

No. 73439-3-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

JILL S. CALABRESE,  
Appellant,

v.

JACK S. CALABRESE,

Respondent.

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RESPONDENT'S BRIEF

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FILED  
COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON  
OCT 19 PM 3:14

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**ORIGINAL**

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## I. STATEMENT OF THE ISSUES

Has the Appellant, Ms. Calabrese, failed to meet the standard of review on appeal, which is abuse of discretion, when the trial court exercised its discretion to reduce Appellant's spousal maintenance payments?

Should the Court affirm that Respondent, Mr. Calabrese, met his burden of proof as to his involuntary reduction in income due to the loss of a long standing business relationship with Federated Insurance?

Do the trial court's findings of fact and conclusions of law confirm that the Trial Court understood the evidence presented by Mr. Calabrese to support the reduction in his spousal maintenance obligation?

Did the trial court also properly consider Ms. Calabrese's financial assets, which were double those of Mr. Calabrese at the time of the modification trial?

Should Mr. Calabrese receive an award of attorney's fees pursuant to RAP 18.1?

## II. STATEMENT OF THE FACTS

The parties married on January 22, 1983. On September 10, 2009, Ms. Calabrese filed a Petition for Dissolution. The parties reached a settlement and a Decree of Dissolution was entered on September 10, 2010. CP 335-337. They agreed to a detailed CR2A agreement. CP 2031-

2038. The overall division to Ms. Calabrese was 54.6% of the community assets. CP 2035.

The Decree of Dissolution required that Mr. Calabrese pay \$10,000/mo. in spousal support to Jill S. Calabrese as follows:

The Husband shall pay the Wife spousal maintenance through his 65<sup>th</sup> birthday of \$10,000/month. If the Husband is able to earn approximately the same income in his current occupation for his 66<sup>th</sup> year of age he will pay maintenance at the same rate for that year. . . .

CP 336.

Mr. Calabrese made the monthly \$10,000/month payments to the Appellant until the Court modified the obligation on January 12, 2015. CP 1175. Mr. Calabrese is currently 62 years and Ms. Calabrese is currently 61 years of age.

Mr. Calabrese was self-employed throughout the marriage. He operated a business called NAPA Insurance Center (NIC). CP 321, 1171. NIC is in the business of marketing business and health insurance programs, as the endorsed provider of insurance programs nationwide for NAPA Auto Parts (NAPA). CP 321, 1171. Despite the long standing business relationship, Mr. Calabrese has no written contract with NAPA to operate NIC. CP 321, 1171, 1937. NAPA corporate controls his access to the nationwide NAPA Auto Parts stores and allows him to use the NAPA branding and NAPA logo. CP 1172, 1201, 1202. The key to Mr.

Calabrese's income is marketing the insurance company's insurance programs to the nationwide NAPA Auto Parts dealers.

Although Mr. Calabrese's business is called NIC for "NAPA Insurance Center" it has no ownership in common with NAPA Auto Parts dealers and no contract in place with any NAPA Auto Parts stores or NAPA corporate management. CP 1171-1172. Mr. Calabrese's title is "Director". CP 1172. He works under the guidance of NAPA senior management to market the NAPA insurance programs. CP 1172

During the marriage, Mr. Calabrese marketed insurance programs, primarily insurance products offered by Federated Insurance, to NAPA Auto Parts dealers. CP 1171-1172, 1433-1436. The Federated Insurance specialized in business insurance and group medical insurance and Mr. Calabrese had marketed the Federated Insurance to NAPA Auto Parts Dealers owners since 1991. CP 1171. The relationship with Federated Insurance was long standing and lucrative for Mr. Calabrese. CP 1171, 1433-1436.

Mr. Calabrese was not employed by Federated Insurance, but received a percentage of the premiums that Federated Insurance wrote for NAPA stores. CP 1171. Federated Insurance was the only company that his business, NIC, marketed for business insurance. CP 1171, 1433-1436. Mr. Calabrese and Federated had a contract under which Federated

Insurance was the exclusive recommended carrier for NAPA store owners and NAPA Auto Care owners. CP 1433-1436. Federated Insurance paid Mr. Calabrese directly. CP 1171. Mr. Calabrese assumed his business arrangement with Federated would continue at the time that he entered into the final Decree. CP 321, 1171. Over 95% of his income during his marriage was from Federated Insurance. CP 1171.

The business income from Napa Insurance Center declined dramatically from 2009 to 2013, as documented on Schedule C of Mr. Calabrese's tax returns:

**Calabrese Income Summary based on Personal Income Tax Returns**

	2009	2010	2011	2012	2013
Schedule C - Business Income	380,608	316851	422,484	281313	6,182
AGI	309,601	190559	234388	340,098	208653

CP 322, 1407, and Schedule C income (CP 61, 133, 185, 373).

The reason for the decline in income was the loss of the business with Federated Insurance. Federated Insurance became non-competitive. Their rates were higher than the marketplace and they lost over half of the NAPA policyholders. CP 1175-1176, 1455. Federated Insurance also stopped providing necessary business information. CP 1175-1176. NAPA corporate met with Mr. Calabrese and Federated to determine what could be done to improve the performance of the portfolio. CP 1804-

1805. After the meeting, NAPA authorized Mr. Calabrese to go in a different direction (find a different and more competitive insurance company). CP 1804-1805. The program was no longer a benefit to the NAPA owners nor a benefit to NAPA Corporate. CP 1175-1176.

In July of 2014, Mr. Calabrese informed Ms. Calabrese via email of the loss of Federated's income and that he was going to try and rebuild his income with a new insurance company. CP 457. He continued to pay her the \$10,000 per month. She responded that she wanted verification, and requested bank statements, three years of tax returns, and business contracts, which Mr. Calabrese provided immediately. She never replied back after she received his documents, so Mr. Calabrese petitioned for modification of his spousal maintenance in August 2014. CP 1-9. At the time he filed for modification, Mr. Calabrese's financial condition had significantly worsened. CP 1-9. He depleted savings and retirement assets to pay maintenance and meet his living expenses.

Mr. Calabrese presented a summary of his Bank of America Account checking account deposits for 2014. CP 1259-1262. The deposits were from commissions, payments from Lockton and transfers from his savings. CP 1263-1273. The Bank of America records were submitted for purposes of showing his reduced business income, and reduced savings. CP 1699-1740.

The property distribution to which the parties agreed to at the time of settlement provided Ms. Calabrese with substantial assets and has allowed her to continue to live in a very comfortable lifestyle. CP 2032-2038. Ms. Calabrese received 54.6% of the community assets and assets worth \$1,650,589. CP 2032-2038. Her financial declaration dated December 23, 2014 lists over \$2.1 million in assets including \$270,331.72 in the bank, \$543,942.11 in stocks and bonds, and \$1,286,026.80 in annuities. CP 916. She has not had to spend savings to support herself.

Ms. Calabrese has retirement assets totaling \$1,286,026.80, while Mr. Calabrese's retirement assets are far less, totaling only \$810,454.74. CP 1439-1453.

**Spousal Support Payments to Date.**

Mr. Calabrese filed a motion with the Court immediately after he filed his Petition to modify to reduce support at the time that he filed his Petition. The Court denied his motion. CP 798-799. Mr. Calabrese remained current in all of his payments, and used savings to pay Ms. Calabrese, until the court granted his Petition on January 9, 2015. CP 1175, 1699-1740, 1902-1903.

**Relationship/Contract with Federated/NAPA Ends.**

Mr. Calabrese suffered a substantial decline in income that warranted a modification of the previously ordered spousal support. His

change in circumstances was involuntary because it was due to the actions of Federated Insurance and NAPA's dissatisfaction with the Federated Insurance program, which required Mr. Calabrese to replace the Federated Insurance. CP 324-325, 1897-1901. Mr. Calabrese controls neither NAPA nor Federated Insurance. CP 1171-1172.

NAPA corporate authorized Mr. Calabrese to find another insurance company to replace Federated Insurance. CP 1804-1805. Mr. Calabrese did, as he was told because he wanted to keep his job with NAPA. CP 1817.

Federated had insured a high of 2746 NAPA store owners but over the past years had steadily lost over 1341 of them. This was confirmed by Mike Russell of Federated Insurance's email, CP 1455-1456. Mike Russell stated in his email:

You were correct when you stated, "at the end of the 3<sup>rd</sup> year we insured over 1400 Storeowners out of 3500 prospects". I went back and looked it up, it was 1423. Today its 695.

This was due to Federated Insurance's pricing not being competitive. CP 1804-1805. As Mike Russell admitted in his email, "We are not that aggressive of a company in a soft market thus we as a company have been losing market share in all our lines of business these past 5 years." CP 1455-1456. Federated and NIC were not only losing

customers but the pricing was too high to attract new NAPA customers. CP 1814-1817. The Federated Insurance program was no longer a benefit (savings) to the NAPA owners nor a benefit to NAPA Corporate. CP 1814-1817.

Brett Robyck of NAPA Corporate stated:

Around 2009/2010, we saw a decline (nearly 50%) of the number of NAPA AutoCare Centers participating in the NAPA Insurance Center program. The responses from certain owners were that Federated was not providing competitive rates.

CP 1804-1805.

In addition, Federated Insurance breached the terms of its Agreement with Mr. Calabrese. CP 1175, 1433-1437. Federated stopped providing Mr. Calabrese with detailed loss runs on the NAPA business and stopped providing the annual list of the NAPA customers insured. CP 324-325, 1175, 1176, 1815-1816. Without the detailed loss information from Federated Insurance, NAPA corporate was concerned that Federated Insurance was raising rates without financial justification. CP 325, 1175-1176, 1814-1816. NAPA corporate was unhappy with the high Federated rates. CP 325, 1804-1805, 1814-1817. There was a meeting in June of 2011 with NAPA corporate but no improvements. CP 1804-1805.

Mr. Calabrese believes Federated consciously made the decision to withdraw the information that it had historically provided to him because

with the loss of over half of the programs customers. Federated knew NAPA would be talking with other carriers and that NIC would provide this information to another carrier. CP 1816. Federated Insurance did not want to provide its customer list, and detailed loss runs, because of its fear that another insurance carrier would provide less expensive insurance rates. CP 325, 1816.

The Federated Insurance stopped paying Mr. Calabrese in September of 2012, which greatly reduced his income. CP 1176. He still paid the support to Petitioner, for reasons explained below.

**Attempt to Replace Federated Insurance Program with a GMI Agreement.**

Mr. Calabrese's first attempt to salvage his income was an agreement with GMI. In September of 2012, Mr. Calabrese entered into an Asset Purchase Agreement with GMI. CP 1177, 1365-1382. He paid capital gains taxes vs. ordinary income taxes. The transaction would allow Mr. Calabrese and GMI to provide the exclusive recommended insurance program to NAPA store owners and AutoCare centers. CP 1366.

As part of the Asset Purchase Agreement, Mr. Calabrese and GMI formed Newco. CP 1366. Newco was the Napa Insurance Center and the Napa Insurance Center business was placed into the form of an LLC. CP

1366. Newco was owned 33% by Mr. Calabrese and 67% by GMI. CP 1366.

The NAPA program had been Mr. Calabrese's livelihood for many years, and the GMI partners expressed confidence in their business abilities. CP 1177. The financial arrangement was one of an "asset purchase" contract to provide a lower tax base. CP 1177. Mr. Calabrese sold his goodwill in Napa Insurance Center for \$800,000. CP 326, 1368-1369. He retained a 33% interest in the business. CP 1366. GMI agreed to pay Mr. Calabrese the income he lost from Federated for 2 years, thus the \$800,000 (\$400,000 a year). CP 1177, 1368-1369. They paid the \$800,000 to him in an asset purchase arrangement so that he would save money in taxes. (Capital gains vs ordinary income). CP 1368-1369. Thus the large capital gains reported on his tax return in 2012 and 2013.

Mr. Calabrese was required to enter into an employment agreement and a compensation formula that included a base salary of \$200,000/year after two years, plus a percentage of net profit. CP 1369.

Mr. Calabrese used the funds received in 2012 and 2013 to continue paying maintenance, his business and living expenses, taxes, and the buy-back of the GMI contract for \$200,000. CP 1177, 1384-1392. The funds are spent. CP 1168-1187.

NAPA allowed GMI and Mr. Calabrese to form an LLC, knowing

at any time they could terminate GMI. CP 1810. When GMI departed, the LLC was dissolved. Today there is no NAPA Insurance Center LLC. CP 1810.

Mr. Calabrese's support payments were dependent on his ability to earn at his historic levels of over \$350,000/year but he was no longer earning a high income. CP 1168-1187.

**Repurchase of the GMI Contract.**

GMI agreed to pay Mr. Calabrese \$800,000 to replace his Federated income for 2 years with the expectation that the business plan would be successful. In addition, after 25 months he would receive a salary and percentage of the net profits, which GMI projected would be substantial and would keep Mr. Calabrese's income around \$400,000. CP 1819. Unfortunately the expected revenue failed to materialize.

To address the Appellant's reference to One Beacon, One Beacon is an insurance company. GMI is not an insurance company; it is a holding company that has an insurance division which operates under the name EverGuard Insurance Services. CP 1369.

After several months, GMI realized their platform was not going to work and tried to market the program to several outside insurance companies, but no company was interested. CP 1818. GMI wanted out of the agreement to avoid losing any more money. In addition to the amounts

that GMI paid Mr. Calabrese, monthly costs were also paid for two dedicated underwriters, office space, etc. CP 1819. They were losing money each month and owed Mr. Calabrese \$25,000 a month. CP 1819.

Also, NAPA corporate was dissatisfied with GMI, as evidenced by the Declaration of Brett Robyck. CP 1804-1805.

GMI powered the program for over a year and NAPA continued to run into program issues resulting in a very low adoption rate and poor feedback from NAPA customers. We needed to make another change.

CP 1805.

Because NAPA was unhappy with GMI's performance, they wanted to terminate the relationship. CP 1804-1805. However, Mr. Calabrese was under a goodwill and non-compete agreement with GMI, which meant he could not market NAPA to any other insurance carriers. Since GMI also wanted out so as to avoid paying more money, GMI agreed that Mr. Calabrese could buy back his non-compete agreement for \$200,000. Mr. Calabrese immediately agreed to the terms, as he needed to maintain his relationship with NAPA in order to continue earning an income. Mr. Calabrese paid the \$200,000 as follows: 1) since GMI owed him for four months of work at \$25,000 per month (a total of \$100,000) Mr. Calabrese forgave that \$100,000; 2) \$50,000 from savings on October 1, 2013; and, 3) \$50,000 from savings on March 20, 2014. CP 1177,

1385, 1819-1820.

Mr. Calabrese then started searching for another insurance company to replace Federated. CP 1178. From October of 2013 to February of 2014 he was literally out of business. He had no insurance company to sell business insurance to the NAPA storeowners. He was under great pressure from NAPA to find a company. CP 1178. He contacted several insurance companies: Zurich, Travelers, Hartford, Nationwide, Allied and several brokers. CP 1178. No one was interested. CP 1178. During this time of no income, he continued to pay Ms. Calabrese \$10,000 per month from savings. Finally in 2014 he received interest from Lockton Affinity and came to an agreement which started Feb 2014. CP 1178.

**After GMI Agreement Did Not Produce Success, NAPA Insurance Center Started a Business Relationship with Lockton.**

Mr. Calabrese's second attempt to rebuild the Napa Insurance Center program income was with Lockton Affinity. According to its website, Lockton Affinity is an insurance broker, with experience in the motorsports and retail industries. CP 1179, 1409-1415. He entered into an Insurance Program Agreement with Lockton on January 14, 2014. CP 1179-1180, 1397-1405. Lockton is different from Federated Insurance because Lockton has no agents in the field (whereas the Federated

Insurance had over 2,500 agents, knocking on NAPA stores' doors). CP 1179-1180. Lockton has two people in a call center and one sales person working on the NAPA program. CP 1179-1180. Since the start with Lockton in February 2014, Lockton and Mr. Calabrese had only written \$528,872 of premium through November 2014. CP 1179. At the height of the Federated program, there was over \$20,000,000 of premium. CP 1179.

Mr. Calabrese provided the Court with a projection of his income from the Lockton program. CP 1341. Of course, this was simply a projection and his actual commission depended on the success of the Lockton program, which was highly uncertain and off to very slow start. Specifically, Lockton only achieved 64% of its projected premium in 2014, which meant Mr. Calabrese's income was reduced by 36% on top of the reduction he had already taken when NAPA terminated Federated and GMI. CP 1179-1180.

Lockton agreed to pay Mr. Calabrese \$10,000/month for 2014. CP 1404. Mr. Calabrese specifically negotiated the \$10,000 per month in order to pay Ms. Calabrese and made his maintenance payments each month. Since his whole income went toward maintenance, Mr. Calabrese lived off his savings. The deposits from savings are summarized on CP 1259-1262 and reflected on his Bank of America bank statements. CP

1264-1273.

**Projected Income.**

In 2015, Lockton will only pay him 6% of the premiums they collect monthly. CP 1404. Thus, in 2015, he will receive even less income because there is no \$10,000 guaranteed payment. CP 1180, 1404. For example, in 2014, the total premiums were \$528,872. CP 1180. If that number remains the same in 2015, then Mr. Calabrese will receive 6% of \$528,872, or a total annual income of \$32,732. CP 1180. Accordingly, Mr. Calabrese hoped to earn approximately \$3,000 per month for 2015, which is a realistic projection. CP 1180.

Further, Mr. Calabrese's income will drop even more in 2016, as per the contract his compensation is reduced to just 3%. CP 1180, 1404.

The projected income is outlined in the Declaration of Patrick O'Farrell, President of Lockton Affinity and attaches the NAPA Royalty Projections. CP 1806-1808. In 2014 the projection was \$110,000 based on the negotiated \$10,000 payment, but Mr. O'Farrell's royalty projection for 2015 was \$89,892 based on negotiated royalties and then in 2016, \$60,984. CP 1806-1808, 1822. Given the continued significant drop in royalties, Mr. Calabrese believes that he will earn significantly less than these projections in 2015 and 2016. His income has suffered a dramatic reduction. Clearly he will earn nowhere near enough to support himself

and pay Ms. Calabrese \$10,000/month in maintenance.

The best proof of his *actual* 2014 income is his personal Bank of America checking statements (CP 1275-1337) and his contract with Lockton Insurance (CP 1397-1405). His Bank of America checking statements in 2014 report that his average monthly earned income was \$14,679.83, which included the \$10,000/month he negotiated as guaranteed income from Lockton for 2014.

**Current Monthly Expenses and Work Obligations.**

Mr. Calabrese's monthly expenses are \$10,103 not including maintenance. CP 1181, 1796-1803. If he adds maintenance to this number, his monthly expenses are \$20,103.

His expenses will include significant business expenses as he needs to spend money (travel, entertainment) to market the new program. CP 1182. He must be out traveling, talking with customers. CP 1182. He must meet in Atlanta with NAPA Corporate to discuss the progress and his marketing (trips to NAPA customers) of the new program. CP 1182. CP 1804-1805.

Mr. Calabrese's travel expenses will be higher than in past years, as he works to rebuild his income. CP 1182. NAPA has 62 Distribution Centers in the US servicing over 18,000 NAPA owners. CP 1182. Each distribution center usually has four meetings a year, where they bring in

their NAPA owners and have meetings. CP 1182. Mr. Calabrese is asked to come to these meetings and talk to the owners about insurance. CP 1182-1183, 1804-1805. He will be making the rounds to as many of these Distribution Centers owners meetings as he can, and meeting with as many individual NAPA Auto Parts dealers as possible. CP 1182-1183.

When not traveling, Mr. Calabrese is in his office answering his 1-800 number to which over 18,000 NAPA owners have access. CP 1183. He works with corporate NAPA headquarters and individual Distribution Centers on marketing, problem solving, anything related to Insurance. CP 1183. He then passes leads onto Lockton who does the quoting and selling of policies to those leads. CP 1183. He works with NAPA General Managers, and outside salespeople with any insurance matters. CP 1183.

**Modification Was Granted.**

Due to the significant involuntary drop in income, Mr. Calabrese filed his Petition to Modify on August 21, 2014. CP 1-9. The Court ruled on the Petition on January 9, 2015. CP 1897-1901, 1902-1903. As a result of the Court's Order on Modification, the Court reduced his monthly obligation to \$2,500/mo. plus 15% of all commission compensation above \$100,000/year. CP 1902-1903. He must disclose his deposits by providing a copy of his Bank of America bank statements for account

X6758, plus a reconciliation of deposits on a quarterly basis. CP 1902-1903. Thus, Appellant has full visibility into his newly reduced commission compensation. Should his income be restored to historic levels to \$300,000 annually, Appellant may petition the court to reinstate the maintenance amounts and schedule in the Decree. CP 1916-1918.

### III. STANDARD OF REVIEW IS ABUSE OF DISCRETION

Determination of the question whether, under the evidence presented, there has been a substantial and material change in circumstances which will authorize and justify a modification in the alimony and support payments is addressed to, and rests within, the sound judgment and discretion of the trial judge, whose decision thereupon will not be reversed on appeal absent error or abuse of discretion. *Lambert v. Lambert*, 66 Wn.2d 503, 508, 403 P. 2d 664 (1965).

The applicable statute, RCW 26.09.170(1), states in relevant part:

RCW 26.09.170 Modification of decree for maintenance or support, property disposition — Termination of maintenance obligation and child support — Grounds.

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of

circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. [Emphasis added.]

Whether the party petitioning for modification has met his burden to demonstrate substantial change in circumstances occurring subsequent to the entry of the order sought to be modified is determined by whether the facts now relied upon in establishing the change in circumstances could have and should have been presented to the court in the previous hearing. *Lambert v. Lambert*, 66 Wn.2nd 503, 509, (1965). That is, a modification of support is appropriate where circumstances constituting a substantial change were not contemplated, or able to be contemplated, at the time of the order. *See Crosetto v. Crosetto*, 65 Wn.2nd 366, 367-68 (1964).

The circumstances justifying a reduction in Mr. Calabrese's monthly support obligation were not, and could not have been, contemplated at the time of the September 9, 2010 Decree of Dissolution. He had earned a lucrative income for many years prior to the divorce. It was unforeseeable that Mr. Calabrese would not continue to successfully market Federated Insurance to NAPA Auto Parts stores.

Here, Mr. Calabrese's business has been the exclusive provider of insurance programs nationwide for NAPA Auto Parts. His burden of

proof was met in that his income from this business was significantly reduced due to the loss of the relationship between NAPA and Federated Insurance.

IV. MR. CALABRESE MET HIS BURDEN OF PROOF BY  
PROVIDING SUBSTANTIAL EVIDENCE OF HIS INVOLUNTARY  
CHANGE IN CIRCUMSTANCES

Mr. Calabrese provided clear evidence of his reduction in income. This evidence included his tax returns, which confirmed the dramatic decline in income, CP 1407, and his bank statements, which showed his transfers from savings to make the payments to Ms. Calabrese. CP 1259-1273.

Mr. Calabrese's change in business income and the loss of the arrangement with Federated Insurance was clearly involuntary. Mr. Calabrese had one primary source of income from Federated Insurance. NIC is captive to NAPA. Mr. Calabrese has never had any written contract with NAPA and he only is the director of NIC at NAPA's request. NAPA controls the relationship and could decide to terminate it at any time. NAPA corporate representative Brett Robyck stated that Federated Insurance was not providing competitive rates, that he and Mr. Calabrese met with Federated and that there were no improvements to the program. CP 1804-1805. As such, Mr. Calabrese had to find a replacement for the Federated Insurance so that he could continue to operate NIC.

His first effort to replace his income was the September 1, 2012 Asset Purchase Agreement with GMI. CP 1366-1382. In section 3.4, the contract required that Mr. Calabrese be employed to manage and lead the operation. CP 1369. Section 3.4 also outlined his duties, including the same duties he had performed before, “marketing the NAPA insurance program nationwide . . .” CP 1369.

Unfortunately, the GMI program had a very low adoption rate and poor feedback from NAPA customers. CP 1804-1805. This required NAPA to make another change. CP 1804-1805. In order to be able to facilitate that change, Mr. Calabrese needed to remove the non-compete agreement, so he “paid” GMI \$200,000 to purchase back his interest on October 1, 2013. CP 1384-1395.

After his first effort failed, he took additional steps to replace his income, which ultimately resulted in the current agreement with Lockton. Since the agreement with Lockton is a new business relationship, Mr. Calabrese is essentially starting all over because he does not have the existing base of insureds (i.e., no NAPA Auto Parts dealers were insured with Lockton), so there were no premiums from which to collect a commission.

Per Mr. Calabrese’s negotiations, Lockton paid Mr. Calabrese \$10,000/month but Lockton would only agree to that amount for 2014.

CP 1404. In addition, taxes owed on these payments, and Lockton has the right to recover the payments if the contract is terminated before 2019. CP 1399-1400, 1404. Further, as previously discussed, for 2015 Mr. Calabrese will receive 6% of all Lockton premiums, but no guaranteed payment, and for 2016, and forward, he will receive only 3%. CP 1404. He projected earning significantly less than \$10,000/month. CP 1341. Even with the \$10,000/month payment from Lockton in 2014, this only equaled the maintenance amount he owes Petitioner, so his entire income went to her while his own bills were paid using the funds he had in savings. CP 1169.

In addition to his substantial decrease in earnings, Mr. Calabrese expected that his business expenses will increase, as has to travel to NAPA distribution centers and attend an expensive NAPA convention in Las Vegas. CP 1182-1183, 1418-1425. In order to market the new Lockton Insurance options, he planned to travel to as many NAPA Auto Parts dealers as he could, attending seminars and meetings with NAPA Auto Parts owners. CP 1804-1805.

The case law cited by Appellant is inapplicable. *Fox v. Fox*, 87 Wn. App. 782, 942 P.2d 1084 (1997), involved a case where the husband, a doctor, manipulated the transfer of his medical practice to shift the bulk of his income to his new wife. After selling his medical practice, Ross Fox petitioned for modification of his maintenance obligation to his

former wife, Shirlene Fox, on the ground of a substantial change of circumstances. His new wife Kathy was hired as the office manager of the practice at a very substantial salary, the size of which was unexplained. Together, their incomes approximated Ross' pre-sale income. The source of Ross's total household income was the same as the source of his presale income -- his medical practice. He thus suffered no significant reduction of the income he enjoyed prior to the sale. By contrast, while Ross' household income remained stable and his lifestyle unchanged, his ex-wife Shirlene's situation worsened. She was unemployable due to her multiple sclerosis, which is increasingly debilitating.

Thus, the Court of Appeals affirmed the trial court's denial of the petition because the record did not demonstrate the showing of good faith necessary to allow Ross Fox's voluntary reduction of income to serve as a basis for finding a change of circumstances.

In *Fox*, the husband controlled his income as his income was generated by his own medical practice. In this case, there was no attempt to shift income to anyone. Mr. Calabrese does not own NIC, does not control NAPA Corporate, and he did not control Federated Insurance. The decision to have high rates and suffer the reduction in insured stores was a decision made by Federated Insurance without regard for Mr. Calabrese. Also, differing from *Fox*, Ms. Calabrese is employed, earns an income,

and has wealth of over \$2.1 million, well above Mr. Calabrese's net worth.

Even if the Court determines that Mr. Calabrese's sharp decline in financial well-being has been the result of "voluntary changes", his good faith efforts maintain his income and to secure a replacement to his arrangement with Federated Insurance weighs toward a modification of support in this case. *Lambert v. Lambert*, 66 Wn.2d 503 at 510, 403 P.2d 664 (1965) held that a "substantial showing of good faith" may overcome the voluntary nature of a reduction in income or earning capacity sufficient to justify a modification. Mr. Calabrese's reduction in income, unlike the husband in *Lambert*, did not occur at a time when he was considering divorce proceedings or was delinquent in his obligations. *Lambert*, at 509. Mr. Calabrese could not have controlled the timing of his change in circumstances, nor did he orchestrate the loss of his income to achieve a reduction in support.

Also, in *Lambert* the prospect of Mr. Lambert's reduced income was squarely before the trial court at the time of divorce, unlike the Calabrese dissolution. *Lambert*, at 509. Mr. Calabrese had no facts or reason to believe that he would lose the income from Federated Insurance as the relationship had been longstanding. CP 1171.

Indeed, Mr. Calabrese has drawn down his assets in an effort to stay current with his maintenance obligation. CP 249-280. This is

reflected in the decline of his Bank of America savings account, from \$316,632.95 in December 2013 to \$115,340 in August of 2014. CP 249, 278. His savings balance in his Bank of America Savings account on December 1, 2014 was reduced to \$32,701.66. CP 1699-1740.

V. THE ORAL DECISIONS CONFIRM THAT THE COURT UNDERSTOOD THE EVIDENCE PRESENTED BY MR. CALABRESE

The Court entered detailed written findings. CP 1897-1901. It stated:

The spousal maintenance should be modified because: The current Decree of Dissolution requires Jack Calabrese to pay Jill Calabrese \$10,000/mo. in spousal maintenance

There has been the following substantial change of circumstances not explained above since the order was entered: The change in circumstances was involuntary

Mr. Calabrese's earned income was reduced as a result of the loss of business income from Federated Insurance. Mr. Calabrese had one primary source of income, which was from the Federated Insurance. The Federated Insurance Company was endorsed by NAPA AutoCare as the insurance company that would be the exclusive recommended carrier for NAPA AutoParts Stores, AutoCare Collision Centers. The exclusive endorsement and business relationship was expected to continue because it had been longstanding.

Although Mr. Calabrese operates the NAPA Insurance Center, there is no written agreement between Mr. Calabrese and the corporations that operate NAPA AutoCare and NAPA AutoParts. Mr. Calabrese was chosen in 1988 to run the NAPA Insurance Center but does not have any contract that appoints him to this role.

NAPA Insurance Center is a captive business to NAPA AutoCare and NAPA AutoParts as it uses the NAPA logo and branding. The corporate NAPA management which operates NAPA AutoCare and NAPA AutoParts authorized Mr. Calabrese to find a new insurance carrier because the Federated was not competitive and had lost market share. Additionally, the Federated stopped providing Mr. Calabrese with information (loss runs, lists of insured). Federated stopped paying Mr. Calabrese in October of 2012.

Mr. Calabrese has made good faith efforts to maintain his income and to find a new insurance carrier for NAPA to endorse. The first effort was the agreement with GMI in September of 2012, to move to a business model with GMI, and to maintain the NAPA corporate endorsement. Mr. Calabrese received capital gains income from this transaction and paid Ms. Calabrese throughout 2012 and 2013. The deal with GMI did not work out and the parties parted ways. As part of the agreement to separate, Mr. Calabrese purchased his noncompete.

Mr. Calabrese found a new insurance company, the Lockton Affinity group, and began working with Lockton Affinity.

Based on the income in 2012, 2013 and 2014 of combined capital gains and Lockton Affinity Guarantee, maintenance is not modified retroactively but starting Jan. 2015.

His banking records, for Bank of America account X6758 reflect deposits of \$14,679.88/mo. for 10 months in 2014. The figure includes his \$10,000/mo. Lockton Affinity guaranteed payment in 2014, which he will not receive in 2015.

The president of Lockton Affinity has provided a projection of Mr. Calabrese's income of \$89,892 in 2015 and \$60,984 in 2016.

CP 1898-1899

On Revision, the Judge confirmed that the petition to modify had merit on the basis that a substantial change of financial circumstances that was not voluntarily induced by Mr. Calabrese had occurred. CP 97.

The Court's colloquy about Mr. Calabrese as a "middle man" was simply a discussion surrounding Mr. Calabrese's business and were not findings.

The revision Judge also correctly stated that the GMI payments were "one time payments" for two reasons: First, the 2012 Asset Purchase Agreement (CP 1366-1382) describes the purchase price as \$800,000, broken out into \$300,000 and \$500,000 amounts. The GMI contract with the \$800,000 purchase price was a "one time" payment because Mr. Calabrese sold his goodwill in the NIC only one time, for a payment of \$800,000. Second, the GMI agreement was a one-time sale of goodwill. There has been no recurring sales of goodwill. The trial court understood this, stating:

The capital gains do not keep coming at this point and the commission that he's earning at this point is far reduced from the income that he had before this change in circumstance with Federated and NAPA Insurance Center,

RP 95.

As to the oral argument, the volume discount is supported by NAPA's number of nationwide stores. NAPA has 6,000 NAPA stores and

15,000 NAPA Auto Care Centers. CP 1804-1805. It is confirmed by the email from Mike Russell where he outlines the number of stores and by Mr. Calabrese who explained that loss run information can be used to negotiate lower premiums for NAPA dealers. CP 1816. NAPA corporate was dissatisfied with Federated Insurance not providing competitive rates. CP 1804-1805. The argument about volume does not affect the final findings. The Court made no findings as far as any volume discount.

The Commissioner and Judge's findings never state that Mr. Calabrese was a "carrier." The Commissioner called him a middleman, which is accurate. This appellate argument is a smokescreen to distract the Court from Mr. Calabrese's significant reduction in income and his changed financial circumstances. The Commissioner and Revision Judge clearly understood that Mr. Calabrese is not an insurance carrier. RP 5, lines 9-10; CP 1897-1901. Mr. Calabrese is a "go between" NAPA and the insurance company. His own testimony never describes his relationship as a carrier.

The Revision Court also properly confirmed that Mr. Calabrese's income declined in 2013 and 2014.

The evidence that the purchase by GMI gave Mr. Calabrese more office support was described in his declaration as, "2 dedicated underwriters, office space." CP 1819. Also, the contract allowed him

access to GMI's affiliate, EverGuard. CP 1369.

The Lockton agreement was an attempt to salvage the NAPA insurance program. Mr. Calabrese described his ongoing work, describing his duties in his narrative declarations. CP 1182-1183. He provided discovery with his 2014 travel log and expense records. CP 1839-1862.

## VI. THE FINDINGS OF FACT

### A. The Findings of Fact Support the Decision Reached.

The Findings of Fact are CP 1807-1901. They are supported by substantial evidence. *In re the Marriage of Lutz*, 74 Wn. App. 356, 873 P.2d 566 (1994), did not involve maintenance. It involved findings as to separate and community property:

To withstand a challenge on appeal, a finding of fact must be supported by substantial evidence. *Henery v. Robinson*, 67 Wn. App. 277, 289, 834 P.2d 1091 (1992), *review denied*, 120 Wn.2d 1024 (1993). Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise . . . Even though there may be conflicting evidence on the record, [a reviewing court] will not disturb findings based on substantial evidence.

*Henery*, 67 Wn. App. at 289. A trial court must make findings of fact as to all the ultimate facts and material issues. *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972). Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.

B. The Findings of Fact Were Sufficient.

The retirement argument made by appellant is factually and legally defective. Mr. Calabrese never presented the GMI transaction as his plan to retire. CP 326. This argument was invented by Ms. Calabrese and is unsupported by the evidence. Mr. Calabrese was required to continue working as part of the GMI contract. CP 1369. Mr. Calabrese would not earn any income until after the first two years and then would receive a salary and a percentage of net profit. That NAPA Corporate was unhappy with Federated Insurance's high rates and losing NAPA customers is not disputed, and that NAPA Corporate's dissatisfaction forced Mr. Calabrese to enter into the contract with GMI, to replace Federated Insurance.

That Mr. Calabrese entered into the transaction as a "retirement strategy" is entirely disputed. As a practical matter, he had no reason to jeopardize the relationship with Federated because he was earning a six figure income from them due to their high rates. He had no reason to change that except that his business is controlled by NAPA Corporate and he must satisfy NAPA Corporate in order to continue earning his living.

The *Fox* case cited by Appellant did not involve a "retirement decision." Instead the *Fox* case involved a doctor who effectively sold his medical practice to his new wife and started paying his new wife more and

himself less, so that he could argue that his income was reduced. *Fox v. Fox*. 87 Wn. App 782 at 784, 942 P.2d 1084 (1997). The Court concluded his actions did not show the requisite good faith necessary to permit the modification.

Here there is no evidence that Mr. Calabrese's decision was a plan to create the appearance of a worsened financial condition. Mr. Calabrese's income has not been shifted to anyone else; it has just been dramatically reduced for reasons beyond his control.

The retirement argument is not backed up by facts. Mr. Calabrese's contract with GMI required him to work. CP 1367-69. Mr. Calabrese's contract with Lockton also requires him to work. CP 1367-69. His remark about trying to figure out a retirement strategy was not a statement that the transactions were for the purpose of retirement. CP 326. The statement was made in the context of a bigger picture, with the decline of Federated Insurance's number of NAPA insureds and Jack Calabrese's need to keep his business relationship with NAPA. If Mr. Calabrese lost NAPA's approval, Mr. Calabrese would have no income. As seen by the contracts, Mr. Calabrese actually committed to more years of working to fulfill his obligations to Ms. Calabrese. Part of his GMI contract even required him to sign an Employment Contract. CP 1369. His contract with Lockton was commission only in Year Two (6%) and

Year Three (3%) and forward, CP 1404, and the only way to earn commissions is to work. And his contract with Lockton requires him to work to produce commissions. CP 1369.

It is pure speculation that the transactions were a means to retire. The Revision Judge rejected this argument. RP 96.

C. The Circumstances of Mr. Calabrese's Income Reduction Were Involuntary and Not in the Control of Mr. Calabrese.

Mr. Calabrese does not control NAPA. His ability to operate NIC is constrained by NAPA's corporate structure and controlled by NAPA. Again, he has no written contract for NIC, although NAPA allows him to operate using the NAPA logo and brand. NAPA decided to discontinue the relationship with Federated and GMI decided to discontinue the relationship with NAPA, both of which were out of Mr. Calabrese's control.

D. The Sale of 67% of NIC to GMI Insurance Company Was a Good Faith Transaction.

As noted previously, Mr. Calabrese tried to salvage his income by finding a replacement for Federated Insurance. The sale of 67% of NIC to GMI allowed him to have \$800,000 for the sale of the business. These funds were the bulk of his income for 2012 and 2013, which allowed him to maintain his payments to Ms. Calabrese.

Mr. Calabrese also entered into an employment agreement with

GMI to earn a salary of \$200,000, plus a bonus after two years. This was entered into in good faith, as Mr. Calabrese was trying to salvage both his business and his income.

Unfortunately, the sales of GMI failed to materialize and revenue remained low. NAPA Corporate confirmed that there was a low adoption rate and poor feedback from NAPA customers about the GMI program. CP 1804-1805. Mr. Calabrese bought back his goodwill for \$200,000. CP 1383-1395. The terms of the buyback was a waiver of a \$100,000 payment owed to Mr. Calabrese from GMI and two \$50,000 payments: \$50,000 down, and \$50,000 in six months. CP 1384-1385.

Although the GMI transaction was voluntary, the underlying reasons for it were not. Mr. Calabrese was trying to find a replacement for Federated Insurance that would allow him to operate NIC and provide insurance programs to NAPA Auto Parts stores as that is Mr. Calabrese's sole source of revenue. Without his ability to operate NIC and have access to the Napa Auto stores, he would have no income.

E. It Was the NAPA Corporate Dissatisfaction with Federated Insurance That Resulted in the Relationship with GMI.

Clearly NAPA corporate was unhappy. CP 1804-1805. The numbers that the Federated put in an email confirm that Mr. Calabrese needed to find a replacement. CP 1455-1456.

F. The Good Faith Repurchase of GMI.

Ms. Calabrese questions the decision by Mr. Calabrese to repurchase his interest in NIC from GMI. Mr. Calabrese repurchased his interest in order to continue his relationship with NAPA. In Section 3.3 of the agreement with GMI, Mr. Calabrese agreed to enter into a noncompetition and nonsolicitation agreement (non-compete). CPC 1369. The agreement with GMI also required that their business was the exclusive provider of insurance programs to NAPA. CP 1366. Under those terms, GMI had the right to enforce both contract clauses, which put Mr. Calabrese in a difficult predicament because NAPA was dissatisfied with the GMI program, as there was a low adoption rate and poor feedback. CP 1804-1805.

The simple reason for buying back his interest was so that he could void the contract and no longer be bound by a non-compete agreement. By removing the non-compete Mr. Calabrese had the right to market NAPA to other providers.

The Appellant has confused the facts as to involuntary loss of income. Mr. Calabrese's loss of the Federated Insurance income was involuntary. He could not control NAPA corporate and he was not able to change Federated Insurance's rates. While Mr. Calabrese voluntarily looked to replace Federated Insurance, the root cause of his reduction in

income was involuntary. An analogy would be a situation where Mr. Calabrese lost his job (involuntary loss of income) but voluntarily found a lower paying job (voluntary good faith effort) to replace the lost income. Again, the reason for his transactions with GMI, and later Lockton, stemmed from NAPA's dissatisfaction with Federated Insurance, NAPA's dissatisfaction with the poor performance of the GMI program and GMI's desire not to pay out any more funds. NAPA's directive was, "we needed to make another change," CP 1805, so Mr. Calabrese did as he was told so as to maintain his employment.

G. The Findings that Reduction in Savings is Evidence of Reduction in Income / Lifestyle.

Mr. Calabrese's lifestyle has been diminished. Using his savings to pay his expenses, due to his reduction in income, is not contested. CP 1259-1267.

*In re the Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992), is cited by Appellant as authority for the Court to focus on "lifestyle". The *Glass* case was a child support modification case where the father needed to recover from business setbacks and had filed for bankruptcy protection. The father had agreed to nonmodifiable maintenance. The *Glass* court confirmed that nonmodifiable means nonmodifiable. "Even in the event of changed circumstances of either

party a nonmodifiable spousal maintenance award is exactly that: it is nonmodifiable.” Even in *Glass*, the court was faced with the reality that one cannot “get blood from a turnip.” The *Glass* court properly weighed the equities, and properly granted Robert Glass a one year grace period before he resumed making spousal maintenance payments.

In this case, Mr. Calabrese did not agree to nonmodifiable maintenance. The *Glass* case simply confirms that the Court has the power to change maintenance, even in the event of “nonmodifiable” maintenance.

As to the investments made by Mr. Calabrese, he responds as follows:

The loan to Mr. DiJulio was made shortly after the \$800,000 transaction with GMI. CP 2049. The GMI Contract is dated September 1, 2012. CP 1366-1382. Mr. Calabrese entered into the loan with Mr. DiJulio in November of 2012, to earn a higher rate of return. At the time of the loan, the GMI Agreement was recent and had not failed. Mr. Calabrese did not repurchase his interest in NIC from GIM until a year later. CP 1384-1392.

Incurring expenses for travel to NAPA meetings is a business expense. CP 2053. Mr. Calabrese’s business expenses from September 2012 to October 1, 2013 were charged to GMI. CP 2053. Whether they

were charged to Newco or GMI is a distinction without merit, since GMI effectively is Newco. CP 1366. The business expenses show that Mr. Calabrese was working, and his discovery answers supplied the information and attached his expense records. CP 2053.

Mr. Calabrese owns a \$200,000 mortgage (first trust deed) from which he receives monthly payments, as detailed in his discovery responses. CP 2056-2057. He did not take out a \$200,000 mortgage. CP 2056-2057. The trust deed that he owns is reflected by monthly bank deposits of \$833.33 into his bank account, which he documented and explained in his Answers to Interrogatories. CP 2056.

Appellant has also mischaracterized the final \$50,000 payment from Mr. Calabrese to repurchase his interest from GMI. Mr. Calabrese did not purchase a \$50,000 annuity. CP 1289-1293. These funds were a transfer from his Bank of America savings on 3/20/2014 into his checking account to pay the final \$50,000 to GMI. CP 1289-1293. The check shows that the payment was to Everguard Insurance Services, an affiliate subsidiary of GMI. CP 1293, 1369.

Mr. Calabrese's annuities, which are not included in the above payment, were disclosed on his Financial Declaration. Statements of his annuity accounts were provided. CP 1439-1453.

Mr. Calabrese's purchase of the boat was an investment with a

partner. The plan was to restore and “flip” the boat, hopefully for a profit. CP 794, 1942-1944, 2050. He has a contract with his business partner, which states the purpose as acquiring, maintaining, refurbishing and selling a specific boat. CP 1864-1870. He did not pay all cash for the boat, but rather invested \$70,000. CP 1821, 1865. Mr. Calabrese owns 50% of the boat, not 100%. CP 1864-1870. The expectation is the boat will be sold after refurbishment and Mr. Calabrese will recoup his investment capital, plus some.

Mr. Calabrese maintained college football tickets in 2014 for business purposes. CP 2051. He gave the tickets up in 2015.

Mr. Calabrese invested \$25,000 (real estate loan) to earn more money than he would earn in the bank. CP 2049. He had made such short term loans in the past and was repaid. During all of these times, he was paying Ms. Calabrese \$10,000 a month. CP 249-317, 323.

Also, although NIC was appraised during the dissolution, the parties reached a settlement where they agreed on a different value. CP 941, 2035. Appellant cannot change her agreement with respect to value, although she seems to ask the Appellate Court to second guess her 2010 settlement. Further, Mr. Calabrese responded to the advocacy declaration and “report” of Mr. Kessler. CP 1818-1820.



H. Mr. Calabrese Presented Information to Confirm His Involuntary Reduction in Income.

The case cited by Appellant is factually and legally distinguishable because Mr. Calabrese provided full financial disclosure. In contrast, the case cited by Appellant, *In re the Marriage of Bucklin*, 70 Wn. App 837, 855 P.2d 1197 (1993), was a child support modification case where Mr. Bucklin failed to provide any documentation. Mr. Bucklin did not provide independent records from which his income could be determined, despite repeated discovery attempts. His evidence was solely his own testimony and handwritten notes, not verified by tax returns, paystubs or other significant evidence.

On the other hand, Mr. Calabrese provided a large amount of financial detail. His Sealed Financial Source Documents included tax returns, bank statements, and business documents. CP 1467-1794. His Declaration provided additional documentation with respect to his finances. CP 1204-1407, 1428-1466. He answered interrogatories, CP 1998-2029, provided supplemental responses, CP 2059-2096, and amended his supplemental responses. CP 1930-1997. His amended supplemental responses confirmed his full time employment. CP 1937.

In this case, the Court had a clear picture of Mr. Calabrese's income and assets. His reduction income was verified by the bank

statements and income tax returns. CP 1467-1794.

VII. THE TRIAL COURT'S REMEDY WAS EQUITABLE AND APPROPRIATE

The business arrangements in this case were straightforward. Mr. Calabrese operates NIC. NIC provides insurance program to Napa Auto stores. The insurance that was originally marketed and sold was the Federated Insurance. The Federated Insurance had high rates and lost customers. CP 1455-1456, 1804-1805. Mr. Calabrese had no reason to change his relationship with Federated Income, since he was making a healthy income, but NAPA Corporate oversees the thousands of NAPA Auto Parts dealers and NAPA was unhappy with the Federated Insurance high rates and losing NAPA customers. CP 1804-1805. Because NAPA wanted to move away from Federated, Mr. Calabrese's income was involuntarily reduced. Mr. Calabrese has not been able to repeat his past success, despite the contract with GMI and now the contract with Lockton.

The trial court properly exercised its discretion. No changes should be made in the decision.

VIII. MR. CALABRESE SHOULD RECEIVE AN AWARD OF ATTORNEY FEES PURSUANT TO RAP 18.1

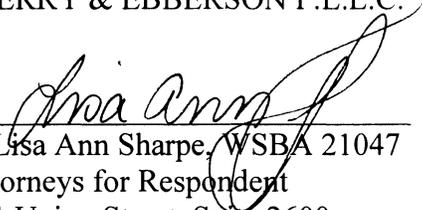
Mr. Calabrese requests an award of reasonable attorney's fees pursuant to RAP 18.1. The supporting law is RCW 26.09.140. The Appellant's Briefing contains references to Clerk's Papers that do not

match and have consumed additional time in trying to locate the correct documents.

Appellant is employed “in a clerical position at one of Seattle’s preeminent law firms.” CP 21. The law firm represented her in the underlying modification action. CP 845-913. In the documents provided, she has provided no proof of payment for her legal fees, except that her Financial Declaration listed \$5,000 in December 2014. Mr. Calabrese has paid his fees, which are billed directly to him with no discounts and which exceeded \$15,000 prior to the modification trial.

RESPECTFULLY SUBMITTED this 19 day of October, 2015.

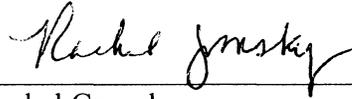
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**CERTIFICATE OF SERVICE**

I certify that on October 19, 2015, I caused a copy of the foregoing document to be served via messenger and email to the following counsel of record:

H. Michael Finesilver (fka Fields)  
Anderson, Fields, Dermody & Pressnall  
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\_\_\_\_\_  
Rachel Gronsky  
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COURT OF APPEALS  
STATE OF WASHINGTON  
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