IN THE SUPREME COURT FOR OF IOWA
SUPREME COURT NO. 20-0090
Dubuque County No. CDDM016001

Upon the Petition of
SURAJ GEORGE PAZHOOR,
Appellee/Petitioner,

And Concerning
HANCY CHENNIKKARA,
f.k.a. HANCY CHENNIKKARA PAZHOOR,
Appellant/Respondent.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HONORABLE JUDGE MICHAEL J. SHUBATT

APPELLANT/RESPONDENT'S FINAL REPLY BRIEF

DARIN S. HARMON,
AT0003212
JEREMY N. GALLAGHER,
AT0014191
KINTZINGER LAW FRIM,
P.L.C.
PO BOX100 WEST 12TH
STREET
DUBUQUE, IA 52001-0703
TEL: (563) 588-0547
FAX: (563) 588-1981
EMAIL: harmon@kintzlaw.com
jeremy.gallagher@kintzlaw.com

ATTORNEYS FOR
APPELLEE/PETITIONER

JENNY L. WEISS,
AT0009397
FUERSTE, CAREW
JUERGENS & SUDMEIER,
P.C.
890 MAIN STREET
SUITE 200
DUBUQUE, IA 52001
TEL: (563) 556-4011
FAX: (563) 556-7134
EMAIL:
jweiss@fuerstelaw.com

ATTORNEYS FOR
APPELLANT/RESPONDENT

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on July 16, 2020, I, the undersigned party or person acting in their behalf, did serve the within Appellant/Respondent's Final Reply Brief on all other parties to this matter by mailing of one (1) copy thereof to the following counsel for said parties at their respective address, to wit: Mr. Darin S. Harmon and Jeremy N. Gallagher, Kintzinger Law Firm, PLC, 100 West 12th Street, Dubuque, IA 52004-0703.

FUERSTE, CAREW,
JUERGENS & SUDMEIER, P.C.
By: */s/ Jenny L. Weiss*
Jenny L. Weiss, AT0009397

I further certify that on July 16, 2020, I will file this document EDMS with the Clerk of the Supreme Court.

FUERSTE, CAREW,
JUERGENS & SUDMEIER, P.C.
By: */s/ Jenny L. Weiss*
Jenny L. Weiss, AT0009397

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION-TYPE FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,182 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief has been prepared complies with the typeface requirement of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman style, size 14 font.

FUERSTE, CAREW,
JUERGENS & SUDMEIER, P.C.
By: */s/ Jenny L. Weiss*
Jenny L. Weiss, AT0009397

I. Response to Suraj's Statement of Facts

In his Statement of Facts, Appellee Suraj George Pazhoor ("Suraj") made factual statements that either misconstrue the record or require further comment:

a. On pgs. 12-13 of his Brief, Suraj quotes Hancy as testifying "that 'for sure' she could go back in the future to try to study and do something else." Hancy made this statement when recounting a meeting that took place approximately 10 years prior, when the parties were considering moving from Chicago to Wisconsin for Suraj's job. (Tr. Vol. 1, p. 103, L24 thru p. 106, L1-4.) In making this decision, recognizing the lack of support the parties would have and Suraj's long hours, the parties jointly decided that while Suraj focused on advancing his career, Hancy would focus on the family and home. (Tr. Vol. 1, p. 103, L24 thru p. 105, L4; p. 105, L8 thru p. 106, L5). Hancy was referring to her thoughts 10 years ago that she could someday go back to school. (Tr. Vol. 1, p. 103, L24 thru p. 105, L4). A lot changed in 10 years, and Hancy never did go back to school, and the parties settled into their roles in the family.

b. On p. 13 of his Brief, Suraj argues that it was Hancy's unilateral decision to be a stay at home mother. He then contradicts himself on p. 20 of

his brief when, where in support of his argument for shared care, he stated that "[i]t is true that Hancy and Suraj made an agreement that Suraj was to concentrate on his career while Hancy was to continue on the home" and further argued said agreement was "indicative of the level of cooperation and trust" between the parties. The district court was also inconsistent in its application of this fact, first citing the agreement between the parties as "mitigate[ing]" the application of the *Hansen* approximation factor while later, in justifying its alimony award, noted derisively and with a tinge of sexism, that "Suraj's earning capacity is significantly higher than Hancy's because he passed his boards and pursued what has turned out to be a successful medical career, whereas Hancy did not pass her boards and chose to stay home to raise the parties' children." (App. 50, 54).

c. On p. 15 of his Brief, Suraj argues Hancy hid her child endangerment charge. This is not true. The charges arose out of an incident when Hancy left a sleeping N.G.Z.P. in her car to run into Target and grab an item at customer service and pick up something for the kids to eat and drink after gymnastics. (Vol. 2, p. 77, L16 thru p. 78, L8). She was not charged on the day of the incident and did not learn charges had been filed against her until months later, when she was stopped for an expired registration. (Vol. 2,

p. 166, L19 thru p. 167, L3). She immediately notified Suraj of the charges when they were brought to her attention, literally calling him and having him come to the location of her arrest while the police were still present. (Vol. 2, p. 166, L19 thru p. 167, L3).

d. On p. 15 of Suraj's Brief, he referenced an incident wherein Hancy accused Suraj of having an affair in the presence of the children. Hancy does not dispute the children were present when she unfortunately found out about the affair and that Suraj did ultimately file for divorce. (Tr. Vol. 1, p. 135, L10-25). As Hancy testified, for her and the children, "the rug was pulled from under us", and it took months for them to come to terms with Suraj's betrayal. (Tr. Vol. 1, p. 136, L4-17). Shockingly, despite therapy, Suraj still fails to see how his insensitive actions affect others, even proposing Hancy work at the same place he and his paramour work. (Tr. Vol. 1, p. 54, L19-23; p. 131, L13 thru p. 132, L8).

e. On p. 17 of his Brief, Suraj references Hancy's investment income from her gifted interest in her family's real estate companies, stating "Hancy earned $23,000 from family business in 2015, over $78,000 in 2016, and $15,000 in 2017." This passage is deceptive. At one time, Hancy had an interest in four (4) family investment properties, Hancy and Hansen, Lincoln

Ridge, Batavia, and ZNE. (App. 27-32, 138, 161-162, 208, 232, 685-88, 689; Tr. Vol 2, p. 7, L4 thru p. 8, L17). Both Hancy and Hansen and Lincoln Ridge were dissolved/sold by Hancy's mother prior to the divorce being filed and generate no income for Hancy. (Vol. 2, p. 14, L7-10; p. 16, L3; p. 173, L14-19). Only Batavia and ZNE remain and Hancy's average annual income arising out of both entities is $13,838. (App. 27-32, 138, 161-162, 208, 232, 685-88, 689; Tr. Vol 2, p. 7, L4 thru p. 8, L17).

II. Suraj's Argument Regarding the *Hansen* Factors.

Contrary to Suraj's brief, *In re Marriage of Hansen* does not support a shared care award. Suraj does not dispute Hancy's role as the primary caregiver of the children. There is simply no question that, since the birth of N.K.P., Hancy has been the children's almost exclusive caregiver. Suraj argues his desire to see his children and occasional play with them in the yard as evidence of his caregiving role. Yet, with very few and non-contemporaneously exceptions, it was Hancy who provided the day-to-day care of the children, getting them up and off to school, enrolling them in school, actively participating in school, working with IEP coordinators and tutors, signing them up and transporting them to extracurricular activities, taking them to fairs and expos, volunteering, teaching, coaching, etc… (Tr.

Vol. 1, p. 212, L10 thru p. 213, L21; p. 216, L2 thru p. 217, L25; p. 223, L10-13; p. 226, L19 thru p. 227, L11; p. 233, L19-23: Vol. 2, p. 80, L16 thru p. 81, L22). She has been and continues to be the parent to whom the children instinctively turn. (Tr. Vol. 1, p. 233, L19-23).

Numerous witnesses who are or were regularly interacting with the children in both social and education settings – friend and life coach Kimberly Nelson, speech pathologist Courtney Druade, Parents-as-Teachers worker Heather Klinge, and religious educator Wendy Osterberger - testified as to the relationship between Hancy and the children, her dedication, and her ever present and conscientious role in the children's lives. Tellingly, each of these witnesses had fleeting, if any, interaction with Suraj.

The children have thrived under the primary care of their mother and the District Court's shared-care decision upended the stability and continuity of their lives so that Suraj can try to do "better". (Tr. Vol. 1, p. 40, L7-8).

Finally, Suraj fails to recognize that the issue is not the mode of communication between the parties, but the fact that there was no communication, resulting in Hancy frequently making unilateral decisions regarding the children because Suraj was either not available or because he was too tired. (Tr. Vol. 2, p. 70, L5 thru p. 72, L14). This lack of

communication and deference to Hancy's decision-making regarding the children resulted in little, child-related conflict during the marriage. Interestingly, once Suraj began insisting on participating more in the children's lives, the parties' conflict increased. (Tr. Vol. 1, p. 221, L15 thru p. 223, L9-21).

III. Suraj's Alimony Argument

Suraj cites *In re Marriage of Becker* as factually similar to this case, presumably to support the Court's award of alimony for a limited duration. In *Becker*, the Supreme Court, in both vacating the decision of the Court of Appeals and reversing the decision of the district court, increased a spousal support obligation to a wife from $4,000 for four (4) years, to $8,000 per month for three (3) years, and then another $5,000 per month for seven (7) years. 756 N.W.2d 822 (Iowa 2008). The Court explained the award of support was intended to allow the wife a period of re-education in order to obtain a Master's degree, followed by a period of reduced support to "give her time to develop earning capacity past an entry-level position." *Id*. at 827. While the husband in *Becker* had after-tax annual income exceeding $500,000 per year, compared to the wife's $20,000-$30,000 income, there is a significant difference between *Becker* and this case: each party in *Becker*

received approximately $3.3M in assets. *Id*. at 827. The Supreme Court, in its alimony award, specifically noted that wife's return on her investment, along with her earnings and alimony, would allow her to enjoy a standard of living comparable to that of which she enjoyed during the marriage during the time it would take to become self-sufficient. *Id*. Such property, specifically liquid or investment income, is not present in this case and the district court's limited alimony award all but ensures Hancy will not only not be able to go to school to obtain her master's in public health, but will never again enjoy a standard of living reasonably comparable to what she had during the marriage, while allowing Suraj to do so with little interruption.

Likewise, Suraj's reliance on *In re Marriage of Monet* and *In re Marriage of Lange* is misplaced. In both of those cases, the economically dependent spouse had been removed from the workforce for a relatively short duration prior to the divorce and both had strong employment histories. 2019 Iowa App. LEXIS 264, *16, 928 N.W.2d 157 (Iowa App. 2019); 2017 Iowa App. LEXIS 1179, *9, 912 N.W.2d 449 (Iowa App. 2017). Both were only approximately ten (10) year marriages. Further, in *Monet*, there was no generally-recognized category of spousal support applicable to the case; instead, the district court's award was intended to "allow [wife] to continue

with the parties' historical caregiving practices until the younger child started school." 2019 Iowa App. Lexis 264, *16.

This case demands a combination of traditional, reimbursement, and rehabilitative alimony. The parties were married for 17-years. (Tr. Vol. 1., p. 16, L19-21). Hancy has been out of the workforce for over a decade, she never obtained her license to practice medicine in the US, and her test scores have expired. (App. 635-638, 645-647: Tr. Vol. 1, p. 85, L19-21; p. 93, L12-17; p. 108, L19-23). She has never had W-2 wage income in excess of $4,000. (App. 635-638). Between 2008 and 2017, Hancy's earned income was $0.00. (App. 635-638). Conversely, at the time of the divorce, Suraj's gross annual income exceeded $500,000, and he experienced a 355% increase in compensation between 2012 and 2018. (App. 633-634; 639-644). Further, while the parties have a marital estate worth approximately $2.2M, 90% of that is in non-liquid, non-investible assets. (App. 58 - 61).

The District Court's alimony award implicitly tasked Hancy with completing a Master's Program in Public Health in five (5) years. However, as Hancy testified, before she can even apply, she would need to transfer her credits from India; if any of those credits do not transfer, she will have to take undergraduate courses; and she will then have to take 2-3 years of a full-

course load to obtain the Master's degree. (Tr. Vol. 1, p. 134, L22-25; p. 137, L1-5). However, the Court, in imputing a $40,000 annual income on Hancy, also tasked her with working full-time while taking a full-course load. Assuming Hancy is able to do all of this in five (5) years, the District Court's order does not give her any support after that five (5) years to allow her a period of time to maximize her earning capacity and become self-sufficient. See *Becker*, 756 N.W.2d at 827 (awarding alimony for additional time after obtaining a degree to allow wife "to maintain the same standard of living she enjoyed during the marriage throughout the period of time it will take her to become self-sufficient at her maximum earning capacity."). Further, the District Court's alimony and child support award, combined with either Hancy's imputed or actual income, leaves little at the end of every month for Hancy to start building a savings or retirement for herself, or even purchase clothing and incidentals for herself and the children. (App. 65-81; 92-95). The Court's alimony award, in both duration and amount, assures Hancy will never be able to become self-supporting in such a way close to the standard of living she enjoyed during the marriage.

Finally, reimbursement alimony is appropriate considering not only the economic sacrifices made by Hancy, per the agreement of the parties, that

directly enhanced Suraj's past, present, and future earning capacity, but also the significant non-marital contributions Hancy made to the marriage, especially early on, that allowed Suraj to focus on his studies. (App. 242; Tr. Vol. 1, p. 164, L16 thru p. 165, L2; p.176, L11-25).

IV. Suraj's Medical Support Argument

Hancy preserved error on the issue of Suraj's entitlement to a child support credit for medical expenses. The issue was argued at trial, reflected in the Court's decision, and again raised in post-trial pleadings. (App. 48-64, 88-90). "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002), citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented to and passed upon by the district court"); *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992) ("issues must be raised and decided by the [district] court"). The issue of whether Suraj was entitled to a credit for medical premiums was preserved. Further, Rule 6.903(2)(g)(3) is discretionary with the reviewing Court.

First, Suraj cites to his Resistance to Respondent's 1.904 Motion, which improperly contained a document reflecting GRMG's medical premiums.

This document was not admitted into evidence and was first presented to court after the record was closed. Iowa Rule App. P. 6.801 defines the "[c]omposition of record on appeal" as "[o]nly original documents and exhibits filed in the district court case from which the appeal is taken, the transcript of proceedings, if any, and a certified copy of the related docket and court calendar entries prepared by the clerk of the district court constitute the record on appeal."

Iowa law is clear that the appellate court cannot consider facts or claims outside the record. *See In re N.P.*, 856 N.W.2d 382, fn. 7 (Iowa App. 2014) (Table) (noting mother's attempts to include the current status of her housing were outside the record and "therefore we cannot consider them on appeal."); *In re L.K.* 725 N.W.2d 660, *1 (Iowa App. 2006) (Table); *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 ("[w]e do not address issues not properly raised or based on information not contained in the record."); *Jones v. Madison County*, 492 N.W.2d 690, 693-694 (Iowa 1992) (same). The appellate court should not consider this improper argument.

Suraj concedes in his brief that the cost of his medical insurance is "not reflected directly on [his] paychecks as a deduction, but ultimately affect his compensation because they are taken into account when his wRVUs are

calculated." (Appellee Brief, p. 17). He further concedes that he "would be compensate more but for this health insurance obligation." In other words, but for the medical premiums, Suraj's wRVUs would be higher and, correspondingly, his income would be higher, which would result in a higher child support obligation. However, with the medical premiums, Suraj's wVRUs are reduced, resulting in a lower income, thus a lower child support obligation. Per Iowa Child Support Rule 9.5(2), Suraj's net annual income is his reduced wVRUS, which incorporates his medical insurance premiums. (App. 633-634; Tr. Vol. 2, p. 84, L24-25 thru p. 85, L1-2; p. 93, L5-7). Allowing a second credit for medical premiums is an inequitable double dipping and logically inconsistent. *See, e.g.*, *In re Marriage of Lalone*, 469 N.W.2d 695, 698 (Iowa 1991) (the Supreme Court held that a $55,000 bonus awarded to a husband by his employer and deposited into two bank accounts shortly before his dissolution of marriage trial was not marital property, but rather was part of his income which had already been considered when establishing his alimony and child support obligations); *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996) (husband's expected bonus was not marital property subject to division where the husband's bonuses had been included in the income calculations that were used to support his alimony

obligation); *In re Marriage of Bethke*, 484 N.W.2d 604, 607-608 (Iowa App. 1992) (goodwill of a professional corporation is a factor that bears on the future earning potential of the professional and will therefore factor into consideration for an award of support but will correspondingly be excluded as an asset in valuing the corporation for property division purposes); *In re Marriage of Hogeland*, 448 N.W.2d 678, 681 (Iowa Ct. App. 1989) (holding similarly).

Suraj cites *In re Marriage of Gaer* in support of his argument. 476 N.W.2d 324 (Iowa 1991). The *Gaer* decision is inapplicable as it addresses how the court should consider depreciation when determining income for purposes of calculating child support. *Id*. at 329.

V. Suraj's Trial Attorney Fee Argument

Trial attorney fees are based on a party's ability to pay, considering the financial circumstance of each party and their respective ability to pay. *In re Marriage of Geil*, 509 N.W.2d 738 (Iowa 1993); *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). As was outlined in Section II of Hancy's Final Brief, the preceding factors clearly reflect the district court's abuse of discretion.

The district court's alimony and child support awarded, when added to Hancy's actual and imputed income, leaves Hancy anywhere between ($212.17) to $830 per month in disposable income to pay for non-variable or reoccurring expenses for herself and the children, including clothing, club membership dues, incidentals, personal grooming products, laundry, allowances, life insurance, babysitting, church donations, gifts for the kids' birthdays and Christmas, etc… (App. 65-81; 92-95; 700; 702-725). This alimony award will require Hancy to either incur additional debt, or dip into the $130,000 in liquid marital assets awarded to her, of which she will need to purchase a home of her own. Suraj, on the other hand, continues to gross over half a million dollars a year, or approximately $40,000 gross per month. He has the ability to pay $13,000 in trial attorney fees for Hancy, as well as appellate attorney fees.

Further, it is appropriate to look at the complexity of issues presented at trial in determining whether there has been an abuse of discretion in the district court's attorney fee award. *See* *Mitchell v. Mitchell*, 193 Iowa 153, 162 (Iowa 1922) (in reducing fees awarded, court noted "nonintricate divorce proceedings".); *In re Marriage of Golwitzer*, 924 N.W.2d 876, *7 (Table) (Iowa App. 2018) (court citing non-complex nature of the issues at trial when

affirming district court's fee award). This was a case that included not only a custody and support dispute, but also a dispute over Hancy's non-marital assets which required significant evidentiary support, going back decades (App. 38-42), as demonstrated by the breadth of Hancy's exhibits.