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

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
Division III**

Court of Appeals No. 343707-III  
Spokane County Superior Court No. 2005-03-02704-3

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**In re:**

**ELIZABETH R. CORULLI,**

**Petitioner/Respondent,**

**and**

**SCOTT K. SUTHERLIN,**

**Respondent/Appellant.**

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**APPELLANT'S OPENING BRIEF**

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

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## I. SUMMARY OF ARGUMENT

A *Decree of Dissolution* cannot be modified by a subsequent mediation agreement that a) explicitly states that it is not a modification of the decree, b) does not actually contain language that modifies the decree, and c) fails to meet the requirements of a valid contract.

## II. ASSIGNMENTS OF ERROR

1. The commissioner erred when he quashed the restraining order requested by Mr. Sutherlin.
2. The commissioner erred when he denied Mr. Sutherlin's request that Ms. Corulli be required to make the equalization payment as described in the *Decree of Dissolution*.
3. The commissioner erred when he denied Mr. Sutherlin's alternative request that Ms. Corulli be required to provide an accounting of the funds she received from the sale of her property and that Mr. Sutherlin be awarded a judgment so that he might put a lien against Ms. Corulli's recently acquired properties.
4. The commissioner erred when he concluded that he could not determine whether Ms. Corulli had complied with her affirmative good faith obligation to make payments to Mr. Sutherlin.
5. The commissioner erred when he concluded that he could not determine whether Ms. Corulli had sufficient funds to make a good faith payment to Mr. Sutherlin.
6. The commissioner erred when he construed the burden of production against Mr. Sutherlin with respect to Ms. Corulli's failure to provide her own financial information.
7. The commissioner erred when he failed to enforce his own *Order to Show Cause*.

8. The trial court erred when it determined that the *Voluntary Settlement Agreement* was a modification of the *Decree of Dissolution*.
9. The trial court erred when it concluded that the parties intended to modify the *Decree of Dissolution* based on the *Voluntary Settlement Agreement*, which contained explicit language that the parties did not intend to modify the *Decree of Dissolution*.
10. The trial court erred when it determined that the *Voluntary Settlement Agreement* was a valid modification of the *Decree of Dissolution* without any evidence to support the elements of a contract or a meeting of the minds.
11. The trial court erred when it denied Mr. Sutherlin's meritorious motion for reconsideration based on an inaccurate recitation of the record and the application of the wrong legal standard.

### III. ISSUES PRESENTED

- A) Whether Commissioner Linehan erred when he quashed the restraining order based on the same findings and conclusions that justified issuance of the restraining order.
- B) Whether Commissioner Linehan abused his discretion when he denied Mr. Sutherlin's requests for relief because he concluded he could not determine whether Ms. Corulli had sufficient funds to make a good faith payment on her obligation to Mr. Sutherlin.
- C) Whether the trial court erred when it concluded that the *Voluntary Settlement Agreement* was a modification of the *Decree of Dissolution*.
- D) Whether the trial court abused its discretion when it denied Mr. Sutherlin's meritorious *Motion for Reconsideration* based on an inaccurate statement of the record and application of the wrong legal standard.
- E) Whether Mr. Sutherlin is entitled to attorney's fees and costs.

#### IV. STATEMENT OF THE CASE

Scott Sutherlin and Elizabeth Corulli were married for 10 years. The parties sought to dissolve their marriage in 2005, and the court entered a *Decree of Dissolution* in 2006.

Paragraph 3.15 of that *Decree* included the following language:

Wife shall owe husband an equalization payment in the amount of \$29,100. This amount shall bear no interest and wife shall pay at her ability. **Wife shall have an affirmative duty to make good faith and reasonable efforts to remit payment in a prompt and timely manner so as not to take advantage of husband's agreement to waive interest and specific repayment terms.** If wife sells home, husband shall receive the first \$29,100 payable directly from the net proceeds of the sale at the time of closing. If wife refinances the mortgage on the home, wife shall refinance an amount sufficient to repay husband the full equalization payment balance owing at the time of the refinances. **If equalization payment has not been paid in full by the time the parties' youngest child graduates from his school, payment shall be due in full within 90 days of child's graduation.**

(CP 10; emphasis added.)

On June 27, 2007, approximately one year after the *Decree* was entered, the parties attended mediation and entered into the *Voluntary Settlement Agreement*, which included the following language:

**The parties intend to abide by the Decree of Dissolution regarding the court ordered debt of twenty-nine thousand one hundred dollars (\$29,100.00). The terms of payment are outlined the in [sic] Decree, however the parties want to add clarity to ensure the understanding between the parties regarding payment of the debt.**

Both parties agree the debt will not be due until 90 days after their youngest daughter, Rylee Sutherlin, graduates as a senior in high school (approximately June, 2017). The approximate graduation date is June 2017. The approximate date the debt is to be paid in full is September 2017. In the event the debt can be paid prior to that, the paying party may do so without any prepayment penalty. Should the child not complete high school for any reason, the debt is still due 90 days after what would have been the child's anticipated graduation date. In addition, the debt will be due and payable upon the resale or refinancing of the home located at 11214 E. 44<sup>th</sup> Ave., Spokane, WA. This loan will be forgiven should the defendant become deceased before the debt is due as clarified above.

Both parties also agree defendant has received a payment of \$600.00 and a credit of \$375.00. The new balance, effective today, June 27, 2007, is \$28,125.00. The parties further agree that this is a non interest bearing loan and shall remain the same until the loan has been paid in full.

(CP 50-51; emphasis added.)

It is undisputed that Ms. Corulli has not made *any* payment to Mr. Sutherlin since the date of mediation – a period of time that now exceeds nine years.

On June 1, 2015, Ms. Corulli filed a petition for modification of child support. (CP 115.) In doing so, she filed a child support worksheet and testified under penalty of perjury that she received no other income beyond her wages in the amount of \$3,256/month. (CP 115-116.) In preparing his response to Ms. Corulli's petition, Mr. Sutherlin discovered that the information supplied by Ms. Corulli was, in fact, false. Contrary to her sworn child support worksheets, Ms. Corulli received a great deal

more than the wages she disclosed to the trial court. (CP 48.) In fact, further investigation revealed that in addition to the increased income, Ms. Corulli had also come into a great deal of real property, some of which was subject to a pending sale at the time she filed her petition and likely to result in a large sum of cash. (CP 18-43.)

Mr. Sutherlin made a motion requesting that Ms. Corulli be required to appear and show cause why she should not be immediately required to pay the equalization transfer amount ordered in the *Decree of Dissolution* and requesting an ex parte restraining order to prevent Ms. Corulli from disbursing any funds received from the sale of the property until the matter could be heard. (CP 18-43.) Mr. Sutherlin testified that, pursuant to the language contained in the decree, he had agreed to wait for the equalization payment in order to accommodate Ms. Corulli's financial situation and avoid any negative impact on the parties' children. (CP 20.) He had also agreed to waive the interest in an effort to make the situation manageable for Ms. Corulli; however, he believed that Ms. Corulli was in direct violation of her "affirmative duty to make good faith and reasonable efforts to remit payment in a prompt and timely manner so as not to take advantage of husband's agreement to waive interest and specific repayment terms," given that she had inherited considerable assets (including multiple rental properties that were generating income), and

that one of her properties had recently sold for the sum of \$241,352.02. (CP 19-20.) Mr. Sutherlin noted that Ms. Corulli's financial means far exceeded his own, and that Ms. Corulli's failure to disclose this information as required pursuant to Ms. Corulli's pending request to modify child support demonstrated the extent of her bad faith. Mr. Sutherlin asked the court to order Ms. Corulli to pay her obligation from the proceeds of the pending sale on one of her properties or, alternatively, if the proceeds had already been spent, that the court order Ms. Corulli to provide an accounting of the funds and award Mr. Sutherlin a judgment for the remaining amount owed to him so that he could put a lien on one of Ms. Corulli's recently acquired properties. (CP 19-21.)

In support of his motion, Mr. Sutherlin submitted a copy of the *Deed of Trust* evidencing the sale of Ms. Corulli's interest in real property located in Chelan County for the amount of \$241,352.02. (CP 35-42.) He submitted the Chelan County Assessor & Treasurer's online report for property held in Ms. Corulli's name. (CP 29-30.) He submitted an online report showing the listing price of the property held in Ms. Corulli's name. (CP 31.) He submitted an online report showing that a sale was pending on the property held in Ms. Corulli's name. (CP 32-33.)

Mr. Sutherlin requested that an ex parte restraining order be granted without notice because immediate and irreparable injury, loss, or damage

would result before Ms. Corulli could be heard; Mr. Sutherlin testified that he did not expect Ms. Corulli would use any of her considerable influx of cash to make a payment, and that he believed if Ms. Corulli were given notice of his request, she would disburse the money before the matter could be heard.<sup>1</sup> (CP 19-21.)

Commissioner Linehan granted Mr. Sutherlin's motion and found that "there is sufficient basis to issue an *Ex Parte Restraining Order and Order to Show Cause* pursuant to the declaration made by the Respondent in the *Motion/Declaration for Ex Parte Restraining Order and Order to Show Cause.*" (CP 44-45.) The commissioner also issued a restraining order that prevented Ms. Corulli from "transferring, removing, encumbering, concealing, or in any way disposing of any funds she receives or has received from the sale or transfer of any real property held in her name or in which she has an interest until the respondent's motion can be heard by the court." (CP 45.) The order directed Ms. Corulli to appear and show cause why the relief requested by Mr. Sutherlin should not be granted. (CP 44-46.)

Ms. Corulli moved to quash the restraining order and submitted a declaration in support of her request. (CP 47-52.) In her declaration, Ms.

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<sup>1</sup> Mr. Sutherlin's concern was justified; Ms. Corulli did, in fact, disburse all the funds in question (over \$20,000) and testified that she had done so in one day, prior to "receiving notice" of the restraining order through her attorney.

Corulli admitted to having come into an inheritance that included at least three rental homes and an “eight plex and 12 plex.” (CP 48.) Since Mr. Sutherlin had already submitted a copy of the *Deed of Trust* to the trial court, Ms. Corulli also confessed that she had received an additional “\$1,000 a month” from her siblings (which she had previously failed to disclose); neither did she dispute that she had sold her interest in the “eight plex and 12 plex” for over *a quarter of a million dollars* in principal and interest. Further, Ms. Corulli did not dispute the real estate contract submitted by Mr. Sutherlin evidencing that she had received a down payment of \$40,000 in cash and was owed a remaining \$60,000 that was to be paid to her in monthly installments of \$322.09, plus interest, per month. (CP 61-62.) With respect to the remaining three rental homes, Ms. Corulli admitted that she had received “some money” (approximately \$20,188.09) but that she had rather curiously managed to spend the entire sum in *one day* “before receiving notice” from her attorney about the restraining order entered by Commissioner Linehan. (CP 48-49.) Ms. Corulli provided no evidence to support her narrative statement, nor did she disclose the total amount of profit she had received from the sale; rather, she simply recited the list of bills she claimed to have paid, including \$3,500 to “Doug Corulli.” (CP 48-49.)

Ms. Corulli similarly failed to provide any information with respect to the income generated by the remaining unsold properties or their value, nor did she disclose whether she received additional assets beyond the real estate discovered by Mr. Sutherlin. Ms. Corulli did not dispute Mr. Sutherlin's allegations that the information contained in her worksheets was inaccurate or that she had filed false information under penalty of perjury, nor did she dispute that disclosure of her additional income was required by RCW 26.19.071 at the time she filed her worksheets. She did not file any amended worksheets nor did she file any financial declaration. She made no attempt to explain why she had withheld that information from the trial court or why she continued to refuse to file a financial declaration. In fact, Ms. Corulli provided almost no financial information at all in response to the order directing her to show cause as to why payments should not be made according to the *Decree of Dissolution* according to Mr. Sutherlin's request.

Ms. Corulli's only argument was that the *Voluntary Settlement Agreement* resulted in some kind of modification to the *Decree of Dissolution*, saying, "[i]t now provides that the payment would not be due until 90 days after our youngest, Rylee, graduated as a senior from high school, which was estimated to be in June, 2017." (CP 48.)

In his reply, Mr. Sutherlin argued that to the extent Ms. Corulli submitted the *Voluntary Settlement Agreement* to show that the balance owed was \$28,125 rather than \$29,100, he conceded the point. (CP 54.) He testified that he had forgotten that he had agreed to issue her a credit against her balance, and that he intended to honor that agreement. (CP 54-55.) To the extent, however, that she intended to argue that the mediation agreement was intended to modify the decree, Mr. Sutherlin argued that the *Voluntary Settlement Agreement itself* explicitly stated that “[t]he parties intend to abide by the Decree of Dissolution regarding the court ordered debt of twenty-nine thousand one hundred dollars (\$29,100.00),” and “[t]he terms of payment are outlined the in [sic] Decree, however the parties want to add clarity...” (CP 56.) Mr. Sutherlin noted that Ms. Corulli appeared to believe that the *Voluntary Settlement Agreement* relieved her of her affirmative good faith duty to make payments and testified that not only does the mediation agreement clearly state that it does not change any obligation, but that he had no intention of waiving the right to receive payments prior to 2017, nor was he provided any consideration in return for that benefit. (CP 57.) Specifically, Mr. Sutherlin argued that according to the decree, the *total amount* of the equalization payment is not due until the youngest child graduates from high school, but *payments* are due based on Ms. Corulli’s ability to make

them. (CP 57.) He argued that not only did the decree require Ms. Corulli to make payments (“wife shall pay at her ability”), but it even anticipated that she might do precisely what she was in fact doing by refusing to make payments, and it explicitly provided that Ms. Corulli had a “an affirmative duty to make good faith and reasonable efforts to remit payment in prompt and timely manner so as not to take advantage of husband’s agreement to waive interest and specific repayment terms.” (CP 57.)

In support of his motion, Mr. Sutherlin submitted a copy of the *Real Estate Contract* showing that Ms. Corulli received \$40,000 for the sale of one of her properties, and that she would be paid another \$60,000 at the rate of \$322.09/month, plus interest at 5%. (CP 58; 61-69.) Mr. Sutherlin also requested that he be awarded attorney’s fees for having to bring the motion.

On July 28, 2015, the parties’ motions were heard by Commissioner Linehan. Mr. Sutherlin’s attorney argued that none of the evidence provided by Ms. Corulli disputed anything previously submitted by Mr. Sutherlin as the basis of the restraining order; rather, it confirmed it. (CP 79-91; 96-99.)

When it was Ms. Corulli’s attorney’s turn to argue, he became quite hostile, saying to the commissioner that he was “really, really upset” and “freely I’ll admit I was upset with you,” stating, “I know I’m not supposed

to talk to judicial officers like that....” (CP 91.) He went on to argue that Mr. Sutherlin “intentionally omit[ted]” a “supplemental document” in the form of the *Voluntary Settlement Agreement*, but despite repeatedly referring to the document as “critical,” Ms. Corulli’s attorney never clearly argued in what manner it *differed* from the decree in any relevant way. (CP 93.) 3

Commissioner Linehan made the following rather confusing ruling:

We are here on an ex parte motion that granted a restraining order regarding this new inheritance that Ms. Corulli received. In reading the documents for today – and I was the one that signed that in ex parte. And in looking at these documents that I’ve read today, I must admit, one of the things that struck me as the most problematic is learning of this mediation agreement that I was not aware of at the time when I signed the ex parte restraining order.

And one of the reasons that the ex parte restraining order was signed was, looking at the file, a pretty decent amount of time had gone by without Ms. Corulli making this payment on this income. And Ms. Watts does make a good argument regarding that Ms. Corulli has an affirmative duty to pay back that was owed, but I also am struggling with the fact that there’s this whole – there’s this subsequent agreement after the decree, after the – after the decree that allows payment to be made by June of 2017.

So the question that – then becomes – Well, one, the ex parte restraining order was signed without that understanding that there was this later date. The reason that I put the mother – or that Ms. Corulli could put in the motion for shortening time was really not understanding how this would impact her, as she was not given notice that day. And the basis for not giving notice was to – according to Mr. Sutherlin, was his concern

that she would conceal or disburse the funds before we could get here, and there is this amount that she does owe.

That being said, I don't – I've read Ms. Corulli's statement – or declaration. Whether or not she's needing to use those funds for other aspects – she mentions a child getting into an accident, that she's trying to deal with – the affirmative duty I don't think goes away, but I'm not going to continue the restraining order at this point. I think this is more of a discovery issue that the parties need to deal with going forward.

And if it can be – if that can be found out that Ms. Corulli really did have this extra income and has not been performing her affirmative duty, I think that could be another hearing down the road, but I'm not going to continue the restraining order at this point. Quite frankly, I'm a little irritated to find out that there was this agreement after the fact of signing a restraining order, because, really, the reason it was granted was thinking that it's been a decade without any payments being made, and then I find out that you can't actually force the payment until June of 2017.

But I'm not discounting the fact that Ms. Corulli still does have that affirmative duty. Because of that affirmative duty, I'm not going to grant attorney fees, because I don't know yet on – if you really do have the funds or not. I didn't get into that depth in the file.

The restraining order will be quashed, but the attorney fees will not be granted.

(CP 99-101.)

Mr. Sutherlin's attorney made the following clarifications on the record:

MS. WATTS: Just to clarify for my own understanding, are you finding that what was determined in the mediation

agreement is substantively different than what was in the decree?

THE COURT: No.

MS. WATTS: Oh.

THE COURT: What I'm saying is, one of the bases for signing that without giving notice to the other party was the understanding that a lot of time had gone by, --

MS. WATTS: Okay.

THE COURT: -- there wasn't any payments being made, and not knowing that there was a subsequent agreement that she had until June of 2017. If I knew that, I would have required notice of the other party.

MS. WATTS: Okay.

THE COURT: I didn't really understand that there was this subsequent agreement to the decree. That doesn't -- I don't think that changes the decree and I don't think it changes the amount owed or the affirmative duty. So for those reasons, I'm not going to award fees, but I am going to quash the restraining order.

MS. WATTS: And if I could just -- Just for the sake of making my record, I want to say that the 90 days after graduation of the youngest is the same in both. So, I don't know if that's --

THE COURT: I'm not changing --

MS. WATTS: Okay.

THE COURT: -- anything regarding that.

MS. WATTS: All right, good. Thank you.

(CP 102-103.)

Mr. Sutherlin moved to revise the commissioner's decision, and at hearing, Mr. Sutherlin argued that Commissioner Linehan had no basis to quash the restraining order because he had made no alternative findings to those that he had relied upon when he issued the order. (RP 5-6, 12-13.) In fact, the commissioner *explicitly* found that the *Voluntary Settlement Agreement* did not substantively differ from the decree, that Ms. Corulli had not made payments in nearly a decade, and that Ms. Corulli had an affirmative duty to make payments. (CP 102-103.) Mr. Sutherlin further argued that he was entitled to enforce the decree, and that, contrary to Commissioner Linehan's ruling, Mr. Sutherlin was not obligated to pursue further discovery because the order to show cause issued by the commissioner directed *Ms. Corulli* to appear and present evidence showing why she should not comply with the decree, which she failed to do. (RP 5, 13.) Her refusal to comply with the commissioner's order could not properly serve as the basis to deny Mr. Sutherlin's request. Mr. Sutherlin had already presented all the financial information available to him, which was both substantial and undisputed by Ms. Corulli; any further evidence was solely in the possession of Ms. Corulli who had already been ordered to appear and present it. In fact, Ms. Corulli had failed to provide *any* evidence or argument that she could not comply with her affirmative good faith duty to make payments to Mr. Sutherlin;

instead, she had simply argued that she had no affirmative good faith duty to make payments. (RP 13.) Because Commissioner Linehan had explicitly ruled that she did have an affirmative good faith duty to make payments, he erred by denying Mr. Sutherlin's requests.

The trial court denied Mr. Sutherlin's motion for revision, saying:

Well, I'm going to affirm the commissioner and in large part it's because of what the Voluntary Settlement Agreement provides.

(RP 14.)

And this settlement agreement was entered into on June 27, 2007, and in part this provides that both parties agree the debt will not be due until 90 days after their youngest daughter, Rylee Sutherlin, graduates as a senior form high school, which would be approximately June 2017. It goes on in other parts to provide that it may not be due until September of 2017. And then now I quote, "In the event that the debt can be paid prior to that, that paying party," I emphasize, "may do so without prepayment penalty." The way I interpret that is that there isn't really any obligation to pay until September of 2017, but if you do pay early, there wouldn't be any prepayment penalty. And with respect to notice of ex-parte restraining order, in the last paragraph of this agreement, it says, "We further agree that if the terms of this agreement are not carried out, then following written notice to the noncomplying party of not less than 10 days and by certified mail return receipt requested judgment by default my be entered." So to me, it's clear that the Parties contemplated that this agreement would control. The commissioner was correct by vacating the restraining order. And the agreement itself, and the rules, I think, under these circumstances, required notice. That's my ruling.

(RP 14-15.)

Mr. Sutherlin moved for reconsideration. (CP 114-131.)

In his memorandum, Mr. Sutherlin argued that the trial court had erred when it concluded that the mediation agreement was an amendment that controlled the decree. (CP 114-122.) He argued that in interpreting settlement agreements, courts must determine the intent of the parties by focusing on the objective manifestations expressed in their agreement, and that, in this case, the parties had *expressly stated their intention* to abide by the decree and its terms, and that the mediation agreement only served to clarify the agreement as contained in the decree. (CP 119-120.) Mr. Sutherlin argued that the trial court's conclusion that the parties intended the *Voluntary Settlement Agreement* "to control" was directly contrary to the explicit language contained in the *Voluntary Settlement Agreement* itself.

Mr. Sutherlin further argued that if the *Voluntary Settlement Agreement* were to be considered a modification of the *Decree of Dissolution*, it would need to meet the burden of "proving a contract," including the essential contractual elements of "mutual intent/meeting of the minds" and "consideration." (CP 120.) With respect to the element of a "meeting of the minds," Mr. Sutherlin noted that since the *Voluntary Settlement Agreement* signed by the parties clearly stated that they *did not intend* to modify the decree, it was surely not reasonable to conclude that

there was a “meeting of the minds” that the *Voluntary Settlement Agreement* was a modification of the decree. (CP 121.)

Mr. Sutherlin noted that he had received no consideration for his waiver of Ms. Corulli’s affirmative good faith obligation to make payments, and a modification requires consideration or a mutual change in obligations and rights; he noted that although consideration may be “any bargained for act or forbearance,” it must be something separate from what was promised in the original contract.

Finally, Mr. Sutherlin argued that reconsideration of the trial court’s ruling on this issue served public policy and the interests of justice. (CP 121.) Mr. Sutherlin was not forced to forego equalization payments or interest on the amount owed; rather, he had *agreed* to do so in consideration of Ms. Corulli’s affirmative good faith duty to make payments as she was able. Mr. Sutherlin argued that it is in the interest of public policy that parties resolve issues by agreed settlements, that parties enter into settlements that are in the best interest of their children, and that parties mediate disputes or agree to clarifications; yet, inexplicably, the trial court’s ruling, which interpreted all of these activities to the detriment of Mr. Sutherlin in direct contradiction to the express language contained in the documents, would serve to chill the resolution of family conflict by agreement given that a party could be found to have waived his rights in

the face of explicit language to the contrary. (CP 122.) In light of such construction, Mr. Sutherlin argued that any litigant would be better served to forego resolution by agreement and proceed to court action given that he cannot be assured the benefit of his own bargains. (CP 122.)

Ms. Corulli filed a response to Mr. Sutherlin's motion, which primarily focused on abusing Mr. Sutherlin's counsel, made very little in the way of substantive argument. It noted that it would be a "fundamental misunderstanding" to conclude that the "mediation agreement did not modify the obligations under the decree," and that "the parties mediated new terms." (CP 133-136.) In response to Mr. Sutherlin's argument regarding the elements of a contract, Ms. Corulli merely stated that Mr. Sutherlin's counsel "chooses to ignore the signatures of the parties evidences [sic] the agreement." (CP 135.) Ms. Corulli provided no evidence in support of her claims other than stating that "[t]he document speaks for itself," and that the language is "clear and unambiguous." (CP 134-36.)

In his reply, Mr. Sutherlin noted that the language contained in the *Voluntary Settlement Agreement* document explicitly stated that the parties *did not intend to modify* the obligations related to the debt, and that the language is legally insufficient to modify the obligations related to the debt. (CP 139.) Mr. Sutherlin pointed out that as he had previously

argued, “there are no new terms of agreement contained in the *Voluntary Settlement Agreement* with respect to the debt, and “[t]here are a many terms of agreement about other matters, but there are no new terms of agreement with respect to the debt.” (CP 140.)

The trial court entered an *Order Denying Reconsideration*. (CP 148.) In the order, the trial court provided no explanation of its ruling other than to comment that Mr. Sutherlin filed a memorandum in support of his motion or reconsideration that included points and authorities that were not before the commissioner when he issued the order that was the subject of the revision. (CP 147.)

Mr. Sutherlin appealed.

## V. ARGUMENT

Generally, on appeal, this Court reviews the trial court's ruling rather than the commissioner's ruling, but when the trial court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own. State ex rel. J.V.G. v. Van Guilder, 137 Wn.App. 417, 423, 154 P.3d 243 (2007). In this case, however, the trial court affirmed the commissioner's ruling and denied Mr. Sutherlin's request for revision, but it did so based on findings and conclusions that substantially differed from those made by the commissioner. It is unclear, therefore, how this

affects review on appeal. As a result, this brief will discuss the commissioner's ruling as well the subsequent ruling by the trial court.

**A) Commissioner Linehan erred when he quashed the restraining order based on the same findings and conclusions that justified issuance of the restraining order.**

STANDARD OF REVIEW: A trial court's decision regarding a determination of compliance with court orders is reviewed for abuse of discretion. State ex rel. Shafer v. Bloomer, 94 Wn.App. 246, 250-51, 973 P.2d 1062 (1999). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

ARGUMENT: In issuing the *Ex Parte Restraining Order/Order to Show Cause*, Commissioner Linehan relied on the declaration of Mr. Sutherlin. In that document, Mr. Sutherlin quoted the relevant portion of the *Decree of Dissolution*, which stated that Mr. Sutherlin had no ability to force the sale of Ms. Corulli's residence until 90 days after the parties' youngest child graduated from school and indicated that, in the interim,

Ms. Corulli had an affirmative good faith duty to make payments as she was financially able. (CP 19-20.) In his declaration, Mr. Sutherlin testified that Ms. Corulli had made no payments in approximately nine years, which was subsequently undisputed by Ms. Corulli, provided documentation evidencing that Ms. Corulli had come into significant financial assets, which was similarly undisputed, and testified that in the absence of a restraining order, he believed that Ms. Corulli would disburse the considerable funds available to her without making any payment to him.

At hearing, every fact alleged by Mr. Sutherlin was confirmed or undisputed, and Mr. Sutherlin's suspicions that Ms. Corulli would violate her affirmative good faith duty by refusing to make payment regardless of her access to funds proved prophetic.

The only reason given by Commissioner Linehan for quashing the restraining order was that he had not been aware of the *Voluntary Settlement Agreement* when he issued it; however, this makes little sense in light of the commissioner's own conclusion that the *Voluntary Settlement Agreement* did not substantively alter the *Decree of Dissolution*, which had already indicated that the equalization payment owed by Ms. Corulli to Mr. Sutherlin was not "due in full" until 90 days after the youngest child graduated from high school. That provision was

not the issue before the court nor was it ever in dispute. Neither does such a conclusion reasonably follow from the commissioner's acknowledgement that Ms. Corulli had come into significant financial assets, that she had an ongoing affirmative good faith duty to make payments, and that she had failed to do so for nearly a decade.

Finally, the commissioner's ruling is particularly puzzling in light of Ms. Corulli's own testimony that once she had inherited several properties and received thousands upon thousands of dollars, she refused to make a payment of even a penny based on her belief that she had no affirmative good faith duty – just as Mr. Sutherlin had predicted. Instead, Ms. Corulli, by her own admission, spent \$20,161.09 of the considerable funds she received, and she allegedly did so *in one day* (the night before the issuance of the restraining order) to pay all manner of debts except her obligation to Mr. Sutherlin, after which, she engaged in ongoing legal action to *avoid* making any payment in accordance with her affirmative good faith duty. (CP 48-49.)

Commissioner Linehan issued an *Ex Parte Restraining Order/Order to Show Cause* based on the *Decree of Dissolution* and the allegations contained in Mr. Sutherlin's declaration; he then subsequently quashed the same order after Mr. Sutherlin's allegations were confirmed to be

undisputed facts, because of a document which the commissioner himself admitted differed from the *Decree of Dissolution* in no substantive way.

The commissioner's ruling is unsupported by his findings and is therefore based on untenable grounds. The commissioner's decision is also based on untenable reasons, and the circular nature of his reasoning indicates that it is not guided by any discernible legal standard. The commissioner's ruling is manifestly unreasonable on its face and reflects a position no reasonable person would take. It appears that he simply declined to follow any of his findings to their reasonable conclusions and instead quashed the restraining order in an effort to avoid an uncomfortable interpersonal situation.

**B) Commissioner Linehan abused his discretion when he denied Mr. Sutherlin's requests for relief because he concluded he could not determine whether Ms. Corulli had sufficient funds to make a good faith payment on her obligation to Mr. Sutherlin.**

STANDARD OF REVIEW: "A trial court's 'decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). 'Substantial evidence' is evidence

sufficient to persuade a fair-minded person of the truth of the matter asserted.” In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014).

ARGUMENT: The commissioner’s conclusion that he could not reasonably determine whether Ms. Corulli had made “a good faith and reasonable effort to remit payment” is unsupported by the record. Ms. Corulli made no claim to have exerted *any* effort, reasonable or otherwise, to remit payment to Mr. Sutherlin; in fact, she is remarkably bold in her denial of any such obligation at all.

The commissioner’s similar conclusion that he could not determine whether Ms. Corulli had the financial means to make a payment is also unsupported by the record. A great deal of financial information was submitted with respect to Ms. Corulli’s assets and income. For example, the evidence presented by Mr. Sutherlin included a copy of a notarized *Real Estate Contract*, signed by Ms. Corulli as the seller. The contract clearly stated that Ms. Corulli sold real property on July 10, 2015, for \$100,000.00, for which she immediately received \$40,000 as a down payment. (CP 61.) Ms. Corulli did not dispute this document. Ms. Corulli herself testified that she disposed of \$20,188.09 the day before the restraining order was put in place, including thousands of dollars in payments to Kohls, Bank of America, and Capital One, as well as an

unexplained payment to her brother for \$3,500. (CP 48-49.) Ms. Corulli provided no documentary evidence to support her testimony, which appeared to describe her decision to pay every debt she could imagine except the amount owed to Mr. Sutherlin. This information does not support a conclusion that Ms. Corulli has insufficient funds to meet her affirmative good faith duty to Mr. Sutherlin; in fact, it does quite the opposite. The evidence in the record clearly indicates that Ms. Corulli was using surplus funds to pay off her debts. Despite the frenzy of spending that was alleged to have taken place the day before the entry of the restraining order, Ms. Sutherlin still failed to provide any accounting for the whereabouts of the remainder of the down payment she received, which undisputedly amounted to almost \$20,000.

Not only was there plenty of evidence in the record to indicate Ms. Corulli's financial circumstances, but the commissioner improperly construed the absence of financial information against Mr. Sutherlin. Not only did Ms. Corulli have an affirmative good faith duty, but Commissioner Linehan had previously issued an *Order to Show Cause* directing Ms. Corulli to "appear and show cause, if any, why the restraints below should not be continued in full force and effect pending final determination of this action and why the other relief, if any, requested in the motion should not be granted." (CP 44.) Ms. Corulli failed to provide

such information in direct violation of the commissioner's order. The commissioner erred when he shifted the burden of production and construed Ms. Corulli's refusal to comply with the *Order to Show Cause* against Mr. Sutherlin.

Even had the commissioner properly determined that further information was needed despite Ms. Corulli's failure to provide it, he abused his discretion by concluding that the absence of financial evidence should result in the quashing of the restraining order and the denial of all Mr. Sutherlin's requests, which included a continuing restraining order to prevent the dissipation of assets until the relevant financial information could be submitted to the court. It is particularly puzzling that Commissioner Linehan would quash the restraining order in the face of evidence provided by Ms. Corulli herself to confirm precisely the irreparable loss that Mr. Sutherlin had described in his initial request. Having previously issued a restraining order based on Mr. Sutherlin's concern that Ms. Corulli would disburse significant funds without fulfilling her affirmative good faith duty (a duty which the commissioner repeatedly affirmed), it is fundamentally unreasonable for Commissioner Linehan to have quashed the restraining order after Ms. Corulli confessed to having done that very thing.

Commissioner Linehan's decision to deny Mr. Sutherlin's requests for relief and to grant Ms. Corulli's request to quash the restraining order was therefore an abuse of discretion.

**C) The trial court erred when it concluded that the *Voluntary Settlement Agreement* was a modification of the *Decree of Dissolution*.**

STANDARD OF REVIEW: "The validity and enforceability of a settlement agreement is determined by reference to the substantive law of contracts." Vieth v. Xterra Wetsuits, LLC, 144 Wn.App. 362, 366, 183 P.3d 334 (2008), citing Stottlemyre v. Reed, 35 Wn.App. 169, 171, 665 P.2d 1383 (1983); see also Morris v. Maks, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). Questions of law are reviewed de novo. Mayer at 684.

ARGUMENT: In its oral ruling, the trial court stated the following in reference to the *Voluntary Settlement Agreement*: "So to me, it's clear that the Parties *contemplated* that this agreement would *control*." (RP 15; emphasis added.) Two important consequences follow from this statement. First, the trial court's use of the word 'contemplated' clearly has the force of the word 'intended.' Second, the trial court's statement that the *Voluntary Settlement Agreement* is 'controlling' could either mean that the *Voluntary Settlement Agreement* contains a more specific recitation of the same terms that are described broadly in the *Decree of Dissolution* and the specific should be interpreted to take precedence over

the general, or it could mean that the *Voluntary Settlement Agreement* does not agree with the *Decree of Dissolution* in all respects, and where there is conflict between the documents, the *Voluntary Settlement Agreement* controls as a modification of the *Decree of Dissolution*.

There is no doubt which of these meanings the trial court intended by its use of the term ‘controls,’ because the trial court also states, “[t]he way I interpret that is that there isn’t really any obligation to pay until September of 2017, but if you do pay early, there wouldn’t be any prepayment penalty.” (RP 14-15.) The trial court used the term ‘controls’ to conclude that an obligation (an ‘affirmative good faith duty to make payments’) that was explicitly described in the *Decree of Dissolution* was subsequently extinguished in the *Voluntary Settlement Agreement*. Therefore, the statement that “it’s clear that the Parties contemplated that this agreement would control” must be taken to mean that the parties *intended* that the settlement agreement would *modify* the decree.

Therefore, trial court erred in two ways. First, the trial court erred when it found that the parties intended the *Voluntary Settlement Agreement* to modify the *Decree of Dissolution*, and, second, it erred when it concluded that the *Voluntary Settlement Agreement* was a valid modification of the *Decree of Dissolution*.

INTERPRETATION: In interpreting settlement agreements, the court attempts to determine the intent of the parties by focusing on the objective manifestations expressed in their agreement. McGuire v. Bates, 169 Wn.2d 185, 189, 234 P.3d 205 (2010). The subjective intent of the parties is irrelevant as long as the court can impute an intention that corresponds to the reasonable meaning of the actual words used. Id. Under the “context rule” adopted in Berg v. Hudesman, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990), a court may consider extrinsic evidence to discern the meaning or intent of the words used in the agreement, but this evidence will not be considered if it merely shows a party’s subjective intent or if it contradicts the words used. Hollis v. Garwall, Inc., 137 Wn.2d 683, 693-95, 974 P.2d 836 (1999).

Here, the trial court determined that by signing the *Voluntary Settlement Agreement*, the parties intended to modify the decree to remove the affirmative good faith duty owed by Ms. Corulli to make payments according to her ability. But the *Voluntary Settlement Agreement* explicitly states: “*the parties intend to abide by the Decree of Dissolution regarding the court ordered debt of twenty-nine thousand one hundred dollars (\$29,100.00).*” (CP 10; emphasis added.) It goes on to confirm that “[t]he terms of payment are outlined the in Decree [sic], however the parties want to add clarity to ensure the understanding between the parties

regarding repayment of the debt.” (CP 10.) Therefore, the trial court erred as a matter of law when it interpreted the *Voluntary Settlement Agreement* to be a modification of the decree in direct contradiction to the parties’ intention as explicitly stated in the *Voluntary Settlement Agreement* itself.

Further, even if the parties had intended to modify the decree, the trial court erred in determining that they actually had. Not only does the *Voluntary Settlement Agreement* explicitly state that it does not intend to modify the *Decree of Dissolution* but to clarify it, the clarifying language itself does not actually make any modification. The *Voluntary Settlement Agreement* states that the entire debt would not be called due until 90 days after their youngest daughter graduates from high school, which is precisely what the *Decree of Dissolution* itself stated. Even in the absence of an explicit statement of intention with respect to modification, it is clear from the language contained in the *Voluntary Settlement Agreement* that no modification was made.

VALIDITY: The trial court erred when it concluded that the *Voluntary Settlement Agreement* was a valid modification of the decree as a matter of law. “A contract requires offer, acceptance, and consideration.” Veith at 366, citing Christiano v. Spokane County Health Dist., 93 Wn.App. 90, 95, 969 P.2d 1078 (1998). “The burden of proving

a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.” Cahn v. Foster & Marshall, Inc., 33 Wn.App. 838, 840, 658 P.2d 42 (1983)(citing Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). A modification requires consideration or a mutual change in obligations and rights. Dragt v. Dragt/Detray, LLC, 139 Wn.App. 560, 576, 161 P.3d 473 (2007); Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980); Rosellini v. Banchemo, 83 Wn.2d 268, 517, P.2d 955 (1974); Ebling v. Gove’s Cove, Inc., 34 Wn.App. 495, 499, 663 P.2d 132 (1983). While consideration may be “any bargained for act or forbearance,” it must be something separate from what was promised in the original contract. Dragt at 572.

In this instance, there is no evidence provided, allegation made, or argument presented by Ms. Corulli with respect to any of the contract elements; this alone results in some difficulty for Ms. Corulli’s position because she is obligated to prove each element of the contract she asserts.

Mr. Sutherlin did, in fact, argue to the commissioner that Ms. Corulli failed to prove the element of consideration with respect to the modification she alleges. (CP 80; “But it does not in any way say that Ms. Corulli is not to make payments or that her affirmative duty and, you

know, good faith requirement to do that is waived in any way. Neither is there any consideration for waiving that.”)

Pursuant to the trial court’s interpretation, the *Voluntary Settlement Agreement* released Ms. Corulli from her affirmative good faith duty to make payments – a concession for which Mr. Sutherlin received no benefit or consideration whatsoever. This demonstrates a complete failure of consideration.

Further, the issue of whether a meeting of the minds took place is addressed by the parties’ statement of intention. If the parties both signed a document stating that they did not intend to modify the decree of dissolution, it is not reasonable to conclude that there was a meeting of the minds sufficient to support a modification.

The trial court erred when it determined that the *Voluntary Settlement Agreement* constituted a controlling modification of the *Decree of Dissolution*.

**D) The trial court abused its discretion when it denied Mr. Sutherlin’s meritorious *Motion for Reconsideration* based on an inaccurate statement of the record and application of the wrong legal standard.**

STANDARD OF REVIEW: A trial court’s denial of a motion for reconsideration is reviewed for abuse of discretion. Martini v. Post, 178 Wn.App. 153, 161, 313 P.3d 473 (2013). “A court necessarily abuses its

discretion if its decision is based on an erroneous view of the law.” In re Marriage of Scanlon, 109 Wn.App. 167, 174-75, 34 P.3d 877 (2001), citing Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

ARGUMENT: In its *Order Denying Reconsideration*, the trial court indicated that it dismissed Mr. Sutherlin’s arguments because they had not previously been argued to Commissioner Linehan, implying they were therefore not properly before the court on reconsideration. This is error for three reasons.

First, Commissioner Linehan did not conclude that the *Voluntary Settlement Agreement* controlled the *Decree of Dissolution*, nor did he make any statements interpreting the parties’ intent. The points and authorities included in Mr. Sutherlin’s motion for reconsideration were not presented in their entirety to the commissioner because the commissioner did not make errors that would be addressed by that information. The matters discussed with Commissioner Linehan in the underlying hearing, were tailored to the reasoning of Commissioner Linehan, not presented in anticipation of an error by a different judicial officer.

Second, Mr. Sutherlin did indeed repeatedly argue to Commissioner Linehan that the *Voluntary Settlement Agreement* was not a modification

based on the stated intention of the parties and the lack of consideration to support a modification.

Finally, contrary to the implication of the trial court's order, there is no requirement that the points and authorities contained in Mr. Sutherlin's motion for reconsideration must have been previously presented to the commissioner. The civil rule governing motions for reconsideration, CR 59, states that a motion for reconsideration "may be granted for any one of the following causes materially affecting the substantial rights of the parties," including "[t]hat there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law" or "[t]hat substantial justice has not been done." CR 59(a)(7) & (9). Here, the trial court's decision was not justified by evidence or reasonable inference from the evidence, the decision was made contrary to law, and substantial justice was not done. The trial court abused its discretion when it denied Mr. Sutherlin's request for reconsideration based on an inaccurate recitation of the record and pursuant to the wrong legal standard.

**E) Mr. Sutherlin is entitled to attorney's fees and costs.**

Mr. Sutherlin is entitled to attorney's fees on two bases, and he requests them on appeal pursuant to RAP 18.1(a).

*RCW 26.09.140.* Pursuant to statute, the court may consider the financial resources of both parties and order one party to pay a reasonable amount to the other party for maintaining any proceeding under RCW 26.09 and for reasonable attorney's fees in connection therewith. RCW 26.09.140. On appeal, the appellate court may order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. Id.

*BAD FAITH.* The Washington Supreme Court has recognized that "bad faith litigation can warrant the equitable award of attorney fees." In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267 & n. 6, 961 P.2d 343 (1998). Prelitigation misconduct (obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right) has been recognized by Washington's Supreme Court as a type of bad faith. Rogerson Hiller Corporation v. Port of Port Angeles, 96 Wn.App. 918, 927-28, 982 P.2d 131 (1999)(citations omitted). The inherent equitable powers of the court authorize the award of attorney's fees in cases of bad faith. Pearsall-Stipek at 266. Mr. Sutherlin repeatedly asked for an award of attorney's fees for having to bring a motion to force Ms. Corulli to do what she already had an affirmative good faith obligation to do. Her ongoing refusal to comply with her obligation coupled with her active opposition in this proceeding have resulted in a financial burden to Mr.

Sutherland that further exacerbates the burden he bears as a result of Ms. Corulli's failure to act in good faith as agreed.

## V. CONCLUSION

Because a *Decree of Dissolution* cannot be modified by a subsequent mediation agreement that a) explicitly states that it is not a modification of the decree, b) does not actually contain language that modifies the decree, and c) fails to meet the requirements of a valid contract, the trial court erred when it denied Mr. Sutherland's request based on conclusions to the contrary. Mr. Sutherland respectfully requests that the trial court's decision be reversed, that Ms. Corulli be ordered to pay Mr. Sutherland in accordance with her affirmative good faith duty, and that Mr. Sutherland be awarded attorney's fees and costs related to bringing his motion and this appeal.

RESPECTFULLY SUBMITTED this 14~~th~~ day of September, 2016,

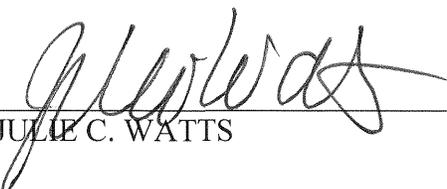
  
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JULIE C. WATTS/WSBA #43729  
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of September, 2016, the undersigned prepared a true and correct copy of the foregoing document for delivery by messenger service by the method indicated below to the following parties:

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