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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31724-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

RENE VERCOE f/k/a MILLER,

Petitioner/Appellant,

vs.

MICHAEL D. MILLER,

Respondent/Respondent.

RESPONSIVE BRIEF OF RESPONDENT MICHAEL D. MILLER

Bevan J. Maxey, WSBA #13827
Attorney for Respondent

Maxey Law Office, PLLC
1835 W. Broadway Avenue
Spokane, WA 99201
(509) 326-0883

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A. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether, contrary to the claims of RENE M. VERCOE, petitioner and appellant herein, the record reflects the court commissioner did, in fact, address the motion to dismiss of respondent, MICHAEL D. MILLER, under the principles of CR 56 as to the legal issue posed under the doctrine of res judicata, even though the commissioner ultimately determined under the undisputed facts that Ms. VERCOE'S petition presented no substantial, significant, or unanticipated change in circumstances warranting modification of spousal maintenance? [CP 13-14; 385-90]

2. Whether, contrary to the additional unfounded claims of Ms. VERCOE, the record reflects that the court commissioner did, in fact, allow her the opportunity to respond to Mr. MILLER's motion to dismiss on the basis of res judicata and she also, in fact, availed herself of this opportunity by filing a "responsive memorandum" on April 1, 2013? [CP 361-65, 384].

3. Whether, contrary to Ms. VERCOE's bald contention, the court commissioner did not abuse its discretion when disallowing discovery prior to ruling on the legal issue of res judicata as framed by the court and upon which respondent's motion to dismiss rested? [CP 382-83, 390].

4. Whether, as a result of Ms. VERCOE's failure to identify and assign a separate and concise statement of error, as required under RAP 10.3(a)(4) and RAP 10.4(c), to each of the challenged "findings" of court

commissioner, those findings of fact should now be considered verities in terms of this appeal? ["Brief of the Appellant," at page 1 and 2].

5. Whether the May 10, 2013, decision and final ruling of the superior court on revision should now be deemed conclusive of all issues and matters on this appeal, insofar as Ms. VERCOE failed to raise and address the assignment of error with appropriate argument as required by RAP 10.3(a)(6) which, thus, constitutes a waiver of that particular assignment of error? ["Brief of the Appellant," at page 1 and 2, et seq.].

B. COUNTER-STATEMENT OF THE CASE

1. This matter concerns a petition for modification of spousal maintenance which was filed in the superior court of Spokane County, State of Washington, on June 8, 2012, by the petitioner, and appellant herein, RENEE M. VERCOE f/n/a MILLER. [CP 11-14]. The parties were married on April 9, 1983, and were later separated on November 1, 2008. [CP 416].

During the course of the separation, the appellant, Ms. VERCOE, petitioned the superior court of Spokane County, State of Washington, under cause no. 09-03-00052-1, for entry of decree of dissolution from her husband and respondent, MICHAEL D. MILLER. Through the dissolution process, both parties were represented by legal counsel in this matter. [CP 6, 421].

On May 10, 2012, findings of fact and conclusions of law, along with a final decree of dissolution, which had been prepared by Ms. VERCOE's attorney, were formally presented to and entered by the superior court. [CP 1-7, 415-23]. Under paragraph 2.12 " Maintenance," the superior court went into great detail in determining what would be required in order that the wife could "attain a comfortable lifestyle" after the dissolution. [CP 418-19]. In relevant part, the court stated in subparagraphs 33 and 36 of paragraph 2.2 "Maintenance" that:

33. The wife needs to have some assistance while she is in the training or developing stages of real estate or other marketing opportunities in either this or other far away markets. So, for a period of three years, a maintenance amount of \$3,000 is appropriate to give her just the stability and an income level to be able to devote time to career-building activities. It is meant to be a short-lived burst for a great launch. With that, she can be very successful and attain a comfortable lifestyle.
36. . . . The court finds that, given her background, that a \$36,000 annual salary would not be something that she would be earning for very long; she would be quickly able to acquire skills and experience to go back into those higher income levels without an extended period of time.

[CP 419]. Paragraph 3.7 "Maintenance" specified, in pertinent part, that:

Commencing with March 1, 2010, and for a period of thirty-six consecutive months, husband shall pay to the wife spousal

maintenance in the amount of \$3,000 per month. The spousal maintenance payment shall be due . . . commencing with March 1, 2010, through an including February 1, 2013.

[CP 3].

Subsequently, given the extent of those debts assigned to him as a result of the dissolution, coupled both with the unwillingness of Ms. VERCOE's creditors to work with him because "he" was not the debtor, along with Ms. VERCOE's having obtained a show cause order against him on June 16, 2012 [CP 8-9, 10], Mr. MILLER was forced to file a Chapter 13 bankruptcy petition in United States Bankruptcy Court, Eastern District of Washington under cause no 10-03877-PCW13 on June 30, 2010. [CP 75-76].

During the course of said bankruptcy, the restructuring and confirmation of the same was initially contested by Ms. VERCOE. [CP 76]. In addition, she filed several creditor's claims which ultimately had to first be addressed in state court before the bankruptcy was concluded. [CP 76].

In her creditor's claim no. 7, Ms. VERCOE alleged that her credit standing had been damaged as a result of Mr. MILLER having filed for Chapter 13 bankruptcy relief and, consequently, she had been unable to obtain employment. [CP 76]. In terms of this claim, Ms. VERCOE averred that she had suffered \$125,000 in damages. [CP 77].

During the time spent resolving said claim no. 7, Mr. MILLER never missed a payment of spousal maintenance and continued to do so as required under the terms of the decree entered on May 10, 2010. [CP 77]. Ms. VERCOE's claim no. 7 was ultimately settled on April 5, 2012 for an agreed sum of \$15,500 and said claim thereupon became an allowed claim under Mr. MILLER's Chapter 13 plan. [CP 77, 80-84]. An order confirming the Chapter 13 plan was presented by Ms. VERCOE's attorney and was entered by the bankruptcy court on April 25, 2012. [CP 85-87]. Contrary to Ms. VERCOE's representations otherwise, the Chapter 13 plan only restructured, and did not discharge, the subject credit card debt at issue. See, "brief of the Appellant," at page 5.

Less than two months later, on June 8, 2012, Ms. VERCOE filed in the superior court of Spokane County, State of Washington, again under cause no. 09-03-00052-1, a summons and petition for modification of spousal maintenance. [CP 11-14]. The gravamen of this petition was that, once again, the filing of the Chapter 13 bankruptcy by her former husband had damaged her credit and, thus, had negatively impacted her ability to find employment and stabilize her economic position. [CP 14]. Thus, in her view and continuing on into this appeal, the bankruptcy filing amounted to a substantial change in circumstances contemplated under RCW 26.09.170(1). See, "Brief of the Appellant," at pages 14-15.

On October 19, 2012, the respondent, Mr. MILLER, filed a motion to dismiss on the basis of CR 56(c). [CP 61]. In support of the motion, it

was contention the stipulation and settlement of Ms. VERCOE's creditor's claim no. 7 was res judicata of any issue concerning her present petition to modify spousal maintenance, and such resolution of said claim both in bankruptcy and state court fails to establish the required substantial change in circumstances. [CP 43-60].

Consistent with the mandate for consideration and possible entry of a summary judgment on the basis of res judicata and the requirement of a substantial change in circumstances, the court commissioner on March 14, 2012, framed the issue of res judicata to be a legal issue in the sense there was no genuine issue of material fact in dispute in terms of the existence of the subject stipulation and settlement of the appellant's claim no. 7. [CP 382, 384]. Consequently, the court commissioner stayed any discovery in this matter until such time as the issue of res judicata could be heard and resolved. Finally, the commissioner allowed Ms. VERCOE the opportunity to file a brief on the subject issue of a procedural bar to her petition if she chose to do so. [CP 384].

On April 1, 2013, Ms. VERCOE filed a responsive memorandum which only in terms of the last two pages addressed the precise issue of res judicata framed by the court. [CP 361-65]. Therein, she argued without supporting evidence (1) that her claim no. 7 only pertained to pre-bankruptcy damaged to her credit, not any resulting post-bankruptcy damage thereto, and (2) that the bankruptcy court had no jurisdiction to determine spousal maintenance issues. [CP 364-65].

Thereafter, on April 3, Mr. MILLER filed a reply reiterating once again his position that "[t]he settlement and release from liability, along with the dismissal with prejudice of [the] Superior Court claim based on . . . identical arguments, resolved all liability for damage to [Ms.] Vercoe's credit rating and subsequent supposed difficulty locating employment." [CP 369]. In other words, Ms. VERCOE's attempt to somehow bifurcate her alleged damages to her credit were entirely illogical and ill-founded given the ongoing nature of said damage. [CP 369-72].

On April 4, 2013, the motion to dismiss was heard by the court commissioner. Initially, during a bench conference, the court noted that many of the depositions filed in connection with the motion "recite ancient history going back to predating the divorce" which the court was not going to "retry." [CP 385]. During the court hearing itself, the commissioner then stated that the motion before it was based on the fact that this issue [of damage to credit and for which modification of spousal maintenance was being sought by the wife] was already addressed and litigated and resolved through the bankruptcy and the state court, and . . . [as a result of this undisputed fact] . . . there's no . . . change in circumstances to warrant a petition to modify maintenance. [CP 387].

The court observed that any alleged "impact" to the wife's credit, the inability to get a job, et cetera, flow from the debt that both of these parties incurred during marriage. [CP 388]. So all of the debt that caused this burden that the

wife is claiming was already in place at the time the divorce was completed, was addressed in the bankruptcy when she filed a creditor claim and litigated

[CP 388]. The court further pointed out that the identical claim of damage to credit was then litigated in state court and it's all the same issues [as in the bankruptcy]. The results that spillout from it might be not what everybody anticipated, but it's the same issue and that has already been decided and . . . [the court] . . . is not going to . . . revisit

[CP 388]. Finally, the commissioner noted that "a change in circumstances" is one which is an unknown, unanticipated change in circumstances is what a modification of a maintenance provision is about.

. . . .

[The] debt was already in place and so that is not a new circumstance . . . The damage is also not new . . . By the time . . . [of] . . . the divorce both . . . [parties] . . . credit was already damage . . . Plus, . . . [the wife] . . . has already being paid for the debt through the bankruptcy.

[CP 388-89].

Consequently, the commissioner concluded Ms. VERCOE had not demonstrated "a significant and unintended or unanticipated change in circumstances" which was her burden to prove under the governing provisions of RCW 26.09.170(1). [CP 389-90]. As a result, the petition of Ms. VERCOE was dismissed on this basis. [CP 390]. The court then reiterated its position that in this case "there is no basis for discovery."

[CP 390].

An order of dismissal was entered on April 4, 2013. [CP 376]. On April 11, Ms. VERCOE filed a motion for revision under RCW 2.24.050 and LR 0.7 of the Spokane County superior court local rules. [CP 377-78, 392-94]. Mr. MILLER opposed the motion. [CP 395]. The matter was heard and then taken under advisement on May 9 by the superior court. [RP 1-38; CP 397].

However, during the course of the hearing, the court indicated that it was its view that the court commissioner had initially entertained the motion to dismiss Ms. VERCOE's petition for modification as being a CR 56 motion and, then, ultimately determined that she had failed to identify or state any "substantial change in circumstances" warranting any modification to the court's initial award of spousal maintenance. [RP 15-17, 33-35]. Throughout the hearing, Ms. VERCOE had, in turn, characterized both the motion to dismiss, and resulting ruling of the court commissioner, as encompassing the considerations identified in CR 56(c). [RP 6-13]. No claim was made by anyone that of CR 12(b)(6) had, in fact, served as a basis for the court commissioner's ruling. [RP 1-38]

By letter opinion, on the day following the hearing on dismissal, the superior court formally denied Ms. VERCOE's motion for revision. [CP 397-98]. An order was entered to this effect on May 10. [CP 399-400]. In denying the revision, the superior court once again noted, in part, that the court could find no basis in a de novo proceeding to set aside . . .

[the court commissioner's] . . . order of dismissal dated April 4, 2013. Although the pleadings were couched as a summary judgment motion pursuant to CR 56, . . . [the commissioner's] dismissal essentially grants the same relief that would be provided had . . . [the commissioner] . . . directed full summary judgment on the respondent's motion. [CP 397]. This appeal followed. [CP 403-09].

C. STANDARD OF REVIEW

The counter-issues framed in Part A, above, as well as those corresponding issues set forth in the "Brief of the Appellant", at pages 1-2, entail (1) the standards of review associated with review of a summary judgment motion, and (2) the standards associated with review of a claim of abuse of discretion by the trial court.

1. Summary judgment. The grant of a summary judgment motion is reviewed de novo on appeal. McNabb v. Dept. of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008). The appellate court engages in the same inquiry as the trial court. See, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Under CR 56(c), summary judgment may be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits and other competent, admissible evidence, show (1) there is no genuine issue of material fact in dispute and (2) the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 p.2d 1030 (1982). A material fact is one upon which

the litigation depends either in whole or in part. Morris v. McNichol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974); see also, Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In certain instances, where the facts are not in dispute, the trial court may treat the motion as being one purely legal in nature and proceed with summary judgment. See generally, Firth v. Lu, 103 Wn.App. 267, 278-79, 12 P.3d 618 (2000). Again, the standard of review in this instance remains the same in terms of de novo review. Bjarnson, v. Kitsap Cy., 78 Wn.App. 840, 844, 899 P.2d 1290 (1995). In rendering its decision, the court may also consider items not specifically mentioned in CR 56(c) including stipulations and items subject to judicial notice. Gain v. Carroll Mill Co., 114 Wn.2d 254, 787 P.2d 533 (1990); Am. Universal ins. Co. v. Ransom, 59 Wn.2d 811, 816, 370 P.2d 867 (1962).

Once a prima facie showing has been made, warrant summary judgment, the opposing party may not rely on the bare allegations in that party's pleadings but must set forth specific facts establishing there is a genuine issue for trial. CR 56(e); Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989); Baldwin v. Sisters of Providence, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1998). Ultimately, summary judgment will be subject to affirmance when all reasonable persons could reach but one conclusion, that summary judgment was proper. Ranger Ins. Co. V. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008);

Wilson, at 437; Morris, at 494-95; Condor Enters., Inc. v. Boise Cascade Corp., 71 Wn.App. 48, 856 P.2d 713 (1993). In addition, a decision of the trial court, including summary judgment, may be sustained on any ground or theory within the pleadings and supported by the proof. See generally, Lundberg v. Corporation of Catholic Archbishop, 55 Wn.2d 77, 85, 346 P.2d 164 (1959); Stark v. Allis-Chalmers, 2 Wn.app. 399, 404, 467 P.2d 854 (1970).

2. Abuse of discretion. On appeal, a claim of abuse of discretion by the trial court is granted by the standard of manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Rulings limiting or denying discovery are governed by this standard, and are to be afforded great difference on appeal. See, Lang v. Dental Quality Assurance Comm'n, 138 Wn.App. 235, 254, 156 P.3d 919 (2007); State v. Montgomery, 93 Wn.App. 192, 198, 974 P.2d 904 (1999); Stark v. Allis-Chalmers, 2 Wn.App. 399, 467 P.2d 854 (1970). Such claim of abuse will only subject to reversal if it can be said that the court acted manifestly unreasonable, or entered its ruling on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also, Rhinehart v. Seattle Times, 98 Wn.2d 226, 232, 654 P.2d 673 (1982).

No abuse of discretion exists when it cannot be shown that the challenging party was prejudiced by the court's ruling. See, Lagele v. Frederick, 43 Wn.2d 410, 261 P.2d 699 (1953). The trial court may limit

discovery that is irrelevant, inefficient or constitutes a waste of time in terms of resolving the dispositive issues in a given case. Id.; see also, CR 26(b)(1) and 26(c).

D. ARGUMENT IN RESPONSE

1. Counter-issue no. 1. Contrary to the assertions of RENE M. VERCOE, petitioner and appellant herein, the court commissioner never applied CR 12(b)(6) to this case when summarily dismissing her petition to modify spousal maintenance. In fact, that particular court rule never once shows up in the record before the court commissioner. Instead, the record on appeal clearly reflects the commissioner did, in fact, address the motion to dismiss of respondent, MICHAEL D. MILLER, under the principles of CR 56 as to the precise legal issue posed under the doctrine of res judicata. Needless to say, even though the commissioner ultimately determined the respondent's motion should be granted insofar as Ms. VERCOE'S petition posed no significant, unknown or unanticipated, change in circumstances posed by the wife in terms of the stated basis and theory upon which her petition rested, this action of the commissioner was once more consistent with the application of CR 56 to this case. [CP 13-14; 385-90]. Suffice it to say, a petition under RCW 26.09.170(1) poses purely a question of law to extent the court commissioner has no authority whatsoever to modify or change even the court's own decree in the absence of conditions warranting reopening, adjustment or modification of

the original decree of spousal maintenance. Kern v. Kern, 28 Wn.2d 617. 619, 183 P.2d 811 (1947).

While Ms. VERCOE relies quite heavily upon the decision in In re Marriage of Myers, 54 Wn.App. 233, 773 P.2d 118 (1989), that case is not dispositive nor does it support her claim of change circumstances warranting modification of the superior court's original decree of dissolution in terms of spousal maintenance. [CP 3]. In essence, her reliance thereon is totally misplaced.

First, Myers involved a Chapter 9 bankruptcy rather than a Chapter 13 filing for re-organization such as was the case in Mr. MILLER's bankruptcy filing. [RP 20-22, 24]. By the same measure, the respondent continued to honor his maintenance obligation throughout the bankruptcy process and beyond, whereas the husband in Myers was discharged from such obligation. Second, and dispositive of the appellant's undue reliance on Myers, that case did not encompass a creditor's claim such as Ms. VERCOE's claim no. 7, nor was there any stipulation or settlement of the same. Third, the court commissioner correctly stated that debt and the negative effect upon the Ms. VERCOE's credit was already a reality when the decree of dissolution was entered. [CP 389-90]. Finally, the court in Myers was not faced with an issue of a settlement beforehand and, thus, res judicata was not an issue or factor in Myers. Lastly, Ms. VERCOE never provided any evidence that her ability to find work was impacted by any credit issues.

Suffice it to say, the decision of the court commissioner which was affirmed on revision can be upheld on the separate basis of res judicata. It is axiomatic that a judgment of the trial court can be sustained on any theory within the pleadings and the proof. Northwest Collectors, Inc. v. Enders, 74 Wn.2d 585, 595, 446 P.2d 200 (1968). Lundberg v. Corporation of Catholic Archbishop, 55 Wn.2d 77, 85, 346 P.2d 164 (1959); Knisely v. Burke Concrete Accessories, Inc., 2 Wn.App. 533, 540-41, 468 p.2d 717 (1970); Stark v. Allis-Chalmers, 2 Wn.app. 399, 404, 467 P.2d 854 (1970). In sum, Myers is simply not germane to this case.

Contrary to any misguided suggestion of the appellant, Ms. VERCOE's claim regarding damaged credit is precluded by the stipulation and settlement entered in Mr. MILLER's bankruptcy thus, there was no basis to modify the maintenance, and accordingly, said respondent was entitled to judgment as a matter of law. The doctrine of res judicata prohibits the re-litigation of claims that were actually litigated, settled, or might have been so resolved in a prior proceeding. Pederson v. Potter, 103 Wn.App. 62, 69, 11 P.3d 833 (2000).

The doctrine has four elements including "identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made." Id. Furthermore, and contrary to any assertion of the appellant, the doctrine applies with full force in bankruptcy

proceedings. Woodley v. Myers Capital Corp., 67 Wn.App. 328, 336, 835 P.2d 239 (1992). The fact a bankruptcy case occurs in federal court does not in any way deprive the Washington state courts of jurisdiction over questions related to res judicata. Id. In effect, the state courts are bound by judgments issued by the federal courts, and the resulting effects of such judgments, in terms of full faith and credit including the preclusion of claims associated with such judgments. Id.; see also, 28 U.S.C. § 1738.

Under CR 56(c), summary judgment will be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits and other competent, admissible evidence, show (1) there is no genuine issue of material fact in dispute and (2) the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 p.2d 1030 (1982). A material fact is one upon which the litigation depends either in whole or in part. Morris v. McNichol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974); see also, Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Where the relevant and material facts are not in dispute, as is certainly true in this case as reflected in the March 14 and April 4, 2013, proceedings before the court commissioner [CP 382, 384-86] the court is authorized to then treat the motion as being one purely legal in nature and is entitled to proceed with summary judgment on this basis. See generally, Firth v. Lu, 103 Wn.App. 267, 278-79, 12 P.3d 618 (2000).

Again, the standard of review in this instance remains the same in terms of de novo review. Bjarnson, v. Kitsap Cy., 78 Wn.App. 840, 844, 899 P.2d 1290 (1995).

In rendering its decision, the court was also fully entitled to take into account the parties' stipulation and settlement of Ms. VERCOE's creditor's claim no. 7 as to her alleged impaired credit as well as take judicial notice that her credit was already impaired when the May 14, 2010, decree was entered [CP 1-7, 384, 385-90]. Gain v. Carroll Mill Co., 114 Wn.2d 254, 787 P.2d 533 (1990); Am. Universal ins. Co. v. Ransom, 59 Wn.2d 811, 816, 370 P.2d 867 (1962).

Finally, as demonstrated by the record, once a prima facie showing had been made by Mr. MILLER so as to warrant summary judgment [CP 382, 384, 385-90], Ms. VERCOE was no longer entitled to rely on the bare allegations that she had a viable claim in terms of changed circumstances for purposes of invoking RCW 26.09.170(1). CR 56(e); Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989); Baldwin v. Sisters of Providence, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1998). As the record reflects she was afforded this opportunity to respond [CP 384], but her responsive memorandum [CP 361-65] fails to met her burden under CR 56(e). [CP 386-90].

Ultimately, summary judgment will be subject to affirmance when all reasonable persons could reach but one conclusion, that summary judgment was proper. Ranger Ins. Co. V. Pierce County, 164 Wn.2d 545,

552, 192 P.3d 886 (2008); Wilson, at 437; Morris, at 494-95; Condor Enters., Inc. v. Boise Cascade Corp., 71 Wn.App. 48, 856 P.2d 713 (1993). Contrary to the appellant's various claims, the record on appeal is devoid of any reasonable inference which could drawn in a light most favorable to her as nonmoving party so as to avoid summary judgment in this case. See generally, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Accordingly, the decisions of the superior court should be affirmed on this appeal. See, RAP 12.2.

2. Counter-issues nos. 2 and 3. Contrary to the unsustainable claims of Ms. VERCOE, the record reflects that the court commissioner did, in fact, afford her the chance to respond and present legal argument in opposition to Mr. MILLER's motion to dismiss concerning the bar of res judicata [CP 384]. In fact, the record also reflects she availed herself of this opportunity by filing a "responsive memorandum" on April 1, 2013. [CP 361-65].

Simply put, her claim that she was deprived of due process prior to the April 4 hearing is totally disingenuous. The trial court has wide discretion in terming whether or not evidence will be admitted or excluded during the course of a hearing or at trial. State v. Wilson, 60 Wn.App. 887, 890, 808 P.2d 754, review denied, 117 Wn.2d 1010 (1991). Likewise, to the extent, she is also claiming the commissioner improperly limited discovery by putting on hold her requested discovery and motion to compel prior to resolution of the issue of procedural bar [CP 382-83], it

cannot be said any manifest abuse of discretion can be said to have occurred in this regard. See, Lagele v. Frederick, 43 Wn.2d 410, 261 P.2d 699 (1953). Decisions concerning the nature, extent and timing of discovery and are afforded great difference on appeal. See, Lang v. Dental Quality Assurance Comm'n, 138 Wn.App. 235, 254, 156 P.3d 919 (2007), review denied, 162 Wn.2d 1021 (2008); State v. Montgomery, 93 Wn.App. 192, 198, 974 P.2d 904 (1999); State v. Young, 62 Wn.App. 895, 902-03, 817 P.2d 412 (1987); State v. McKinney, 50 Wn.App. 56, 61, 747 P.2d 1113 (1988). The court has broad discretion under CR 26 to manage the discovery process and, if necessary limit or continuance discovery to an appropriate time. See, CR 26(b) and (c); see also, Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 232, 654 P.2d 673 (1982), aff'd, 467 U.s. 20, 81 L.Ed.2d 17, 104 S.Ct. 2199 (1984); see also, Lang, at 254; Howard v. Royal Specialty Underwriting, Inc., 121 Wn.App. 373, 89 P.3d 265 (2004).

In short, Ms. VERCOE had no right to discover, or present thereafter at hearing, evidence that was irrelevant and immaterial to the issue at hand. Said evidence and discovery would have constituted a total waste of time at that particular juncture in terms of resolving the dispositive issue whether the basis for her petition in terms of her claim of impaired credit had been relinquished by her earlier stipulation and award of damages of \$15,500 in the context of Mr. MILLER's bankruptcy. Lagele v. Frederick, supra. Thus, the trial court was well within its

authority, discretion and prerogative to exclude such proposed evidence of Ms. VERCOE as to the legal issue at hand involving res judicata. Id. In sum, there was no manifest abuse of discretion as the appellant now frivolously claims. State ex rel. Carroll v. Junker, 70 Wn.2d 12, 26, 482 P.2d 775 (1971).

3. Counter-claim no. 4. Ms. VERCOE's claims that the court commissioner looked beyond the evidence and made findings which were not supported by the evidence clearly presents a non-issue in this instance. [See, "Brief of the Appellant," at page 2]. First, the trial court is fully authorized to consider matters not specifically mentioned in CR 56(c), or not otherwise raised by the parties, including stipulations and matters subject to judicial notice including the court's prior orders and decrees. See, Gain v. Carroll Mill Co., 114 Wn.2d 254, 787 P.2d 533 (1990); Am. Universal ins. Co. v. Ransom, 59 Wn.2d 811, 816, 370 P.2d 867 (1962). By the same measure, the court has inherent authority to raise an issue sui sponte and rest its decision on that dispositive issue even though not briefed or argued by the parties. State v. Aho, 137 Wn.2d 736, 741, 975 P.2d 512 (1999); see also, City of Seattle v. McCready, 123 Wn.2d 260, 269, 868 P.2d 134 (1994). This is particularly true when the dispositive issue at hand is purely legal in nature. Id.

Second, contrary to Ms. VERCOE's unsupported claim, the court commissioner did not enter any formal, written findings in this case. Even if it had, such findings would be superfluous since, and thus, non-

prejudicial and non-binding on the appellate court, because summary judgment may only be entered when there are, in fact, no genuine issues of material fact. See, Telford v. Thurston Cy. Bd of Comm'rs, 95 Wn.App. 149, 974 P.2d 886, review denied, 138 Wn.2d 1015 (1999); see also, Gwinn v. Church of Nazarene, 66 Wn.2d 838, 405 P.2d 602 (1965).

Finally, even if the commissioner had entered formal, written findings of fact, those factual findings would now be considered verities in terms of this appeal insofar as Ms. VERCOE's failed to identify and assign a separate and concise statement of error, as required under RAP 10.3(a)(4) and RAP 10.4(c), to each of the challenged "findings" of court commissioner. [See, "brief of the Appellant," at page 1].

4. Counter-issue no. 5. As a final procedural matter, it is Mr. MILLER's position that the May 10, 2013, decision and final ruling of the superior court on revision should now be considered conclusive of all issues and matters on this appeal. Simply put, Ms. VERCOE failed to raise and address the assignment of error no. 6 with appropriate argument as required by RAP 10.3(a)(6). Such failure should be considered a waiver of that particular assignment of error by the appellant. ["Brief of the Appellant," at page 1].

E. REQUEST FOR AWARD OF ATTORNEY FEES

It is a long-standing rule of law in Washington state that a party is entitled to recovery of his reasonable attorney fees when a statute, contract or recognized ground in equity allows for recoupment of the same. See,

Panorama Village Condominium Owners Association Board of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Insofar as the present appeal (1) is clearly frivolous and totally devoid of any merit, (2) constitutes a classic example of abuse of process and failure to undertake a reasonable investigation prior to suit, (3) has been further interposed in bad faith in terms of appellant's misrepresentations of fact and attempt to re-litigate a previously settled and resolved claim, and (4) is simply being brought to further harass Mr. MILLER and cause delay, an award of reasonable attorney's fees against Ms. VERCOE and her attorney is fully warranted under RCW 4.84.185 and CR 11. See also, RAP 18.9(a); Green v. Normandy Park Riviera Section Community Club, Inc., 137 Wn.App. 665, 678-81 & n.9, 151 P.3d 1038 (2007). In sum, Ms. VERCOE should not be allowed to pursue, without consequences, this "ongoing personal vendetta against" her former husband. [RP 17, 26].

F. CONCLUSION

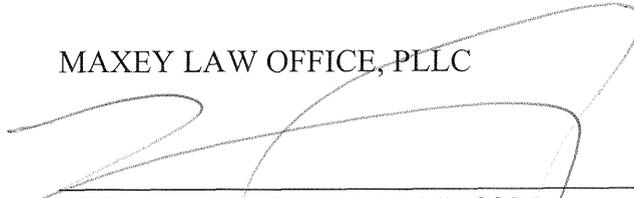
Based upon the foregoing points and authorities, respondent, MICHAEL D. MILLER, respectfully requests that, in accordance with the authority of this court under RAP 12.2, the challenged decisions of the superior court of Spokane County, State of Washington, be affirmed on this appeal and that, as contemplated under RAP 18.9(a), said respondent be awarded his costs, including a reasonable attorney, on this appeal insofar as he has been forced and compelled to defend against this frivolous and totally unjustified appeal. In sum, under the indisputable

facts presented in this appeal, Ms. VERCOE has without question failed to establish any substantial change in circumstances supporting her petition to modify maintenance as mandated under RCW 26.09.170(1).

DATED this 28th day of January, 2014.

Respectfully submitted:

MAXEY LAW OFFICE, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Bevan J. Maxey', is written over a horizontal line.

BEVAN J. MAXEY, WSBA# 13827
Attorney for MICHAEL D. MILLER