

FILED
NOVEMBER 30, 2015
Court of Appeals
Division III
State of Washington

No. 335771

IN THE COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

In re)	
)	COA No: 335771
GEOFF MERRIT ,)	
)	Walla Walla Sup. Ct.
Petitioner/Respondent)	No. 08-3-00202-5
vs.)	
)	
HEIDI EHM,)	
)	
Respondent/Appellant)	

APPELLANT'S OPENING BRIEF

PAUL A. DINENNA, JR., WSB 34927
Attorney for Appellant

DiNenna & Associates, P.S.
7 S. Howard, Suite 425
Spokane, Washington 99201
Phone: (509) 325-0125/Fax: (509) 456-2085

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I. STATEMENT OF FACTS

The Respondent (Mr. Merritt) filed his Petition for a Child Support Modification on December 7, 2011, 6 weeks after the Petitioner (Ms. Ehm) moved the Walla Walla Superior Court to vacate a highly restrictive, modified parenting plan that Mr. Merritt obtained against her by default. *CP 17-21, CP 22-27; & CP 160-167*. In addition to his petition for a child support modification, Mr. Merritt filed a Motion and Declaration for Temporary Child Support, noting the matter for argument on December 19, 2011, the same date Ms. Ehm's moved the Walla Walla Superior Court to hear argument on her motions to vacate the Final Parenting Plan, entered by default, and temporary parenting plan. *CP 22-27; CP 33*.

In his Petition for a Child Support modification dated December 7, 2011, Mr. Merritt plead the following basis' for modification: "Substantial changes in the mother and father's income have been reported" "Whether or not there is a substantial change of circumstances, the previous order was entered more than one year ago and; the order works a severe economic hardship, the child has moved to a new age category for support purposes, and an automatic adjustment of support should be added consistent with RCW 26.09.100" *CP 17-21*. Mr. Merritt filed a motion for a modified, temporary child support order, but did not file a declaration in support of his own behalf. *CP 22-27*. Instead, a

declaration was submitted by his previous counsel attesting only that certain financial information had been provided to the court. *Id.*

Subsequent to argument on December 19, 2011, the Honorable Donald W. Schacht (Retired) issued a written ruling dated January 6, 2012. *CP 34-37*. In his ruling, Judge Schacht suggested appropriate visitation for Ms. Ehm and ordered the parties submit to mediation before returning to court. *Id.* Mr. Merritt then abandoned his motion for a child support adjustment. *CP 160-167*.

The parties, in combination with Mr. Merritt's new counsel, Angel Base, subsequently mediated a resolution of the parenting plan on July 31, 2014. *CP 48-51*. Mr. Merritt did not address child support at mediation. *CP 160-167*.

Mr. Merritt, through his counsel, thereafter served Ms. Ehm's counsel with a Motion for Order re Parenting Plan and Child Support as well as a Note for Hearing on Thursday, February 5, 2015. *CP 108*. Mr. Merritt set the matter for hearing in Walla Walla Superior Court on Monday, February 9th. *Id.* Ms. Ehm and her Counsel were afforded a day to respond. *CP 199-205*.

Counsel for both parties conferred: Appellant's Counsel advised that he was unavailable for hearing on Monday, February 9th as he was conflicted with different court hearing and also advised that he would be

on vacation, returning on March 5th, and that I would likely need additional time to respond to her motion upon my return. *CP 199-205*. Mr. Merritt's filed an Amended Note for Hearing, setting the matter on Friday, March 6th. *CP 110*.

The Walla Walla Superior Court then contacted Mr. Merritt's counsel and advised that the hearing was incorrectly set for a Friday, rather than a Monday. *CP 199-205*. The Walla Walla County Superior Court did not contact Ms. Ehm's Counsel. *Id.* Thereafter, Mr. Merritt's counsel filed a second, Amended Note for Hearing. *CP 124*.

On Monday, March 9th, the Law and Motion Docket Minutes for the Walla Walla Superior Court identified that Mr. Merritt's counsel was present, Respondent's counsel as "not there," and Mr. Merritt's counsel made a statement. It also identified that the court "authorized entry of orders" and that the "order signed as presented." *Please See Exhibit A*.

Through his Counsel, Mr. Merritt entered a Final Order of Child Support, State Support Worksheet, Order on Modification of Child Support, and Findings of Fact/Conclusions of Law on Petition for Modification of Child Support on Monday, March 9, 2015. *CP 144-157, 142-143, 158*.

Mr. Merritt established a judgment for back child support in the amount of \$12,333.90 despite the fact that Ms. Ehm had always been

current on her child support obligation. *Id.* Mr. Merritt proposed a modified support obligation in the amount of \$706, a \$310.10 increase above Ms. Ehm's \$396 support obligation identified in the final order of child support entered in Walla Walla Superior Court on June 8, 2009. *Id.* Mr. Merritt arrived at his judgment calculation by multiplying the \$310.10 difference between his proposed, modified amount of child support and Ms. Ehm's established support obligation for 39 months, the period between December, 2011, up to, and including March, 2015. *Id.*

Mr. Merritt also established a judgment for interest in the amount of \$2,514.78, an interest accrual on the \$310.10 difference between the proposed, modified amount of child support and the balance Ms. Ehm had been paying between December, 2011 and March 31, 2015 as well. *Id.* Furthermore, Mr. Merritt included a prospective modification for the younger child with an automatic increase in support beginning February, 2017. *Id.* Mr. Merritt never provided Ms. Ehm or her counsel any of the above proposed orders. *CP 47, 48-51, 108, 110, 124.*

Thereafter, Ms. Ehm, through counsel, moved the Walla Walla Superior Court to vacate the Final Orders of Child Support, including the Final Order of Child Support, Order re: Modification, and Findings of Fact and Conclusions of Law. She obtained her Order to Show Cause re: Motion to Vacate Temporary Orders in Walla Walla Superior Court on

April 22, 2015. *CP 160-167*. Ms. Ehm moved the Walla Walla Superior Court to vacate the final child support pleadings based on CR 60(b)(1), (5), (11), and RCW 26.19.001. She also submitted a Responsive Declaration addressing Mr. Merritt's motion for child support, a Washington State Support Worksheet, and her 2014, 2013 individual tax returns and W-2's, as well as her most recent pay stubs under seal. *CP 174-178, 185-191*.

Ms. Ehm and her counsel plead that that they mistakenly relied Mr. Merritt's Note for Hearing setting her motion on March 6th rather than March 9th. *CP 168-173*. Ms. Ehm also cited issue with the arrearage, interest calculation, automatic step increase in child support, and argued that the modified child support obligation was not equitably apportioned between the parents regarding incomes and long-distance transportation. *CP 174-178, 185-191*.

Mr. Merritt, through counsel, responded to Ms. Ehm's pleadings. He argued, "[counsel] was provided notice of the hearing and failed to show or request continuance or to provide any information to defend against the proposals of the Petitioner. Evidence of service was provided to the court and the court ruled on the merits of the case in favor of the Petitioner's proposals." *CP 199-205*.

The Honorable M. Scott Wolfrom first heard argument on Monday, May 18, 2015. *RP 3-6*. The Walla Walla County Superior Court then stated, “Based on what is in the file, I’m inclined to vacate the temporary orders. And what I would suggest to the parties is that you mediate the dollar amount that is going to need to be paid going forward.” *RP 4*. It also identified that Ms. Ehm’s counsel was not present for hearing on Monday, March 9, 2015. *RP 5*. It, however, continued the matter to consider the materials Mr. Merritt submitted late to court. *Id.*

On June 1, 2015, the Walla Walla County Superior Court then denied Ms. Ehm’s Motion to Vacate. *RP 7-15*. The Honorable M. Scott Wolfrom held that Ms. Ehm had adequate notice of Mr. Merritt’s motion. *Id.* The Walla Walla Superior Court entered an Order re: Motion to Vacate that same day in June, 2015. *CP 232-233*. In it, the court found: “There is no basis to vacate the orders re: child support. The court entered the orders re: child support after review of the file and the pleadings and judgment was taken on the merits based on the facts as considered by the court.” *Id.*

Ms. Ehm filed her Notice of Appeal on June 29, 2015. She requests review of the Walla Walla Superior Court’s ruling denying her Motion to Vacate.

II. STANDARD ON APPEAL

“A trial court’s CR 60(b) ruling will be upheld on appeal unless the trial court has abused its discretion.” *In re Marriage of Tang*, 57 Wn.App. 648, 653, 789 P.2d 118 (1990). “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 940 P.2d 1362, 1366, 133 Wn.2nd 39, 47 (Wash. 1997) citing *State v. Rundquist*, 79 Wash.App. 789, 793, 905 P.2d 922 (1995) (citing WASHINGTON STATE BAR ASS’N WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5(2D ED. 1993)), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1966).

The Honorable M. Scott Wolfrom abused his discretion for the reasons that follow:

III. ABUSE OF DISCRETION

A. THE WALLA WALLA COUNTY SUPERIOR COURT’S FINDINGS, ORDER RE: MODIFICATION AND FINAL CHILD SUPPORT ORDER

**REFLECTED A DEFAULT, NOT THE COURT'S
DECISION ON THE MERITS:**

Ms. Ehm differs with Mr. Merritt and the court's finding that its decision denying her motion to vacate was based on the merits of the matter. The Walla Walla County Superior Court found, "it entered the orders re child support after review of the file and the pleadings and judgment was taken on the merits based on the facts as considered by the court." *Order re: Motion to Vacate – Denied*. Ms. Ehm argues that the final orders of child support entered in court on March 9, 2015 were entered by default.

The Court of Appeals, Division III, clarified the distinction between final orders entered by 'default' and orders entered on the 'merits' in the *Marriage of Olsen*, 183 Wn.App. 546, 333 P.3d 561 (Wash.App. Div. 3 2014). The Appellate Court ruled, "[w]e determine the nature of an order by examining its substance, object, and purpose, not what a party or the court chose to call it." *Olsen* at 556, 565 citing *Cf. Seal v. Camerson*, 24 Wash. 62, 64, 63 P. 1103 (1901). In *Olsen*, the appellant and his attorney failed to appear for his dissolution trial a third time. The trial court then proceeded to hear testimony from the opposing party, heard argument, issued a memorandum decision, and later, final orders based on the testimony it considered at trial. The appellant then

moved the trial court to vacate the final orders pursuant to CR 60(1), advocating that a liberal standard should apply to the trial court's decision to vacate. The Appellate Court, Division III, upheld the trial court decision denying the motion to vacate because final orders in this case were entered on the merits, and did not result by default.

The *Olson* Appellate Court, Division III, found that a default results when a party "failed to plead or otherwise defend." *Olson* at 564, 554 citing Fed.R.Civ.P. 55(a). It also found, "...it is well settled Washington law and also the view of federal courts that if one side fails to appear on the date set for trial, a single-party trial can proceed and the outcome of the trial will be a judgment on the merits, not a judgment by default." *Olson* at 564, 554 citing *Tacoma Recycling, Inc. v. Capital Material Handling Cox*, 34 Wn.App. 392, 661 P.2d 609 (1983).

In upholding the trial court decision, the *Olson* Appellate Court, Division III, reasoned, default judgments "determine liability in favor of the party securing the judgment without requiring that party to meet its burdens of production or proof" where in *Olson*, the final orders were entered based on the evidence and testimony it procured at trial. *Olson* at 565, 555. "Because the orders from which [the Appellant] was entitled to seek relief under CR 60(b) were not default orders in substance," the Appellate Court "rejected his position that this relief under CR 60(b)

should be determined under the relatively liberal standard for relief from a default judgment.” *Id.*

There is no issue in Ehm that final child support pleadings were entered pursuant to a motion, not trial. Mr. Merritt moved the court to approve or adopt his final child support pleadings via a motion. *CP 47*. He filed a Note for Hearing. *CP 108*. He and his counsel appeared at the Walla Walla County Superior Court on Monday, March 9, 2015 at the court’s Law and Motion Docket. *Please See Exhibit A*. There was no trial.

The hearings court “authorized entry of the orders” and “signed [the orders] as presented” that day, Monday, March 9, 2015. *Id.* Ms. Ehm nor her counsel was present at hearing on Monday, March 9, 2015. *Id.* Mr. Merritt and his counsel were present. *Id.* The hearings court only considered a statement from Mr. Merritt’s counsel attesting to service of a Note for Hearing and subsequent Amended Note for Hearing upon Ms. Ehm’s attorney. *Id; RP 3*. It did not hear argument. *Please See Exhibit A*.

Mr. Merritt, furthermore, did not file a proposed order of child support, Findings & Conclusions of Law, or Order re: Modification at the time he originally filed his motion on February 4, 2015. He presented these orders for the first time on Monday, March 9, 2015 when the court

signed. *CP 144-157, CP 142-143, and CP 158*. Despite the Walla Walla County Superior Court finding in its Order Denying Ms. Ehm’s Motion to Vacate [CP232-233] that it “entered [final child support orders] after review of the file, the pleadings, and judgment” [Id.], the court signed the final orders at the same time the pleadings were presented Monday morning, March 9, 2015. *Please See Exhibit A*. It did not review or consider the final child support pleadings prior to signing.

Ms. Ehm had “failed to appear or defend,” which is consistent with the *Olson* Appellate Court, Division III, and CR 55(a) definition of default. The Walla Walla County Superior Court “determine[d] liability in favor of [Mr. Merritt] without requiring that [him] to meet [his] burdens of production or proof.” *Olson* at 565, 555. Ms. Ehm was not present. Mr. Merritt did not engage or proceed in a single-party trial. He did not provide evidence or testimony, which the court relied on adopting final child support pleadings in this case.

A proper analysis or examination of the “substance, object, and purpose” and the Ehm final child support pleadings would conclude that they were not entered on the merits, but rather by default against Ms. Ehm. *Olson* at 556, 565.

B. MS. EHM SHOULD HAVE BEEN AFFORDED A LIBERAL STANDARD FOR HER MOTION TO VACATE:

The Washington State Supreme Court ruled, “Default judgments are not favored in the law.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289, (Wash.1979) citing *Ramada Inns. Inc. v. Lane & Bird Advertising, Inc.*, 102 Ariz. 127, 129, 426 P.2d 395 (1967). The trial court in this case vacated a judgment obtained by default. The creditor appealed and the Appellate Court reinstated the judgment, finding that the default was appropriate. The State Supreme Court then evaluated the judicial attitude toward default judgments, balancing the equitable principle that controversies are best determined on the merits rather than default, against the necessity of having a responsive and responsible judicial system which mandates compliance with judicial summons. *Dlouhy v. Dlouhy*, 55 Wash.2d 718, 721, 349 P.2d 1073, 1075 (1960); *Griggs*, 92 Wn.2d at 581. The Court upheld the trial court decision, finding, “the trial court should exercise its authority ‘liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done’.” *Id* citing *White v. Holm*, 73 Wash.2d 348, 351, 438 P.2d 581 (1968). The Washington State Supreme Court reasoned, “what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.” *Griggs*, 92 Wn.2d at 582.

In deciding a motion to vacate [a default judgment], the court addresses two primary and two secondary factors that must be shown by the moving party: (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated." *Johnson v. Cash Store*, 116 Wn.App. 833, 841, 68 P.3d 1099 (2003) citing *White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968); *Norton v. Brown*, 99 Wn.App. 118, 123, 992 P.2d 1019, 3 P.3d 207 (1999), review denied, 142 Wn.2d 1004 (2000).

Here in Merritt/Ehm, there is little issue that it would be more equitable and also furthers the court's policy to determine issues on the merits by vacating the child support pleadings. *CP 160-167*.

There is also substantial evidence to support a defense to the opposing party: Mr. Merritt's income is in question. Ms. Ehm is required to complete all transportation between Oregon and Walla Walla, Washington one weekend per month: Mr. Merritt's proportionate contribution towards this cost and her visitation should be factored. The court currently needs a more equitable start date to any modified

obligation considering Mr. Merritt waited over 3 years to pursue this modification.

Ms. Ehm's failure to appear was indeed due to mistake: Mr. Merritt's counsel noted the matter for an incorrect date, which precluded her appearance.

Ms. Ehm has acted with appropriate diligence, moving the court to vacate in less than one month after the final pleading were entered by default. There is no prejudice to Mr. Merritt considering he moved the court to set an appropriate amount of child support commensurate with the state support schedules. Without appropriate consideration on the issues, support will not be equitable between the parties or appropriately set.

Furthermore, the Walla Walla County Court should have applied a liberal standard to vacate final child support pleadings rather than hold Ms. Ehm to a hard and fast rule based on notice.

C. FINAL CHILD SUPPORT PLEADINGS ARE VOID:

The Washington State Supreme Court ruled, "[i]n entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint." *In re the Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013, 1016, (Wash. 1989) citing *Scava Steel Bldgs., Inc. v. Weitz*, 66 Wash.2d 260, 262, 401 P.2d 980 (1965); *Stablein v. Stablein*, 59 Wash.2d 465, 466, 368 P.2d 174 (1962); *In re*

Marriage of Campbell, 37 Wash.App. 840, 845, 683 P.2d 604 (1984); *In re Marriage of Thompson*, 32 Wash.App. 179, 183-184, 646 P.2d 163 (1982); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wash.App. 952, 954, 533 P.2d 152 (1975). In *Leslie*, the Petitioner requested review of a court order that required him to pay proportionately towards orthodontia expenses. He argued that the provision requiring him to do so was void because it exceeded the relief originally requested in the petition for dissolution and was also not included in a settlement agreement later established between the parties. *Leslie* at 1015. The Court held that the Order was “void to the extent it awards relief in excess of that sought in the petition for dissolution and the property settlement agreement signed by the parties.” The Court reasoned, “[t]o grant such relief without notice and an opportunity to be heard denied procedural due process.” *Leslie* at 1016 *citing Conner v. Universal Utils.*, 105 Wash.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wash.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wash.2d 879, 884, 468 P.2d 444 (1970).

The Court found, “[s]uperior court civil rule 60(b)(5) provides that upon a motion to vacate, a court may relieve a party from a final judgment, order or proceeding if that judgment, order or proceeding is void.” *Leslie* at 1016.

Mr. Merritt obtained a final order of child support by default. In it, the court awarded Mr. Merritt a judgment for interest on unpaid child support as well as a prospective automatic step increase in child support beginning in February, 2017. However, Mr. Merritt did not request this relief in the petition he filed in December, 2011. These provisions are void pursuant to the Washington State Supreme Court's ruling in *Leslie*.

The Final Order of Child Support and associated final support pleadings entered in Walla Walla County Superior Court on March 9, 2015 should be vacated pursuant to the *Leslie* decision above as well as CR 60(b)(5).

D. THE WALLA WALLA SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT SET SUPPORT BEGINNING WHEN MR. MERRITT FILED HIS PETITION IN DECEMBER, 2011 RATHER THAN WHEN HE FILED HIS MOTION FOR ADJUSTMENT IN FEBRUARY, 2015:

RCW 26.09.170(1)(a) & (b) states:

“Except as otherwise in RCW 26.09.070(7), the provisions of any decree respecting...support may be modified: (a) only as to installments accruing subsequent to the petition for modification or motion for adjustment... (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances.”

RCW 26.09.170(1)(a) & (b).

The Court of Appeals, Division I, ruled, “RCW 26.09.170(1) envelopes an adjustment action within the purview of a modification,

making an adjustment a form of modification, but one that is narrower in scope, thus limiting the relief a court can grant.” *In re Marriage of Scanlon and Witrak*, 34 P.3d 877, 889-890, 109 Wn.App. 167 (Wash.App. Div. 1 2001). The *Scanlon* Appellate Court, Division I, sought to clarify the difference between a modification proceeding and an adjustment of child support. The Appellant/Father petitioned the King County Superior Court for a downward modification of his child support obligation based on a reduction of income. He also requested an allocation of the long-distance transportation expenses and an award of the federal income tax exemptions for the children. The Respondent/Mother moved the county court for an increase in the Appellant/Father’s support obligation and for payment of postsecondary educational expenses. The King County Court denied the Appellant/Father’s request for relief, but instead awarded the Respondent/Mother the relief she sought including postsecondary support and long-distance transportation expenses. The Appellant/Father appealed the county court’s authority to modify his child support obligation with finding a substantial change in circumstance. The Court of Appeals, Division I, reversed the county court decision and remanded the case pursuant to its instruction in its written decision.

The Appellate Court clarified the difference between a modification and adjustment of child support: “A full modification action

is commenced by service of a summons and petition. RCW 26.09.175. It may only be sustained under certain prescribed circumstances. RCW 26.09.170.” *Scanlon* at 881. “A full modification action is significant in nature and anticipates making substantial changes and/or additions to the original order of support.” *Scanlon* at 881.

“By contrast, parties may adjust an order of child support every 24 months on a change of incomes, without showing a substantial change in circumstances. RCW 26.09.170(7)(a). This routine action may be effected by filing a motion with the court for a hearing. RCW 26.09.170(7)(a)” *Scanlon* at 881. “An adjustment action therefore simply conforms existing provisions of a child support order to the parties’ current circumstances.” *Id.*

In *Scanlon*, the Appellant/Father “alleged in his petition only that more than 24 months had passed and there had been a change of in income of the parties. He argued that this is insufficient to constitute a substantial change of circumstances” and the Appellate Court, Division I, agreed. *Scanlon* at 890. The Appellate Court, Division I, found that “RCW 26.09.170(7)(a) explicitly states that the mere passage of time and routine changes in incomes do not constitute a substantial change of circumstances.”

RCW 26.09.170(6)(a) & (b) also state that a “showing of substantially changed circumstances” is not necessary if (a) “the order in practice works a severe economic hardship on either party or the child; and (b) “If a party requests an adjustment in an order for child support which was based on guidelines which determined the amount of support according to the child’s age, and the child is no longer in the age category on which the current support was based.”

In his Petition for Modification, Mr. Merritt plead “substantial change in the Mother and Father’s incomes have been report” and that “the child has moved to a new age category for support purposes.” *CP 17-21*. Mr. Merritt plead factors that did not require a substantial change in circumstance when he filed his Petition. His Petition for a Child Support Modification was filed in direct response to Ms. Ehm’s Petition for a Parenting Plan Modification, wherein she requested modification to the restrictive parenting plan Mr. Merritt entered against her by default. *CP 160-167 (Motion to Vacate)*.

After the parties agreed to the terms and provisions of the modified, final parenting plan in August, 2014, Mr. Merritt subsequently moved the court for an adjustment of the child support obligation. In so doing, he sought to “conform the existing provisions of the child support

order to the parties' current circumstances" with the final parenting plan that had been entered. *Scanlon* at 889.

Although Mr. Merritt filed his Petition in December, 2011, he did not file his motion until February, 2015. Pursuant to RCW 26.09.170(1), the court can set support beginning either when the Petition or Motion was filed. Because Mr. Merritt sought an adjustment, consistent with the provisions he plead in his Petition, the Walla Walla County Court erred and abused its discretion when it considered Mr. Merritt's petition a substantial change to the existing Order of Child Support beginning in December, 2011 rather than an adjustment, consistent with the current circumstances of the parties, modifying Ms. Ehm's support obligation in February, 2015. In so doing, the county court inappropriately established a \$12,999.00 judgment for an arrearage.

E. ERROR OF LAW – MR. MERRITT FAILED TO SATISFY MEDIATION, A CONDITION PRECEDENT TO MODIFICATION:

The Court of Appeals, Division I, ruled, "Under RCW 26.09.170, a retroactive child support modification is highly disfavored except in certain unusual instances, none present here." *In Re Marriage of Cummings*, 101 Wn.App. 230, 234, 6 P.3d 19 (Wash.App. Div. 1 2000). Subsequent to the dissolution in 1984, the Respondent/Mother filed a child support modification in 1986, ultimately seeking to enforce a child support

adjustment provision in the existing order of child support that required her to first submit copies of her tax returns to the Appellant/Father before any adjustment would occur. Following entry of an agreed order in 1986 where the parties clarified their procedure for exchanging tax returns respectively, the Respondent/Mother moved the county court for child support arrearages, interest, and attorney fees in a 1996 motion, despite failing to provide copies of her tax returns to the Appellant/Father. The county court dismissed her motion in 1996 for her failure to do so. Without disclosing the court's 1996 ruling or agreed order entered clarifying the exchange of tax information in 1986, the Respondent/Mother thereafter provided copies of her tax returns and successfully moved the court for the relief she sought in 1998 when it awarded her a judgment for nearly \$62,000 in arrearages, interest, and attorney fees dated back to 1986, when she filed her petition for modification. The Appellant/Father appealed.

The *Cummings* Appellate Court, Division I, reversed the decision awarding the Respondent/Mother arrearages, interest, and attorney fees. The Court first reasoned that the Appellant/Father had fully paid the amount of child support established in the order and had always been current in his support obligation. The Cummings Court found that, although the Respondent/Mother moved the county court for a judgment

on child support arrearages and interest, the matter was “one for retroactive modification of child support at a minimum” [Cummings at 234] and thus disfavored.

The *Cummings* Appellate Court, Division I, also reasoned that the Respondent/Mother was “foreclosed” from an award of any back support because she failed to provide her tax returns as “a condition precedent to any request for adjustment.” *Cummings* at 235. The Court found that the Respondent/Mother “waived her right to request adjustments by failing to comply with the 1986 Order” illustrating the requirement and provision that she do so. *Id.* The *Cummings* Appellate Court, Division I, held that the “trial court erred as a matter of law in granting a judgment for arrearages.” *Id.*

In the current, pending matter, Ms. Ehm had always been current on her support obligation. *CP 144-157*. The modified Order of Child Support entered in Walla Walla County on March 9, 2015 established a judgment and interest on the increased, modified amount of child support rather than on any unpaid balance of child support beginning in June, 2009, when the original Order of Child Support had been entered in Walla Walla Court. *CP 144-157 - Attachment A; CP 6-16*.

Mr. Merritt, furthermore, was ordered to mediate subsequent to filing his Petition for a Child Support Modification in December, 2011,

when the Honorable Donald W. Schacht (Retired) ordered it in his written ruling dated January 6, 2012. *CP 34-37*. Despite mediating a resolution of the final parenting plan in July, 2014, Mr. Merritt nor his counsel addressed the issue of child support in mediation at that time. *CP 199-205*. The Walla Walla County Court, in what amounted to a bench conference on May 18, 2015, correctly identified Mr. Merritt's requirement to mediate: "Based on what is in the file,... And what I would suggest to the parties is that you mediate the dollar amount that is going to need to be paid going forward." *RP 4*. In failing to do so, Mr. Merritt is foreclosed from a modification of support beginning in December, 2011 since he failed to satisfy the "condition precedent" before seeking a modification of Ms. Ehm's support obligation. *Cummings* at 235.

F. THE WALLA WALLA COUNTY COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AFFORD MS. EHM AN EQUITABLE DEFENSE:

"Washington Courts are allowed in some contexts to apply traditionally recognized equitable principles to mitigate the harshness of claims for back support." *State v. Base*, 131 Wn.App. 207, 216, 126 P.3d 79 (Wash.App. Div. 3 2006) *citing In re Marriage of Shoemaker*, 128 Wash.2d 116, 123, 904 P.2d 1150 (1995). "Courts have applied equitable principles to some claims for retrospective support when doing so did not

work an injustice to either the custodial parent or to the child.” *State v. Base* at 218 *citing Shoemaker*, 128 Wash.2d at 123, 904 P.2d 1150 and *Hartman v. Smith*, 100 Wash.2d 766, 768-69, 674 P.2d 176 (1984). The trial court’s power can only be exercised within the framework of established equitable principles that have been traditionally recognized in the context of child support proceedings, such as laches. *State v. Base* at 218 *citing Shoemaker*, 128 Wash.2d at 123, 904 P.2d 1150.

In *State v. Base*, the State of Washington appealed a county court decision limiting an obligor’s liability for reimbursement to the State for public assistance paid to the custodial parent for a period of 10 months rather than the State’s request for 5 years, the period of time the state had provided financial assistance. “The primary issue in this case is whether the trial court acted within its authority when it relied on the equitable considerations to limit [the obligor’s] liability for back child support.” *State v. Base* at 215. The Court of Appeals, Division III, upheld the county court decision limiting liability for back child support.

The *State v. Base* Court of Appeals, Division III, found that laches was a proper defense in this case. “Laches bars a cause of action for back child support if: (1) the plaintiff was aware or should have been aware of the facts constituting the cause of action, (2) the commencement of the action was unreasonably delayed, and (3) the defendant is damaged by the

delay.” *State v. Base* at 218 citing *In re Parentage of Hilborn*, 114 Wash.App. 275, 278, 58 P.3d 905 (2002). The Appellate Court reasoned that the State stood in the shoes of the custodial parent when it sought a subrogation action for past support, and that the “rights and remedies to it are no greater than those that would be available to a parent.” *State v. Base* at 218; See e.g., *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wash.2d 334, 341, 831 P.2d 724 (1992). “The court found that the State had, ‘[sat] on its hands for four or five years... and then [came] in and ask[ed] for reimbursement’.” *State v. Base* at 219. “The court found that the amount of arrearages that would be imposed on Mr. Base as a result of the State not pursuing its parentage action in a timely manner would be patently unfair.” *Id.* The Court of Appeals held that the “trial court did not abuse its discretion when it applied equitable principles to limit Mr. Base’s liability for back child support.” *Id.*

The Court of Appeals, Division I, also applied equitable principles to limit the liability of an obligor for child support, which had not been paid. See e.g., *In re Marriage of Watkins*, 42 Wn.App. 371, 710 P.2d 819 (Wash.App. Div. 1 1985). The county court denied the Respondent/Mother’s request for back child support because she waited 5 ½ years before bringing the action despite knowing the obligor had ceased

making payments. The Court of Appeals upheld the trial court application of laches and its reasoning that the obligor incurred financial obligations that he would have otherwise forsaken in the 5 ½ the obligee waited to enforce the claim. *Watkins* at 375.

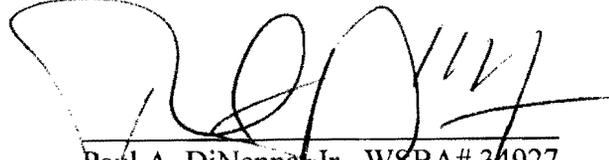
In Ehm, like *Watkins* and *State v. Base*, Mr. Merritt waited a substantial period of time before moving the court for child support, 3 years and 3 months. He provided the Walla Walla Superior Court with no explanation why he waited. *CP 48-49; CP 50-51*. He did not plead how the children had been denied an appropriate amount of financial support from Ms. Ehm. He was aware of the facts constituting his cause of action having plead both the petition for modification in 2011 and motion for adjustment in 2015. *Id. CP 17-21; CP 47*.

Conversely, Ms. Ehm suffered damages monetarily despite being current on her existing child support obligation. *CP 144-157: Attachment A*. The Walla Walla Superior Court assessed judgments in the amount of 12,333.90 for the modified, back child support obligation and \$2,514.78 interest on the modified arrearage for a period of time of three years and 3 months. *CP 144-157*. In so doing, it failed to consider how Mr. Merritt “sat on his hands” [*State v. Base* at 219] or how its decision was “patently unfair” [*Id.*] to Ms. Ehm. It also failed to consider that Ms. Ehm “incurred financial obligations she would have otherwise forsaken” [*Watkins* at 375]

had the court modified her obligation nearer to the time Mr. Merritt moved for an adjustment.

Ms. Ehm, through counsel, advised the Walla Walla Superior Court that establishing judgments against Ms. Ehm for over a three year period of time was unfair and inappropriate. *Please See Transcript, Pg. 10, Lines 8-11; 19.* The Walla Walla County Superior Court abused its discretion when it allowed these judgments to stand, and refused to consider laches as an appropriate equitable defense for Ms. Ehm.

Respectfully submitted this 30th day of November, 2015



Paul A. DiNenna Jr., WSBA# 34927
Attorney for Heidi Ehm

EXHIBIT A

COURT

LAW & MOTION DOCKET MINUTES

DATE Monday, March 09, 2015

JUDGE: M. Scott Wolfram

COURT REPORTER Tina Driver

DEPUTY CLERK Rachel Taylor

Geoffrey Merritt
Petitioner/Plaintiff

vs

NO 08-3-00202-5

Heidi Merritt
Respondent/Defendant

Petitioner/Plaintiff appearing X, represented by Angel Base
_____, of counsel.

Respondent/Defendant appearing not her, represented by _____
_____, of counsel.

The matter before the Court is Motion Re: Child Support

Statement
Argument in support by Ms. Base

Argument in opposition by _____

Rebuttal argument by _____

Court authorized entry of orders.

____ The Court grants/denies the _____ motion

____ The Court takes the matter under advisement

X Order signed as presented _____ Order to be presented

____ The matter is stricken by _____

____ The matter is continued to _____