

FILED  
Court of Appeals  
Division II  
State of Washington  
3/5/2018 4:37 PM

51019-7-II

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

---

STEVEN RAY HOLLOWAY,

Appellant,

v.

TONI JUSTICE (Formerly Holloway),

Respondent.

---

BRIEF OF RESPONDENT

---

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

LAW OFFICES OF  
BENJAMIN & HEALY, P.L.L.C.  
STACEY SWENHAUGEN, WSBA 41509  
1201 Pacific Avenue, Suite C7  
Tacoma, WA 98204  
(253) 512-1140

Attorneys for Respondent

**TABLE OF CONTENTS**

A. TABLE OF CONTENTS ..... i

B. TABLE OF AUTHORITIES .....ii

C. COUNTERSTATEMENT OF ISSUES ..... 3

B. COUNTERSTATEMENT OF FACTS ..... 4

C. ARGUMENT ..... 14

    1. Standard of Review ..... 14

    2. A Finding of Ambiguity is not require to Modify a Spousal Maintenance Provision..... 16

    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.....17

    4. Appellant’s Request that the Court of Appeals Review and Order entered July 21, 2017 is Untimely when he did not File a Notice of Appeal until October 17, 2017.....22

    5. The Court should not consider new evidence filed by Appellant with his Motion for Reconsideration.....24

D. CONCLUSION ..... 28

E. CERTIFICATE OF SERVICE ..... 29

## TABLE OF AUTHORITIES

### STATE CASES

<i>In re Marriage of Stern</i> , 68 Wn.App. 922, 928–29, 846 P.2d 1387 (1993). .....	14-16
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987)...	15
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 819, 828 P.2d 549 (1992) .....	15
<i>In re Marriage of Hunter</i> , 52 Wn.App. 265, 268, 758 P.2d 1019 (1988), review denied, 112 Wn.2d 1006 (1989) .....	15
<i>In re Marriage of Jarvis</i> , 58 Wn.App. 342, 346, 792 P.2d 1259 (1990). .....	15
<i>Davenport v. Taylor</i> , 50 Wn.2d 370, 311 P.2d 990 (1957). .....	25-26
<i>Schoening v. Young</i> 5 Wn. 90, 104 P. 132 (1909). .....	27
<i>Lawrence v. Farmers' Mut. Ins. Co.</i> 174 Wash. 588, 25 P.2d 1029 (1933).....	28

### STATE STATUTES AND COURT RULES

RAP 18.1.....	28
RCW 26.09.170.....	16, 17
RCW 26.09.091.....	13, 21
RCW 26.09.140.....	23, 24, 28
CR 59.....	14, 24, 25, 28

### **COUNTRSTATEMENT OF ISSUES**

- 1) Is the appropriate Standard of Review, *De Novo*, or whether the findings are supported by substantial evidence?
- 2) Is a finding of an ambiguity in the Decree required to modify a spousal maintenance provision?
- 3) Are the Appellant's admitted decision to defer his Military Retirement, and Appellant's increased income, substantial changes in Circumstance that would warrant Modifying and extending spousal maintenance?
- 4) Is the Appellant's request to reverse and remand on the issue of attorney's fees due to additional declarations ordered on a Revision Motion, timely when Appellant did not appeal the July 21, 2017 decision within 30 days?
- 5) Can the Court of Appeals consider new evidence submitted for a Motion for Reconsideration, which was offered by Appellant in violation of Washington Civil Rule 59(a)(4)?

- 6) Should the Respondent receive an award of costs and reasonable attorney's fees for prosecution of an appeal which is without arguable merit?

**COUNTERSTATEMENT OF FACTS**

After a sixteen (16) year marriage, the parties entered with Pierce County Superior Court, an Agreed Final Decree of Dissolution, on May 14, 2013. 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. 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. 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. 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.

On December 27, 2016, Respondent sent Appellant an 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?" 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. In response, Respondent notified Appellant that she would be filing a Motion to Extend spousal maintenance due to this new development.

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.

Appellant was timely served with the Motion via U.S. Mail and certified mail, to his last known address. A courtesy copy of the motion was also emailed to Appellant's then attorney of record, Erik

Bjorn. A public records search had revealed that Appellant and his wife owned the home where the motion was delivered.

Appellant did not respond to the Motion to Extend Spousal Maintenance. Therefore, the Court entered an Order granting the Motion to extend maintenance in the amount of \$1,100 until Appellant's date of retirement, on May 30, 2017.

Appellant hired new counsel shortly after the May 30, 2017 Order was entered, and demanded that Respondent sign an Agreed Order to Vacate the May 30, 2017 Order, because he had relocated to Alaska in November 2016, and did not receive proper notice of the Motion.

Through counsel, Appellant admitted that he had initiated address forwarding through the United States Postal Service in November 2016, so it is unclear why he would not have received a copy of the Motion. Appellant's new counsel made threats of additional motions and attorney's fees, levying personal and professional attacks against Respondent and her counsel, causing Respondent to feel quite bullied. In effort to act in good faith, potentially save the additional cost of attorney's fees for a Motion to

Vacate, Respondent agreed to vacate the order and proceed to re-hear the matter on the merits. The Order from May 30, 2017 was vacated by agreement on June 21, 2017.

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.

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, and seeking attorney's fees due to a disparity in income and for Appellant's intransigence (failure to update address with the Court, pretending not to have knowledge of the motion until after an Order was entered, despite having initiated mail-forwarding and having his then attorney of record receive a copy of the documents).

The matter was heard before Commissioner Sabrina Ahrens on the merits, on June 29, 2017. Commissioner Ahrens' denied to Motion to Extend Maintenance, and denied the request for attorney's fees, without prejudice, indicating Respondent could bring back her

request for fees at a later date. The ruling on fees was based upon her decision to grant Appellant's oral motion to strike the request for fees, based upon the request being made for the first time, on strict reply.

On July 7, 2017, Respondent file a timely Motion for Revision of the entire June 29, 2017 Order. On July 21, 2017, the parties appeared, through counsel, before Judge Shelly K. Speir. Appellant, through counsel, made an oral Motion to Strike portions of Respondent's Strict Reply Declaration dated June 27, 2017, regarding the request for attorney's fees. Appellant argued that the Court did not have the authority to rule on the issue of attorney's fees. Judge Speir ultimately gave Appellant a choice – to continue the matter and allow for written responses on the issue of attorney's fees, or to proceed with the hearing on that date, and allow for oral argument regarding attorney's fees. In making such a ruling, she essentially granted Respondent's request to revise Commissioner Ahrens' ruling, that the request for attorney's fees at the underlying hearing, was improper. Judge Speir's July 21, 2017 ruling, placed the issue of attorney's fees properly on the table for consideration.

The Order dated July 21, 2017, is entitled, "Order on Motion to Strike and Continuance".

Appellant chose to continue the matter and be afforded the opportunity to file a declaration in response to the request for attorney's fees. He filed said declaration on July 26, 2017.

Respondent submitted a declaration in reply, on July 27, 2017.

The Appellant took advantage of Judge Speir's offer to allow him to submit an additional declaration, and did so. He did not file a Motion for Reconsideration of Judge Speir's July 21, 2017 ruling. In his additional responsive declaration, Appellant made a counter-request for attorney's fees.

The parties again appeared before Judge Speir on August 4, 2017 to argue the Motion for Revision.

Of note, Appellant argued that there was no substantial change in circumstances because her "need" for maintenance was manufactured by her voluntary choice to incur additional debt after the Decree was entered.

Respondent argued that regardless of the assumption of additional debt, the total financial obligations currently held by Respondent were actually lower than the debt listed to the financial

obligations indicated in her financial declaration, which pre-dated the Decree. Respondent also argued that it was disingenuous for Appellant to highlight her assumption of new debt, while simultaneously ignoring the \$60,000+ of new debt he has assumed since the parties' 2013 divorce. Appellant argues his debt is a basis to support his position that he lacks the ability to pay spousal maintenance.

Even including receipt of \$1,100 spousal maintenance, Respondent could not afford independent housing. Instead, she rents a room at my former sister-in-law's home.

Respondent argued that under no circumstances would she have incurred additional liabilities had she known that her income would be impacted by the loss of the retirement benefits awarded to her in the divorce decree because of Appellant's decision to postpone his retirement.

Respondent argued that Appellant's income had increase substantially since the parties' 2013 divorce. His BAH was only \$1,600 at the time of the divorce. According to his LESs provided in advance of the initial hearing, his BAH is now \$2,353 (assuming we

are reading that correctly – as Appellant did not provide very clear and legible copies of his LESs).

Appellant grossly under-reported his current income. He failed to include his BAH, a contract related benefit, and chose to deduct mortgage and other costs from his income while also deducting the same cost from his expenses. It appears that Appellant earns \$4,516 in base pay, his BAS is \$353, his BAH is \$2,352 and he also receives COLA pay of \$2,352. The YTD pay shown on his May LES is \$41,979. Divided over 5 months, his gross monthly pay is \$8,395.80. It is realistic to assume Appellant also earns additional pay for TDYs or deployments, signing bonuses as he appears to have extended his military contract, and the like. Certainly, \$8,395.80 does not include a payment of \$945 for "TLA", as listed in a 2016 LES. Further, gross income at \$8,395.80 does not even include the funds he receives for his rental home.

According to the Financial Declaration filed by Appellant in the parties' 2008 legal separation action, Appellant's net monthly income was only \$4,772 ; However, based upon recent financial information, Appellant nets well over \$8,000.

Respondent also argues that the expenses listed on Appellant's financial declaration were heavily overstated. He claimed his Georgia rental mortgage and expenses, twice. He claimed he was paying a \$325 telephone bill, car payments of \$809, \$950 in food/grocery expenses for only two people, and \$2,045 in credit card debt. He claims that his expenses are roughly \$2,000 more than his net income – so his financial declaration fails to pass the smell test. Either the amount of his expenses is accurate, so he has additional income to pay his expenses, or his expenses are heavily inflated and not at all reflective of what he pays on a monthly basis (how could he, at a \$2,000 deficit?).

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

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. 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.

Judge Speir further stated,

**We have to look at the other factors under 26.09.091. 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.**

Judge Speir ultimately considered the parties' then current financial circumstances, and reduced the spousal maintenance obligation to \$700 per month. Judge Speir also granted attorney's fees in the amount of \$4,500, and stated that the Court found that Appellant was not credible about his date of retirement, the prior agreements between the parties, and was evasive about his financial circumstances

On August 14, 2017, after retaining new counsel, Appellant filed a Motion for Reconsideration before Judge Speir. Appellant's

Motion contained substantial new evidence which was known to Appellant at the time of the June 29, 2017 hearing, and therefore improper under CR 59. The court invited Respondent to provide a written response, and allowed for oral argument on the Motion for Reconsideration.

Respondent filed a response and objection to the additional evidence submitted with the Motion for Reconsideration, on September 11, 2017. On September 22, 2017, the Court denied Appellant's motion.

## **ARGUMENT**

### **1. STANDARD OF REVIEW**

The Court of Appeals shall review a spousal maintenance modification order to determine whether substantial evidence supports the trial court's findings, and whether the court made an error of law that may be corrected on appeal. *In re Marriage of Stern*, 68 Wn.App. 922, 928–29, 846 P.2d 1387 (1993). Substantial evidence supports a factual determination if the record contains sufficient evidence to persuade a fair-minded, rational person of the truth of that determination. *Bering v. SHARE*,

106 Wn.2d 212, 220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). In the present case, Appellant bears burden to prove that Judge Speir's order was based upon insubstantial evidence and was based upon an error of law.

Appellant appears to be misguided in his claim that the appropriate standard of review is de novo. Generally, findings of fact will not be overturned if they are supported by substantial evidence. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Yet case precedent suggests that when reviewing a support modification proceeding, the reviewing court may independently consider the record de novo because it is a trial by affidavit. *In re Marriage of Hunter*, 52 Wn.App. 265, 268, 758 P.2d 1019 (1988), review denied, 112 Wn.2d 1006 (1989); accord, *In re Marriage of Jarvis*, 58 Wn.App. 342, 346, 792 P.2d 1259 (1990). The authority cited by Hunter for this proposition does not necessarily support such a conclusion within the context of a trial by affidavit calendar. *In re Marriage of Stern*, 68 Wn.App. 922, 846 P.2d 1387 (1993). It is illogical to state that we conduct exactly the same review as the trial court when we also require the trial court to enter findings of fact and conclusions of law. See CR 52(a)(2)(B). *Id.* In

addition, the trial court below has the benefit of oral argument to clarify conflicts in the record. *Id.* It is consequently in a better position than the reviewing court to balance and assess discrepancies, resolve conflicts, and determine an equitable method for determining income and deductions. *Id.* Moreover, concerns of judicial economy prevent an exhaustive appellate review of each detail of every support modification. *Id.* Therefore, the proper standard of review is whether the findings are supported by substantial evidence and whether the trial court has made an error of law that may be corrected upon appeal. *Id.*

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

Appellant cites to *In re Marriage of Smith* and *In re Marriage of Mudgett* 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, rather than spousal maintenance.

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.

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, Appellant chose to remain silent about whether his plans for a retirement date had changed since the Decree of Dissolution was entered. 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. 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 now again, on appeal.

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. 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. The 2016 emails show she was, as Judge Speir found, “shocked” by the Appellant’s

choice to defer his retirement. 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.

Respondent also argues that Appellant's income has substantially increased since the date the Decree was entered, based upon comparison of current financials to a financial declaration that pre-dates the entry of the Decree. Again, Appellant was silent on this issue, and further misleads the court with a haphazard financial declaration which significantly understates his income and overstates his expenses. He fails to account for his BAH pay, simply because it goes straight to pay his housing obligation – yet he accounts for two mortgage obligations, with one being deducted from gross income, and the other being listed as an expense. He fails to disclose any social security disability income that is likely being collected by his wife, and Judge Speir correctly found that Appellant failed to provide a complete financial picture his household.

Rather than respond directly to Respondent's assertions that his income has increased and that he changed the expected date of

his retirement, Appellant chose to focus largely on debt incurred by Respondent after the entry of the Decree. However, Respondent was able to show that her debt in 2017 was actually less than it was prior to the entry of the Decree, so the fact that she purchased reliable vehicle and incurred additional credit card debt is irrelevant in determining financial need. Finally, Respondent has historically made hypocritical and lop-sided arguments that he believes should only apply in favor of himself, and this is one of them. While focusing largely on Respondent's assumption of additional debt, Appellant suggests the Court disregard the \$60,000+ additional debt that we has incurred since the entry of the Decree, which he goes on to rely upon in his Financial Declaration to show he lacks the ability to pay.

Appellant relies upon *Carstens v. Carstens* for the proposition that a moving party's voluntary actions to diminish his/her financial circumstance that are self-imposed, cannot be a basis for a substantial change in circumstance. Respondent cites as case involving an alcoholic respondent whose chemical dependency issues led to the depletion of his assets. Not only is this case NOT analogous to Respondent financing a new commuter vehicle for

work, it's just a moot issue considering her current debt does not exceed her pre-Decree debt. The *Lambert* case cited by Appellant also lacks analogy. There, the moving party sought to modify maintenance based upon reduced income for himself. Here, Respondent has not argued she has reduced income. She argues that Appellant has more than doubled his income, and has chosen to defer his retirement, which financially impacts Respondent in an adverse way.

Judge Speir was careful to point out that she considered the relevant factors of RCW 26.09.091 in determining that Respondent had a need for spousal maintenance and that Appellant has the ability to pay maintenance. As noted above, The Court of Appeals should not reverse Judge Speir's findings unless it finds that there is a lack of substantial evidence to support the findings. Here, Judge Speir did not just rubber stamp the prior maintenance provision. Instead, she carefully considered the financial evidence before her, and found that Respondent had a need for \$700 in spousal maintenance, while Petitioner had the ability to pay. 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.

**4. APPELLANT'S REQUEST THAT THE COURT OF APPEALS REVIEW AN ORDER ENTERED JULY 21, 2017, IS UNTIMELY WHEN HE DID NOT FILE A NOTICE OF APPEAL UNTIL OCTOBER 17, 2017**

Appellant argues that Judge Speir erred by allowing both parties to submit additional declarations regarding an attorney's fee issue on July 21, 2017 at a hearing for a Motion for Revision. However, Appellant fails to consider that he made an oral Motion to Strike, and the Court's July 21, 2017 Order was in response to the Motion to Strike. While typically, no new evidence should be considered on a Revision Motion, Judge Speir did not commit an error by ordering new declarations on a Motion to Strike. Respondent does not dispute the holding in *Moody*; however, it would have been appropriate for Appellant to bring a Motion for Reconsideration within 10 days of the July 21, 2017 ruling on that issue, or to appeal the same decision within 30 days. Appellant did neither. Instead, Appellant availed of the opportunity given to him, to provide an additional declaration. In that declaration, he included information that was "beyond the scope" of the issue of attorneys' fees, and in that sur-reply declaration, he also asked for the first time,

that the Court award him fees. In his sur-reply declaration, Appellant engaged in behavior which he claims were violations and impermissible on Respondent's party. It was only after Judge Speir did not rule in favor of Appellant, that he then decided it was appropriate to challenge the July 21, 2017 Order. To the extent that Appellant's request to strike consideration of the attorneys' fee declarations filed after July 21, 2017 is untimely.

Respondent did not once claim that Appellant "invited error" as he claims. Respondent only argued that the request was untimely, and that he should not have filed a declaration if he thought doing so was improper. Instead, he should have taken the proper steps to ask for a reconsideration or appeal .

Appellant agrees that the Judge had the authority to *sua sponte* order fees under RCW 26.09.140, but also argues that Judge Speir was precluded from considering the issue at all, because it was denied by Commissioner Ahrens. Respondent disagrees. In Respondent's Motion for Revision, she requested that the reviewing judge revise the denial of attorney's fees. The issue was properly on the table for Judge Speir to consider. Just like in the court below, Appellant made an oral request to strike the attorney fee request.

Judge Speir has the de novo ability to make an independent ruling, and she is not required to agree with the Commissioner. Because she believed she had the ability to rule on fees under RCW 26.09.140 regardless of the timing of the attorney fee request, Judge Speir was included to deny the Motion to Strike. As a courtesy to Appellant, although not required, she gave Appellant the opportunity to respond in writing to the request for fees. Regardless of the additional declarations submitted, the Court did not have to consider them in order to make a ruling on fees.

The bottom line is that Judge Speir did not err by allowing new declarations in response to a Motion to Strike – an even if she did, Appellant's request to appeal the issue is untimely.

**5. THE COURT SHOULD NOT CONSIDER NEW EVIDENCE FILED BY APPELLANT WITH HIS MOTION FOR RECONSIDERATION**

It is unclear whether Appellant is asking the Court to rely upon additional evidence filed by Appellant on August 14, 2017. In the event that the Court might consider that evidence, Respondent makes the following argument: Motions for Reconsideration are governed by Washington Civil Rule 59 (CR 59). New evidence cannot be submitted with a Motion for Reconsideration, unless the

new evidence comports with the requirements in CR 59(a)(4), which states the court may consider “newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial”.

*CR 59(a)(4)*. The Appellant knows or should know, that evidence is not “newly discovered” if it was known, or under the circumstances must have been known, or by the exercise of reasonable diligence should have been known by the moving party prior to the submission of the case. *Davenport v. Taylor*, 50 Wn.2d 370, 311 P.2d 990 (1957). In that case, the court found that it was error for trial court to treat certain correspondence as “newly discovered” evidence justifying grant of new trial, where correspondence was in his possession or under his control not only before but during and after trial, he searched through his records twice before trial but did not find it, and he found it eleven days after adverse verdict while he was again “rummaging” through same records. *Davenport v. Taylor* 50 Wn.2d 370, 311 P.2d 990 (1957). In the present case, Appellant’s declaration and legal memorandum are made up in substance almost entirely of information that was not before either Commissioner Ahrens or Judge Speir at prior hearings. The new

information submitted for the first time on Reconsideration includes as follows:

1. Reference to Petition for Dissolution and Response to Petition, which were never provided to Commissioner Ahrens or Judge Speir as working copies;
2. Information and/or projection about what Respondent's share of retirement would or should be upon retirement;
3. Exhibit 1 – DOD regulation/retirement calculations;
4. Exhibit 2 - Retirement Percentage Multiplier Chart (Petitioner claims this is accessible to "anyone on the Internet");
5. Exhibit 3 – Copy military website and retirement reports calculated by military
6. Reference to how retirement pay should be calculated based upon improper exhibits;

On page 4 of Petitioner's Motion/Declaration, he states under penalty of perjury, "although I had explained the [military retirement calculations] to my previous attorney, he did not have the attachments and this information was never provided to the court.

In light of the Court's revision of the commissioner's ruling denying

the motion to extend, I believe it is important for the court to understand how much money Ms. Justice would have received.”

Here, the Petitioner essentially acknowledges and admits that the information he provided for the first time with this motion was known and readily available to him, he neglected to provide the attachments to his attorney prior to the initial hearing with Commissioner Ahrens because he didn't believe it was important enough information for the Court to consider. “Where evidence was known but not produced because its necessity was not anticipated, new trial for newly discovered evidence is properly overruled”.

*Schoening v. Young* 5 Wn. 90, 104 P. 132 (1909).

Further, given the fact that most of the information provided was readily available on the internet, there is no reason why it could not have been provided to Commissioner Ahrens, and it therefore should be stricken. “Where evidence was available from public records, for three months before trial, and would have been obtained by reasonable diligence, new trial for newly discovered evidence was properly denied”. *Lawrence v. Farmers' Mut. Ins. Co.* 174 Wash. 588, 25 P.2d 1029 (1933).

Additionally, Petitioner's counsel acknowledges that this court cannot accept new information on Reconsideration in his legal memorandum. At page 10, line 13, he states "due to the fact that this requires that the court accept new information that was not presented to the court commissioner...this matter must be remanded to the court commissioner for the taking of new evidence".

Washington Civil Rule CR 59(a)(4) bars consideration of new evidence if it was available for production prior to the hearing, and therefore, since the evidence was available to be produced to Commissioner Ahrens, even with a remand, Commissioner Ahrens would be unable to consider it.

### **CONCLUSION**

Based on the arguments, records and files contained herein, Respondent respectfully requests that the trial court's rulings and orders are affirmed. Further, pursuant to RAP 18.1 and RCW 26.09.140 Respondent requests her reasonable attorney's fees and costs.

DATED this 5<sup>th</sup> day of March, 2018.

Law Offices of Benjamin & Healy, P.L.L.C.

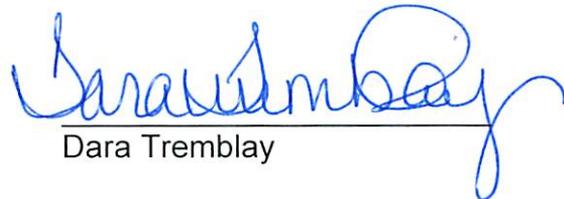


STACEY SWENHAUGEN, WSBA No. 41509  
1201 Pacific Avenue, Suite C7  
Tacoma, WA 98402

**E. Certificate of Service.**

I certify under penalty of perjury under the laws of the State of Washington that on March 5, 2017 I filed with the clerk's office of the Division II Court of Appeals in Tacoma, Washington, the Brief of Respondent, and requested that the same be filed with the court; and I further sent to Appellant via electronic service, and sent via ABC Legal Messengers of the Brief of Respondent, addressed to Law Offices of Clayton Dickinson, 6314 19<sup>th</sup> St. W., #20, Fircrest, WA 98466.

Signed at Tacoma, WA 98402.



Dara Tremblay

**LAW OFFICES OF BENJAMIN & HEALY, PLLC**

**March 05, 2018 - 4:37 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51019-7  
**Appellate Court Case Title:** In Re Steven Ray Holloway Appellant v Toni Justice, Respondent  
**Superior Court Case Number:** 12-3-04654-8

**The following documents have been uploaded:**

- 510197\_Briefs\_20180305163542D2259951\_5429.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Brief of Respondent 3-5-18.pdf*

**A copy of the uploaded files will be sent to:**

- crdattorney@msn.com

**Comments:**

---

Sender Name: Stacey Swenhaugen - Email: stacey@attorneys253.com  
Address:  
1201 PACIFIC AVE STE C7  
TACOMA, WA, 98402-4393  
Phone: 253-512-1140

**Note: The Filing Id is 20180305163542D2259951**