COURT OF APPEALS NO. 31365-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DOUGLAS CHARLES LEE,	)	
	)	
Appellant,	)	
	)	Court of Appeals No.31365-4-III
vs.	)	Sup. Ct. No. 10-3-03046-6
	)	
JAIME LYNN STILLMAN,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

RESPONSIVE BRIEF OF THE RESPONDENT

Ellen M. Hendrick, WSBA #33696
Law Office of Ellen M. Hendrick
1403 West Broadway Avenue
Spokane, Washington 99201
Attorney for Respondent Stillman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

A. RESPONDENT'S STATEMENT OF THE ISSUES

Ms. Stillman sets forth her statement of issues and the case as follows:

Issue # 1: Whether the standard of review for the issues before this Court is de novo or abuse of discretion?

Issue # 2: Whether Mr. Lee's assignments of error and issues for appeal inappropriately ask this Court to presume facts that are unsupported by the evidence in the record?

Issue # 3: Whether the trial court abused its discretion when, based upon the evidence Mr. Lee presented a trial, it declined to find Ms. Stillman had engaged in intransigence and ordered Mr. Lee to pay a portion of Ms. Stillman's attorney fees?

Issue # 4: Whether the trial court abused it discretion when it did not address, *sua sponte*, issues not raised in Mr. Lee's post-trial motion for clarification (i.e., whether Ms. Stillman was intransigent, precluding an attorney fee award in her favor)?

Issue # 5: Whether the court abused its discretion when it excluded tax deductions in the calculation of Mr. Lee's net monthly income for child support purposes when Mr. Lee failed to produce tax returns for the parties' 9/10/12 trial, but post-trial attempted to introduce copies of his 2011 and 2010 returns for the first time with his 10/5/12 Motion for Clarification (or CR 52/54 amendment) on IRS Deductions?

Issue # 6: Whether the trial court abused its discretion when on 10/24/2012, pursuant to Mr. Lee's 10/5/12 post-trial Motion, in which Mr. Lee alleged for the first time that there was an "agreement between counsel," the trial court declined to find there had been a pre-trial agreement regarding the calculation of Mr. Lee's income for child support purposes?

Issue # 7: Whether attorney fees should be awarded to Ms. Stillman pursuant to statutes or on the basis of intransigence?

Issue # 8: Whether sanctions are warranted for Mr. Lee's non-compliance with the RAPs and on the basis of frivolity?

B. RESPONDENT'S STATEMENT OF THE CASE

On December 10, 2010, Ms. Stillman filed a Petition to establish a parenting plan/child support for the parties' four-year-old son DL. CP 1-19. After counsel appearance, Ms. Stillman amended her proposed parenting plan, and alleged RCW 26.09.191 factors. CP 25-31. Mr. Lee filed another Response and his own proposed parenting plan. CP 32-51. On April 27, 2011, the Commissioner entered a temporary plan as follows:

> The first two visits ... shall occur with Sue Elg or another ... counselor, to be arranged ... by the father, and the next two visits ... at Fulcrum...(3) If no problems are identified, then the father's proposed parenting plan is adopted ... The family counselor ... and Fulcrum visits will each occur **in a week**. (1 week family counselor, 1 hour each x 2) (Next week Fulcrum 2 hours each)... CP 74-5. [Emphasis added]

The next day, Mr. Lee filed a motion to compel conformity with the 4/27/11 Order, to be heard in ex parte. CP 77-78, 82-86. Mr. Lee did not allege intransigence, or ask for fees. CP 77-78. He did not designate for this Court the 4/28/11 pleadings, nor did he provide a transcript.

On May 3, 2011, Mr. Lee filed another Motion to compel re: the 4/27/11 order, to be heard that day in ex parte. CP 93-108. He did not allege Ms. Stillman was intransigent and did not ask for fees. Mr. Lee has not provided a transcript to this Court of those proceedings.

On May 11, 2011, Mr. Lee filed a third Motion to compel with regard to the 4/27/11 order (regarding Fulcrum visits), to be heard ex parte

that day. CP 118-125. He did not allege that Ms. Stillman engaged in any intransigent conduct, nor did he ask for attorney fees. CP 118-119. The ex parte hearing was stricken pursuant to agreement. CP 126-127.

On 5/9/11, Ms. Stillman's counsel filed a motion to revise the 4/27/11 order. CP 114-16. Mr. Lee moved to strike it procedurally. CP 140-145. Ms. Stillman's attorney amended the motion; Mr. Lee moved to strike it. CP 149-150. Five days later, on 5/24/11, Ms. Stillman's attorney again amended the motion and renoted it for hearing on 5/26/11. CP 153-154. That day, Mr. Lee's counsel moved to strike the renoted motion and asked for fees. CP 151-152. The hearing on revision was stricken on May 26, 2011, but the reasons are not discernable from the record Mr. Lee designated for review, and his fee request was not granted. CP 161.

On May 26, 2011, Ms. Stillman had to file a motion for time with the child during her vacation, as Mr. Lee did not respond to her about it. CP 155-158. They reached agreement, and the hearing was stricken. CP 191-192. On 6/8/11, Mr. Geissler withdrew as Ms. Stillman's lawyer. CP 193-194. After that one month of activity, activity on the case stopped.

Over a year later, on 8/31/12, Ms. Stillman's new counsel, Ellen Hendrick, moved to continue trial and extend the discovery cutoff date, as Mr. Lee had not responded to Ms. Stillman's discovery served on 2/11/11. CP 250-270. Ms. Stillman stated her attorney contacted Mr. Lee's attorney

on 8/28/12 and asked for pay statements, tax returns and W-2s for the past two years, but Mr. Lee only filed a single pay statement for 3/20/12 and his 2011 W-2. CP 253-54. The only trial issues were child support and attorney fees; it was imperative that Mr. Lee produce his pay statements, tax returns, W-2s and any other income documents. CP 250-270. Ms. Hendrick tried to schedule a CR 26(i) conference. CP 282-289, EXs A, B, and C. In an email to Mr. Mason on 8/31/12, Ms. Hendick asked, CP 289:

> Why will your client simply not provide what the statute requires in time for me to prepare for trial? It has been a year and a half since this matter was commenced!!!!

Mr. Lee did not file a sanctions motion for alleged refusal to comply with CR 26(i), as he alleged. Opening Brief at 15. Mr. Lee cites to Ex. D in CP 498-519 to support the claimed motion. But CP 498-519 is Mr. Lee's 10/29/12 second post-trial reconsideration motion; its Ex. D is merely a 9/4/12 email between counsel. Only after Ms. Stillman moved to continue the trial and discovery cutoff dates did Mr. Lee produced pay statements (in addition to the 3/20/12 statement previously provided). CP 290-310.

Counsel prepared a joint Trial Management Report listing disputed issues as "Child Support, whether or not an upward deviation should be ordered in the support transfer payment amount, and attorney's fees." CP 311-15. Intransigence was not listed, nor was enforcement of an alleged settlement agreement. CP 312. The parties also listed trial exhibits and

exchanged exhibit notebooks. CP 312-313, EX P-1 - PS, and EX R-101-R-106. Of significance is Ms. Stillman's Exhibit P-3. CP 312, EX P-3. This exhibit was Ms. Stillman's proposed child support worksheet. Id. The worksheet did not give Mr. Lee credit for tax deductions. Id. Mr. Lee did not submit returns for any years for review, did not submit pleadings or other documents filed with the trial court prior to the 9/10/12 trial, and did not submit copies of pre-trial email communication for consideration.

Trial in this matter occurred on 9/10/12. CP 317-319. During trial, all the parties' listed exhibits were admitted. Neither attorney objected to the admissibility of any exhibits, or made any pre-trial motions.

Intransigence: In his opening statement Mr. Mason did allege Ms. Stillman was intransigent and caused an increase in fees. RP 9/10/12, pg. 11, lines1-25. In direct examination of Mr. Lee, Mr. Mason did ask whether motions were filed to ensure Mr. Lee could visit the child. RP 9/10/12, pg. 81. But Mr. Lee did not offer court documents to verify the claim he had to take Ms. Stillman to ex parte twice to get visits. Nor did he offer previously-filed court documents verifying Mr. Lee had to threaten a third. In his cross-examination of Ms. Stillman, Mr. Mason asked:

> Q. Did you initially resist [the] order that supervised visits begin?
> A. I didn't resist. I wasn't happy about it, but I didn't resist.
> Q. Was it necessary to go to court to get those to occur?
> A. Yes.
> RP 9/10/12, pg. 142, lines 15-21.

At no time when cross-examining Ms. Stillman did Mr. Mason offer evidence that Ms. Stillman resisted the 4/27/11 order. At no time did Mr. Mason introduce evidence that Mr. Lee had to go to court to get visits to occur. Id. Nor did Mr. Lee produce, or seek admission of, documents to verify he incurred fees because of Ms. Stillman's alleged intransigence.

Tax Deductions: At trial, Ms. Hendrick asked Mr. Lee if he was aware he needed to provide tax returns to verify income and deductions:

> Q. Mr. Lee, you are aware that we were going to be addressing child support at this hearing today. Correct?
> A. Yes, ma'am.
> Q. Were you also informed that you needed to provide verification of your income?
> A. Yes, Ma'am.
> Q. Okay. Were you informed that that verification in part requires you to provide tax returns for the past two years?
> A. Yes, ma'am.
> Q. Okay. Did you bring any tax returns with you for the past two years?
> A. Just my W-2s.
> Q. The question was, did you bring any tax returns with you?
> A. No.
> RP 9/10/12, pg. 23, lines 4-19.

Contrary to Mr. Lee's testimony, Id., pg. 24, lines. 1-2, he only provided a copy of a 2011 W-2. Mr. Lee also disclosed he had not paid taxes for 2009, 2010, or 2011. Id., pg. 24, lines 15-23. After a break, Mr. Mason provided copies of Mr. Lee's 2009 and 2010 W-2s, admitted as R 107. Id., pg. 56, lines 18-25, pg. 57, line 1. In spite of admission of these W- 2s, counsel did not elicit testimony from Mr. Lee about them. Despite

taking time at lunch to create new proposed support worksheets (admitted as R 108), counsel only elicited testimony from Mr. Lee about calculations for Ms. Stillman's income, not Mr. Lee's. Id., pgs. 85-86. Mr. Mason did not ask Mr. Lee about the calculation of his income in Mr. Lee's proposed worksheets, nor did Mr. Lee provide testimony related to tax deductions. Mr. Lee gave no reasons for why he failed to provide tax returns for trial.

Alleged settlement agreement: Prior to trial, Mr. Lee had Ms. Stillman's trial exhibits. Exhibit P-3 was her proposed support worksheet where she calculated Mr. Lee's net monthly income without credit for tax deductions. EX P-3. After the lunch break at trial, Mr. Lee proffered his 2009 and 2010 W-2s, and counsel stated he misunderstood what was needed: "I had misunderstood Ms. Hendrick last week that she has enough to go on, and when the W-2s came in the end of last week, I didn't provide those; now I did." RP 9/10/12, pg. 56. [Emphasis added].

Opening Statement: Even though he was on notice Ms. Stillman did not include tax deductions for Mr. Lee, in his opening statement, Mr. Mason did not discuss the calculation of Mr. Lee's tax deductions when discussing his income. Nor was there a claim of a pre-trial "agreement" between attorneys in which Ms. Stillman's attorney allegedly conceded there was no prejudice to Ms. Stillman if taxes were deducted from Mr. Lee's gross income despite Mr. Lee's failure to produce tax returns. Id.

In his direct examination of Mr. Lee, Mr. Mason did not elicit any testimony about an alleged "agreement between counsel" regarding the calculation of Mr. Lee's net monthly income. Mr. Mason did not elicit testimony from Mr. Lee concerning Mr. Lee's alleged "reliance" upon an alleged "agreement" of counsel.

When Ms. Hendrick elicited testimony from Ms. Stillman about the calculation of Mr. Lee's monthly gross and net income without credit for tax deductions, as set forth in Exhibit P-3, Mr. Mason did not object or claim unfair surprise or breach of any agreement, or ask for a continuance. When he cross-examined Ms. Stillman about her worksheet, admitted as Exhibit P-3, he asked no question about an alleged agreement between counsel. He asked Ms. Stillman about incomes and tax withholdings set forth on Mr. Lee's 2009, 2010, and 2011 W-2s, but did not ask if she would be prejudiced by allowing Mr. Lee's net income calculation to be based in part upon a credit for tax deductions. Id., pg. 138- pg. 140, line 6.

Lastly, in closing argument, Mr. Mason did not object to Ms. Stillman's calculation of Mr. Lee's net income excluding deductions for taxes; argue about an alleged agreement between counsel; object on the basis of breach of an agreement; or argue there was an alleged concession by Ms. Hendrick regarding the calculation of Mr. Lee's net income.

On 9/11/11 the court made oral findings and rulings that set the parties' incomes and ordered Mr. Lee to pay a portion of Ms. Stillman's fees. RP 9/11/12, pgs. 165-178; CP 317-319. The court relied, in part, on Ms. Stillman's exhibit P-3 to calculate gross and net monthly incomes. RP 9/11/12 pg. 167, line 16 -pg. 168, line 2. The court wanted 2 support worksheets drafted, one for 2012 and one from 2013 forward. RP 9/11/12 pg. 167, ln 16- 18; pg. 168, lines 3-8. The Court calculated Ms. Stillman's income for the rest of 2012 pursuant to her actual earnings/deductions, and determined her net monthly income was $2,568.37. RP 9/11/12, pg. 167, lines 17-25. The court ordered Ms. Stillman's income starting in 2013 to be based on income imputed to Ms. Stillman at her hourly rate, full time. RFP 9/11/12, pg. 168. The court used Mr. Lee's 2011 W-2 with annual income of $94,118 and held Mr. Lee's gross monthly income was $7,843. RP 9/11/12 pg. 168, lines 15-23. The court found Mr. Lee's net income should be calculated by deducting FICA and union dues but not taxes. RP 9/11/12, pgs. 167 line 16-pg. 169 line 7; pg. 175, lines 21-25; pg. 176, lines 1-2. The Court did not credit Mr. Lee for day care expenses, long distance transportation, or health insurance, RP 9/11/12, pg. 170, ln 6-11:

> I didn't see evidence of dad's existing contribution to day care....There certainly was evidence of an $800 lump sum prior to child support order in place, but there was no testimony that broke out what portion of the child's medical/health coverage was in dad's premium allotment.

As to day care, the Court ordered each party to pay according to income. Id. pg. 171, lines 7-9. Regarding attorney fees, the court ruled:

> [T]he wife testified that she has paid $1,500 initially to Ms. Hendrick, and that came from a loan from her mother, and Exhibit 7 established she still owed $4, 575.88. In considering the question of awarding attorney fees to one party or the other, the Court must take into consideration each of the parties' financial needs and their ability to pay the attorney fees that they have been required to incur. As I'm reviewing Exhibit 106, which was the Mason invoice for dad's attorney fees, I am satisfied that the subtotal amount of$878.90 did not include time running through the pretrial conference trial dates' actual time, was an estimate. And recognizing that there was also likely a prior payment to prior counsel, the amount of attorney fees is likely going to be significant for Mr. Lee as well. However, as it relates to the current situation, the dad is living with his parents, and his current status, although he's providing assistant to ailing dad and probably both parents who need more assistance now than they have in the past, has freed up a significant amount of cash flow, if you will, and cost savings in his residence, his living expenses, and the one-time obligation for assistance with attorney fees is just that. That won't be recurring. The wife does need her attorney fees paid, and it will be quite some time before she's able to build up any resources to be able to satisfy that obligation. RP 9/11/12l pg.172, line 7-pg, 173, line 14.

The court also considered the motions filed early in the case and balanced costs to Mr. Lee for those motions against "the determination of the Court was somewhat hindered by the less than forthcoming evidence on dad's income." Id., pg. 175, lines 3-5. When asked, Mr. Mason stated he had no questions regarding the Court's ruling. Id., lns 15-18. The court asked Ms. Hendrick to prepare final documents. Id. pg. 172, lines 4-6.

Post-Trial Filings: On 9/26/12, 16 days post trial, Mr. Lee filed his 2011 tax return, an employer declaration regarding 2012 deductions, and final papers (that the court ordered Ms. Stillman to prepare). CP 324-57. On 9/27/12, Mr. Lee filed another copy of his 2011 return. CP 358-62. Ms. Stillman had to file a motion to strike filings, and for sanctions. CP 396-403. She filed final proposed orders on 10/3/12. CP 366-95.

Mr. Lee also filed post-trial motions. On 10/5/12, Mr. Lee filed a Motion for Clarification/Amendment of the Court's 9/11/12 Oral Rulings, citing CR 26, 52, and 54. CP 406-420. For the first time, Mr. Lee alleged there was an enforceable agreement between counsel about the calculation of Mr. Lee's net monthly income, and Ms. Stillman was seeking, through court rulings, a discovery sanction in the form of exclusion of a deduction from his gross monthly income for taxes in calculating net income. CP 408-413 and 419. Mr. Lee's Motion was an attempt to present evidence post-trial that he failed to provide at trial. He argued CR 59(a)(4), "newly discovered evidence," allowed him to submit post-trial tax filings and a declaration from his employer. CP 410, lines 18-21. Nowhere in Mr. Lee's Motion did he ask the Court to reconsider its rulings with regard to Ms. Stillman's alleged intransigence or the Court's award of attorney fees to her. CP 406-420. Mr. Lee noted his motion to be heard on 10/24/12; at the same time as the previously set presentment hearing for final orders.

On 10/15/12, Ms. Stillman's attorney responded to the 10/5/12 motion and asked for sanctions and attorney fees pursuant to RCW 26.26.140. CP 423-427. On 10/16/12, (36 days post-trial), Mr. Lee filed a copy of his 2010 tax return. CP 428-430. On 10/18/12, Mr. Lee filed a Memo Rebutting Petitioner's Counsel's Declaration. CP 431-438. In the memo, Mr. Lee argued discovery cut-off violations by Ms. Hendrick, the non-viability of Ms. Stillman's pre-trial motion for order that extended discovery and compelled discovery from Mr. Lee, additional claims about the alleged agreement of counsel, and waiver by Ms. Stillman of her right to obtain answers to her previously filed discovery. CP 431-438.

On 10/24/12, the court adopted Ms. Stillman's proposed papers, with minor changes. CP 442-468. The worksheets were those Ms. Stillman proposed, and did not include deductions from Mr. Lee's gross monthly income for taxes; as Mr. Lee failed to provide verification of taxes he paid at trial, when he failed to provide copies of the past three years of his tax returns; as required by RCW 26.19.071(2) and the Joint Trial Management Report. EX R-101-R 108, CP 114.

In addition, on 10/24/12, the court reviewed the transcript of its 9/11/12 immediate, post-trial oral rulings. CP 472. At no time during the 10/24/12 hearing did Mr. Mason ask the court to reconsider Ms. Stillman's alleged pretrial intransigence. His only comment was:

> We faced horrible allegations at the outset, a bunch of litigation from Mr. Geissler that Commissioner Grovdahl then ignored. We had the litigation to get the visits occurred that Commissioner Grovdahl Ordered. ... The only thing that we would really be either hoping the Court didn't say or asking the Court to reconsider would be the issue of sanctioning him by excluding income tax when Ms. Hendrick had indicated she could calculate net income when Jamie Stillman acknowledged he would be paying income tax. RP 10/24/12, pg. 15- pg. 16.

Also on 10/24/12, the court denied Ms. Stillman's motion to strike, in part, but also ordered Ms. Stillman could ask for fees for having to respond to Mr. Lee's 10/5/12 Motion. RP 10/24/12, pg 29, ln 3 - pg.33, ln 19. CP 439. CP 440-441. The court stated, id. pg. 18, lines 4-9:

> ... a large part of the Court's ruling was based on the fact that there had been no production pursuant to discovery of the type of financial information necessary to produce at a minimum the statutory required considerations, findings, conclusions and order.

In referencing Mr. Lee's newly filed tax returns for 2010 and 2011 and whether they were "newly discovered evidence," the court found that,

> If one were to look just at the tax returns, again, the Court really cannot determine that to be newly discovered. They are more likely newly created. ... Rule 59 has not been satisfied by facts presented here. The Court was very clear that a fundamental principle underpinning the financial determinations in trial was the absence of information that could have been streamlined and made this entire litigation less costly for both parties. And for those reasons, I'm not going to be able to determine that an amendment of the findings is in order and reconsideration is not in order under the argued authority. RP 10/24/12, pg. 20, line 25, and 21, lines 1-17 [Emphasis added].

The court went on to say, Id. pg. 22, lines 5-19:

> The health care, long distance transportation, and the day care were all part of the Court's intentional determination not to be credited into the child support worksheet. And certainly no federal or state income tax netting should be part of that process, again, in light of the evidence at trial that there was no filings. Mr. Lee should not be able to take advantage of some deduction that he didn't, in fact, engage through his own financial contributions. So union dues and FICA do appear to be appropriate components of the process to arrive at a net income. So I'm not seeing anything that has been provided to the Court to warrant amendment or reconsideration.

On 10/29/12, Mr. Lee filed another reconsideration motion. CP 498-519. This time Mr. Lee argued that reconsideration was warranted under CR 59(b)(l),(3),(4), and (9). CP 499. For the first time, Mr. Lee asked the court to consider documents filed prior to trial which were never proffered at trial. CP 500-503. Again Mr. Lee asked the court to find an agreement between counsel about calculation of his net monthly income, and attached exhibits that were never presented at trial, never admitted as exhibits, and not attached to the previously filed Motion. CP 406-420, CP 503-507. Also on 10/29/12, Mr. Mason filed his assistant's declaration (who did not testify at trial) which alleged Ms. Stillman's "lack of pretrial cooperation" for the first time. CP 484-497. Mr. Lee filed a supplement to his 10/29/12 Reconsideration Motion on 11/1/12, CP 521-522, in which he asked the court to reconsider the 10/24/12 orders, and again alleged he

had presented evidence at trial of Ms. Stillman's intransigence, and that Ms. Stillman admitted to intransigence at trial. CP 521. In the meantime, on 11/1/12, the court ordered Mr. Lee to pay additional fees in the amount of $1,843.40 for Ms. Stillman having to respond to Mr. Lee's 10/5/12 Motion for Amendment/Reconsideration (excluding fees for clarification), and for having to file a Motion to Strike Mr. Lee's post-trial exhibits. RP 11/1/12, pg. 39, lines 13-14. CP 526-527. Mr. Lee's 10/29/12 and 11/1/12 motions for reconsideration were denied without argument. CP 555-556.

Mr. Lee's Appeal: Mr. Lee filed his notice of appeal on 12/24/12 and his Opening Brief on April 3, 2014. CP 563-584, 675-700. It is important to note, in reviewing the 10/24/12 Findings of Fact/Conclusions of Law, there were no findings or conclusions addressing the issues Mr. Lee set forth in his Opening Brief, CP 675-700, CP 463-468, including:

--Whether Ms. Stillman was intransigent, and that such intransigence should have precluded the award of attorney fees to her.

--Whether the court's calculation of Mr. Lee's net income that did not incorporate a deduction for federal/state income taxes, or whether the trial court's denial of that deduction, constituted a "penalty" for Mr. Lee's failure to submit copies of his tax returns at trial, or "discovery sanction."

--Whether there was an enforceable agreement between counsel.

--Whether or not Ms. Stillman would be prejudiced by the court adopting Mr. Lee's proposed child support worksheets; which deducted taxes from his monthly gross income, for which verification was not provided at trial.

The lack of written findings of fact and conclusions of law in the final orders on his issues made it clear from the onset of his appeal that Mr. Lee would need to provide transcriptions of the trial and post-trial hearings. However; as set forth below, Mr. Lee refused to provide any transcripts applicable to his appeal which this Court would need to review.

Post-Appeal Motions: In his appeal, Mr. Lee declined to order transcripts. CP 640-641. On 2/8/13, Ms. Stillman designated transcripts and on 2/14/13, asked Mr. Lee to arrange to pay for transcripts. CP 643-646. Mr. Lee made no arrangements. Pursuant to RAP 9.2(c), on 3/4/13, Ms. Stillman moved the trial court for an Order compelling Mr. Lee to pay for transcripts of the trial and post-trial hearings. CP 631-648. Mr. Lee responded by moving this Court to deny Ms. Stillman's motion to compel. CP 661-663. This Court ruled that the motion should be heard by the trial court. CP 651-652. The motion was heard by the trial court on 4/19/13, the trial court orally ruled that Mr. Lee would be required to order the trial court's oral rulings made at trial and on 9/11/12. RP 4/19/13 pgs. 49- 52, 54-55, 57-59. Mr. Lee's counsel agreed that was reasonable. RP 4/19/13, pg. 53. The trial court's written ruling on 4/24/13 was not designated as part of the record for this Court to review, but the trial court did order Mr. Lee to pay for the transcriptions of the two post-trial rulings from10/24/12 and 11/1/12, and deferred to this Court for other rulings.

On 7/3113 Ms. Stillman then filed a Notice of Appeal, under Case No. 318117, of the trial court's 4/24/13 order and 6/7/13 ruling denying her Motion for Clarification/ Reconsideration of its 4/24/13 ruling. On 8/20/13, Mr. Lee filed the partial transcripts from the 10/24/12, 11/1/12, and 4/19/13 with the Court of Appeals, under this cause number.

Ms. Stillman filed a discretionary review motion in No. 318117, for review of the trial court's 4/24/13 and 6/7/13 rulings. Ms. Stillman also filed a Motion to Dismiss Mr. Lee's Appeal for failure to provide the record, or to affirm on the merits, under Case Nos. 313654 and 318117. Ms. Stillman subsequently withdrew her appeal and instead supplemented the record in Mr. Lee's appeal with transcripts from the trial and post-trial oral rulings because she could not financially sustain a separate appeal.

C. LEGAL ARGUMENT

Issue # 1: Whether the standard of review for this Court in this case is de novo or abuse of discretion?

In challenging a trial court's decisions re child support, one must show that the court abused its discretion. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). An award of attorney fees under Uniform Parentage Act is within the trial court's discretion and this Court will not disturb the court's award unless it was manifestly unreasonable or based on untenable reasons. Fernando v. Nieswandt, 87 Wn. App. 103,

110, 940 P.2d 1380 (1997). A ruling on a Motion for Reconsideration "is within the discretion of the trial court and is reversible only for a manifest abuse of discretion." Jacob's Meadow Owners Association v. Plateau 44 II, LLC, 139 Wn. App. 743, 752, 162 P.3d 1153 (2007).

Despite this law, Mr. Lee, without citation, asks this Court to find the trial court erred "*as a matter of law*" and seeks a *de novo* review of the trial court's failure to find that Ms. Stillman had engaged in intransigence pretrial and the court's exclusion of tax deductions in Mr. Lee's monthly income calculations for child support. Opening Brief at 10, 11, 14, 17. A *de novo* review is only when the trial court relied solely on documentary evidence and credibility was not at issue. In re Marriage of Langham, 153 Wn.2d 553, 559, 106 P.3d 212 (2005). Because this Court is asked to review testimonial evidence and because credibility of the witnesses was at issue, the correct standard of review on all issues is abuse of discretion.

Issue # 2: Whether Mr. Lee's assignments of error and issues for appeal inappropriately ask this Court to presume facts that are unsupported by the evidence in the record?

Mr. Lee asks this Court to presume the trial court made rulings that are not in the record. Mr. Lee, without citation, asks this Court to presume the court found a "discovery settlement agreement" between counsel, that there was a breach of that agreement, and the court refused to enforce that agreement as a discovery sanction. Opening Brief at 14. Mr. Lee also

asks the Court to presume he relied on the alleged agreement to his detriment in not providing tax returns or W-2s for trial. Nothing in the record supports Mr. Lee's claims. Mr. Lee also claimed: "in exchange for Ms. Hendrick's offer to rely on pay stubs alone, Mr. Lee accepted and dropped his motion to sanction Ms. Hendrick for refusing to comply with CR 26(i) and the case scheduling order." Id. pgs 15-16. He claims "both parties gave up their motions against the other, as consideration for the agreement to proceed to trial on the pay stubs." Id., at 16. Not only was there no "settlement agreement," Mr. Lee never filed a sanctions motion.

Mr. Lee asks this Court to presume that the trial court's omission of credits for income tax deductions from Mr. Lee's income is a discovery sanction. Id. at 14. Mr. Lee himself, without citation to the trial record, asserts that it *"appeared"* to be a discovery sanction. Id. at 14. Mr. Lee does not cite to trial transcripts or post-trial rulings to show the trial court found he violated the rules of discovery and sanctioned him on that basis.

Mr. Lee argues, without citation to the record, that Ms. Stillman suffered no prejudice if Mr. Lee was credited for tax deductions. Id. at 14-15, 17-18. Yet the record reflects this argument was never made to the court, and was not advanced until Mr. Lee submitted his Opening Brief.

Mr. Lee claims, without citation to the record, that the trial court did not consider lesser sanctions. Id. at17. Mr. Lee offers no evidence to

support his claim that this was a discovery sanction, nor did he show the court did not properly weigh the alleged sanction. Without record cite, Mr. Lee did not meet his burden of proof. Certainly the fact that Mr. Lee's gross income was calculated at a level lower than Ms. Stillman requested shows Mr. Lee benefited from the court's ruling. RP 9/11/12 at 168-169.

Finally Mr. Lee asserts that Ms. Stillman does not challenge facts on the record. This makes no sense, as essentially every point he asserts has been challenged – both at the trial court below, and in this brief.

Mr. Lee does not cite to transcripts, so his logic is that this Court should decide the appeal from the court's written orders. This is a myopic view of his burden, and his risk. If a trial court's findings are not properly contested, they are verities on appeal. State v. Alexander, 125 Wn. 2d 717, 723, 888 P.2d 1169 (1995). They are not properly contested here; the Court should affirm. See also Wade, at 464 (court "is presumed to be correct and should be sustained absent an affirmative showing of error").

Issue # 3: Whether the trial court abused its discretion when, based upon the evidence Mr. Lee presented a trial, it declined to find that Ms. Stillman had engaged in intransigence and ordered Mr. Lee to pay a portion of Ms. Stillman's fees?

A trial court may consider if additional legal fees were caused by one party's intransigence and award attorney fees on that basis. In Re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). "A trial

court's findings of fact are treated as verities on appeal, so long as they are supported by substantial evidence" – i.e., "evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." In re Marriage of Chandola,180 Wn.2d 632, 649, 327 P.3d 644 (2014). Intransigence is an equitable as opposed to a statutory basis for awarding fees. Id. at 657. A person alleging intransigence must come to court with clean hands. In re Marriage of Buchanan, 150 Wn. Spp. 730, 737, 207 P.3d 478 (2009). It includes foot dragging, obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly. Bobbit at 30. It will not be supported by bald assertions. In re Marriage of Wright,78 Wn. App. 230, 239, 896 P.2d 735 (1995). If intransigence is found, finances of the party seeking the award are irrelevant. Bobbit, at 30. Unless the court finds intransigence permeates the entire proceedings, the court must segregate which attorney fees were a result of intransigence, and which were not. In re Marriage of Burrill, 113 Wn. App. 863, 873, 56 P.3d 993 (2002).

Issue # 3, Subpart A: Evidence Mr. Lee Presented At Trial Did Not Support a Finding of Intransigence.

This Court is asked to review the trial court's post-trial refusal to find Ms. Stillman engaged in pretrial intransigence. Contrary to what Mr. Lee asks, the transcript clearly shows he produced virtually no evidence to support a finding of pretrial intransigence. At trial Mr. Lee did not produce

evidence to support it, and certainly did not show Ms. Stillman engaged in intransigence that "permeated the entire proceedings." Also, at trial Mr. Lee did not provide evidence that showed Ms. Stillman's pre-trial actions or inactions caused him additional fees, and did not produce any evidence segregating which fees were incurred due to her alleged intransigence.

In his opening statement, Mr. Mason did allege Ms. Stillman's intransigence. RP 9/10/12, pg 11, lines1-25. Additionally, in questioning Mr. Lee, he asked if motions were filed to ensure Mr. Lee's visitation. Id., pg. 81, lns1-17. This was the only evidence Mr. Lee presented to support his intransigence claim. He did not offer previously-filed court documents to support his claim he had to go back to court two times to get visits.

In reviewing Mr. Lee's trial exhibit, R 106, Mr. Mason's invoice, the subtotal indicated thereon amounted to only $878.90. RP 9/11/12, pg 172, lines 19-23. There was no segregation of fees or costs that Mr. Lee allegedly incurred due to Ms. Stillman's alleged pre-trial intransigence. EX. R 106. Mr. Lee did not testify that he had incurred any amount of fees as a direct result of Ms. Stillman's alleged intransigence. And as noted in the Facts section of this Response on page 7, Mr. Lee did not seek to present documents through Ms. Stillman's cross-examination, and only elicited from her that she did not resist the Commissioner's 4/27/11 order.

"A finding of intransigence will not be supported by simply making bald assertions of intransigence behavior." In re Marriage of Wright, 78, Wn. App. 230-239, 896 P.2d 735 (1995). Here, not only did Mr. Lee fail to allege specifics, but he failed to provide actual costs.

In his closing argument, Mr. Mason made limited and insufficient statements to the trial court regarding intransigence:

> I want to applaud her [Ms. Stillman] for admitting that we did have to go to court in early 2011 to get the visits. There was a lot of legal fees involved in moving the case from no visits for Mr. Lee to visits. RP 9/10/12, pg 157, lines 11-15. And because of that, we do not ask for any attorney's fees for any past intransigence. We do hope that the Court will not hold Mr. Lee responsible for any, given the obvious of the court file showing the costs that he had to undertake to get these visits moving, but instead we just want to focus on the future.
> RP 9/10/12, pg158, lines7-13.

In its post-trial ruling on attorney fees, the court did complete a "*need vs. ability to pay*" analysis as recited on pages 11-12 of this Response Brief, showing the court considered it. The court considered the motions filed early in the case, and balanced costs incurred by Mr. Lee against, "the determination of the Court was somewhat hindered by the less than forthcoming evidence on dad's income." RP 9/11/12 pg 175, lines 3-5. The court's comments show Mr. Lee engaged in "foot dragging" and nondisclosure tactics that impeded a straightforward

resolution at trial and cost the court and Ms. Stillman (not Mr. Lee) additional time/money.

Issue # 3, sub-argument B: This Court cannot review the pre-trial record to decide pretrial intransigence when no portion of the pretrial record was produced for consideration at trial.

Mr. Lee argues that regardless of trial evidence, this Court can find intransigence from the record, "even if the trial court did not..." Opening Brief at 12. Mr. Lee cites to In re the Marriage of Crosetto, 82 Wn. App., 545, 918 P.2d 954 (1996), and asks this Court to review all pretrial filings filed with the trial court; none of which were presented to the trial court for consideration at trial. Id., pg 12 and 13. RP 9/10/12, pgs. 1-143.

It is Mr. Lee's burden to prove that Ms. Stillman was intransigent. In re Marriage of Pennamen, 135 Wn. App. 790, 807, 146 P.3d 466 (2006). Mr. Lee did not do so at trial. Crosetto does not save him because (a) the Crosetto party actually presented the alleged pretrial intransigence documents at trial and (b) the facts were significantly different from the facts here. The Crosetto Court found that the record produced at trial supported an intransigence ruling despite the trial court's lack of ruling:

> [James] asserts that the trial court "found" intransigence on [Laurel's] part. He cites to the trial court's comments, and states no other word is available to characterize the conduct described by the trial court. We agree. Although the trial court did not make a finding ... a review of the record discloses a continual pattern of obstruction [by Laurel].

Crosetto at 564. In its decision, the Court considered components of the Crosetto trial record and the trial court's written memorandum decision to determine that Ms. Crosetto had in fact engaged in intransigence. Id.

> These obstructionist tactics include: refusal to cooperate with the GAL, refusal to allow visitation, and interferences with court ordered visits ...; attempts to avoid service, and threatening to take administrative action [against an expert] ... [A] court commissioner acknowledged the obstructionist nature of Laurel Crosetto's conduct and stated, "there is a course of conduct engaged in by the mother in which if she is not outright flaunting court orders, she is doing indirectly what she cannot do directly," and noted that two previous commissioners had warned her regarding sanctions that would be imposed for further violations of court orders. In re Marriage of Crosetto, 82 Wash. App. 545, at 564.

Thus, in Crosetto, the Court of Appeals reviewed the record as created at trial and ruled that the trial record supported a finding of intransigence. In contrast, here Mr. Lee asks this Court to review evidence not produced at trial, with no findings of ongoing allegedly bad behavior. The record created below did not support a finding of intransigence of any kind, or that Mr. Lee incurred fees as a result.

Issue # 3, Subpart C: Even if this Court decides to review the pretrial record (neither produced nor considered at trial), that record does not support a finding of pretrial intransigence.

Even if this Court concluded that it could consider documents in the trial court's court file (which were neither proffered nor considered at

trial) to determine if the trial court erred in declining to find intransigence, the record does not support a finding of pretrial intransigence.

Mr. Lee claims Ms. Stillman was intransigent in filing a second proposed parenting plan that made RCW 26.09.191 allegations. Opening Brief at 4. In citing only to Mr. Lee's 4/4/11 declaration, and no findings by the Commissioner, Mr. Lee claimed Ms. Stillman, "perjured herself in her filings." Id. at 5. Mr. Lee then claimed Ms. Stillman and her mother made unfounded and scurrilous allegations. Id. at 5.[1] Mr. Lee states that at the 4/27/11 hearing on temporary orders, the Commissioner "found the abusive allegations made against Doug Lee to be without foundation, and simply established a few prerequisites prior to adoption Mr. Lee's proposed parenting plan." Opening Brief at 6. This is not supported by the transcript, in which the Commissioner stated, CP 132-139:

> [A]nytime you're a father and you haven't had contact with your child for over three years there's ways of getting that done. But it's taken him an awful long time... [T]hat would be one of the concerns I've got here is motivation ... The parties are at loggerheads about how you get off the dime, I think both parties expect that you've got to move forward. ... [T]he only issue is ... how many restrictions do you put on it? That's the real issue ... [B]ecause Dad came up from California a lot of aspects of his behavior, drinking and so forth, are basically unknown ... maybe that's another part of his maturation process ... I'd certainly

---

[1] Mr. Lee cites to "CP 56-57" as Ms. Stillman's declarations, but Mr. Lee did not designate that declaration of Ms. Stillman as part of the record.

> restrain him from drinking alcohol before and during any visit and allow Ms. Stillman if she thinks he is under the influence of drugs or alcohol to have him submit to a test.

CP 133-134. See also CP 75 (order implemented non-drinking and drug use requirements, showing court's finding of Ms. Stillman's credibility). It is apparent from the record that Ms. Stillman's parenting plan alleging RCW 26.09.191 factors did not constitute intransigence.

Mr. Lee's Pre-Trial Motions to Compel Conformity

Mr. Lee also complains that he had to go to court to force Ms. Stillman to comply with orders. Yet the 4/27/11 order had no date or time certain for the commencement of the first visit. CP 74-75. Actions taken by Mr. Lee in order to "enforce" order took place the day after the 4/27/11 order was entered, where the counselor in the order was not available and a new counselor had to be selected. CP 77-78. There was no allegation that Ms. Stillman had been reached. Neither Mr. Mason nor Mr. Lee testified that Mr. Lee actually spoke with Ms. Stillman about the suddenly changed therapeutic visit. Neither Mr. Mason nor Mr. Lee claimed that Ms. Stillman refused to make the child available for the therapeutic visit with Carol Thomas that had been set at the last minute. Mr. Mason, in a 5/28/11 email to Ms. Stillman's attorney, stated that, "Thanks, I have sent you an ex parte notice for Tuesday as back up in case your client is recalcitrant. (We can do ANYWHERE, as long as it is done by

Tuesday—even this weekend would be fine.)" [Emphasis added] CP 120. Mr. Mason went on to state, "They LOOKED very defiant, especially the Grandma. When I said that to Doug, he said that Grandma is why they are not married, and now why they cannot get along... We shall see." Id. [Emphasis added]. Mr. Mason's own statements show that the 4/28/11 motion was preemptive, made in anticipation of Ms. Stillman's alleged resistance. That is quite different than moving to compel compliance after resistance or refusal to comply. In his 4/28/11 Motion to Compel, Mr. Lee neither alleged intransigence nor asked for fees on that basis. CP 77-78.

On 4/28/11, Mr. Mason renoted an ex parte hearing for 5/3/11 on his 4/28/11 motion to compel compliance with the 4/27/11 order. CP 109-111. On 5/3/11, Mr. Lee filed another Motion to compel, incorporating his prior Motion. CP 93-108. On page 2, paragraph # 7 of this Motion, Mr. Mason confirmed that counsel had different understandings of what the term "in a week" meant; as that term was incorporated into the 4/27/11 order. CP 94. Also in his 5/3/11 motion, no intransigence on the part of Ms. Stillman was alleged and no fees were requested. CP 83-108. The matter was resolved with specific dates and times designated. CP 112. Nothing in the record shows Ms. Stillman failed to comply with the 4/27/11 Temporary Orders in any way that would have necessitated a second Motion for Order Compelling Compliance. CP 83-108.

On May 11, 2011, Mr. Lee filed a third Motion to enforce visits, in which he alleged, "Ms. Stillman appeared in court on 5/3/11 to express her intransigent opposition to visits; which were then compelled by the Court ..." [Emphasis added]. CP 118-120. Mr. Lee did not provide a verbatim report of the 5/3/11 ex parte proceedings for this Court to review in order to determine whether Ms. Stillman engaged in any acts of "intransigent opposition" that would necessitate filing a third motion. Mr. Mason simply opined Ms. Stillman engaged in "intransigent opposition," but failed to verify that claim. In the 5/11/11 Motion neither Mr. Lee nor Mr. Mason alleged that Ms. Stillman engaged in any intransigent conduct to prevent visits. CP 118-119. Neither Mr. Lee nor Mr. Mason asked for attorney fees on that basis. CP 118-119. Mr. Lee noted another ex parte hearing on shortened time for 5/12/11. CP 122-125. The 5/12/11 ex parte hearing was stricken pursuant to an agreement of counsel. CP 126-127.

In sum, Mr. Lee filed 3 motions to compel Ms. Stillman to comply with the 4/27/11 Order: one on 4/28/11, one on 5/3/11 (incorporating the 4/28/11 Motion), and one on 5/11/11. There was a hearing for the 4/28/11 motion (where the commissioner denied a motion to shorten time, found Mr. Lee "misunderstood Jamie's willingness" and ruled the motion was premature). Opening Brief at 6. There was an ex parte hearing on 5/3/11, but Mr. Lee provides no transcript and the only basis for his intransigence

claim was counsel's later-stated opinion that Ms. Stillman "expressed her intransigent opposition to visits" at that hearing. CP 118. The ex parte hearing noted for the 5/11/11 motion was stricken based on agreement. The record clearly shows Mr. Lee did not have a basis for filing any of the motions, but did so preemptively. In his Opening Brief, Issue # 2, Mr. Lee incorrectly states he had to return to court 3 times to procure the ordered visits. Opening Brief at pg ii. The record does not support this claim, or the filing of any of Mr. Lee's motions to compel. No evidence was produced to show Ms. Stillman failed to comply with the 4/27/11 order.

Ms. Stillman's Pretrial Motions for Revision of 4/27/11 Order Revision:

The Fact Section at page 3 of this Response Brief outlines the Revision motions noted by Ms. Stillman, and Mr. Lee's objections on procedural bases. It also outlines that although the Motion was stricken, Mr. Lee's request for fees was not granted. Mr. Lee failed to obtain a copy of the transcript for this Court's review or for review by the trial court, even though the Order incorporated oral findings, CP 161. No basis exists for a finding by any court of intransigence on this basis.

Vacation: As noted in the Fact Section at page 4 of this Response Brief, Mr. Lee forced Ms. Stillman to file a motion for time with the child during vacation. This shows intransigence by Mr. Lee, not Ms. Stillman. Even Mr. Lee's position was that any misunderstanding was the fault of

Ms. Stillman's counsel, not Ms. Stillman. See CP 185 ("Mr. Lee requests the hearing be stricken as moot, and his understanding is that counsel for the petitioner, and not the petitioner, is the source of unnecessary contention") [emphasis added]. The parties reached agreement on visitation issues and the hearing was stricken. CP 191-192.

At trial, Mr. Lee did not address the motions for revision and did not produce documents related to the motions. By his own admission, Ms. Stillman was not the source of litigation. CP 185.

Time Period for All Motions by Both Parties

All the above-cited activity related to pretrial filings made between 4/27/11 and 5/26/11 - a total of one month's time. The docket shows little activity between 5/26/11 and the 9/10/12 trial (15 months later). By the time of trial, the parties had reached an agreement regarding residential times. CP 196-200. The documents in the court file do not support this Court finding that Ms. Stillman engaged in intransigence. Clearly, the proceedings were not "permeated" by intransigence, as alleged.

Pretrial Preparations

Mr. Lee also alleged Ms. Stillman should be found intransigent for "refus[ing] to participate in pretrial preparations." Opening Brief at 7. He did not elicit testimony or evidence supporting this claim at trial. He cites only to a post-trial declaration and it is false. This claim must be rejected..

Issue # 4: The court did not abuse discretion when, post-trial, it did not find Ms. Stillman engaged in pretrial intransigence.

The evidence Mr. Lee produced at trial did not support a finding of intransigence. His post-trial motions do not justify a different conclusion.

Mr. Lee filed his first post-trial motion on 10/5/12, moving to clarify/amend the Court's 9/11/12 rulings, citing CR 26, 52, and 54. CP 406-420. Nowhere in this Motion did he ask the Court to reconsider its 9/11/12 rulings regarding alleged intransigence or the Court's fee award. CP 406-420. Mr. Lee did complain of post-trial filings, but not pretrial filings. CP 415-417. He sought reconsideration only of the tax issue. RP 10/24/12, pg 15 ("The only thing we would really be ... asking the Court to reconsider would be the issue of the sanctioning him by excluding income tax when Ms. Hendrick indicated she could calculate net income when Jamie Stillman acknowledged he would be paying income tax").[2]

On 10/29/12, Mr. Lee filed another Reconsideration Motion. CP 498-519. This time Mr. Lee argued pursuant to CR 59(b)(1), (3), (4), and (9). CP 499. Without citation to supporting section(s) of CR 59 or other authority, Mr. Lee asked for reconsideration of his request to deny Ms. Stillman fees on the basis of alleged intransigence. CP 498-499.

---

[2] The only statement made that may have remotely address Mr. Lee's intransigence claim are recited at page 15 of this Response, and were in oral argument only, not the Motion.

Reconsideration pursuant to CR 59(a)(4) may be appropriate if the moving party presents new and material evidence that could not have been discovered or produced at trial. Wagner Dev. v. Fid. & Deposit, 95 Wn. App. 896, 906, 977 P.2d 639, *review denied*, 139 Wn.2d 1005 (1999). "If the evidence was available but not offered until after the opportunity passed, the parties are generally not entitled to another opportunity to submit the evidence." Meridian Minerals Co. v. King County, 61 Wn. App. 195, 203, 810 P.2d 31, *review denied*, 117 Wn.2d. 1017 (1991).

In his10/29/12, second, post-trial motion for reconsideration, Mr. Lee, without citation, incorrectly stated that, "At trial Jamie admitted her intransigence, as was confirmed by the court file." CP 498-499. Mr. Lee did not proffer any documents for the court to consider with his 10/29/12 motion. Instead he simply cited to documents filed in the court file prior to trial that were not considered at trial. In his 10/29/12 motion he stated:

> The two major categories of facts relate: (A) to Jamie Stillman's intransigence, which has not been fully appreciated by the court, due to the inevitable transferring of cases between judicial officers, and (B) Jamie Stillman's pre-trial intransigence and legal errors of her new counsel, Ellen Hendrick. CP 502.

Mr. Lee did not cite to the record. As noted on page 17 *supra*, he alleged for the first time that Ms. Stillman had refused to cooperate with preparing for the 9/10/12 trial. CP 484-497.

On 11/1/12, Ms. Stillman's request for attorney fees (pursuant to the Court's 10/24/12 ruling, for having to respond to a portion of Mr. Lee's post-trial pleadings) was granted. CP 523-524. Mr. Lee filed a supplemental to his 10/29/12 Motion for Reconsideration and asked that the 11/1/12 fee award to Ms. Stillman be considered in conjunction with his 10/29/12 second motion for reconsideration. CP 521-522. He asked the court to reconsider its 10/24/12 orders and again alleged he presented evidence at trial re Ms. Stillman's intransigence, and that Ms. Stillman admitted to intransigence at trial. CP 521. The 10/29/12 and 11/1/12 reconsideration motions were denied without hearing. CP 555-556.

Mr. Lee's assignments of error (that Ms. Stillman's alleged intransigence should have prevented an attorney fee award) are completely without merit, and only emphasize why Mr. Lee refused to provide this Court with the complete record below. Ms. Stillman asks this Court to affirm the trial court on the issue of Ms. Stillman's alleged intransigence.

Issue # 5: Whether the trial court abused its discretion when it excluded tax deductions in post-trial rulings when calculating Mr. Lee's net monthly income for child support purposes?

Late Filed Tax Returns Not "Newly Discovered Evidence."

Mr. Lee assigns error to the trial court's 10/24/12 denial of his 10/5/12 Motion for Clarification/Amendment in the calculation of his net monthly income for determining his child support obligation. Opening

Brief, pg ii. Mr. Lee concedes he failed to produce copies of tax returns for the 9/10/12 trial; at which the disputed issues were child support and attorney fees. Id. See also, Mr. Lee's 10/5/12 Motion, CP 406-420.

CR 52(b) authorizes the court to "make additional findings and . . . amend the judgment accordingly" on motion for reconsideration pursuant to CR 59. In re Marriage of Brossman, 32 Wn. App. 851, 855, 650 P.2d 246 (1982). Mr. Lee neglected to tell this Court that his 10/5/12 motion was not made pursuant to CR 59. Though Mr. Lee did incorporate a very roundabout, limited reconsideration request into his motion, citing "newly discovered evidence," he failed to meet his burden of proving that his late-filed tax returns were "newly discovered" and not merely newly produced.

The "newly discovered evidence" Mr. Lee asked the trial court to consider for the first time in his 10/5/12 post-trial motion consisted of: (1) a declaration from Mr. Lee's employer's payroll administrator, filed 16 days after trial; (2) Mr. Lee's 2011 tax return, filed 16 and 17 days after trial; and (3) Mr. Lee's 2010 tax return filed, 36 days after trial. CP 324-326, 353-362, 428-430. Evidence is not "newly discovered" under CR 59(a)(4) if it could have been made available for trial. In re Marriage of Tomsovic, 118 Wn. App. 96, 109, 74 P.3d 692 (2003). "CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox v. Lexington Eye

Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). And Ms. Stillman filed a Motion to Strike the new evidence (a motion which was granted for purposes of anything other than Mr. Lee's motion for clarification). CP 396-403. This means the material was not available for the trial court to review under CR 59. Richter v. Trimberger, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) (where party attempted to have court consider pretrial interest issue but did not submit proper evidence until after trial, the trial court was prohibited from considering it); CR 59(a)(4) (motion may be granted on newly discovered evidence only if requesting party "could not with reasonable diligence have discovered and produced [it] at trial"). All evidence presented post-trial were subject to the Motion to Strike – including Mr. Lee's late returns – so none can be considered here. Id.

The trial court correctly determined that the late-filed tax returns were not "newly discovered evidence," but that, "They were more likely newly created." RP 10/24/12, pg 20, lines 1-25, and pg 21, lines1-14.

Issue # 6: Whether the trial court abused its discretion when it did not find a pretrial settlement agreement between counsel, the existence of which Mr. Lee alleged for the first time in post-trial motions?

Trial Court's Calculation of Mr. Lee's Income: Because Mr. Lee is the party asserting that his income should be decreased, he has the burden of proving that. In re the Marriage of Gainey, 89 Wn. App. 269, 274-275, 948 P.2d 865 (1997). If a party fails to present that evidence, the

court has authority not to grant exemptions when calculating income, and may use "any reasonable method not dependent on the information" the party "failed to produce in a timely manner." Id. Mr. Lee did not provide tax returns and W-2s at trial as required by statute and trial management report. RCW 26.19.071(2) and CP 311-315. Thus, the court properly calculated Mr. Lee's net monthly income based on evidence he presented at trial. Even if he presented this issue properly (which he did not), it was not an abuse of discretion for the court to enter the support order. On this point Mr. Lee raises two appeal issues, both of which should be denied.

First, He Alleges a Settlement Agreement and Unfair Surprise:

Mr. Lee excuses his failure to provide tax returns and W-2s at trial by asserting he was "caught by surprise" at trial that Ms. Stillman "reneged on a settlement agreement." Opening Brief at 15. But the record shows that, prior to trial, Ms. Stillman provided Mr. Lee with her proposed child support worksheet which did not credit him with tax deductions. EX P-3, CP 311-315. In addition, RCW 26.19.071(2) and the parties' trial management report (done by both parties before trial) required both parties to produce income verification documents, tax returns and W-2s for trial. RCW 26.19.071(2), and CP 311-315. Prior to opening statements, the trial court afforded Mr. Lee an opportunity to address motions, and Mr. Lee did not raise alleged "surprise" or noncompliance with an alleged settlement

agreement at that time. Nor did he object to Ms. Stillman's calculations on the basis of unfair surprise or seek a continuance so he could produce his yet-to-be-filed tax returns. As discussed below, the record of the trial and post-trial rulings shows that Mr. Lee did not object on the basis of "surprise" or assert at any time there was a "settlement agreement," and breach thereof. His assignments of error on those bases must fail:

> At trial where a respondent made no claim of surprise, no objection was made to an appellant's testimony on the ground of any surprise involved, and there was no request for a continuance, respondent waived the right to claim surprise and that his cause was prejudiced thereby.

Ward v. Ticknor, 49 Wn.2d 493, 495, 303 P.2d 998 (1956). See also State v. McKenzie, 56 Wn. 2d 897, 901, 355 P.2d 834 (1960).

This situation did not change. After lunch, counsel for Mr. Lee initially confirmed there was no "settlement agreement" when he returned to court and stated he had "misunderstood." Fact Section supra at 8. Mr. Lee did not testify to an agreement about calculating his net income. Nor did he testify he "relied" on that alleged agreement. Nor did he challenge Ms. Stillman's calculation of his net income without tax deductions. He did not allege in closing there was an agreement about income calculation. In fact, Mr. Lee did not address the issue of credit for tax deductions *at all* during closing, despite the fact that Ms. Stillman asked the court to adopt her worksheet, giving Mr. Lee no credit for tax deductions.

Even under Mr. Lee's contract theory; which was never advanced at trial, no binding agreement can be found and no finding of Mr. Lee's "detrimental reliance" can be made. Mr. Lee asserted (a) "The matter was settled, as Mr. Lee agreed to strike his motion to sanction Ms. Hendrick for violating CR 26(i) and the case scheduling order, and Ms. Hendrick agreed that she could calculate gross and net pay from the submitted pay stubs," CP 498-519, and Ex. D, and (b) "[t]his was the exchange of consideration creating the discovery settlement agreement." Opening Brief at 9. However, the record shows that Mr. Lee did not file a motion for sanctions. And Ms. Hendrick had no authority to bind Ms. Stillman by an agreement that is contrary to statute (primarily RCW 26.19.071(2), which requires parties to verify incomes with pay statements, tax returns and W-2s, or other documentation) See RCW 2.44.010 (court disregards agreements unless such agreement are made in open court, or in presence of the clerk, and entered in the minutes, or signed) Mr. Lee's failure to assert during trial any alleged agreement is fatal to his claim here.

Post-trial: In his 10/5/12 Motion for Clarification (or CR 52/54 Amendment) re IRS Deductions, Mr. Lee alleged for the first time that there was an "agreement between counsel" about the calculation of his net monthly income and, because he relied on the "alleged agreement," he did not produce W-2s or tax returns for trial. CP 406-420. Though Mr. Lee

did not move for CR 59 Reconsideration in conjunction with his 10/5/12 Motion for Clarification, he did speak of "newly discovered evidence." CP 411. At the 10/24/12 hearing on his 10/5/12 Motion for Clarification, Mr. Lee argued there was a discovery settlement agreement between counsel with regards to the calculation of Mr. Lee's net income. RP 9/10/12, pgs 1-164, and RP 9/11/12, pgs 165-180; See also, CP 407, lines 7-8, 408, lines17-18, 23-24, 409, lines 9-11, 412, lines 5-6, 413, lines 9-10; and See also, RP 10/24/12, pg 11, lines 22-25, pg 12, lines 1-8, lines 16-20, pg 13, lines 21-15, pg 19, lines 22-25, pg 16, lines 1-4. "CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Moreover, Ms. Stillman filed a Motion to Strike the new evidence (which was granted, except as to Mr. Lee's clarification motion). This means the material was not available for review even if Mr. Lee had filed a proper CR 59 motion. Richter v. Trimberger, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) (party tried to have court consider pretrial interest but did not submit evidence until after trial; court could not consider it). All documents presented post-trial were subject to the Motion to Strike – including his late tax returns – and thus none can be considered here. Id.

The court's reasoning, see pg. 16 *supra*, was sound; it correctly denied Mr. Lee's Motions to have late-filed tax returns considered.

No Enforceable Contract: There is no contract here – nor is there a legitimate argument that supports a finding that there is an enforceable contract. At best, Ms. Stillman's counsel represented that *she* had enough information to determine what she would argue at trial regarding Mr. Lee's gross and net incomes – not whether the *trial court* would be able to calculate them. To the extent that Mr. Lee's counsel misunderstood; as he conceded after lunch on the day of trial, the fact there was no "meeting of the minds" would have become clear to him before trial, and no later than upon the admission of Ms. Stillman's proposed child support worksheet that gave Mr. Lee no income tax deductions. See EX P-3 and City of Everett v. Sumstad's Estate, 26 Wn. App. 742, 745, 614 P.2d 1294 (1980) ("In the absence of mutual assent, there can be no contract…").

Mr. Lee said he "filed a motion for sanctions against Ms. Hendrick (Jamie's counsel) for Ms. Hendrick's failure to follow CR 26(i), LCR 37, and the case scheduling order. Both parties gave up their motions against the other, as consideration for the agreement to proceed to trial on pay stubs." Opening Brief at 16. But that statement is not supported by the record. Mr. Lee did not file a motion for sanctions. The only "motion" Mr. Lee filed subsequent to Ms. Hendrick's Motion to Continue the trial

date was a Response and Motion for Temporary Relief if continuance was granted. The temporary relief requested was not for sanctions, but for a temporary order of child support pending trial if continuance was granted. Moreover, in her Motion for Continuance, Ms. Hendrick did not represent that she complied with CR 26(i). Ms. Hendrick acknowledged she tried to set a CR 26(i) conference with Ms. Mason, there was none scheduled, and asked the Court to find that her unsuccessful efforts to schedule a CR 26(i) conference constituted compliance given the short time frame before trial. Id. Mr. Lee did file a Declaration in Response to Ms. Hendrick's Motion, but did not incorporate any requests for sanctions re discovery or CR 26(i) violations therein. CP 280-289. Thus, Mr. Lee's basis for "consideration" in support of his alleged "enforceable contract" argument is without merit.

Instead of acknowledging this truth, Mr. Lee cites to black letter law on contracts. But that is not the issue; indeed, Mr. Lee is attempting to litigate an alleged contract when there is no record that a contract was ever presented at the proper time – i.e., before or during trial itself. Had Mr. Lee addressed the issue at trial, or requested a continuance based on alleged surprise, the court would have considered the argument, including if his attorney's refusal to participate in a CR 26(i) conference can prohibit Ms. Stillman's attorney from bringing an emergency motion about discovery or will result in a discovery penalty to her (it would not).

Mr. Lee litigated none of this at trial. He simply attended trial, provided incomplete and contradictory evidence and now appeals findings on an incomplete record, even though it is his burden to prove his income. RCW 26.19.071(2). The trial court should be affirmed. See State v. Sisouvanh, 175 Wn. 2d 607, 619, 270 P.3d 942 (2012) (if record fails to affirmatively establish abuse of discretion, the appellate court may affirm).

Second, He Claims Lack of Prejudice: Mr. Lee argues there is no "prejudice" to Ms. Stillman for enforcement of this alleged settlement agreement. Opening Brief at 17. He inaccurately, without citation, urges this Court to find that Ms. Hendrick (Ms. Stillman's attorney), "conceded there was no prejudice from her having to use Mr. Lee's pay statements without tax returns to calculate his income." Opening Brief at1. Mr. Lee states, without citation, that "Ms. Stillman was not prejudiced, by the admission of her own counsel, in calculating child support based upon Mr. Lee's complete pay stubs." Id. at 2. There was no agreement, nor any concessions by Ms. Stillman's attorney with regards to any issue raised in this case. This argument was not advanced until Mr. Lee's Opening Brief.

Mr. Lee testified he did not provide deductions. RP 9/10/12, pgs. 22-56, 58-88, 100-119. CP 397, 408-409. The trial court already reduced his income based on W-2s that arguably do not include his overtime. RP 9/11/12, pgs 168-169; CP 397. It would prejudice Ms. Stillman to have

him have tax deductions in this scenario, as the transfer payment to her would be reduced if Mr. Lee were given credit for deductions for which no verification was provided. It is also prejudicial for Mr. Lee to have credit for tax deductions without payment verification where Ms. Stillman was only given credit for tax deductions for which she provided verification.

Issue # 7: Whether attorney fees should be awarded to Ms. Stillman pursuant to statutes or on the basis of intransigence?

Pursuant to RAP 18.1(a) & (b) RCW 26.18.160, and RCW 26.26.140, Ms. Stillman asks this Court to order Mr. Lee pay her attorney fees incurred on appeal and attaches her financial declaration.

Also, RCW 26.18.160 mandates fees to a prevailing party in an action to enforce a child support order. "An award of attorney fees under the Uniform Parentage Act, Wash. Rev. Code § 26.26.140, is within the trial court's discretion." Fernando vs. Nieswandt, 87 Wn. App. 103, 110, 940 P.2d 1380 (1997) (abuse of discretion standard). RCW 26.26.140 authorizes the court to order a party to a paternity action to pay another party's fees. RCW 26.26.140. In ordering one party to pay another party's fees, the court may conduct a need vs ability to pay analysis. Id. In paternity action, fees for attorney time spent on support and parenting plan determinations were authorized by this statute. State ex rel. T.A.W. v. Weston, 66 Wn. App. 140, 147, 831 P.2d 771 (1992).

As indicated by Ms. Stillman's financial declaration, and by the record and final order, CP 452-456, it is clear Ms. Stillman has a financial need and Mr. Lee has the ability to pay for Ms. Stillman's attorney fees incurred in defending against Mr. Lee's appeal. The appeal stems from a trial where the main issue in dispute was a final order of child support.

Attorney fees should be awarded to Ms. Stillman based Upon Mr. Lee's Post-trial /pre-appeal Intransigence

A court may order legal fees paid if caused by another party's intransigence. In Re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Ms. Stillman also asks this Court to find Mr. Lee intransigent in this appeal process, causing unnecessary and substantial increase in her fees throughout this appeal. See e.g., Pennamen supra; Wade, supra, 138 Wn. 2d at 853 (court may impose sanctions for failure to provide complete record). As discussed throughout this Brief, Mr. Lee's post-trial motions were without merit, and denied by the trial court. Mr. Lee violated court rules when he attempted to introduce evidence for the first time post-trial that could have been, but was not, presented at trial. Mr. Lee's post-trial filings caused Ms. Stillman to incur substantially more fees; as she was forced to defend against and prevent consideration of improperly filed post-trial evidence. Mr. Lee was intransigent when he refused to order transcripts for this Court, including transcripts of the trial, the oral ruling,

the 10/24/12 hearing on his Motion to Clarify (CR 52/54 Amendment), and Ms. Stillman's Motion to Strike Mr. Lee's tax returns. Because Mr. Lee refused to order transcripts, Ms. Stillman was forced to file motions and then file a Motion for Discretionary Review under case no. 31811-7 seeking an order compelling Mr. Lee to pay for the transcripts so that this Court would have a complete record for review in Mr. Lee's appeal.

Issue #8: Whether sanctions are warranted for noncompliance with the RAPs and on the basis of frivolity of the appeal?

Ms. Stillman asks this Court to impose sanctions upon Mr. Lee, pursuant to RAP 18.9(a); as Mr. Lee's refusal to comply with the Rules of Appellate Procedure in refusing to provide this Court with a complete record of the proceedings below, forced Ms. Stillman to incur substantial, additional attorney's fees and costs in moving to compel the production of the transcripts of the record below, seeking discretionary review, and filing a cross-appeal to address this issue. RAP 9.2(b) requires an appellant to, "Arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." RAP 9.2(b). After filing his appeal, Mr. Lee refused to provide any record, in the form of verbatim report of proceedings, for any of the relevant proceedings below. RAP 9.2(c) provides that where a party seeking appellate review refuses to provide a verbatim report of the

proceedings, the other party to the appeal may move the trial court for an order requiring the appellant to pay for the verbatim report of the proceedings. RAP 9.2(c). Because Mr. Lee refused to provide a verbatim report of any of the proceedings below, Ms. Stillman was forced to file a motion with the trial court to compel Mr. Lee to pay for the transcript for the 9/10/12 trial and 9/11/12, immediate post-trial rulings. CP 631-648. Given the nature of Mr. Lee's appeal and his assignments of error, it was imperative this Court have a report of the trial and post-trial proceedings.

The matter was heard by the trial court on 4/19/13, when the court orally ruled Mr. Lee was required to pay for the court's oral rulings made at trial, and on 9/11/12. RP 4/19/13, 49-52, 54-55, 57-59. At that hearing Mr. Lee's counsel agreed those transcripts were reasonable. RP 4/19/13, 53. But when the court issued its written ruling, it reversed its oral ruling, saying Mr. Lee only had to order transcripts of the post-trial 10/24/12 and 11/1/12 hearings. CP 703-05. Ms. Stillman moved to clarify/reconsider the court's 4/24/13 ruling; on 6/7/13, the court denied her motion. CP 725-730. So Mr. Lee was not required by the trial court to transcribe testimony at trial or any objections made and rulings during trial, and was not required to pay for transcribing the trial court's 9/11/12 immediate, post-trial oral findings, conclusions, and rulings; which were essential for this Court to determine the legitimacy of Mr. Lee's assignments of error here.

On 7/3/13 Ms. Stillman was forced to file an appeal, under case no. 318117, of the trial court's 4/24/13 ruling and its 6/7/13 order denying Ms. Stillman's Motion to clarify/reconsider. CP 725-30. Mr. Lee filed partial transcripts from 10/24/12, 11/1/12 and 4/19/13 with this Court in this case. CP 754. Ms. Stillman filed a Motion for Discretionary Review, regarding the court's 4/24/13 and 6/7/13 rulings (case 318117). She filed a Motion to dismiss Mr. Lee's appeal for failure to provide a record or alternatively, Motion to Affirm on the Merits, in case nos. 313654 and 318117.

There can be no finding of good faith effort on Mr. Lee's part. He should be responsible for fees he caused to be incurred.[3] To make matters more egregious, he fails to follow rules regarding record citation. RAP 10.3(a)(5) requires the Statement of the Case be a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." Mr. Lee's Statement is full of argument, violating this Rule. RAP 10.3(a)(5) also requires"[r]eference to the record must be included for each factual statement." As noted in Ms. Stillman's factual section, Mr. Lee failed to do this too, by failing to reference the record for each statement and by misstating the references. "As a general principle, an

---

[3] Mr. Lee requests fees based on alleged intransigence under Mattson v. Mattson, 95 Wn. App. 592, 976 P.2d 156 (1999), that actually holds that an *appellant* who was held below to be intransigent can be ordered to pay respondent's fees on appeal due to intransigence of the appellant below. Here, Mr. Lee himself is the appellant – not Ms. Stillman. She is just defending herself on appeal; Mattson is inapposite. His request should be denied.

appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record through the factual recitation." Matter of Estate of Lint, 135 Wn. 2d 518, 531-32, 957 P.2d 755 (1998). That is the case here. See State v. Nelson, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006) ("We do not review assignments of error without citation to the record"), citing RAP 10.3. Mr. Lee's failure to follow citation rules shows his lack of "good faith efforts" in prosecuting this appeal. See RAP 9.10.

Frivolous Appeal As A Basis for Attorney Fee Award:

Where a party files an appeal without reasonable cause, this Court may require him to pay the prevailing party expenses, including fees that party incurred in opposing the action. RCW 4.84.185. In deciding if an appeal is frivolous, justifying terms and compensatory damages, a court considers: (1) a party has a right to appeal under RAP 2.2, (2) all doubts as to whether an appeal is frivolous should be resolved in favor of appellant, (3) the record should be considered as a whole, (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous, (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. In re Marriage of Lee, 176 Wn. App. 678, 692, 310 P.3d 845 (2013). Sanctions are authorized when a person

(1) uses the rules for the purpose of delay, (2) files a frivolous appeal, or (3) fails to comply with the rules to pay terms or compensatory damages. RAP 18.9(a). If a request for attorney fees on appeal is pursuant to RAP 18.9(a), and appeal is not frivolous if it presents debatable issues. Id.

"Attorney fees and costs are not recoverable by a prevailing respondent on appeal under RAP 18.9(a) if at least one of the appellant's issues or assignments of error is not frivolous. RAP 18.9(a) does not speak in terms of filing one or more frivolous issues or assignments of error—only a frivolous appeal as a whole." Id. Ms. Stillman also asks this Court to require Mr. Lee to pay all of the statutory attorney fees, expenses and costs she has actually incurred in bringing this appeal.

This appeal has been tedious and difficult to defend due to Mr. Lee's refusal to provide the barest of requirements, such as transcripts of the trial court's oral rulings that form the basis of this appeal, or the transcripts of the evidence at trial. Fees should be ordered.

D. CONCLUSION

Ms. Stillman asks that this Court to deny Mr. Lee's appeal and to order Mr. Lee to pay Ms. Stillman's attorney fees and costs as requested in Sections 7 and 8 above, and pursuant to RAP 14.1, 14.2, and 14.3.

DATED: 8/3/15

Ellen M. Hendrick, WSBA #33696

COURT OF APPEALS NO. 313654

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMIE LYNN STILLMAN,	)	
	)	
Respondent,	)	
	)	Court of Appeals No. 313654
vs.	)	Sup. Ct. No. 10-3-03046-6
	)	
DOUGLAS C. LEE,	)	
	)	
Appellant.	)	
	)	
	)	

CERTIFICATE OF SERVICE

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

1. On Monday, August 3, 2015, I caused to be hand-delivered the original and a copy of this Response Brief to the Court of Appeals, Division III, 500 North Cedar Street, Spokane, 99201.

2. Also on Monday, August 3, 2015, I served a copy of this Response Brief by having them hand delivered to Craig Mason, 1707 West Broadway, Spokane, Washington 99201.

3. I certify that the foregoing is true and correct.

DATED: 8/3/15

Ellen Hendrick

Ellen M. Hendrick, WSBA #33696
Law Office of Ellen M. Hendrick
1403 West Broadway Avenue
Spokane, Washington 99201
Attorney for Respondent Stillman