only when the action is advanced without cause and the action as a whole can be deemed frivolous. *Id.*

Mr. Saha asserts that there was not a specific law cited for an attorney fee award. See Appellant’s Opening Brief, P. 18. This is not accurate. Ms. Battista specifically asserted that the petition should be dismissed and that attorney fees should be awarded. CP 78. Ms. Battista specifically asserted that that the Court should award attorney fees pursuant to CR 11 and/or because of Mr. Saha’s ongoing intransigence on the topic

of his actual income. CP 116. “Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one’s actions.” *In re Marriage of Bobbitt*, 135 Wn.App. 8, 30, 144 p.3d 306 (Div. II, 2006). Ms. Battista also responded to the petition by claiming that the matter should be denied due to ongoing evidentiary deficiencies. CP 74. Ms. Battista renewed her request for attorney fees leading up to the hearing on October 8, 2019. CP 347.

Mr. Saha’s petition is frivolous because it was brought in bad faith. Mr. Saha’s petition is frivolous because Mr. Saha failed to follow court orders on providing verification of income. Mr. Saha’s petition is frivolous because it continues a pattern of harassing conduct that Mr. Saha has exemplified for years. Mr. Saha’s petition is frivolous as it caused unnecessary attorney fees for Ms. Battista.

a. Mr. Saha’s petition was brought in bad faith

CR 11 and the court’s inherent equitable powers authorize the award of attorney fees when petitions are intentionally frivolous and filed in bad faith. *In re Recall of Piper* at 787.

The court commissioner found that “due to his continued failure to provide sufficient verification of his income for a second time and after, once again, being allowed to supplement the evidence by the court, the court finds that his petition was frivolous.” CP 448.

Mr. Saha failed to provide sufficient verification of income causing the court to impute his income after a trial in 2015. CP 14-40. Mr. Saha filed his petition to modify child support on November 27, 2018. CP 41-49. When Mr. Saha did not provide verification of income by June 25, 2019, Ms. Battista filed a motion to dismiss the petition. CP 78-111. The Court specifically found that Mr. Saha had not provided verification of income on August 7, 2019. CP 121. Mr. Saha was given two additional months to provide material for the court's consideration. CP 122. Mr. Saha failed to provide sufficient verification. CP 448.

The record contains substantial evidence that Mr. Saha's dishonesty rendered his claimed income unverifiable. *See In re Marriage of Dodd*, 120 Wn.App. 638, 646, 86 P.3d 801 (Div. III, 2004). Mr. Saha's repeated obstruction and foot dragging highlights the bad faith of his petition. *See In re Marriage of Bobbitt*, at 30.

Additionally, Mr. Saha's harassing behavior throughout the litigation demonstrates the bad faith nature of his petition. For example, Ms. Battista was followed despite there being a restraining order. CP 343-344.

The decision to hold Mr. Saha's petition as frivolous was within the discretion of the trial court and is supported by substantial evidence.

b. This is not a matter of first impression

This case is not an issue of first impression. Mr. Saha asserts that that this is a matter of first impression, and therefore cannot be frivolous. See Appellant's Opening Brief, P. 22; citing *Moorman v. Walker*, 54 Wn.App. 461, 466, 773 P.2d 887 (1989). For example, in the *Matter of Marriage of Lyle*, the court affirmed a superior court judge denying to revise a superior court commissioner's decision to dismiss a petition to modify child support. *Matter of Marriage of Lyle* at 631.

Further, Mr. Saha's argument that this is a matter of first impression simply misses the point. The trial court found that Mr. Saha's petition was frivolous and agreed with the court commissioner's findings. The court commissioner was clearly concerned with Mr. Saha's repeated bad faith efforts to request a modification of child support without providing verification of income.

c. Substantial evidence supports the decision that Mr. Saha's petition was frivolous

"The decision of whether to award attorney fees for a frivolous lawsuit is within the trial court's discretion and we will not disturb the court's decision absent a clear showing of abuse." *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn.App. 376, 386, 149 P.3d 427 (Div. II, 2006).

Mr. Saha asserts that the court did not address other issues concerning whether there was a substantial change of circumstances. See Appellant's Opening Brief, P. 22-26.

Again, a substantial change of circumstances is one that was not contemplated at the time the original order of support was entered. *In re Marriage of Scanlon and Witrak*, at 173-174. "The mere passage of time and routine changes in incomes do not constitute a substantial change in circumstances." *Id.* at 173.

The court correctly determine that Mr. Saha failed to meet his burden in demonstrating that there not a change of circumstances. CP 448. In determining that Mr. Saha failed to verify his income, the court was left unable to determine if there would be a substantial change of circumstances. Mr. Saha's additional factors such as moving to California were nothing more than a passage of time that was within the trial court's discretion that Mr. Saha failed to state a claim upon which relief can be granted.

In making the determination that the matter was frivolous, the court ultimately determined that Mr. Saha failed to provide sufficient verification of income. Due to Mr. Saha's failure the court was not in a position to make a determination of a substantial change of circumstances.

d. Mr. Saha was put on notice of the attorney fee request.

A prevailing party may receive expenses for opposing frivolous actions. See RCW 4.84.185. Mr. Saha asserts that the statutory process was not followed regarding the award of attorney fees for frivolous action because Ms. Battista did not file a motion for attorney fees “after” the petition was dismissed. See Appellant’s Opening Brief, P. 27.

In the Order on Petition to Modify Child Support issued on October 14, 2019, the court commissioner required Ms. Battista to “provide a cost bill within 10 days of this order.” CP 448. Further, Mr. Saha was given the opportunity to provide a response within 10 days after Ms. Battista’s submission for the court to make a determination on attorney fees.

A party against whom fees are awarded must have the opportunity to contest the necessity of the legal services provided and the reasonableness of the fees claimed for those services. *Reid v. Dalton*, 124 Wn. App. 113, 124, 100 P.3d 349 (Div. III, 2004).

Ms. Battista filed a Declaration Re: Attorney Fees/Costs on October 21, 2019. CP 450-477. The court commissioner issued a letter on October 21, 2019 requested an unredacted submission of the attorney fees from Ms. Battista. CP 478. Ms. Battista filed a second Declaration Re: Attorney Fees/Costs on October 21, 2019 due to redactions in the first request. CP 481-508. Mr. Saha filed an “Exhibit A to Response to Atty Fees Request” on November 4, 2019. CP 509-687. Mr. Saha also filed a “Response to Atty

Fees Request” on November 4, 2019. CP 688-721. Clearly, Mr. Saha had the opportunity to respond to the amount of attorney fees prior to the Order on Fees that was entered on November 13, 2019. CP 722-723.

Regarding Mr. Saha’s response, the court commissioner found “In his objection, Mr. Saha appears to object to being assessed for fees associated with Ms. Battista’s failed motion to dismiss the petition. Primarily, however, Mr. Saha raises new arguments related to the merits of the case. His primary argument is that Ms. Battista failed to provide full disclosure of all her bank accounts and business income. Mr. Saha did not file a motion to reconsider.” CP 723. Ultimately, the court found that Ms. Battista’s attorney fees were reasonable. CP 723.

e. There was no impermissible biasness against Mr. Saha

Mr. Saha asserts that there is impermissible biasness against him, and that he has received disparate treatment. See Appellant’s Opening Brief, P. 28. Mr. Saha relies upon *Johnson v. Department of Social and Health Services*, which indicates to establish a prima facie case of racial discrimination due to disparate treatment he must show that he was treated less favorably than others because of his race.” *Johnson v. Department of Social and Health Services*, 80 Wn.App. 212, 907 P.2d 1223 (Div. II, 1996).

Mr. Saha’s counsel claimed that he had been treated differently by a prior judicial officer in 2016 because the decision “is based on either

prejudice or something inappropriate.” RP 18. At that point, the Honorable Timothy J. Fennessy directly addressed the accusation made by Mr. Saha’s counsel, and found no evidence supporting the assertion of disparate treatment. RP 19-20.

Mr. Saha’s effort to argue that the dismissal of his action, or that the attorney fees were unreasonable because of his minority status only further demonstrates the frivolous of his request. There is no evidence that Mr. Saha was treated in a disparate fashion. His request should be denied.

4. Mr. Saha should pay attorney fees on appeal

Ms. Battista is requesting that Mr. Saha pay her attorney fees regarding this appeal. RAP 18.1(b) indicates that a party must devote a section of its opening brief to the request for the fees or expenses. See RAP 18. Further, a party may be issued attorney fees if authorized by applicable law. *In re Marriage of Raskob*, 153 Wn. App. 503, 520, 334 P.3d 30 (Div. I, 2014).

At the trial court level, Ms. Battista was awarded attorney fees due dismissal of Mr. Saha’s petition to modify being frivolous. CP 448, see also CP 722-723. RCW 4.84.185 allows for a prevailing party to receive expenses for opposing frivolous actions. See RCW 4.84.185.

Furthermore, Mr. Saha continued pursuit of review of a frivolous action is further demonstrated by a frivolous appeal pursuant to RAP

18.9(a), and CR 11. Mr. Saha provides no factual argument in asserting disparate treatment by the trial court. Mr. Saha's continued efforts in this matter have been made in bad faith, and should result in an award of attorney fees. "An appeal is only frivolous 'if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.'" *State v. Parada*, 75 Wn. App. 224, 235, 877 P.2d 231 (Div. I, 1994).

Mr. Saha continues to further a frivolous action with his appeal. It is not debatable that Mr. Saha failed to provide verification of his income. It is not debatable that Mr. Saha was given opportunity to respond to attorney fee award. Mr. Saha's accusations about impropriety against Judge Moreno, Judge Fennessy, and Commissioner High-Edward are simply inappropriate.

Finally, RCW 26.09.140 allows for "upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party maintaining the appeal and attorneys' fees in addition to statutory costs." See RCW 26.09.140. "In exercising discretion under this statute, we consider the arguable merit of the issues on appeal and the parties' financial resources." *In re Marriage of Raskob* at 520.

Mr. Saha's determined net income has been \$10,000.00 a month. CP 7. Ms. Battista will file a financial declaration pursuant to RAP 18.1(c).

Ms. Battista has the need for attorney fees, and Mr. Saha has the ability to pay.

Mr. Saha should pay for Ms. Battista's attorney fees for defending this appeal.

D. CONCLUSION

Mr. Saha's petition was properly dismissed. Mr. Saha failed to meet his burden to demonstrate a change of circumstances. Mr. Saha failed to provide sufficient verification of his income despite being afforded multiple opportunities by the trial court.

In dismissing the petition, the trial court correctly found the petition to be frivolous. Mr. Saha's petition was brought in bad faith. Mr. Saha was on notice of Ms. Battista's request for dismissal and attorney fees.

Mr. Saha was given an opportunity to respond to the amount of attorney fees following the dismissal of the petition. The amount of attorney fees was reasonable, and the amount is not objected by Mr. Saha on appeal.

Mr. Saha was not discriminated against. Mr. Saha's assertion that he was discriminated against in a trial that occurred in 2016 has no basis in law or fact.

Mr. Saha has the ability to pay attorney fees regarding the appeal. Mr. Saha, and his counsel, have continued to further a frivolous action

through this appeal. Mr. Saha should be ordered to pay Ms. Battista's attorney fees.

Respectfully submitted this 15th day of May, 20202.



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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Respondent's Brief with postage paid to the indicated parties:

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