

2009

Jeffery G. Fuell v. Lorencita Diel (Fuell) : Brief of Appellee

Utah Court of Appeals

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Vernon C. Jolly; Alexander D. Jolly; Jolly and Jolly; Attorneys for Appellant.

Gary Buhler; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JEFFERY G. FUELL
Petitioner/Appellant,

vs.

LORENCITA J. DIEL (FUELL)
Respondent/Appellee

Appellate Court No 20090382CA

Trial Court No. 034300398 DA

BRIEF OF APPELLEE

This is an appeal from the final judgment and order issued by the Honorable Judge Stephen L. Henriod, Third Judicial District Court, in and for Tooele County, Utah, entered in this matter March 30, 2009.

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UTAH APPELLATE COURTS**

OCT 22 2009

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<p>JEFFERY G. FUELL Petitioner/Appellant,</p> <p>vs.</p> <p>LORENCITA J. DIEL (FUELL) Respondent/Appellee</p>	<p>Appellate Court No200090382CA</p> <p>Trial Court No. 034300398 DA</p>
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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann §78A-4-103.

STATEMENT OF THE ISSUES

ISSUE ONE: Mr. Fuell failed to challenge the adequacy of the court's factual findings in the trial court. The statement on page 5 of the Appellant's Brief, "*In order to evaluate the merit of appellant's first imputation argument, we must determine whether the trial court's decision to impute income was **supported by adequate findings** in light of Utah Code Ann. §78-45-7.5(7)(a) [§78B-12-203]. . .*" clearly demonstrates that upon appeal, Mr. Fuell intends to challenge the adequacy of the trial court's findings.

In the recent case, *State Ex Rel. K.F.*, 201 P.3d 985 (UT 2009) 2009 UT 4, the Utah Supreme Court reaffirmed *438 Main Street v. Easy Heat, Inc.* 2004 UT 72, ¶56, 99 P.3d 80, which held in ¶59 that in order to preserve an adequacy of the findings issue for appeal, a party is required to challenge the adequacy of the court's factual findings in the trial court. In ¶60, of that case, the Supreme Court stated that:

The requirement that a party raise a challenge to the adequacy of the findings of fact at the trial court before the challenge may be heard on appeal does not conflict with rule 52 of the Utah Rules of Civil Procedure, which provides in relevant part as follows:

- (a) . . . Requests for findings are not necessary for purposes of review.
- (b) . . . When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial. Utah R. Civ. P. 52(a)-(b) (emphasis added).

Clearly, rule 52 addresses sufficiency of the evidence challenges. In 438 Main Street, however, we addressed challenges to the adequacy of the detail in the findings of fact. There we stated that a plaintiff "waive[s] any argument regarding whether the district court's findings of fact were sufficiently detailed" when the plaintiff fails to challenge the detail, or adequacy, of the findings with the district court. 438 Main St., 2004 UT 72, ¶56, 99 P.3d 801

In this appeal, a review of the record demonstrates that Mr. Fuell has failed to take any action whatsoever at the trial court level to preserve the issue of adequacy of the factual findings. Accordingly, this Court must presume the factual findings are valid and reject Mr. Fuell's challenges as stated in his Issue #1.

ISSUE TWO: Mr. Fuell has failed to marshal the relevant facts on appeal. "On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshal" the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Hagan v. Hagan*, 810 P.2d 478 at 481 (Utah App. 1991) (citing *Myers v. Myers*, 768 P.2d 979, 984 (Utah App. 1989) (citations omitted)

The Advisory Committee Notes to Utah to Rule 24 of the Rules of Appellate Procedure states:

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App.

1994) (alteration in original)(quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)).

In this appeal, a brief review of the trial transcript demonstrates that Mr. Fuell has neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings are clearly erroneous, citing instead only the carefully selected evidence that supports the outcome he desires. Further, in his brief, Mr. Fuell has slanted his presentation of the evidence heard by the trial court and in some cases he has attempted to mislead this Court by completely ignoring in his argument the testimony given at trial even when it appears in his own brief.

Accordingly, this Court must view the evidence in a light most favorable to the district court and assume that the factual findings are sufficiently supported by the evidence presented at trial and reject Mr. Fuell's challenge as stated in Issue #2. Mr. Fuell's complete failure to Marshal the evidence when challenging the trial court's findings must be fatal to his appeal.

STATEMENT OF THE CASE

Case History

On August 6, 2007 Lorencita Diel filed her petition to modify the divorce decree asking the court to (1) modify the existing joint physical custody award to award her the primary physical custody of the parties' two minor children; (2) modify the child support award to comport with the custody situation after modification; and (3) award her judgement for the \$2,600.00 in child support Mr. Fuell had failed to pay her under the terms of the existing decree. (00049) At the time she filed the petition, Lorencita believed Mr. Fuell had received substantial pay increases since the time of the divorce that would also allow a modification of the existing \$200.00 per month total child

support award for his three children because in his original complaint, Mr. Fuell had claimed that he made \$3,500.00 per month gross (00009 ¶7), even though his pay stub attached to the Findings and the Divorce Decree indicated he actually earned \$4,009 per month (000016 – Pay Stub Y-T-D income = \$29,063 / 7.25 months as 8/05/03 pay period).

On October 1, 2007, the parties were directed by the court to exchange a full accounting concerning the child support payments due and made. (00074) This issue was again before the Court on November 5, 2007. On April 18, 2008 Lorencita served upon Mr. Fuell several interrogatories and her requests for the production of documents concerning his employment and income status and parent time issues. (00082) This request was followed on June 11, 2008 by Lorencita's Motion to Compel Mr. Fuell's cooperation with discovery. (00091) On July 7, 2008 Lorencita's Motion to Compel was granted and Mr. Fuell was once again ordered to provide the requested financial information within 15 days. (00094)

On September 29, 2008, this action was certified for trial to include Lorencita's issues of custody, her out-of-pocket medical expenses and insurance premiums, the \$2,600.00 of past due child support and the modification of child support obligations beginning August 2007.

Because Mr. Fuell had continued to refuse to provide the financial and parent time information as previously ordered several times, Lorencita was directed to file a Motion in Limine which she did on December 1, 2008. (00107) On December 15, 2008 the court held a pretrial conference and once again ordered Mr. Fuell to provide his tax returns and pay stubs within 5 days and entered the order that other than the tax

returns and pay stubs Mr. Fuell would not be allowed to introduce any evidence that he had not previously produced at trial. (00155 Pg 6 Ln 18-22)

On January 29, 2009 Lorencita filed and served Mr. Fuell with her Witness and Exhibit List. Mr. Fuell never did file any witness or exhibit lists prior to trial. (00155 Pg 7 Ln 21 – Pg 8 Ln 5) The only relevant income information Lorencita ever received from Mr. Fuell was a single pay stub from his new job that arrived several days after the second pretrial conference held on December 15, 2008.

Trial was conducted on February 4 and 11, 2009. The Court issued its Memorandum Decision on March 5, 2009, and entered the Findings and final Order on March 30, 2009, from which this appeal was taken. (00146)

It appears from the court record that Mr. Fuell's Notice of Appeal was not filed with the trial court and the fee was not paid until May 6, 2009. (00148)

Trial Evidence

At trial, Lorencita testified that Mr. Fuell had been ordered in the 2003 divorce decree to pay her \$200.00 in monthly child support for the parties' three children (00155 Pg 41 Ln 7 -10) and that at the time she served her petition to modify, Mr. Fuell was earning \$4,825.00 per month at his job at EG&G as shown on his July 2008 pay stub. (00155 Pg 39 Ln 4 – 11, 19)

At trial, Mr. Fuell testified that he had changed his job and began earning a lower amount of income 9 or 10 months after he had been served with Lorencita's petition to modify the divorce. Mr. Fuell testified that as of July 13, 2008 his year to date pay stub from his job at EG&G indicated he had earned \$31,366 (00155 Pg 126 Ln 7 – 12) which is equivalent to \$4,823 per month average income.

Mr. Fuell stated that his change in employment reduced his income that he had historically been making from the \$20.80 base pay plus night shift differential, Sunday premiums and eight hours of overtime every two weeks (00156 Pg 44 Ln 16- Pg 45 Ln 2) to \$14.00 per hour at his new job. (00156 Pg 46 Ln 4-7)

Mr. Fuell responded to his attorney's question "*So am I correct that you also changed your jobs because it was recommended by your doctor?*" with the statement "*They just recommended a lifestyle change.*" (00156 Pg 42 Ln 5-7) Mr. Fuell also stated that "*I changed jobs - - I didn't want to wait five years after I graduated to look for the employment that I took my school for and it had already been three years since I graduated.* [from Heating and Air Conditioning school] (00156 Pg 45 Ln 3-15)

At the conclusion of trial, the court entered its Memorandum Decision that included the order to use \$4,825 per month as Mr. Fuell's income for the calculation of the modified child support award. Mr. Fuell has appealed that order to this Court.

SUMMARY OF ARGUMENT

Mr. Fuell failed to comply with Rule 4(a) of the Utah Rules of Appellate Procedure thus denying this Court jurisdiction to hear or consider this appeal when he filed this appeal on May 6, 2009 which is more than 30 days after the final order was entered on March 30, 2009.

Mr. Fuell stated the standard of review for his first issue to be "*whether the trial court's decision to impute income was supported by adequate findings . . .*"

A review of the record demonstrates that Mr. Fuell has failed to take any action whatsoever at the trial court level to preserve the issue of adequacy of the factual findings. Because Mr. Fuell failed to preserve the issue of the adequacy of the factual

findings as required by the Supreme Court's ruling in *438 Main Street v. Easy Heat, Inc.*, this Court must presume the trial court's factual findings are valid and the appeal of this issue must be denied.

In his second issue, Mr. Fuell challenges sufficiency of the evidence used by the court to support its imputation of income. Mr. Fuell has failed to marshal the relevant evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are clearly erroneous as required by Rule 52 of the URCP and by Rule 24 of the Rules of Appellate Procedure.

At trial, Mr. Fuell did not allege that he had been fired or laid off and he produced no credible evidence to support any of his claims of medical problems that might have precluded his continued employment at this former job and income, thus the finding that his change in jobs had been voluntary was sufficiently supported by the evidence presented at trial.

Mr. Fuell testified that at the time he was served the petition to modify, he had been historically making \$20.80 base pay plus substantial premiums and overtime. He also testified that nine months after he was served the petition, he took a new job where his income was reduced to \$14.00 per hour, thus the court's finding that his change in jobs had created an underemployment situation was sufficiently supported by the evidence presented at trial.

Because the Appellant's brief failed to marshal the evidence as required by Rules 52 and 24, this Court must presume the trial court's factual findings are supported by sufficient and competent evidence, thus the appeal of this issue must be denied.

ARGUMENT

Untimely Notice of Appeal

After the Findings and final Order were entered on March 30, 2009, Mr. Fuell filed no motions that would extend the time to file an appeal. Therefore, pursuant to the Utah Rules of Appellate Procedure, Rule 4(a) Mr. Fuell's appeal from the final Order entered on March 30, 2009 must have been filed prior to the day it was filed on May 6, 2009. Because Mr. Fuell failed to comply with Rule 4, this Court does not have jurisdiction to hear or consider this appeal which should therefore be dismissed.

Imputed Income Not Pled

On appeal, Lorencita Diel is charged with failing to ask for imputed income in her petition to modify and that she raised the issue of voluntary underemployment for the first time at trial. Because Mr. Fuell failed to marshal the evidence, the appellant's brief does not tell this Court that for the 15 months immediately preceding the trial, Mr. Fuell continuously refused to provide and actively resisted every effort by Lorencita to make him provide his income information so that child support could be properly calculated. The numerous motions and orders contained within the court record provides ample indication of Mr. Fuell's continuing refusal to participate in the trial preparation process for more than one year. Finally, after the court demanded it be turned over and just a few days before the beginning of trial, Lorencita did receive a single pay stub from Mr. Fuell. With that pay stub, she received the first evidence that Mr. Fuell's new job paid him significantly less than the job he held at the time she filed her petition. The next court appearance to occur after she finally did receive the information that Mr. Fuell had reduced his income by 50%, was the opening day of trial on February 4, 2009.

Contra to the claim in Mr. Fuell's brief, that there was error by the trial court because there was no claim for imputation of income stated in the petition to modify, the court made no error in imputing income simply because Mr. Fuell did not voluntarily end his historical job at his historical income until at least nine months after the petition to modify had been served upon him. (00156 Pg 81 Ln 1-11)

Because the pretrial order from September 29, 2008 specifically listed child support obligations beginning August 2007 as an issue for trial (00111), Mr. Fuell's claim that the imputation of income was presented for the first time at trial while technically correct, is no basis for appeal simply because he created the situation by hiding his income from Lorencita until there were no more court appearances before trial started where she could make such a claim once his income was known to her.

The trial court made no error in imputing income because it was Mr. Fuell that had refused to provide the information that established he had reduced his income until several days after the final pretrial hearing of December 15, 2008, which was the last court appearance before the trial began. (00115)

The trial court did not allow Lorencita to engage in trial by ambush as claimed by Mr. Fuell. The record clearly shows that after Lorencita had provided Mr. Fuell all of her pertinent information without request, she was required to spend many months unsuccessfully trying to force Mr. Fuell to provide his basic information relevant to the issues at trial. After the Court had twice unsuccessfully ordered Mr. Fuell to provide his income information, Lorencita's efforts to gain the necessary information included a formal discovery request, followed by a Motion to Compel, followed by a Motion in Limine when Mr. Fuell continued to refuse to provide the information as ordered. The

only relevant information ever received from Mr. Fuell was a single pay stub that arrived after the last pretrial conference and even that was never indicated as a trial exhibit by Mr. Fuell as he never filed any witness or exhibit lists prior to trial. (00105 - 107, ¶1-11, 15)

Willfully hiding your financial information until after the Court has ordered that it not be introduced at trial and then crying you were not able to produce rebuttal evidence is not “trial by ambush” by any definition, nor an err by the trial court.

The trial court did not err in holding Mr. Fuell was voluntarily underemployed as the court made very adequate findings of fact as to the evidentiary basis for the imputation pursuant to UCA 78B-12-203. (127 – 128)

Adequacy of Findings Not Challenged in Trial Court

Mr. Fuell failed to challenge the adequacy of the court's factual findings in the trial court. The statement on page 5 of the Appellant's Brief, *“In order to evaluate the merit of appellant's first imputation argument, we must determine whether the trial court's decision to impute income was **supported by adequate findings** in light of Utah Code Ann. §78-45-7.5(7)(a) . . .”* demands that in order to preserve his appeal to this Court, Mr. Fuell must have challenged the adequacy of the court's factual findings in the trial Court as discussed in detail above.

Because Mr. Fuell failed to make the required challenge in the trial court, the appeal on this issue must be denied.

Failed to Marshal Facts on Appeal

As discussed in detail above, to convince this Court to overturn the trial court's decision, Mr. Fuell must marshal the evidence in support of the findings and then

demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be clearly erroneous.

The court's decision to impute income was adequately supported by sufficient evidence. On the issue of voluntary change of jobs, Mr. Fuell produced no documentary evidence and no testimony other than his own to support any of his claims of medical problems that might have precluded his continued employment at this former job and income. Mr. Fuell did respond to his attorney's leading question "*So am I correct that you also changed your jobs because it was recommended by your doctor?*" with the statement "*They **just recommended** a lifestyle change.*" (00156 Pg 42 Ln 5-7) He did indicate that he was having trouble sleeping because of the shift work, but also stated that he refused to take any medications that might help with this problem. (00156 Pg 38 Ln 17-25) That was the total sum and body of all medically oriented evidence presented by Mr. Fuell at trial concerning his physical inability to continue his historical employment.

In response to a second leading question from his attorney, Mr. Fuell also stated that "*I changed jobs - - I didn't want to wait five years after I graduated to look for the employment that I took my school for and it had already been three years since I graduated.* [from Heating and Air Conditioning school] (00156 Pg 45 Ln 3-15)

Mr. Fuell went on to testify that at the time he was served the petition to modify, he had been historically making \$20.80 base pay plus night shift differential, Sunday premiums and eight hours of overtime every two weeks. (00156 Pg 44 Ln 16 - Pg 45 Ln 2) He also testified that nine months after he was served the petition to modify his income was reduced to \$14.00 per hour at his new job. (00156 Pg 46 Ln 4-7)

Even with nothing other than Mr. Fuell's testimony, the court clearly had adequate evidence before it to determine the facts concerning Mr. Fuell's income history at his prior employment and his then current employment. Given this evidence coupled with Mr. Fuell's evasive testimony, the court made the reasonable finding of underemployment, which had been freely admitted by Mr. Fuell as having been voluntary.

Mr. Fuell's charge that the Respondent nor her attorney presented any evidence that Petitioner was voluntarily underemployed is not quite correct when considering the Petitioner's own testimony that his doctor did not recommend that Mr. Fuell change jobs, but rather the doctor "*just recommended a lifestyle change.*" (00156 Pg 42 Ln 5-7)

Mr. Fuell was not fired or laid off from his historical job where he earned more than \$20.80 (00156 Pg 44 Ln 16- Pg 45 Ln 2), but rather Mr. Fuell testified, although he had already been out of a trade school for three years, soon after he was served the petition to modify, he decided to change to a \$14.00 per hour job because he didn't want to wait five years after he graduated. (00156 Pg 45 Ln 3 –15 - Pg 46 Ln 4-7)

The claim by Mr. Fuell on page 20 of his Summary of the Argument, that the court required Mr. Fuell to essentially disprove Lorencita's allegation of voluntary underemployment rather than requiring her to provide competent evidence of his employment condition completely misses the mark of the basic mission of any trial court, that being the process of finding the truth of a given matter and then applying the law to the facts established thereby, regardless of which party testifies as to those facts. For Mr. Fuell's attorney to argue in his brief that his client was not providing "competent evidence" when testifying under oath can only mean that Mr. Fuell's attorney

disbelieves his own client's sworn testimony. Be that as it may, the trial court was clearly within its discretion to believe that Mr. Fuell told the truth concerning his employment situation thereby providing competent evidence upon which the court could properly base its decision to find voluntary underemployment as a basis to impute income to Mr. Fuell.

The argument made in the first paragraph on page 21 of Mr. Fuell's brief and again on the last half of page 27, that "*the only evidentiary basis provided by the trial court in imputing income based on voluntary underemployment was that Mr. Fuell changed jobs*" is absurd and intentionally misleading. Rather than marshal the ample evidence available in the trial record, that argument completely ignores the sworn testimony of Mr. Fuell that his voluntary change in employment reduced his income from the \$20.80 base pay plus night shift differential, Sunday premiums and eight hours of overtime every two weeks that he had historically been making to \$14.00 per hour at his new job. (00156 Pg 44 Ln 16 - Pg 45 Ln 2)

That argument also completely ignores the court's finding in its Memorandum Decision that Mr. Fuel was earning \$4,825 per month until he decided he needed a lifestyle change and took a new job earning \$2,427 per month. (00139)

Likewise, the unsupported argument on page 22 of Mr. Fuell's brief, that Mr. Fuell's change of employment "was for the benefit of his children" and the argument on page 24-25, that it would not be logical for Mr. Fuell to earn less money so he would not have to pay more child support completely belies the often demonstrated non-custodial parent's willingness to do exactly that.

If that were not true, there would be no need for a statutory definition of voluntary unemployment or voluntary underemployment. The fact that UCA 78B-12-203 has been created by the Utah legislature gives life to the fact that other parents, like Mr. Fuell, have made the decision to eliminate or reduce their income so they could pay less to support their children and/or former spouse.

In polar and direct opposition to the argument Mr. Fuell makes above, on page 29 of his brief he cites *Griffith v. Griffith* 959 P.2d, 1015, 1018 to provide the judicial explanation of the goal of imputing income to prevent parents from reducing their support obligations by purposeful underemployment. Had Mr. Fuell read the *Griffith* case he was citing to, it would be inconceivable that he could continue to make the argument in his brief that no parent could or would ever do such a thing to their family.

Mr. Fuell tries to convince this Court that based upon *Griffith v. Griffith*, the trial court was required to find that his underemployment was “purposeful” and then goes on to claim his was not “purposeful” underemployment and he should therefore prevail on appeal. However, the law in Utah does not require a finding of purposeful underemployment, but rather, in Utah before a court imputes income to a parent, UCA 78B-12-203 requires a finding of exactly what the trial court did find, voluntary underemployment. (00127-128)

Finally, Mr. Fuell’s citation to *Burningham v. Ott*, 525 P.2d 620 to support the contention that “a trial is not to be by ambush. Instead the evidence upon which one relies for judgment can be and should be known to the opponent” after he actively and adamantly refused to provide any evidence whatsoever to Lorencita for the 15 months immediately preceding trial and then complained when the exhibits he wanted to

produce for the very first time at trial were rejected by the court, completely summarizes the total lack of candor and respect Mr. Fuell has shown to the judicial system from the first day he filed his divorce complaint containing false income information through the very last page of his appellant's brief.

CONCLUSION

Mr. Fuell's demand that this Court reverse the imputation of income to him for the calculation of his child support obligation is simply not supported by his brief and therefore, must be denied.

As demonstrated above, first Mr. Fuell failed in his obligation to challenge the findings in the trial court. Then he filed an untimely appeal. Then in his appellant's brief, Mr. Fuell failed to marshal the evidence as required by the rules. This is a three strike situation where his appeal must be declared to be OUT.

REQUEST FOR COSTS

Lorencita Diel has been subject to the emotional and personal financial costs of this action for more than two years. She has been required to expend substantial amounts in costs and attorney's fees in order to conduct the trial and again now to respond to this untimely and groundless appeal. The claim that the demand for imputation of income was not included in the petition to modify, even though Mr. Fuell did not reduce his income until nine months after the petition was served upon him (00156 Pg 81 Ln 1-11) is typical of the less than honest approach taken by Mr. Fuell through out this entire divorce action, beginning with the false information about his income stated in his complaint that was carried over into the divorce decree.


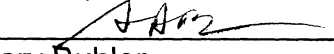
The statement in the full paragraph on page 13 of his brief that Mr. Fuell was *"advised to seek different employment by his doctors due to stress and that he completed an educational program to become a HVAC technician"* is another example of the intentional misrepresentation of the facts of this case made in his brief as contrasted by the statements he actually made under oath, those being Q. *"So am I correct that you also changed your jobs because it was recommended by your doctor?"* A. *"They just recommended a lifestyle change."* (00156 Pg 42 Ln 5-7) and *"I changed jobs - - I didn't want to wait five years after I graduated to look for the employment that I took my school for and it had already been three years since I graduated. [from Heating and Air Conditioning school]"* (00156 Pg 45 Ln 3-15)

Mr. Fuell's false claim that the only evidentiary basis used by the trial court in imputing income was that *"Mr. Fuell changed jobs"* is again typical of the intentional misrepresentations made throughout this action thereby greatly increasing the length and cost of the litigation to Lorencita.

Were this devious activity presented in the trial court, there is little doubt that the evidence would be sufficient for the court to award Lorencita the fees and costs she incurred solely because Mr. Fuell's defense was totally lacking in merit.

Therefore, Lorencita Diel asks this Court to award her the costs and legal fees she has incurred in responding to this appeal in the minimum amount of \$5,165.00.

RESPECTFULLY SUBMITTED ON THIS 19th Day October 2009.

Gary Buhler
Attorney for Lorencita J. Diel, Appellee

CERTIFICATE OF DELIVERY

I hereby certify that on this 27 day of October, 2009, I served 2 copies and a PDF disk of the forgoing document, by depositing a true and correct copy thereof in the United States Mails, addressed to:

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