Supreme Court No. 98127-2
Court of Appeals No. 51019-7-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVEN RAY HOLLOWAY,

Appellant,

v.

TONI JUSTICE (Formerly Holloway),

Respondent.

ANSWER TO PETITION FOR REVIEW

Pierce County Superior Court
Cause No. 12-3-0465-8
The Honorable Judge Shelley K. Speir

LAW OFFICES OF
SOPHIA M. PALMER, PLLC.
STACEY SWENHAUGEN, WSBA 41509
615 Commerce St., Suite 101
Tacoma, WA 98104
(253) 777-4165

Attorneys for Respondent

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STATEMENT OF THE CASE

After a sixteen (16) year marriage, the parties entered with Pierce County Superior Court, an Agreed Final Decree of Dissolution, on May 14, 2013. (CP 68-72) The Decree of Dissolution provides that Appellant shall pay Respondent spousal maintenance in the amount of $1,000 for 48 months, and also that Respondent would receive only 30% of Appellant's disposable Military Retirement pay, 0% from Appellant's Thrift Savings Plan, and other personal property. (CP 69-70). Appellant was due for his retirement from the military after exactly 20 years of service on the date which maintenance was scheduled to expire under the Decree. (CP 75). Respondent relied upon Appellant's assertion that he would retire after 20 years of service, and she therefore agreed to accept 48 months of spousal maintenance. (CP75). The expectation created at the time of entry of the Decree, was that Respondent would begin receiving her share of Appellant's military retirement pay in the month immediately following the expiration of spousal maintenance, thereby precluding a detrimental gap in financial support. (CP75).

On December 27, 2016, Respondent sent Appellant at email message, stating, "Steven my last alimony payment is on June and the retirement payments should begin in July, is there any information you need from me to ensure this happens on time?" (CP 124). Appellant's response to Respondent on that date, is the first time Appellant notified Respondent that he did not plan to retire until late Spring/early summer of 2019. (CP 125). In response, Respondent notified Appellant that she would be filing a Motion to Extend spousal maintenance due to this new development. (CP 125).

On April 28, 2017, Respondent filed a Motion to Extend Spousal Maintenance, arguing there had been a substantial change in circumstance based upon Appellant's decision to defer his date of retirement, and arguing additionally that she had a need for continued spousal maintenance, while Appellant had the ability to pay maintenance. (CP 73-77)

Appellant submitted a responsive declaration to Respondent's motion on June 23, 2017, denying that any agreement, at any time, ever existed as to Respondent's date of

retirement or that the duration or termination of spousal maintenance would coincide with that date. (CP 85-98)

Respondent submitted a strict reply declaration on June 27, 2017, submitting evidence of discussions regarding the date of retirement and spousal maintenance, thereby refuting Appellant's claims.(CP 109-135)

The matter was heard before Commissioner Sabrina Ahrens on the merits, on June 29, 2017. (CP 158-159) Commissioner Ahrens' denied to Motion to Extend Maintenance.(CP 159)

The parties again appeared before Judge Speir on August 4, 2017 to argue the Motion for Revision. (August 4, 2017 RP 1-2)

Appellant argued that the Decree should not be changed because the parties' agree that the language is not ambiguous. (CP 113) However, Respondent argued that she doesn't have to prove ambiguity in order to seek a modification of spousal maintenance. (CP 113).

Judge Speir granted the Motion to Extend Spousal Maintenance, based upon the finding that the parties had initially discussed tying the end date of the maintenance to the retirement

date prior to entry of the Decree, and then the December 2016 emails are clear that Respondent was surprised that Appellant had decided to defer his retirement. (August 4, 2017 RP 28-29) Therefore, the Court found that Mr. Holloway's decision to retire in 2019 constitutes a substantial change in circumstance to warrant a modification of spousal maintenance. (August 4, 2017 RP 28-29)

Judge Speir further stated,

> **We have to look at the other factors under 26.09.090. I do find that Ms. Justice has a financial need for the maintenance. She's stated in her declaration that even with the maintenance payment, her expenses exceeded her income. Because the family was a military family and they were moving, she was unable to advance in her profession. She was having to transfer repeatedly every two to four years. This was a long marriage, 16 years. I understand that Mr. Holloway has now remarried and his new spouse has some health issues, but I'm not sure that I've gotten all the information about his financial picture. I think he has the ability to pay maintenance.**

(August 4, 2017 RP 29) Judge Speir ultimately considered the parties' then current financial circumstances, and reduced the spousal maintenance obligation to $700 per month. (August 4, 2017 RP 30)

ARGUMENT

1. THE COURT SHOULD DENY PETITION FOR REVIEW

To obtain this court's review, the Appellant must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision. RAP 13.4(b).

In the present case, the Court of Appeals, Division II, applied the legal standard under RCW 26.09.170, finding that a substantial change of circumstance existed to warrant a modification of spousal maintenance.

Appellant argues that the Court's decision was in conflict with *in re Marriage of Smith*, 158 Wn. App. 248, 241 P.3d 449 (2010), citing the "rule of law regarding decrees that are unambiguous". However, as described in more detail below, the "rule of law" cited in *Smith* and other cases relied upon by Appellant, has nothing to do with the legal standard appropriately relied upon under RCW 26.09.170. There has been no contradiction because the cases are no analogous. Simply put, Appellant argues that the Court of Appeals incorrectly "interpreted" an unambiguous Decree. In reality, the Court did not *interpret* the Decree as a means to enforce already required language; rather,

the Court did what Respondent asked for, and *modified* the existing language in Decree. Cases cited to and relied upon by Appellant are consistent with motions to enforce court orders. The present case is not a motion to enforce or other type of property division case that would require the court to review interpret language for intent and meaning in a Decree. The present case seeks to change the language and modify the award under an entirely different legal standard.

Respondent disagrees that the "well established principles" set forth in *Smith*, *Callan* and other cases were overturned by the present Holloway ruling. The cases are simply not analogous in any way.

As such, Appellant has not met his burden under RAP 13.4(b), and the Supreme Court should not accept review.

2. A FINDING OF AMBIGUITY IS NOT REQUIRED TO MODIFY A SPOUSAL MAINTENANCE PROVISION

Appellant cites to *In re Marriage of Smith*, *In re Marriage of Mudgett, Byrne v. Ackerlund, Callan v. Callan,* and other various *cases,* for the proposition that the Court cannot re-open and attempt to interpret unambiguous language in a Decree of

Dissolution with the use of extrinsic evidence. These cases are not analogous to the present case, because they address property issues and enforcement issues, rather than addressing the only issue at bar – the modification spousal maintenance. Specifically, *Smith* required the trial court to interpret the property division language in a Decree for the purpose of deciding appropriate language to include in the supplemental retirement division order (DRO). The husband argued the Decree language was ambiguous and therefore it was necessary for the court to consider extrinsic evidence to determine the parties' intent behind the language. The legal questions presented in the *Smith* case have little to no resemblance to the legal question in the present case. "Interpretation" of the decree has never been an issue in this case, although Appellant continues to raise it as a red herring. The primary legal question involved, is whether there had been a substantial change in circumstance to warrant a change to the maintenance award.

The relevant standard for a spousal maintenance modification is codified under RCW 26.09.170, which states that the

moving party must make "a showing of a substantial change of circumstances" to warrant modification. The statute further states that "provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state" *RCW 26.09.170(1).*

In the present case, as Respondent is not seeking to revoke or modify property disposition, the issue of ambiguity in the Decree is irrelevant. The primary issue the Court must consider, is whether there has been a substantial change in circumstance to warrant a change to spousal maintenance.

Appellant has also relied upon *Callan v. Callan*, 2 Wn. App. 446, 468 P.2d 456 (1970), misstating that the case involved a "petition to modify maintenance". Careful analysis of this case shows that the Plaintiff filed a "petition to interpret and modify a divorce decree". *Callan*, 2 Wn. App. 446. The motion for interpretation had to do with slightly different language in two sections of the decree, referring to spousal maintenance. As such, the question of whether it is appropriate to "interpret" the

language in the Decree was relevant and directly tied to the motion itself. There, the Decree allowed for extended maintenance to the Wife in the event her health condition or incapacitation rendered her unemployed. The primary question there was whether her "health condition" must to relate to a physical ailment or whether it included an inability to work due to an emotional or psychological state. There appears to have been a secondary "modification" request that the court declined to address or analyze under the applicable statute. Instead, it considered the interpretation request, and interpreted the Decree to require maintenance to wife – rendering any question of modification, moot.

So, while the *Callan* case is somewhat analogous in that it involves a spousal maintenance award – the legal questions involved are strikingly different. The *Callan* decision very clearly addresses the interpretation of the language related to the wife's capacity to work as was requested by the initial "Motion to Interpret". In the present case, the Court hasn't been asked to "interpret" any language in the Decree as both parties agree the language is not ambiguous. Again, the legal question in this case

is whether there was a substantial change of circumstance. Such a question does not require the Court to interpret existing language in the Decree – but rather to make findings about circumstances based upon the testimony of the parties and evidence presented.

Another red herring raised by Appellant, is the Court of Appeals' citation to *Marriage of Tomsovic*, 118 Wn. App. 96, 74 P.3d 692 (2003). While it is true that *Tomsovic* dealt with a parenting plan modification, the Court of Appeals did not apply an incorrect legal standard. Certainly, the Court applied the legal standard consistent with RCW 26.09.170, which mandates a finding of a substantial change of circumstance. Division II of the Court of Appeals merely cited to *Tomsovic* in effort to rely upon a definition of "substantial change of circumstance" made by Division III. Both RCW 26.09.170, regarding modifications to spousal maintenance provisions, and RCW 26.09.260, regarding modifications to parenting plans, require a finding of a "substantial change of circumstance". It certainly is not legal error to apply the same definition of a legal term used to two similar statutes.

The *Tomsovic* citation was meant for purposes of defining a legal term. As Appellant does not appear to be challenging the Court of Appeal's *definition* of substantial change of circumstance, the relevance of this issue is unclear. Respondent does not agree there was any "mistake regarding the law.

In all, Appellant continues to place false reliance upon this notion that the lower court's incorrectly "interpreted" the unambiguous Decree. The plain and simple facts are that the lower courts found a substantial change of circumstance existent in the form of Appellant's deferred retirement and increased income. The deferred retirement stalled Respondent's ability to collect her portion of Appellant's military pension, drastically changing her financial circumstances.

3. APPELLANT'S ADMITTED DECISION TO "DEFER" HIS RETIREMENT AND APPELLANT'S INCREASED INCOME ARE SUBSTANTIAL CHANGES IN CIRCUMSTANCE TO WARRANT

MODIFYING AND EXTENDING SPOUSAL MAINTENANCE

At the onset, when afforded an opportunity to provide a responsive declaration to the trial court, Appellant chose to remain silent about whether his plans for a retirement date had changed since the Decree of Dissolution was entered. (CP 85-98) As a result, Respondent was forced to provide emails spanning in time between 2012 to 2016, in effort to show the parties had discussed that she would receive maintenance until he "got out" of the military, and to show her understanding that there would be no gap between the termination of maintenance and the onset of receipt of the military retirement payments due to her under the Decree. (CP 121-133). As the case moved forward, Appellant finally admitted that he had chosen to "defer his retirement", with the first admission made in his Motion for Reconsideration, and then again, on appeal. (CP 224)

Appellant argues that his decision to retire in 2019 is not a substantial change in circumstance, but never provides a reason. Instead, he argues that there was never an agreement or even a discussion between the parties, that the date of retirement was tied

to the expiration of spousal maintenance, and therefore his retirement date was irrelevant.

Appellant's position ignores the fact that, whether it was discussed or agreed to or not, his choice to "defer" his retirement does have a significant financial impact on Respondent that was not anticipated when the Decree was entered. Respondent has been able to prove by her 2016 emails, that she assertively attempted to make arrangements to assure there would be no gap in financial support between the date of the expiration of maintenance and the receipt of retirement pay. (CP 124-125). The 2016 emails show she was, as Judge Speir found, "shocked" by the Appellant's choice to defer his retirement. (CP 124-125; August 4, 2017 RP 28) Judge Speir found Respondent credible in that she had relied upon prior discussions about Appellant's retirement date, and found Appellant to lack credibility due to his assertion that no such discussion ever existed. (August 4, 2017 RP 32-33)

Judge Speir was careful to point out that she considered the relevant factors of RCW 26.09.090 in determining that Respondent

had a need for spousal maintenance and that Appellant has the ability to pay maintenance. (August 4, 2017 RP 29). Appellant failed to argue there was any sort of error in law with regard to the Courts' reliance on the financial materials submitted by the parties. It was undisputed that Respondent's income had increased since the entry of the Decree of Dissolution, and that both parties' financial circumstances had changed.

Based upon the financial materials reviewed by the trial court, in addition to the evidence of Appellant's deferred retirement and its financial impact on the Respondent, the trial Court properly found that there was a substantial change in circumstances – a necessary finding in order to modify and extend the spousal maintenance award under RCW 26.09.170.

4. RESPONDENT SHOULD BE AWARDED ATTORNEY'S FEES PURSUANT TO RAP 18.1 and RAP 18.9.

RAP 18.1(j) provides that "if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review." *RAP 18.1(a).* Respondent requests that if the Petition

for Review is denied, that she is awarded attorney's fees for the time expended to draft and file her Answer to Petition for Review.

RAP 18.9(a) has provided authority to the appellate courts to sanction frivolous appeals since 1976. The Supreme Court first made an award under RAP 18.9(a) that was specifically denominated as attorney's fees in *Boyles v. Retirement Systems*, 105 Wn.2d 499, 716 P.2d 869 (1986). An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal. *Boyles*, at 509. Appellant has repeatedly relied upon an incorrect legal standard and cases clearly devoid of analogous facts to support his position, causing undue financial repercussions to Respondent in the form of attorney's fees. Appellant's claims are completely devoid of merit and as such, Respondent respectfully requests that attorney's fees under RAP 18.9(a) be awarded.

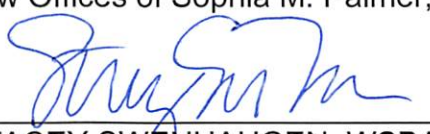
CONCLUSION

Based on the arguments, records and files contained herein, Respondent respectfully requests that the Supreme Court deny the

Petition for Review. The Court's ruling does not contradict or "overturn" any Supreme Court cases or published Court of Appeals cases. The Court applied the correct legal standard and properly granted the Respondent's request to modify spousal maintenance after finding a substantial change in circumstance had occurred. Further, pursuant to RAP 18.1(j) and RAP 18.9(a), Respondent requests her reasonable attorney's fees and costs.

DATED this 27th day of February 2020.

Law Offices of Sophia M. Palmer, P.L.L.C.



STACEY SWENHAUGEN, WSBA No. 41509
615 Commerce St., Suite 101
Tacoma, WA 98402

E. Certificate of Service.

I certify under penalty of perjury under the laws of the State of Washington that on February 27, 2020 I filed with the clerk's office of the Supreme Court of Washington, the Answer to Petition for Review, and requested that the same be filed with the court; and I further sent to Appellant via electronic service, and sent via email the Answer to Petition for Review, addressed to Clayton Dickinson.

Signed at Tacoma, WA 98402.

Stacey Swenhaugen

LAW OFFICE OF SOPHIA M. PALMER

February 27, 2020 - 7:02 PM

Transmittal Information

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