

**FILED**

NO. 317242

OCT 30 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

**COURT OF APPEALS FOR DIVISION III  
OF THE STATE OF WASHINGTON**

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RENÉ MILLER n/k/a RENÉ M. VERCOE,

Appellant,

v.

MICHAEL D. MILLER

Respondent.

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**BRIEF OF THE APPELLANT**

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**I. ASSIGNMENTS OF ERROR.**

1. The trial court erred by treating the motion to dismiss as a motion under CR 12(b)(6) in certain aspects while treating it as a motion under CR 56 in other aspects.
2. The trial court erred by not allowing the Appellant to produce evidence when considering the motion to dismiss as a motion for summary judgment.
3. The trial court erred by not compelling the Respondent to answer discovery before resolving the motion to dismiss as a motion for summary judgment.
4. The trial court erred by reading the facts in a light most favorable to the *moving* party while deliberating the motion to dismiss as a motion for summary judgment.
5. The court erred by making findings that were not supported by any evidence.
6. The Superior Court Judge erred by not revising the Commissioner's decision.

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Did the trial court apply the wrong legal standard when it

considered the motion to dismiss?

2. Did the trial court abuse its discretion when it limited the Appellant's ability to submit evidence when considering the motion to dismiss?

3. Did the trial court abuse its discretion when it denied the Appellant the opportunity to compel answers to discovery before it ruled on the motion to dismiss?

4. Did the trial court apply the wrong legal standard when examining the evidence in support of the motion to dismiss?

5. Did the trial court make erroneous assumptions about the evidence which were done in a light most favorable to the moving party, instead of the non-moving party?

6. Did the trial court look beyond the evidence and make findings which were not supported by any evidence?

### **III. STATEMENT OF THE CASE.**

The parties' 27 year marriage was dissolved by a Decree entered May 14, 2010. CP 1-7. The Decree provided for a division of the community property and assets, a provision for payment of a portion of the Appellant's attorney fees, and spousal maintenance commencing

March 1, 2010 for a period of 36 months, in the amount of \$3,000 per month. CP 1-7. As a secondary component of spousal maintenance, the Decree provided that the Respondent would pay the home mortgage payment of \$3,458.23 commencing March 1, 2010, until the home was sold. CP 4. The Appellant was to contribute \$1000 per month toward the mortgage payment. CP 3-4. Mr. Miller was allowed to deduct this \$1,000.00 from the transfer payment that he was making to Ms. Miller. CP 4. As a factual basis for the award of maintenance, the court described 36 factors upon which it based its decision. CP 417-419. The court found specifically that “Mr. Miller’s income was significantly progressive and did not show the kinds of peaks and valleys that Ms. Miller’s did.” CP 418, at ¶22. The “spouses are in very different economic circumstances.” CP 418, at ¶28. “As it relates to maintenance, it is very clear that Ms. Miller has devoted her life to assisting her husband at the front end of his career to allow him to take wing. Her efforts have been commendable and she has seen bursts of great success throughout periods of the marriage. But at this particular time she is not in a place where she can expect to be earning lots of money for a while.” CP 418, at ¶29.

The Respondent failed to abide by the terms of the Decree and instead opted to file for bankruptcy protection 47 days later on June 30, 2010. CP 76, lines 10-11. Before Mr. Miller filed for bankruptcy, Ms. Vercoe moved for and the court granted an order to show-cause regarding contempt for Mr. Miller's failure to comply with the Decree of Dissolution. CP 10. Appellant filed a declaration with the Superior Court that demonstrated that the Respondent had withheld the \$1,000.00 from the spousal maintenance payment yet failed to make the mortgage payments. CP 425. The declaration also stated that Mr. Miller failed to make the credit card payments and did not sign a listing agreement for the family home. CP 426-427. Additionally, the declaration describes Ms. Vercoe's attempts to protect her excellent credit rating. CP 425.

On June 16, 2010, the court granted the Appellant's motion for a show cause order regarding contempt of court by the Respondent for failing to comply with the court ordered payments. CP 10. Before the hearing on the show cause order was held, the Respondent filed for bankruptcy protection. CP 76.

As part of the bankruptcy proceeding, the Respondent chose to

allow the family residence to go into foreclosure. The Respondent's refusal to pay the mortgage and discharge that obligation through bankruptcy meant that the Respondent's contemplated income increased by \$2,458.23, his share of the payment order by the Decree. CP 3-4. The bankruptcy relieved the Respondent of his obligation to pay the credit card debt totaling approximately \$60,000. CP 5. It also meant depletion of that asset for which the contemplated value was \$799,000. CP 4.

The Appellant hired bankruptcy counsel to protect her rights through the bankruptcy proceeding. CP 324. Mr. Miller's original chapter 13 offered to pay all creditors \$550.00 per month over the course of 60 months, or a total of \$33,000.00, with \$2,500.00 of that amount to be paid to his bankruptcy counsel. CP 333, 345. Through the bankruptcy proceeding, it was established that Mr. Miller's gross income was \$180,000 per year, not the \$140,000 - \$160,000 per year contemplated by the Decree. CP 325, 335, 419. After nearly two years of litigation in bankruptcy court, the Respondent ended up paying all of the filed claims over the course of about 50 months with a plan payment ranging from \$1,000 per month to \$4,500 per month, pursuant

to the confirmation order entered on April 5, 2012. CP 349-350.

On June 8, 2012, the Appellant filed her Petition for Modify of Spousal Maintenance. CP 11-14. As grounds for the modification, the Respondent listed the effects of the Respondent's bankruptcy petition along with a continued need and ability to pay maintenance. CP 14.

On October 19, 2012, the Respondent filed a Motion to Dismiss the petition which relied upon CR 56. CP 61. No court action was taken on the motion for several months, until March of 2013, when the court held several hearings on issues related to the petition. CP 221-222, 229-230, 359-360, 376. On March 14, 2013, the court framed the motion to dismiss would be a legal determination based on res judicata. CP 382. On April 4, 2013 Commissioner Joliquier dismissed the Petition stating that she based her decision on no significant change of circumstances. CP 391. The Appellant moved for revision on April 11, 2013 and the motion was denied on May 10, 2013. CP 397-398.

During the period between the filing of the Motion to Dismiss and the hearing on the motion, Appellant served a set of Requests for Production of Documents, and a Motion to Compel Responses. CP 90, 94-95, 96. The Court Commissioner refused to rule on the motion to

compel before the hearing on the motion to dismiss. CP 391.

The Appellant timely filed a Notice of Appeal of the Rulings regarding the Motion to Dismiss and associated issues. CP 403-409.

#### **IV. SUMMARY OF ARGUMENT.**

The Superior Court committed multiple errors when considering the Motion to Dismiss. First, the Commissioner stated that she would treat the motion as one to dismiss under CR 12(b)(6) dealing only with the issue of *res judicata*. However, she considered evidence outside the petition for relief, thus making the motion to dismiss one for summary judgment. This error was compounded when the Commissioner treated some aspects of the motion to dismiss as a motion under CR 12(b)(6) and other aspects as a summary judgment motion under CR 56, while stating that she was **not** considering the motion as one for summary judgment.

The Commissioner expressed displeasure at the amount of filings in the case. Because of this, she limited the Appellant's ability to produce evidence in opposition to the motion. Although she stated that the motion was one under CR 12(b)(6) dealing with *res judicata*, the Commissioner allowed the Respondent to put in evidence while

unfairly limiting the Appellant's ability to produce evidence in opposition to the motion. This error is an abuse of discretion and is of sufficient magnitude to warrant a reversal of her ultimate ruling.

The Commissioner refused to rule on Appellant's motion to compel discovery because she stated that the motion to dismiss was a motion under CR 12(b)(6) based on *res judicata*. The Commissioner then proceeded under CR 56 without allowing the Appellant an opportunity to compel that discovery. This error is an abuse of discretion and is of sufficient magnitude to warrant a reversal of her ultimate ruling.

Throughout this entire process, the Commissioner should have been consistent. She should have denied a motion under CR 12(b)(6), or she should have treated the motion as one for summary judgment and allowed the Appellant to produce evidence and conduct discovery. Without this consistency, the Appellant was wrongfully denied due process and an opportunity to effectively respond to the motion. The magnitude of this error is sufficient to warrant reversal.

When she considered the motion, the Commissioner made findings which were not supported by the evidence. The standard

under a CR 56 requires her to make findings in a light most favorable to the non-moving party. However, her extrapolation of the evidence favored the moving party, in addition to her denying the Appellant to present evidence. This error is sufficient to warrant a reversal of her decision.

Under any circumstances, the motion to dismiss should have been denied because the petition is sufficient to state a claim for relief which would pass muster under CR 12(b)(6). In addition, the facts read in a light most favorable to the Appellant do not support the granting of a summary judgment motion under CR 56. The existence of factual issues will require a trial.

## **V. ARGUMENT.**

### **A. THE COURT COMMISSIONER'S INCONSISTENT APPLICATION OF THE PROCEDURAL RULES RESULTED IN A CONFUSING AND ERRONEOUS SERIES OF RULINGS.**

The court Commissioner initially treated the Motion to Dismiss as a motion calling for a “legal” determination. This would tend to indicate that she was operating under CR 12(b)(6). She then considered evidence outside the initial pleadings. This would tend to indicate she

was operating under CR 56. This hybrid approach to the motion allowed the Commissioner to pick and choose certain aspects of the legal standards prescribed by each procedural rule and the supporting decisional law. The problem with this approach is that it denied the Appellant a fair hearing, and allowed the court to make an erroneous series of rulings.

**1. APPELLANT'S PETITION STATES A CLAIM FOR RELIEF.**

If the court Commissioner had treated the motion to dismiss purely as a motion under CR 12(b)(6), the result should have been denial of the Respondent's motion.

Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint....Such motions should be granted 'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief.

*San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

Dismissal pursuant to CR 12(b)(6) is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot

prove any set of facts which would justify recovery. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims. *Id at* p. 842.

In making a determination of the sufficiency of a plaintiff's complaint under CR 12(b)(6) a court must consider hypothetical facts proffered by the plaintiff which may be introduced to assist the court in establishing a conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered even if these facts are not part of the formal record and even if these facts are alleged for the first time on appellate review of the dismissal. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). This legal standard for adjudicating CR 12(b)(6) motions in Washington has been the law for almost half a century. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 103, 233 P.3d 861 (2010).

In *McCurry* the Washington State Supreme Court was given

the opportunity to revise the standard of adjudicating CR 12(b)(6) motions in this state and adopt a standard similar to the one under Federal Rule of Civil Procedure 12(b)(6) which contains a requirement that the plaintiff's complaint presents a "plausible" claim for relief. *McCurry supra at pp. 101-2*. Because such an interpretation would have added a determination of the likelihood of success on the merits so that a trial judge can dismiss a claim, even where the law does provide a remedy for the conduct alleged by the plaintiff, if that judge does not believe it is plausible that the claim will ultimately succeed, the Washington State Supreme Court declined the opportunity to change the law regarding CR 12(b)(6) dismissals. *McCurry supra at pp. 101-2*.

In the context of family law the CR 12(b)(6) standard is particularly relevant. Under the *Gorman* standard, the most rudimentary complaint should pass muster. Much of the family law practice is form generated and therefore the pleadings are deemed sufficient by operation of the adoption of the various forms used in the family law arena.

In this matter, the Appellant alleged the following reasons for the modification of maintenance:

There has been a substantial change in the circumstances since the entry of the decree. The husband has filed a bankruptcy proceeding which resulted in the foreclosure and loss of the shared residence and resulted in a reorganization of debts and liabilities among the parties. This has caused significant legal fees and related costs to the wife. Overall this process, along with the resulting efforts of the bankruptcy, have had a severe impact on wife's stability and ability to equalize the economic position of the parties after a 27 year marriage. The wife's has suffered additional hardship as a direct result of the husband's conduct after the entry of the decree causing a continued need for spousal maintenance.

CP 13-14.

For purposes of application of CR 12(b)(6), these facts are taken as true. The Appellant's petition states that the Respondent filed for bankruptcy, there was a foreclosure, and the wife has incurred expenses related to the Respondent's bankruptcy. Since the Respondent filed for bankruptcy only 47 days after the entry of the decree of dissolution, it is reasonable and logical to conclude that he did this to avoid the effects of the decree. Indeed, just a few months earlier, the Superior Court had examined the evidence at trial and had determined that he had the

ability to pay the amounts assigned to him by the Decree of Dissolution. CP 424-428. Additionally, his bankruptcy counsel stated that the Respondent filed for bankruptcy protection to avoid a finding of contempt for failing to comply with the Decree of Dissolution. CP 76. Under these circumstances, the filing of the bankruptcy in itself is more than sufficient to establish a substantial change in circumstances. *See, In re Marriage of Myers*, 54 Wn.App. 233 (Wash.App. Div. 3 1989). In *Myers*, this Court affirmed the trial court's ruling which modified spousal maintenance based on Mr. Myer's bankruptcy filing:

There has been a material change in circumstances not contemplated by the Court regarding the needs of Petitioner. She is without the debt free car contemplated by the Court, she is being pursued by the creditors from whom Respondent obtained discharge, her attorney fees have increased, and, generally, her expenses are higher and are not being met by her full time income.

There has been a material change in circumstances not contemplated by the Court in terms of Respondent's ability to pay. This change is the result of his discharge from substantial debts, his increased income from his employment, and his remarriage to a wife who has income to contribute to the community and the needs of the community.

*Myers*, at 235. As one can see, the focus of the *Myers* case was the change in the wife's need for support, and the change in the husband's

ability to pay which were not contemplated in the original decree. The allegations in Appellant's petition are sufficient to establish a very similar situation as described in the *Myers* case. Appellant has described change in her circumstances which increase her need, and change in the Respondent's circumstances which increase his ability to pay maintenance. The petition in this matter alleges a viable claim for modification.

There are only two ways to approach dismissal in this case. The motion is either a motion under CR 12(b)(6), or a motion under CR 56. Because the petition passes a CR 12(b)(6) examination, there are only two conclusions that can be drawn. Either, the Commissioner's decision was wrong and must be reversed, or the Commissioner's decision was based on CR 56. However because the Commissioner did not follow the procedural rules and decisional law under summary judgment, CR 56, reversal is still the appropriate remedy in this Court.

- 2. THE APPELLANT SHOULD HAVE BEEN ALLOWED TO PROPERLY RESPOND TO THE EVIDENCE PRESENTED BY THE RESPONDENT, AND THE COURT SHOULD HAVE GRANTED THE MOTION TO COMPEL DISCOVERY.**

Regarding the production of evidence before hearing the motion to dismiss, the court ruled as follows:

THE COURT: . . .

This case has been convoluted that best. And I need to be really clear with what I am able to do, what I am able to do, [sic] what is appropriate for me, what is not appropriate for me. I will not re-litigate what happened at the trial. And much of the argument really was, I was not happy with the result, and I understand not being happy with the result, but I'm not an appellate court. I'm not going to revisit what the trial court did. So anything that predates the dissolution is clearly off the table.

It is important to know if this motion to dismiss is going to be successful. And it's a legal argument. it's not really an argument with regard to finances and that kind of thing, because if the issue is *res judicata* I can't redo it, in that, as I understand, the framework of the pleadings is the real question before the court.

Discovery only flows from a pending action. So if the petition is dismissed, discovery is not appropriate. So to take these in the right sequence would be first the motion to dismiss to determine if we – if you have a right to move forward at all. If you have a right to move forward then you have a right to address what discovery you're entitled to. Those cases are typically heard in *ex parte*. I'm reluctant to do that to *ex parte* with the voluminous material that is in this file. Which some of which is not very helpful and you have to wade through to get to what is really important and germane. So I will hear the discovery motion if necessary.

CP 382-383.

This is the first instance of the Court hearing and deciding any issues regarding the motion to dismiss. The Court states that it will not allow discovery until it decides the motion to dismiss on the basis of *res judicata*, and that this issue is purely a “legal argument”. If the Court was in fact going to rule on the issue of *res judicata*, then discovery would not be necessary to decide the motion and the court could move forward.<sup>1</sup> However, after the hearing on the motion to dismiss, the Court ordered as follows:

THE COURT: . . .

What we've got here is a motion on the stand alone motion that cites CR 56, which is the summary judgment proceedings. But we also have in the response to the petition, which was filed almost immediately after the summons and petition to modify parenting plan [sic] is a motion to dismiss based on the fact that this issue was already addressed and litigated and resolved through the bankruptcy and the state court, and also that there's no circumstances -- change in circumstances to warrant a petition to modify maintenance.

. . .

**So I don't think I need to go to summary judgment.** I think I can rule on this very clear and on the fact that there is not a significant and unintended or unanticipated change in circumstance. Where you were at before is where you are

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<sup>1</sup> The motion would remain a summary judgment motion, because material outside the pleadings would necessarily have to be considered. However, because all the factual events pertaining to *res judicata* are public record no discovery would be necessary to decide that issue.

now. **And so I'm going to dismiss the petition based on no significant change in circumstance** and if, as I said before, if there's no pending petition, there is no basis for discovery.

CP 387, 389-390 (emphasis added.)

In reviewing what the trial court did, it is evident that the decision was basically a combination of CR 12 and CR 56. On one hand she said that “she does not need to go to summary judgment” while on the other hand she dismissed the petition on the merits of the claim after examining the evidence. Because the essence of the ruling was “I’m going to dismiss the petition based on no significant change in circumstances”, this is necessarily a summary judgment determination. CR 56 should be followed along with the case law and evidentiary standards therewith. This would include CR 56(f) which would allow the Appellant to conduct discovery if issues of fact need to be investigated.

Moreover, the basic tenants of due process include two elements - notice and a meaningful opportunity to be heard. *Mathews v. Eldridge* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In this matter, two weeks before the hearing on the motion to dismiss, the Commissioner stated that she was going to decide the motion to dismiss based on the

principals of *res judicata* under a CR12(b)(6) standard. The Commissioner then decided the merits of the case on a CR 56 standard. The Court's chosen procedure denied the Appellant the opportunity to be meaningfully heard on this issue. The Appellant's denial of due process derived from this error is sufficient to reverse the decision herein.

**B. THE RESPONDENT'S DEFENSES FAIL AS A MATTER OF LAW.**

Summary judgment is an appropriate means of resolving a case only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

The standard of review of a summary judgment decision before the Court of Appeals is *de novo*. The Appellate Court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Association*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). All facts

submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) (Citations omitted).

In a summary judgment motion, the moving party bears the burden of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

There were two separate defenses proffered by the Respondent with respect to the petition. Respondent claimed that the petition was barred by *res judicata*, and by accord and satisfaction. Because the reviewing Superior Court Judge did not give us insight into his thoughts, the Appellant will demonstrate that both of these defenses fail

as a matter of law.

**1. THERE WAS NO ACCORD AND SATISFACTION AS TO THE PAYMENT OF MAINTENANCE.**

An accord and satisfaction must be based upon an agreement between the parties.

Accord and satisfaction is based upon the law of contract. *Teel v. Cascade-Olympic Construction* 3 Wn.App. 931 Co., 68 Wash.2d 718, 415 P.2d 73 (1966). For an accord and satisfaction to be binding and thus discharge the earlier obligation, there must be a bona fide dispute, an agreement to settle that dispute, and then performance of that agreement. *Boyd-Conlee Co. v. Gillingham*, 44 Wash.2d 152, 266 P.2d 339 (1954); *Dodd v. Polack*, 3 Wn.App. 272 63 Wash.2d 828, 389 P.2d 289 (1964).

*Eagle Ins. Co. v. Albright*, 3 Wn.App. 256, 271, 272, 474 P.2d 920 (Div. 2, 1970).

In order for the Respondent to prevail on his claim of accord and satisfaction, he must prove that there was a dispute, and an agreement to settle the dispute, and that the subject matter of the settlement resolved the issues raised in the petition before the court, i.e. spousal maintenance. This settlement agreement must reflect some intent on the part of the Appellant to forebear her right to seek a modification of future spousal maintenance as the form of consideration. Therefore any settlement of any claim upon which the defense of accord and

satisfaction is viable, must be the result of a dispute involving spousal maintenance and the Appellant's right to seek modification thereof.

The relevant portion of the agreement reached in bankruptcy court reads:

Creditor Rene' Miller and Debtor Michael Miller both acknowledge that this agreement incorporates, settles and releases each of them from any liability on all prepetition claim[s] or counter-claim[s] that they may have against each other upon successful completion of the plan; this agreement also includes and settles any prepetition claim[s] which may not have been provided for in the chapter 13 plan; The State Court complaint regarding claim #7 shall be dismissed with prejudice within 5 (five) days of entry of this stipulation;

CP 81.

First, all claims that were settled were pre-bankruptcy petition claims, i.e. all claims related to debts and obligations incurred before June 30, 2010. These include all claims from the time of entry of the decree of dissolution until the filing of the bankruptcy, a period of 47 days. The payment of past, present and future spousal maintenance was not at issue in the bankruptcy proceeding. The Respondent did not owe any past-due spousal maintenance at the time he filed for bankruptcy and remained current throughout the process. CP 77, lines 4-5. The Appellant did not file a claim in the bankruptcy for past due

maintenance, nor did she make an affirmative request before the bankruptcy court to determine future maintenance.

As to any claim for modification of maintenance, such a claim is a post-bankruptcy petition claim which is not subject to the jurisdiction of the bankruptcy court, because of the timing and nature of the claim. *See*, 11 U. S. C. § 362(b)(2)(A)(ii) actions to modify maintenance are an exception to the bankruptcy stay; 11 U. S. C. § 502(b) claims are determined as of the date of the filing of the petition.

The change of circumstances which formed the basis of the modification of spousal maintenance occurred simultaneously and after the filing of the Respondent's bankruptcy petition. Because of the timing of the events, it is impossible for the settlement agreement to affect the Appellant's right to seek modification of spousal maintenance. The agreement settled only "pre-petition claims". Additionally, the settlement agreement which forms the basis of the defense of accord and satisfaction does not deal with the issues related to spousal maintenance. Therefore, the Respondent cannot establish any circumstances under which he would prevail using this defense. Under a summary judgment standard, the Respondent must show that

he would prevail as a matter of law. To the extent the Superior Court used this as a basis to dismiss, it committed reversible error.

**2. THE DOCTRINE OF *RES JUDICATA* DOES NOT PRECLUDE THE APPELLANT'S PETITION TO MODIFY SPOUSAL MAINTENANCE.**

Respondent claims that the filing of the petition for modification of spousal maintenance is precluded as a result of the claims process in bankruptcy. The Respondent's legal theory is claim preclusion which is a form of *res judicata*, or literally "a matter judged". At first glance, there appears to be no question that the bankruptcy court did not make any ruling whatsoever with respect to spousal maintenance. First, a bankruptcy court has no jurisdiction to modify a state court order with respect to a family law case. This is why there is a general exception to the bankruptcy stay to allow these actions to be initiated or continued. See, 11 U. S. C. § 362(b)(2)(A). Second, the bankruptcy court, during the claims process in the Respondent's bankruptcy, did not make any findings, conclusions, or judgment with respect to the three factors which are considered by a state court when modification is sought, i.e. change of circumstances, need, and ability to pay. The test to determine if an issues is subject to the defense of *res judicata* is as follows:

The purpose of the doctrine of *res judicata* is to ensure the finality of judgments. Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons

and parties; and (4) same quality of the persons for or against whom the claim is made. *Norco Constr., Inc. v. King County*, 106 Wash.2d 290, 293, 721 P.2d 511 (1986).

*Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997).

In this matter, there is no question of fact that elements (3) and (4) have been met. The Appellant and Respondent are the only parties in this litigation, and were the parties involved in the claims liquidation process in the Respondent's bankruptcy. The elements that need further examination are (1) and (2).

**a. THE BANKRUPTCY COURT DID NOT ENTER ANY ORDER WHICH MODIFIED SPOUSAL MAINTENANCE.**

The first test is whether the two actions involve the same subject matter. They do not. As Appellant explained above, the claims filed in bankruptcy were to determine what the Respondent owed the Appellant on the day he filed for bankruptcy. Below is a brief review of the subject matter of each claim which was filed in the bankruptcy court:

Claim Number 3: This claim was for an unpaid debt owed by Mr. Miller to Ms. Vercoe for payments made by Ms. Vercoe after the entry of the Decree of Dissolution which should have been made by Mr. Miller. These were direct payments made by Ms. Vercoe to the credit card companies, in her attempt to protect her credit rating, which Mr. Miller was ordered to pay

and he refused. This claim was resolved by agreement. CP 326.

Claim Number 4: This claim was for attorney fees related to the contempt proceeding in Spokane County Superior Court. In the 47 days before Mr. Miller filed for bankruptcy he quit paying all of his obligations related to Ms. Vercoe. As a result, she obtained a show-cause order for contempt. She incurred a bill of \$790.00 for services provided by her family law attorney in pursuit of a valid contempt order. Mr. Miller filed the bankruptcy to avoid showing up at the Show Cause Hearing on the Contempt Proceeding. The bankruptcy court disallowed this claim as being too speculative. CP 326-327.

Claim Number 5: This claim was based on the unpaid debt owed by Mr. Miller to Ms. Vercoe for attorney fees awarded in the Decree of Dissolution. As of the day he filed for bankruptcy, he had not made any payment toward this debt. Dissolution counsel for Ms. Vercoe, Martin Salina, filed a claim on his own behalf. Ms Vercoe also filed a claim in the same amount. Ms. Vercoe's claim was allowed by agreement. CP 327.

Claim Number 6: This claim was based on Mr. Miller's failure to pay credit card debt that this Court ordered him to pay before he sought bankruptcy refuge. As of the day he filed for bankruptcy, he had not made any payment toward this debt. The claim amount was based on the credit

card balances as of the date of filing. After an examination of the evidence and the parties establishing the balance of the credit cards, this claim was resolved. CP 327.

Claim Number 7: This claim was based on the damage caused by the Mr. Miller's actions in depleting the community assets and ruining Ms. Vercoe's pre-petition credit rating. This claim was eventually resolved by stipulation after discovery. CP 327-328.

Claim Number 8: This claim was based on Mr. Miller's failure to divide the parties' pensions within a reasonable time. Because of Mr. Miller's inaction, the pensions could have lost substantial value<sup>2</sup>. After the family court entered the appropriate QDRO's, the parties determined that Ms. Vercoe suffered no loss and the claim was voluntarily disallowed. CP 328.

Claim Number	Basis	Amount	Disposition
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<sup>2</sup> The parties owned two pensions at the time of dissolution of their marriage. At the time of the bankruptcy petition, Mr. Miller regarded these pension as his own property and by legal necessity, property of the bankruptcy estate. Until the entry of the QDRO the pensions were owned by both parties. Since the Spokane County Superior Court had not entered a QDRO before the Debtor rushed to bankruptcy court, it was impossible to determine if there was any damage to Ms. Vercoe which would be compensable through the bankruptcy estate. Once the Superior Court entered the QDRO's, it was established that there was no financial damage to Ms. Vercoe.

Claim 3	Payment by Vercoe which should have been paid by Miller	\$6,188.49	Disallowed by agreement
Claim 4	Attorney fees for contempt proceeding	\$790.00	Disallowed by Court after hearing
Claim 5	Judgment from Decree of Dissolution	\$17,217.85 Plus int.	Allowed by Court for \$17,217.85 without interest after hearing
Claim 6	Balance of Credit Card Debt order to be paid by Miller	\$62,701.46	Allowed by agreement for \$61,713.00
Claim 7	Lost equity in house and damage to credit score	\$125,000	Allowed by agreement for \$15,500.00
Claim 8	Lost value of pensions due to delay in entering QDRO's	\$12,000	Disallowed by agreement

Each claim was efficiently resolved.<sup>3</sup>

The legal issues raised by the filing of claims did not involve spousal maintenance. Indeed, at the time of filing of his petition under chapter 13, the Respondent had paid his maintenance so it was current. The Bankruptcy Court did not consider any issues with respect to present, past or future

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<sup>3</sup> Appellant could have filed one claim in the amount of \$223,897.98 encompassing all issues. Appellant believed that course of action would not have aided the Bankruptcy Court or the parties in resolving the claims.

maintenance. CP 77, ¶ 7. The only rulings made by bankruptcy court involved what the Respondent owed the Appellant at the time he filed his bankruptcy petition - nothing else.

**b. MS. VERCOE'S PETITION IN FAMILY COURT  
SEEKS TO MODIFY HER RIGHTS TO  
CONTINUED SPOUSAL MAINTENANCE.**

The second prong of the claim preclusion test is whether the two actions are the same cause of action. They are not. The legal issues raised by the filing of the Petition for Modification of Spousal Maintenance raises three issues - has there been a substantial change in circumstances which was not anticipated by the court at the time the decree was entered, as a result of this change is there a continued need for maintenance on the part of the payee, and is there a continued ability to pay on the part of the payer? *Myers*, 54 Wn.App. 233, 773 P.2d 118 (1989). None of these issues were address by the bankruptcy court. Again, the answer appears so obvious that detailed analysis seems superfluous. However, case law does offer a four point test which demonstrates that the obvious conclusion is also the correct one.

In deciding whether two causes of action are the same we are to consider the following four factors:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4)

whether the two suits arise out of the same transactional nucleus of facts. *Rains v. State*, 100 Wash.2d 660, 664, 674 P.2d 165 (1983) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982)).

*Hayes*, 131 Wn.2d at 713.

**I. SPOKANE COUNTY SUPERIOR COURT IS NOT BEING ASKED TO MODIFY ANY ORDERS ISSUED BY BANKRUPTCY COURT.**

The bankruptcy court determined the parties' rights with respect to the claims filed therein by the Appellant. The Spokane County Superior Court has been asked to determine if the Appellant is in need of continued maintenance, in part, based on the fact that Respondent escaped full liability of the Decree of Dissolution by filing a chapter 13 bankruptcy. Whatever the ruling in family court, it cannot and will not disturb the fact that the parties rights and liabilities as of the date of the bankruptcy were decided in bankruptcy court.

**ii. MOST OF THE EVIDENCE CONSIDERED BY FAMILY COURT WILL BE DIFFERENT THAN THE EVIDENCE CONSIDERED BY BANKRUPTCY COURT.**

The bankruptcy court determined the parties' rights with respect to the claims filed by the Appellant. The evidence pertaining to those claims will not be reconsidered by the Superior Court. The fact that the Respondent filed

for bankruptcy will be considered. The impact of the bankruptcy filing is a piece of evidence that the Superior Court must consider. Indeed, the filing of a bankruptcy case by itself can be a significant change of circumstances which will support modification of maintenance. *Myers*, 773 P.2d 118, 54 Wn.App. 233 (1989).

In addition, the Superior Court is required to consider other factors which indicate a change of circumstances, none of which were considered by the bankruptcy court. Ms. Vercoe's credit score continues to be damaged as a result of the Respondent's bankruptcy petition. Her credit report will reflect negative data for the next five years. Post petition damage to Ms. Vercoe's financial condition was not considered by the bankruptcy court, but it can be considered by the superior court. The Appellant spent considerable time, energy and money in bankruptcy court which was not recoverable through the bankruptcy proceedings. These factors will be considered for purposes of modifying spousal maintenance. *Myers*, 773 P.2d 118, 54 Wn.App. 233 (1989). The bankruptcy court did not consider the Appellant's efforts to find employment, the superior court will consider this fact. Overall, the evidence presented in bankruptcy will overlap with some of the evidence that will be presented in superior court, but most of it will be different.

**iii. THE PETITION IN SUPERIOR COURT  
DOES NOT INFRINGE THE RIGHTS OF**

**THE PARTIES ESTABLISHED BY THE  
BANKRUPTCY COURT.**

The third part of the test requires the court to determine if the two actions infringe the same rights. They don't. As discussed above, the claims process was used to determine what Mr. Miller owed Ms. Vercoe on the day he filed for bankruptcy. The Appellant's petition in Superior Court seeks to modify her right to receive future maintenance. These are two completely different sets of rights.

**iv. THE CLAIMS IN BANKRUPTCY AND  
THE PETITION TO MODIFY  
MAINTENANCE DO NOT INVOLVE THE  
SAME TRANSACTIONAL NUCLEUS OF  
FACTS.**

The fourth part of the test requires the court to analyze the facts upon which each claim is based. As of the date the Respondent filed for bankruptcy, he had failed to pay Ms. Vercoe for debts that he was obligated to pay pursuant to the decree of dissolution. The transactional nucleus of facts was fairly simple: What was Mr. Miller ordered to do, and what did he refuse do. He did not pay the credit cards as he was ordered to do. He did not pay the judgment for attorney fees, as he was ordered to do. His attorney, acting on his behalf, did not draft the QDRO's as he was ordered to do. He did not pay the home mortgage, as he was ordered to do. He did not appear at a show-cause hearing, as he was ordered to do. Did Mr. Miller's complete

failure to abide by the decree of dissolution cause pre-petition compensable damage to Ms. Vercoe by obliterating her credit score before he filed for bankruptcy? These events were the basis for all the claims in bankruptcy.

By the filing of her petition for modification of maintenance, the superior court is now asked to modify that order, which will require the court to consider other facts. Are the parties in substantially different circumstances because of unanticipated events, i.e. Mr. Miller's bankruptcy, Ms. Vercoe's inability to become employed, Mr. Miller's substantial increase in income and undisclosed bonuses. In addition the superior court will examine Mr. Miller's ability to pay and Ms. Vercoe's continued need for financial support. Did Mr. Miller's bankruptcy filing cause Ms. Vercoe to incur additional attorney fees which were not anticipated by the family court? Did the filing of the bankruptcy frustrate the intent of the trial court including the emotional cost of the litigation on Ms. Vercoe? These facts are substantially different than the facts used to establish the amount of the claims in bankruptcy.

Upon full examination of the test set out in Washington and in the Ninth Circuit, there is no question that the bankruptcy proceedings are not the same legal proceedings as the proceedings in Superior Court. Because the Respondent cannot establish 2 of the 4 necessary elements of *res judicata*,

this defense fails as a matter of law.

**C. MATERIAL ISSUES OF FACT EXIST WHICH WOULD REQUIRE THE SUPERIOR COURT TO DENY THE MOTION TO DISMISS PURSUANT TO CR 56.**

As discussed above, summary judgment is only appropriate when the facts, read in a light most favorable to the non-moving party, demonstrate that the moving party is entitled to judgment as a matter of law. The granting of summary judgment is reviewed *de novo*.

In this matter, the Appellant is seeking a modification of spousal maintenance. In order to prevail, she must prove that there has been a substantial change in circumstances not contemplated by the court in terms of her need and the Respondent's ability to pay.

The ultimate decision to modify maintenance must be based upon a substantial change in the needs of the spouse receiving maintenance and the ability of the other spouse to pay. See *Wagner v. Wagner*, 95 Wash.2d 94, 98, 621 P.2d 1279 (1980); *Lambert v. Lambert*, 66 Wash.2d 503, 508, 403 P.2d 664

*Myers*, at 238.

Therefore, any analysis with regard to modification of spousal maintenance, must determine what the original trial court considered, how it came to its decision and what change of circumstance exist that

would justify modifying the spousal maintenance. Any factual issues that exist are read in the light most favorable to the Appellant. The substantive merits of the Appellant's petition must be examined because the record tends to indicate that the Commissioner ultimately decided the motion to dismiss based on "no significant change of circumstances".

**1. THE INITIAL DECISION OF THE TRIAL COURT AFTER THE DISSOLUTION TRIAL ATTEMPTED TO EQUALIZE THE PARTIES' FINANCIAL POSITIONS FOR LIFE.**

The objective of a trial court in dissolving a long term marriage is to make a ruling which will place each party in roughly the same financial condition for the rest of their lives.

[T]he court is not required to divide community property equally. *In re Marriage of White*, 105 Wn.App. 545, 549, 20 P.3d 481 (2001). In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed. 2000); see also *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances"). The longer the marriage, the more likely a court will make a disproportionate distribution of the

community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community [170 P.3d 577] property. *In re Marriage of Schweitzer*, 81 Wn.App. 589, 915 P.2d 575 (1996).

*In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (Wash.App. Div. 1, 2007).

The principle of equal financial position is not limited to property distribution. Property distribution is just one of the tools that the trial court has at its disposal to ensure an equitable dissolution of a long-term marriage. The Court also decides spousal maintenance and assignment of liabilities, including the payment of legal fees in dissolution proceedings. The Court uses each of these tools synergistically to ensure that the long-term marriage is dissolved in a fair manner with lifetime financial equity as the goal.

In this matter, the initial decision of the superior court to award maintenance was based on the wife's need because of her irregular income, the time it would take for her to find employment and her husband's stable and increasing income over the course of the marriage. CP 417-419. The Court also considered the lifestyle enjoyed by both

parties over the years that they were married, and the wife's contribution to the marriage which allowed her husband to secure his steady and sizeable income. CP 418.

The most valuable assets which were produced from this marriage were the family home, the community pensions, and the husband's steady and sizeable income from his career as an airline captain. CP 415-419. The Court considered these factors and ordered a distribution of assets which included allowing the wife and children to live in the family home until it was sold. CP 4. The court retained jurisdiction over the sale of the family home to ensure that the asset was preserved, and that the division of the proceeds would be consistent with the intent of the court. CP 4. The Court's ruling and retention of jurisdiction over the property was compromised by the Respondent's bankruptcy as discussed below.

The Court divided the community pensions and the division of those pensions was not compromised by the filing of the Respondent's bankruptcy.

Probably the most valuable asset from the marriage, was the husband's job. The court painstakingly took effort to describe how the

wife supported the husband early in his career so that he was able to obtain employment with a steady and sizeable income. CP 417-419. Both parties enjoyed the fruits of his labor during the term of the long marriage. When considering the husband's income, the Court awarded the wife \$3,000 per month in spousal maintenance for 36 months.

Finally, the Court assigned the community liabilities to the husband, and ordered him to pay 60% of the wife's attorney fees. CP 4-6. For purposes of summary judgment, this Court must assume that the initial decision of the Superior Court had an objective of equalizing the financial positions of each party for the rest of their lives using the tools it had available. Anything that substantially disturbs the rulings of the court to achieve the objective of the decree of dissolution could be a justifiable basis to modify the decree.

In summary, the initial decision of the trial court included the following elements: (1) spousal maintenance of \$3,000 per month for 36 months; (2) division of the equity in the family home, in which the court retain jurisdiction, while allowing the wife to reside in the home; (3) the assignment of the community debt to the husband in the approximate amount of \$59,000; (4) the equitable split of the parties

pensions valued at approximately \$292,000; (5) the husband's payment of 60% of the wife's attorneys fees. These five elements were used to achieve the objective of financial equality for life.

47 days after the filing of the court's final decision, the husband filed a bankruptcy petition. The filing of the bankruptcy petition frustrated many of the directives of the Decree of Dissolution and therefore the objective of the trial court. Indeed, the evidence indicates that the Respondent had no intention of honoring most of the provisions of the Decree, and essentially used the bankruptcy court as his personal court of appeals.

**2. THE RESPONDENT'S ACTIONS AND FILING OF A BANKRUPTCY PETITION SUBSTANTIALLY CHANGED THE CIRCUMSTANCES UPON WHICH THE COURT RELIED WHEN IT ATTEMPTED TO EQUALIZE EACH PARTIES' RESPECTIVE LIFETIME FINANCIAL POSITIONS.**

There are many events which substantially changed the parties positions that were not anticipated by the Superior Court when it entered the decree of dissolution. Although the court Commissioner's rulings thwarted the Appellant's efforts at presenting a full defense to the summary judgment motion, there is still enough in the record to

defeat summary judgment when the evidence is examined in a light most favorable to the Appellant.

First, the Superior Court anticipated that the Respondent would obey the Decree. It goes without saying that for any Decree to achieve its intended affect, the parties must obey its provisions. In this matter the Respondent failed to do just about everything he was ordered to do from day one. CP 424-428. Because the Respondent did not obey the Decree, the Appellant incurred more attorney fees pursuing a contempt action. CP 8-9. The Respondent's failure to obey the Decree and make the monthly payment on the family home resulted in lost equity because of the accumulation of late fees and foreclosure costs. In addition, it also forced the Appellant to move from the family home prematurely and under stressful conditions. Some of these items were addressed in the bankruptcy claims process, but only to the extent that they resulted in pre-bankruptcy harm. The Superior Court can still consider the fact that the Respondent did not obey the Decree as a factor to establish a change in circumstances. *Myers*, 773 P.2d 118, 54 Wn.App. 233 (1989).

Second, the Court did not anticipate Respondent would file for bankruptcy. A bankruptcy filing modifies many of the provisions of

any decree of dissolution. As a result, the purposes of the Decree are frustrated. This is why bankruptcy by itself can justify the modification of a Decree of Dissolution. *Myers*, 773 P.2d 118, 54 Wn.App. 233 (1989). This matter is no exception and the list of causal effects is long.

By the filing of his bankruptcy, the Respondent immediately raised his disposable income by in excess of \$3,000 per month. This amount is represented by his share of the house payment \$2,400, plus the credit card payments he avoided in the approximate amount of \$600 per month. CP 426-427. This event was not anticipated by the trial court. An additional \$36,000 per year in disposable income is a significant change.

By the filing of his bankruptcy, the Respondent was relieved of his obligation to make mortgage payments in order to allow the equity in the family home to be preserved. The home went into foreclosure as the Appellant did not have the financial resources to remain in the home until it was sold. This event represents the complete loss of one of the five major rulings by the trial court, and it was not anticipated by the trial court. Indeed, the Superior Court retained jurisdiction to ensure that this asset was preserved. CP 4.

By the filing of his bankruptcy, the Respondent caused the Appellant to incur attorney fees. By his conduct in bankruptcy, he caused those attorney fees to be extraordinary. CP 333. The Respondent's initial chapter 13 plan provided for payments to creditors of \$33,000 over the course of 60 months. This amount represents less than 3% of his income during the 60 months he would be paying into the plan. CP 335, 354-356. The Appellant had no choice but to engage the Respondent in protracted litigation, when his approach to bankruptcy was to attempt work the system to his benefit. The expense of this bankruptcy litigation upon the Appellant was not anticipated by the trial court. It also frustrates one of the five tools that the trial court used to achieve lifetime financial equality.

By the filing of his bankruptcy, the Respondent increased the Appellant's debt burden. Respondent will undoubtedly say that he is in a 100% plan, therefore there is no debt burden placed on the Appellant. This position overlooks the fact that the payment of 100% of the unsecured claims in bankruptcy does not prevent the accumulation of interest, collection costs and attorney fees chargeable to a co-debtor, post-bankruptcy, and the discharge of the hold-harmless

provisions of the Decree of Dissolution. These post-bankruptcy interest, fees and charges are discharged by the Bankruptcy proceedings. However, a co-debtor who does not file for bankruptcy is still subject to the full amount of all claims, past - present and future, just as if no bankruptcy has ever been filed. In this matter that means that the debt burden of all post-bankruptcy fees interest and charges based on the credit cards and the attorney fee judgment to Marty Salina will continue to accumulate as to the Appellant, while the Respondent will enjoy freedom from these obligations when he completes his plan receives his discharge. This event was not anticipated by the trial court. This event also frustrates the debt shifting tool used by the trial court in its attempt to achieve financial equality.

Third, the Court anticipated that the Respondent would not receive annual bonuses and that his income was stable at \$140,000 - \$160,000 per year. CP 410-414, 419. As discovered in the bankruptcy proceeding, the Respondent's income for the year immediately after the entry of the Decree was over \$180,000 per year. CP 335. Both of these factors were not anticipated by the trial court. An additional \$20,000-\$40,000 per year is a significant change in income. When added to the

additional \$36,000 in disposable income he gained from relief of his debt burden, the Respondent has an additional \$56,000-\$76,000 per year to improve his financial position - again not contemplated by the trial judge.

Fourth, the Court anticipated that the Appellant's income would stabilize in about three years. Because of a poor economy, the Appellant was not able to obtain the stable income that the trial court anticipated.

Fifth, because of the failure of the Respondent to pay the creditors as he was ordered, the Appellant's credit rating has suffered great harm. This harm is continuous in nature because of the credit industry. Creditors are able to report derogatory information for a period of about 7 years. The Appellant's credit score will suffer the effects of the Respondent's failure to obey the Decree and Bankruptcy until sometime in 2017. This event was not anticipated by the trial court.

In total, the unanticipated events that occurred after the entry of the Decree of Dissolution have frustrated three of the five major rulings that the trial court used to ensure life-long equality between the Appellant and the Respondent. In addition, most of the factors resulted

as a direct consequence of the Respondent's actions. Surely the facts supported by the record before this court read in the light most favorable to the Appellant would preclude summary dismissal of the Appellant's Petition for Modification.

Additionally, the Commissioner's assumptions on the evidence were more favorable to the Respondent. When the Commissioner gave her final ruling she opined as follows:

But secondly, I'll go back down to the change in circumstance, which is significant and un -- unknown, unanticipated change in circumstances is what a modification of a maintenance provision is about. Not I want more because I need more. But that something changed between the time that the first thing was negotiated and when you came back in to ask. Her debt which is primarily what she cited, as far as the debt, the impact to her when he filed bankruptcy then shifting her is, as I said was already place. That debt was already in place and so that is not a new circumstance.

The damage to credit is also not new. Here's the deal. By the time you got to divorce both your credit was already damaged. It's clear in the documents. You were already struggling. You were already in over your head. You were already in on a house you couldn't afford. So that damage was a long time ago. And it might of gotten worse through the divorce, which is does with most families, but it doesn't -- but that damage was already there.

Plus, this is the piece I think most important to me, she's being paid for the debt through the bankruptcy. It was not

pushed over to her as her responsibility without any relief. So yes, he was supposed to pay the debt, attempted to discharge it in bankruptcy. It is a 100 percent Chapter 13 plan. He's going to pay it. It's not going to be paid in exactly the way you might have anticipated, but it's still being paid.

CP 388-389.

These findings were all read in a light most favorable to the Respondent. There is nothing in the record that suggests that the parties could not afford the home they were living in. Indeed, the house payments were current until February 2010, one month after the dissolution trial and oral ruling. CP 426. There is nothing in the record to suggest that the parties credit ratings were poor at the time the trial court made its decision. CP 425. There is nothing in the record to suggest that the parties were "in over their head". Quite the opposite - the trial court found that the husband had made lifestyle choices which might inhibit his ability to pay his obligations, but that he could manage. CP 419, ¶35. In addition, when the Appellant filed her declaration in support of the motion for contempt on June 16, 2010, she noted that she was paying her credit cards to maintain her excellent credit rating, despite the fact that the Respondent was ordered to pay them. CP 427. It also notes that since Mr. Miller failed to make the

house payments, her credit went from excellent to fair. CP 427.

The fact that the Respondent is in a 100% Chapter 13 Plan does not eliminate the impact of the debt on the Appellant. She is being compensated for what the Respondent owed on the date of filing, but interest and fees continue to accumulate on the debt when it is not paid in a timely manner. The Appellant will ultimately be responsible to pay the difference. This fact, which the Commissioner thought was highly important, was read in a light most favorable to the Respondent.

The reading of facts in favor of the Respondent was clear error. It is also reversible error.

## **VI. CONCLUSION**

The multiple errors committed by the Superior Court support reversal of the ultimate decision to grant the Motion to Dismiss. The order dismissing this matter should be reversed with instructions to grant the Appellant's Motion to Compel and proceed to trial.

Respectfully Submitted, on  
October 30, 2013.



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