

No. 35297-4-II

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

In re the Marriage of:

MARCEIL J. MULLAN,

Appellant,

vs.

FREDERICK A. MULLAN,

Respondent.

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
MAY 11 2009
BY: MULLAN

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KATHRYN J. NELSON

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

After receiving nearly half a million dollars in maintenance over seven years, the wife returned to court after the maintenance obligation had ended to try to profit from the fact that the husband had been compelled to continue his dangerous work in the Alaskan fisheries past normal retirement age because his earlier obligation to her had left him unable to provide for his own old age. The trial court erred in denying the husband's motion to dismiss the wife's action to modify maintenance because the trial court lost its jurisdiction to modify after the maintenance obligation by its clear terms ended when the husband reached age 65.

In the event this court affirms the trial court's order allowing the wife's modification action to proceed, it should also affirm the trial court's order reducing the husband's maintenance obligation. While the wife lives inexpensively on acreage with a boyfriend who helps offset her expenses, the husband cannot even own his own home. The wife's financial condition had significantly improved since the parties' divorce, in large part because of the substantial maintenance that she had received from the husband, while the husband's financial condition did not improve even though he

continued to work 17-hour days for most of the year on a fishing boat in the Gulf of Alaska.

This court should reverse the court's order awarding maintenance past the husband's 65th birthday, or affirm the reduced maintenance award. In either event the husband is entitled to his fees on appeal.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1) The trial court erred in denying the husband's motion to dismiss the wife's action to modify maintenance when the plain language of the decree terminated spousal maintenance when the husband turned age 65 and the wife filed her action five months after the obligation was already terminated. (CP 222)

2) The trial court erred in concluding that it had jurisdiction to modify spousal maintenance because the parties "voluntarily" submitted the matter for modification. (CL 2.1, 2.3; CP 214, 215)

3) The trial court erred in finding that the intent of the original decree of dissolution was for maintenance to be "continuous" and "indefinite[]." (FF 1.6, CP 213-14; CP 222)

4) The trial court erred in finding that "[t]he provision for spousal maintenance in the decree is and the obligation to pay spousal maintenance never ceased. It is clear that the trial court

anticipated that maintenance would continue until modification or death with the need to adjust support with Respondent's retirement." (FF 1.6, CP 1.6)

5) The trial court erred in retroactively modifying maintenance to a date before the wife filed her motion to modify. (FF 1.11, CP 214, 215)

6) The trial court erred in entering its order modifying the husband's spousal maintenance obligation. (CP 212-15)

III. STATEMENT OF ISSUES RELATED TO CROSS APPEAL

1) The decree of dissolution provided that the husband's spousal maintenance obligation continue "until the [husband] reaches the age sixty-five (65) or earlier upon the [husband]'s retirement at which time the court recommends maintenance be set at one-half of [husband]'s social security benefit, offset by one-half of [wife's] social security benefit, if any." Did the trial court err in interpreting the court's "recommendation" as a binding order that awarded spousal maintenance indefinitely, allowing the wife to seek to modify the maintenance obligation after the husband reached age 65? (Assignments of Error 1, 2, 3, 4, 6)

2) Did the trial court err in modifying maintenance retroactively to five months before the wife filed her motion to modify maintenance? (Assignment of Error 5, 6)

IV. RESTATEMENT OF ISSUES RELATED TO WIFE'S APPEAL

1) Did the trial court abuse its discretion by reducing the husband's spousal maintenance obligation when he reached age 66 ½ in light of evidence that the wife had been able to substantially save for retirement during the seven years she received spousal maintenance, while the husband had been unable to do so because of his spousal maintenance obligation?

2) Did the trial court abuse its discretion by sustaining an objection to the wife's counsel arguing with the husband during cross-examination when the husband had already answered opposing counsel's argumentative questions?

3) Did the trial court abuse its discretion by denying the wife's request for Civil Rule 37 sanctions when the trial court rejected the wife's claim that the husband committed discovery violations, and the wife does not assign error to this ruling?

4) Should this court award attorney fees to the husband for being required to respond to this frivolous appeal?

V. STATEMENT OF THE CASE

A. Background.

The cross-appellant/respondent Frederick Mullan and appellant/cross-respondent Marceil Mullan were married on June 14, 1962 and separated on January 1, 1997. (CP 2) The parties' marriage was dissolved on February 17, 1998, after trial before retired Pierce County Superior Court Judge Waldo Stone. (CP 1, 8, 12, 16) At the time of the divorce, Frederick was age 57 (CP 162, 192) and Marceil was age 60.¹ (CP 16, 32)

Judge Stone divided the parties' assets equally, including an equalizing cash payment of \$70,000 to Marceil. (See CP 12, 17-20) In addition to half of the assets, Judge Stone awarded Marceil spousal maintenance in the amount of 40% of Frederick's gross earnings, but not less than \$3,750 per month. (See CP 14-15)

In awarding maintenance, Judge Stone found that the parties' marriage was a traditional one in which Marceil was primarily a housewife and mother and Frederick worked as the chief engineer on a fishing boat. (CP 4) Judge Stone found that it

¹ The parties have the same last name. This brief refers to the parties by first name to reduce confusion. No disrespect is intended.

was unlikely that any retraining would significantly improve Marceil's employability. (CP 4) However, Judge Stone recognized that Marceil should not receive a percentage of Frederick's earnings forever, and limited spousal maintenance until Frederick reached age 65, or sooner if he retired before age 65:

The Petitioner has a need for maintenance and the Respondent has the ability to pay maintenance at the rate of 40% of his gross earnings but not less \$3,750 per month. Payments in this amount shall be made until the Respondent is age sixty-five (65) or earlier upon his retirement.

(F 2.12, CP 4)

Thereafter, Judge Stone "recommend[ed]" that maintenance be reduced to an amount equal to one-half of Frederick's social security income, offset by one-half of Marceil's social security income. (CP 4) Judge Stone suggested that either party could move to modify maintenance "at that time:"

At that time the court recommends maintenance drop to One-Half of his gross social security offset by One-Half of her social security, if any. Either party may request a review of Maintenance at that time.

(CP 4) Neither party appealed.

B. After The Parties Divorced, The Husband Continued To Work Two-Thirds Of The Year On A Fishing Boat In The Gulf Of Alaska. The Wife Did Not Work And Moved To A 7-Acre Property In The Midwest With Her Boyfriend.

Marceil moved to Indiana to live with her boyfriend, John McClure, less than one year after the parties divorced. (6/30 RP 26; CP 16) She netted \$105,000 from sale of the family residence she had been awarded. (6/30 RP 28) Marceil and Mr. McClure together purchased a modular home on a 7-acre property gifted to both of them by Mr. McClure's brother-in-law. (6/30 RP 26-27; CP 25) Marceil and Mr. McClure have not married, but they share their living expenses equally. (6/30 RP 35)

In addition to monthly maintenance from Frederick, Marceil received investment income and Social Security. (6/30 RP 55, 56, 64) Marceil chose to receive Social Security at age 62, resulting in a 20% discount in benefits she would have otherwise received had she waited until age 65. (6/30 RP 66-67) Marceil's total monthly *net* income was \$7,143 from all sources. (6/30 RP 58-59; CP 26) Marceil was able to contribute \$1,800 every month into a retirement account, pay all of her expenses, and have a monthly surplus of \$1,300. (6/30 RP 58-59; CP 26)

Even though there was nothing preventing her from working, Marceil chose not to. (See CP 25-26; 6/30 RP 38) Meanwhile, Frederick continued to work as a fisherman in the Gulf of Alaska. While Marceil was living on a 7-acre property with her boyfriend, Frederick lived on a fishing vessel in the Bering Sea and Alaskan waters, with living quarters "less than what people are living in after Katrina in a trailer," for seven to nine months of the year. (6/30 RP 72, 81; CP 49-50; Ex. 54, 55) During the seven to nine months of the year he is on the vessel, Frederick works 17-hour days, seven days a week. He is on call 24 hours a day. (6/30 RP 83)

Unlike Marceil, Frederick was unable to save significantly for retirement after the divorce, largely due to his maintenance obligation to pay 40% of his income to Marceil. (CP 49-50; 6/30 RP 74-75) Frederick owned two rental properties, but because he had to refinance one of the properties to pay a \$70,000 equalizing cash payment to Marceil as part of the divorce, the properties had a negative cash flow. (6/30 RP 74-75, 78) Frederick could not afford to buy a home after the divorce, and he spent most of the year on the vessel. (6/30 RP 75; CP 49-50) When he was not on the fishing vessel, he lived with his son's family. (6/30 RP 75)

At the time of the modification trial, Frederick was 66. (CP 192) He had previously had surgery on his back and right knee, and he needed surgery on his left knee and left thumb. (6/30 RP 83) Frederick also has high blood pressure and high cholesterol, and takes medication for both. (6/30 RP 83) Despite his age and physical ailments, Frederick chose to continue working so that he could eventually save enough money to construct a home to live in when he was finally able to retire:

I forced myself [to continue working] because my goal was to, after spousal maintenance ceased, and just the – if there was going to be a difference in Social Security, between the two, I was aiming to try to build myself a home. I do not have a home like everybody else does. I have no home to come to.

(6/30 RP 83-84)

C. As Provided By The Decree, The Husband Stopped Paying Maintenance When He Turned 65.

During the seven-year period since the parties divorced, Frederick paid nearly half a million dollars in maintenance to Marceil. (6/30 RP 74) Frederick turned 65 on May 21, 2005. (CP 192) Pursuant to the terms of the decree, Frederick's spousal maintenance obligation should have ended. (6/30 RP 73, CP 15: "Maintenance payments shall be made until the [husband]'s reaches age sixty-five (65) or earlier upon [husband]'s

retirement...”) Frederick paid maintenance of \$3,750 to Marceil through May 2005, and made one last maintenance payment to Marceil, of over \$20,000, in June 2005 when he received his bonus payment. (CP 50) Frederick thus fully satisfied his obligation to pay 40% of his gross income through his 65th birthday to Marceil.

Frederick did not perceive Judge Stone’s “recommendation” that he pay a portion of his social security to Marceil after he turned age 65 as an order. (CP 50-51) In any event, Frederick was not receiving Social Security when his maintenance obligation terminated when he reached age 65. (6/30 RP 73) After Frederick’s maintenance obligation terminated, he continued to work, hoping to save enough money to build a home to live in after he was finally able to retire. (6/30 RP 83-84)

D. Five Months After The Last Maintenance Payment, The Wife Moved To “Modify” Support.

Marceil filed a “Petition to Modify Spousal Support And/Or CR 60 Relief from The Decree Date 2/17/98,” on October 26, 2005, over five months after Frederick made his last maintenance payment under the decree. (CP 21) Citing CR 60(b)(11), Marceil also sought to “clarify” the language of the decree that provided that spousal maintenance be paid “until the [husband] reaches age

sixty-five (65) or earlier upon [husband]'s retirement.” (CP 24-25) Marceil asked the court to ignore the first half of that provision and hold that the decree actually required that Frederick pay spousal maintenance to Marceil in the amount of 40% of his gross income, but no less than \$3,750 per month, for as long as he had to continue working. (CP 25) Alternatively, Marceil asked the court to modify the spousal maintenance award. (CP 25)

On December 19, 2005, Frederick filed a motion to dismiss (CP 225), asserting that Marceil's CR 60(b)(11) motion, brought over seven years after the decree was entered, was not brought within a “reasonable time” and did not raise sufficiently “extraordinary circumstances” to warrant consideration. (CP 231-36) Further, Frederick asserted that Marceil's alternative claim for modification of his spousal maintenance obligation was untimely because it had not been brought before the maintenance obligation terminated. (CP 230-31)

The trial court denied Frederick's motion to dismiss. (CP 222) The trial court held that the “intent [of the decree] was for maintenance to be continuous and the language in the decree provided maintenance indefinitely” and set the matter for trial “to

determine how much maintenance should be paid to wife.” (CP 222)

E. The Trial Court Continued The Husband’s Maintenance Obligation Beyond His 65th Birthday At A Reduced Rate.

The parties participated in a one-day trial before Pierce County Superior Court Judge Kathryn J. Nelson. Marceil asked the court to award her maintenance indefinitely in the amount of 40% of Frederick’s gross income, but not less than \$3,750 per month, until Frederick stopped working. (6/30 RP 14) Marceil claimed that without spousal maintenance, her monthly net income was \$2,311 and her actual expenses were \$3,597, leaving her with an alleged shortfall of \$1,286 each month. (CP 32-38; 6/30 RP 55, 56, 64; *See also* 6/30 RP 116)

At trial, Frederick once again asked the court to dismiss Marceil’s motion because the court no longer had jurisdiction to modify spousal maintenance after the obligation terminated. (CP 173) Frederick also asserted that he no longer had the ability to continue to pay maintenance, and Marceil no longer had the need. (CP 176; 6/30 RP 83-84)

Taking into consideration that Frederick’s most recent employment contract ran until November 2006 (6/30 RP 124), the

trial court awarded Marceil continued spousal maintenance in the amount of \$1,300 until then. (6/30 RP 124) Thereafter, the trial court concluded that Frederick's maintenance obligation should be reduced to a portion of Frederick's Social Security benefit, regardless whether he continued to work. (6/30 RP 126) Based on the formula "recommended" by Judge Stone, the trial court determined that the husband should pay maintenance of \$377 per month beginning December 2006. (6/30 RP 126) The trial court denied each party's requests for fees, finding that each had the ability to pay their own fees. (CP 215) Marceil filed a notice of appeal. (CP 245) Frederick has cross-appealed. (CP 250)

VI. CROSS-APPEAL ARGUMENT

A. **The Trial Court Erred By Interpreting The Decree To Allow Spousal Maintenance To Continue After The Husband Turned Age 65.**

The interpretation of a decree is a question of law reviewed de novo by this court. *Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999). Here, the trial court erred by interpreting the decree of dissolution to mean that spousal maintenance was awarded to the wife "indefinitely" (CP 222), contrary to the plain language of the order. (CP 15)

The original decree of dissolution and findings of fact entered in February 1998 awarded spousal maintenance to the wife “until the Respondent is age sixty-five (65) or earlier upon his retirement.” (FF 2.12, CP 4, 15) Thereafter, the court only “recommend[ed]” that maintenance continue at “one-half of Respondent’s social security benefit, offset by one-half of Petitioner’s social security benefit, if any.” (FF 12, CP 4, 15)

The trial court’s interpretation of the decree to award maintenance “indefinitely” was error. (CP 222) As a result of the trial court’s erroneous interpretation, the wife was improperly allowed to seek to modify the maintenance award after it was already terminated. **Brown v. Brown**, 8 Wn. App. 528, 530, 507 P.2d 157 (1973); **Mason v. Mason**, 40 Wn. App. 450, 457, 698 P.2d 1104, *rev. denied*, 109 Wn.2d 1012 (1985) (court loses jurisdiction to modify maintenance once the obligation terminates).

In **Brown**, the appellate court reversed a trial court order reinstating maintenance nearly two years after the maintenance obligation terminated. The court held that “a residual in the form of alimony is subject to modification... but if there is no modification during the term of the alimony award and no appeal to the failure to

modify, the obligation is forever extinguished when met in full.”

Brown, 8 Wn. App. at 530.

Here, the plain language of the decree provided that spousal maintenance terminated once the husband turned age 65 in May 2005. (FF 2.12, CP 4, 15) Under the terms of the decree, maintenance was awarded to the wife “up to the time of” the husband turning age 65. See **Thompson**, 97 Wn. App. at 878 (reviewing court ascertains the intention of court using the general rules of construction applicable to statutes and contracts); **US West Communications, Inc. v. Washington Utilities & Transportation Comm’n**, 86 Wn. App. 719, 727, 937 P.2d 1326 (1997) (“if statutory language is ambiguous, we resort to a dictionary”). “Up to the time of” means “until.” American Heritage Dictionary, 3rd Edition, 881 (1994). Maintenance terminated once the husband turned 65.

The trial court’s “recommendation” for maintenance after age 65 did not extend the award. “Recommend” is defined as “1. To commend to another as worthy or desirable; endorse” or “2. To advise or counsel.” American Heritage Dictionary, 3rd Edition, 690 (1994). A recommendation is not a binding order continuing spousal maintenance after the husband turned age 65. See **State**

v. Curmon, 171 N.C. App. 697, 704, 615 S.E.2d 417 (2005) (judge's "recommendation" regarding defendant's contact with plaintiff is not a binding order); *State v. Bakalov*, 979 P.2d 799, 822, ¶75 (UT S.C., 1999) ("The trial judge's recommendation to the board [of pardons] is simply the judge's personal non-binding expression of what length of actual incarceration may be appropriate").

By the clear terms of the decree, maintenance terminated when the husband reached age 65. If the wife had wanted maintenance to continue beyond that time, including making the court's "recommendation" an enforceable order, she was required to ask for court assistance before her maintenance terminated. The wife's failure to do so "forever extinguished" any right to maintenance from her former husband. *Brown*, 8 Wn. App. at 530. Because the trial court did not have jurisdiction to modify the maintenance award after the obligation terminated in the original decree, this court should vacate the trial court's order modifying maintenance. (CP 215)

On remand, this court should direct the trial court to order restitution to Frederick for amounts he overpaid for spousal maintenance after his 65th birthday. See RAP 12.8 (if a party has

satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders to restore to the party any property taken from party, or in appropriate circumstances provide restitution); **Marriage of McCausland**, 129 Wn. App. 390, 118 P.3d 944 (2005) (remanding and directing trial court to enter appropriate orders of reimbursement for amounts overpaid by husband) (*review on unrelated grounds* __ Wn.2d __, __ P.3d __, WL 284170 (2/1/2007); **Marriage of Mason**, 48 Wn. App. 688, 692-93, 740 P.2d 356 (1987) (husband entitled to restitution of attorney fees paid by husband to the wife's attorney as a matter of right following reversal of award).

B. The Trial Court Erred By Retroactively Modifying The Husband's Maintenance Obligation.

Even if this court affirms the trial court's order denying the husband's motion to dismiss and holds that the wife's motion to modify maintenance was timely, the trial court erred by retroactively modifying the husband's maintenance obligation. RCW 26.09.170 (the provisions of any decree respecting spousal maintenance may be modified only as to installments accruing subsequent to the petition for modification); **Marriage of Drlik**, 121 Wn. App. 269, 279, 87 P.3d 1192 (2004) (court can only modify maintenance and

support provisions as of the date of the filing of the petition for modification).

The wife filed her motion to modify spousal maintenance on October 26, 2005. (CP 21) The trial court modified spousal maintenance commencing June 2005 – five months before the wife filed her motion – establishing a maintenance obligation of \$1,300 for the months of June, July, August, September, and October. (CP 215) If *any* maintenance was owed during this period, it was based on the original court’s “recommendation” that maintenance be set at one-half of the husband’s Social Security benefit, offset by one-half of the wife’s Social Security benefit. (CP 15) However, since the husband did not receive Social Security until January 2006 (6/30 RP 73), there should have been no maintenance obligation between June 2005 and January 2006.

This court should reverse the trial court’s order modifying the husband’s maintenance obligation prior to October 26, 2005, the date the wife filed her motion to modify. On remand, this court should direct the trial court to order restitution to Frederick for amounts he overpaid for spousal maintenance after his 65th birthday and prior to Marceil filing her petition for modification. See

RAP 12.8; *McCausland*, 129 Wn. App. at 417-18, ¶¶77; *Mason*, 48 Wn. App. at 692-93.

VII. ARGUMENT IN RESPONSE TO APPEAL

A. **The Trial Court Acted Within Its Discretion And Properly Reduced The Amount Of Spousal Maintenance To The Wife After The Husband Turned Age 65.**

The crux of the wife's appeal is her claim that the husband should be ordered to continue to pay 40% of his gross income to her if he continues to work beyond his retirement age. The only reason the husband is forced to continue his physically difficult and dangerous job is because he was unable to adequately fund his own retirement after the parties' divorce, in large part because of the substantial maintenance he was required to pay the wife under the dissolution decree. In the event this court affirms the order denying the husband's motion to dismiss and the order retroactively modifying maintenance, this court should otherwise affirm the trial court's order modifying spousal maintenance. The trial court properly reduced the husband's spousal maintenance obligation during the remainder of his employment contract and thereafter limited his maintenance obligation to a portion of his Social Security.

A trial court's ruling on a motion to modify spousal maintenance is discretionary and will not be reversed absent an abuse of discretion. **Marriage of Ochsner**, 47 Wn. App. 520, 524-25, 736 P.2d 292, *rev. denied*, 108 Wn.2d 1027 (1987). Here, the trial court determined that the husband's decision not to retire at age 65 was a substantial change in circumstance warranting modification of his spousal maintenance obligation, which would have otherwise terminated on his 65th birthday. RCW 26.09.170(1) (trial court can only modify maintenance upon a showing of a substantial change in circumstances) (See FF 1.4, CL 2.3, CP 213, 215). The appellant does not challenge this determination.

Once the trial court found that changed circumstances warranted a modification, the amount and duration are the same as in the original dissolution. **Marriage of Spreen**, 107 Wn. App. 341, 347, fn. 4, 28 P.2d 769 (2001). The court must consider the following factors in determining an award of maintenance:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

RCW 26.09.090(1). The trial court was not required to make specific findings of fact on each factor, contrary to appellant's assertion in the opening brief at 27-29. "Nothing in RCW 26.09.090 requires the trial court to make specific factual findings on each of the factors listed in RCW 26.09.090(1). The statute merely requires the court to consider the listed factors." *Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004).

Here, the wife recognized that several of the RCW 26.09.090 factors did not apply in this post-decree modification setting (6/30 RP 110), largely because the original trial court had already addressed those factors and the modifying court adopted those

findings. (See CP 4, FF 1.1, CP 213) In particular, those factors addressing the wife's ability to acquire training to obtain employment (RCW 26.09.090(1)(b)), the standard of living during the marriage (RCW 26.09.090(1)(c)), and the duration of the marriage (RCW 26.09.090(1)(d)) were by their very nature unchanged and not addressed at the modification trial.

Instead, the focus properly was on the parties' present need and ability for spousal maintenance. (See 6/30 RP 9) Based on the evidence presented, the trial court's oral ruling, and the trial court's written findings, it is clear that the trial court considered the *relevant* factors of RCW 26.09.090 to determine an appropriate award of spousal maintenance, and that the trial court's maintenance award is in fact "just" under the circumstances:

In light of the significant assets already awarded to the wife, and the significant assets she had acquired since the divorce, the trial court properly reduced the maintenance award. RCW 26.09.090(1)(a). The trial court found that the wife had already received \$300,000 in assets as part of the property division. (FF 1.10, CP 214) The trial court also found that since the divorce, the husband has earned over \$100,000 annually, and that the wife had enjoyed the benefit of receiving 40% of that income. (FF 1.10, CP

214) From her maintenance, the wife has been able to save \$1,800 every month for retirement and still have a monthly surplus of \$1,300. (6/30 RP 58-59; CP 26) Thus, the wife has had the opportunity to amass nearly \$300,000 since the parties divorce after paying her living expenses. (See 6/30 RP 117) The trial court also recognized that since the divorce the wife had been gifted seven acres of land, where she now resides and shares expenses with her boyfriend. (6/30 RP 125)

There was also undisputed evidence that since the divorce the wife was able to save \$1,800 per month for her retirement, providing her with over \$150,000 in retirement in addition to the retirement already awarded to her as part of the dissolution. (6/30 RP 59-60; CP 26) The wife also had \$1,300 per month in surplus income since the parties' divorce, with which she made improvements on the house she shared with her boyfriend and purchased antique cars, travel, and a carousel horse. (CP 26; 6/30 RP 28, 31-32, 45-46)

The trial court also considered evidence of both parties' age and physical condition, RCW 26.09.090(1)(e), and properly determined that the husband's obligation to pay the wife a portion of his employment income should terminate in November 2006 – 18

months after his 65th birthday. (See 6/30 RP 124: “I recognize the increasing age and potential disabilities... and the fact at some point, neither party should be expected to work in order to provide the other with spousal maintenance...”); RCW 26.09.090(1)(e).

The wife, age 69, who did not work, described her physical condition as one consistent with any person moving on in age, complaining of lower back aches that made it difficult to stand or sit too long and weather related arthritis. (6/30 RP 39) But there was no evidence that these conditions increased her expenses.

Meanwhile, the husband, age 66, works a physically taxing and dangerous job, despite back and knee problems. He needs surgery on his left thumb and left knee and has high cholesterol and high blood pressure. (6/30 RP 82-83) All of these conditions make his job even more difficult:

I have high blood pressure. I have high cholesterol, take medication for both. At times it's a chore. I can't even stand up, but I have to do it to do the job because the job I'm in, you work 17 hours a day, on call 24 hours. The job is seven days a week, 30 days out of the month. There is no sick [leave]. There is no vacation. There's nothing. If you get sick, you work while you're sick. That's the job.

(6/30 RP 83)

Finally, the trial court considered evidence of the husband's ability to meet his own needs while meeting the needs of the wife, RCW 26.09.090(1)(f), in deciding to award additional spousal maintenance of \$1,300 per month to the wife until November 2006. The trial court considered the husband's testimony that he has been unable to adequately save for retirement while he was required to pay 40% of his gross income to the wife. (See 6/30 RP 83-84) The trial court considered the fact that while the wife lives on a 7-acre property with her boyfriend, who helps offset her expenses, the husband has no home to retire to and had been living with his children when he was not working. (6/30 RP 84, 125) The trial court also considered the fact that the husband's current employment contract ended in November 2006. (6/30 RP 124, 125-26)

The trial court noted that the wife claimed she needed an additional \$1,300 a month to meet her current expenses. (6/30 RP 124) The trial court found that wife knew that the amount of maintenance she was previously receiving would stop or that she would receive a lower amount, and awarded spousal maintenance to the wife for an additional 18 months at an amount to meet her expenses but noted that she should also be prepared to adjust her

expenses thereafter. (6/30 RP 124-25) By the time her maintenance of \$1,300 terminates, the wife will be age 69 and she reasonably should be expected to begin using her retirement accounts to assist her in meeting her expenses.

If it had jurisdiction to do so, the trial court did not abuse its discretion by modifying spousal maintenance and setting it at \$1,300 per month until November 2006, when the husband will be 66 ½ years old, and thereafter reducing maintenance to an amount equal to the difference between the wife's social security income and the husband's social security income. (CP 214)

B. The Trial Court Did Not Limit The Wife's Ability To Cross-Examine The Husband.

The wife's claim that the trial court improperly limited her ability to cross-examine the husband is utterly without merit. (App. Br. 38-42) First, as is evident from the record, the trial court did not limit the subject of the husband's cross-examination. Rather, it limited the argumentative manner in which the wife's counsel cross-examined the husband:

Mr. Robinson: Object, your Honor. He's arguing with the witness.

The Court: Sustained.

(6/30 RP 101)

Second, it is also clear that the wife's counsel had already elicited testimony from the husband regarding any past decrease in his earnings, which was the subject of the husband's cross-examination prior to the trial court sustaining the husband's counsel's objection:

Q. When has it gone down? When has it ever gone down?

A. It's going down now.

Q. When did it go down?

Mr. Robinson: Object, your Honor. He's arguing with the witness.

The Court: Sustained.

Q. Didn't go down through May, did it?

A. Pardon?

Q. Didn't go down through May, did it?

Mr. Robinson: Your Honor---

The Court: Sustained. I just sustained the argumentative line of questioning. Move on.

Compare 6/30 RP 101-102 with 6/30 RP 96-97:

Q. Have you, in the last five years, had any significant reduction in the amount of money you've earned.

A. It's going to be, yes.

Q. Have you, in the last five years, had any significant reduction in what you've earned every year?

A. Not significant, no.

Finally, trial courts are given broad discretion regarding the scope of cross-examination, and the wife has not shown that the trial court's decision to limit her counsel argumentative cross-examination was an abuse of discretion. See **State v. Dixon**, 159 Wn.2d 65, 75, ¶21, 147 P.3d 991 (2006) (*citations omitted*) (affirming trial court's ruling prohibiting cross-examination of witness regarding statements made to therapist).

C. The Trial Court Was Not Required To Award Attorney Fees To The Wife When It Did Not Find That The Husband Committed Discovery Violations.

The wife's claim that the trial court erred in not awarding her attorney fees for the husband's alleged discovery violations is also wholly without merit. (App. Br. 42-48) Civil Rule 26 and 37 allows the trial court to award attorney fees to a party if it finds that a party willfully violated a discovery order or does not comply with the rules of discovery. (See cases cited in App. Br. 44-48) But the trial court did not find that husband committed any discovery violations when it excluded the parties' daughter from testifying. Rather, the trial court found that the daughter's testimony was irrelevant. (See 6/30

RP 107-08) The wife does not challenge this ruling by the trial court. The trial court was not required to award attorney fees to the wife under either Civil Rule 26 or 37 for non-existent discovery violations.

D. This Court Should Deny Attorney Fees To The Wife And Award Attorney Fees To The Husband For Having To Respond To This Appeal.

This court should deny the wife's request for attorney fees. The wife has sufficient assets to pay her own attorney fees and the husband does not have the ability to pay her attorney fees. Further, the husband has already paid \$2,500 towards the wife's attorney fees in the trial court. (6/30 RP 79) She should be required to pay her own attorney fees for bringing this appeal, which is without merit.

The court should award attorney fees to the husband. This appeal is without merit, and sanctionable under RAP 18.9 and CR 11. RAP 18.9(a) (appellate court may impose sanctions on a party or counsel who uses the rules for delay, or files a frivolous appeal); ***Delany v. Canning***, 84 Wn. App. 498, 510, 929 P.2d 475, *rev. denied*, 131 Wn.2d 1026 (1997) (appeal that cites no authority for reversal based on existing law, nor makes a rational, good-faith argument for modification of existing law is sanctionable under CR

11); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (CR 11 sanctions may be imposed on appeal if attorney fails to make a reasonable inquiry into the legal basis of a claim).

The wife focuses her entire argument on her ill-conceived notion that the decree awarded her maintenance of 40% of the husband's gross income until he dies in his traces. Instead, the plain language of the decree provides that maintenance terminates when he reaches age 65 or earlier if he retires before age 65. The wife's appeal of the trial court's discretionary rulings on her counsel's cross-examination of the husband and its denial of fees for illusory discovery sanctions is equally without merit.

This court should award attorney fees to the respondent as sanctions against the appellant and her counsel.

VIII. CONCLUSION

This court should reverse the trial court's order denying the husband's motion to dismiss and vacate the orders modifying his spousal maintenance obligation. In the event this court affirms the trial court's order denying dismissal of the action, this court should reverse the trial court's order modifying maintenance for the months prior to the wife filing her motion to modify but otherwise affirm the

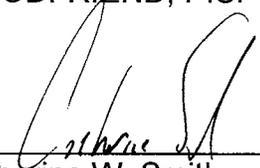
order modifying maintenance. This court should direct the trial court to order the wife to repay to the husband the amounts he has overpaid in spousal maintenance since he reached age 65. This court should also award attorney fees to the husband for having to respond to this appeal.

Dated this 5th day of March, 2007.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 5, 2007, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 5th day of March, 2007.



Tara D. Friesen

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