

**The Governor's Council for Judicial Appointments**

**State of Tennessee**

***Application for Nomination to Judicial Office***

Name: Robert A. Wampler

Office Address:  
(including  
county)150 Court  
Avenue, Memphis,  
TN 38173-0410  
Shelby

Office Phone: 901 523-1844

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**INTRODUCTION**

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website [www.tncourts.gov](http://www.tncourts.gov)). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to [debra.hayes@tncourts.gov](mailto:debra.hayes@tncourts.gov), or via another digital storage device such as

flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

Wampler & Pierce P.C., Attorneys at Law

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1972 BPR #7559

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Mississippi, July 7, 1980, Bar #6935. Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Private practice of law in Tennessee since 1972. Always self-employed. Part time prosecutor Olive Branch, MS; Co-owner of Overton Chapel, a rental venue in Memphis, TN; also own a 200 acre wildlife conservation area in Waterford, Mississippi.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The nature of the practice is civil litigation. 50% domestic relations; 50% contract and other civil litigation

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My primary experience has been in the trial courts of Shelby County Tennessee. The first 15 years of practice were devoted primarily to criminal defense in the trial courts of Shelby County, Tennessee. I have argued matters in the Western District of Tennessee Appellate Court, and on one occasion in the Tennessee Supreme Court. I have represented people and companies in the trial courts of Shelby County, Tennessee, and have represented civil and criminal defendants in the Federal Court for the Western Division, Western District of Tennessee. I have argued a case before the 6<sup>th</sup> Circuit Court of Appeals and successfully reversed the Federal Trial Court before the 6<sup>th</sup> Circuit.

I am admitted to the Supreme Court of the United States, the Supreme Court of Tennessee, The Supreme Court of Mississippi, the Federal Appellate Courts, The Tennessee and Mississippi Appellate Courts and the Tax Court of the United States.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

A often quoted case in which I was involved is Ahern v. Ahern, 15 S. W. 3<sup>rd</sup> 73 (2000) and Bernatsky v. Designer Baths & Kitchens, LLC W2012 00803-COA-R3-CV

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was at one time a certified mediator however I am no longer. I have served as special master in the Chancery Court of Shelby County, Tennessee. I have been appointed guardian ad litem in Circuit Court of Shelby County, Tennessee. I was appointed to review the fiduciary bond of the Chancery Court Clerk. All the cases in which I am involved are noteworthy so there is not one more important than another.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as guardian ad litem.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I have had 42 years of dealing with antiquated judicial practices in our trial courts. I have seen the public incurring expense for judges that do not want to be on time; taking excessive recesses while litigants and counsel waited; judges not being prepared from matters brought before them; and long and unnecessary delays in announcing judgments. I believe that the trial courts can and should run more efficiently to actually serve the public.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not Applicable

**EDUCATION**

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Memphis BBA 1969; University of Memphis School of Law JD 1972

**PERSONAL INFORMATION**

15. State your age and date of birth.

68 Years of Age, October 11, 1947

16. How long have you lived continuously in the State of Tennessee?

Lived in Tennessee 27 years before moving to Mississippi; Have now lived in Tennessee since 2008.

17. How long have you lived continuously in the county where you are now living?

Since 2008

18. State the county in which you are registered to vote.

Shelby County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not Applicable

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any

law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

One. Approximately 10 years ago. Dismissed. Board of Professional Responsibility. Client complaint regarding a CPA's report/testimony, which she personally employed.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

NO

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Ruch v. Wampler & Pierce P.C.; Pierce Wampler Realty Company and Robert Wampler. Shelby Circuit #00-0052-14. Employee slipped on ice in our parking lot and alleged that I was at fault.

The occurred during the morning of winter weather advisory. I was not even at the office that day; I was in court in Olive Branch, Mississippi.

Also I have been divorced twice. Once in approximately 1994 in Desoto County, Mississippi; and once in 2007 in Desoto County Mississippi. Do not have docket numbers. Both were uncentested.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Tennessee Bar Association; Mississippi Prosecutor's Association; Christ Community Church

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues. No

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Not Applicable

### ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association; Mississippi Bar; University of Memphis Society of the Shield.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Chairman of Memphis Bar Association Professionalism Committee, 2007



30. List the citations of any legal articles or books you have published.

None

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Judge of Division II of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis; 2014. Elective.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached to mailed copy.

### **ESSAYS/PERSONAL STATEMENTS**

35. What are your reasons for seeking this position? *(150 words or less)*

To make the trial courts of Shelby County more efficient which in turn should benefit the public with lower legal cost.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

Have taken a few cases from Memphis Area Legal Services; Legal advisor to home owner's association; Generally not much pro bono. I have established four (4) scholarships at the

University of Memphis School of Law and one (1) scholarship for undergraduates at the University of Memphis

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

Division III of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis; the geographic area is Shelby County; the types of cases are civil. There are currently 8 judges with 9 positions. I would try to streamline some of the court's procedures such as not having oral argument on every motion; doing away with jury calls; eliminating tardiness opening court; requiring written stipulations of counsel to be used as evidence of matters upon which they agree; specially scheduling motions that need oral argument; not accepting parties, gifts, or other gratuities from members of the bar.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

None, unless it is purely for a legitimate whole community purpose. I think the independence of the court is essential.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

The only "talent" I can think of is that I am direct and to the point. I have worked all of my life, since I was 14 and believe I understand most facets of life.. Further, I think the courts should mentor young lawyers rather than embarrass them in open court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

I am a textualist. I would apply the law as passed and written by our legislature. I would not apply the law as I wanted it to be, but exactly how it was written. It is up to the legislature to make the law, not the courts.

#### REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least

two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. John Colton, Retire Criminal Court Judge,
B. James McGarrh, Municipal Court Judge
C. Jack Yacoubian, Jeweler
D. Randall Pierce, Retired Attorney
E. Mary Anderson, Circuit Court Clerk

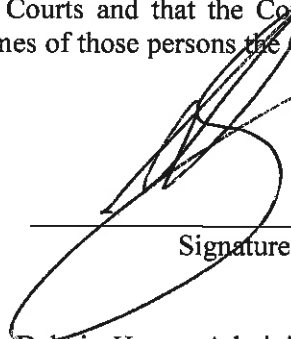
**AFFIRMATION CONCERNING APPLICATION**

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court]Circuit Court Div. III Shelby County Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: Nov. 15, 2015.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS  
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600  
NASHVILLE CITY CENTER  
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY  
TENNESSEE BOARD OF JUDICIAL CONDUCT  
AND OTHER LICENSING BOARDS**

**WAIVER OF CONFIDENTIALITY**

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Robert A. Wampler  
Type or Print Name

[Signature]  
Signature

11-18-2015  
Date

# 7559  
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.


IN THE CIRCUIT COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

FILED  
2015  
CIRCUIT COURT CLERK  
BY \_\_\_\_\_ D.C.

**INCENTIVE TRANSPORTATION, INC.,**

**Plaintiff/Counter-Defendant**

**No.: CT 00 3312 14**

**Div.: VI**

**Vs. ENOBLE, INC. D/B/A/ NBT**

**Defendant/Counter-Plaintiff**

**ENOBLE, INC., d/b/a NBT,**

**Defendant/Counter-Plaintiff**

**Vs.**

**INCENTIVE TRANSPORTATION, INC.,**

**Plaintiff/Counter-Defendant**

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**PLAINTIFF'S MEMORANDA IN OPPOSITION  
TO THE GRANTING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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Comes now the Plaintiff, Incentive Transportation, Inc., and submits this memoranda in opposition to the granting of Defendant's Motion for Summary Judgment, heard on May 13, 2015, to-wit:

References to the transcript of the motion hearing (transcript has been filed with Court) will be by page (Pg.) and Line (L) number.

The parties will be referred to as Incentive (Plaintiff) and Enoble (Defendant).

The Defendant's Motion for Summary Judgment will be referred to as the "Motion".

**ISSUES**

1. UPON WHAT BASIS WAS THE MOTION GRANTED?
2. IS THERE A GENIUNE ISSUE AS TO A MATERIAL FACT FOR THE COURT TO DETERMINE BY TRIAL?

3. MUST THE COURT FIND A GENINUE BASIS FOR THE JUDGMENT REQUESTED BY A PERPONDERANCE OF THE EVIDENCE REGARDLESS OF COMPLIANCE WITH RULE 56 OF T.R.C.P.,

### **SUMMARY OF HOW THE MATTER GOT TO CIRCUIT COURT**

The plaintiff, Incentive Transportation Serv., Inc., sued the defendant, National Banker's Trust Corporation for failure to remit sums pursusant to an equity line of credit and for attorney's fees in Shelby General Sessions #1640964.

The defendant, as counter-plaintiff sued the plaintiff as counter-defendant but naming the counter-plaintiff as Enoble, Inc., d/b/a NBT (believed to be National Banker's Trust Corporation) for failure to remit sums due under equity credit line.

The matters were heard before the General Sessions Court and the plaintiff was granted a money judgement in excess of \$10,000, and the defendant's counter claim was dismissed.

The defendant then appealed the cause to this Court.

### **FACTS**

The first issue is the basis upon which the Court granted Enoble's Motion for Summary Judgment.

The Court determined that the failure of the Plaintiff to comply with Rule 56.06 of the T.R.C.P. was , in fact the basis for the granting of the Motion, without reference to the facts alleged in the pleading filed by the moving party (P35,L15).

However, upon a textual reading of the Rule, the Motion must be "appropriate". In other words, the Motion, the Statement of Undisputed Fact and any affidavits must convince the Court that there is no issue of any material fact and the movant is entitled to judgment as a matter of law. In other words, do the pleadings attendant to the motion for summary judgment prove by a preponderance of the evidence that the moving party is entitled to a judgment.

In particular in this case, those pleadings must show factually that the judgment against Enoble in the lower court has no material facts in dispute upon which the court granted plaintiff a judgment, and that Enoble is entitled to a judgement against the plaintiff on it's General Sessions counter-complaint even though the lower court dismissed it's claim.

Although taken to the extreme, suppose the moving party's pleading alleged that the sun was shining and the respondent filed no responsive pleading. Court the court then look only to the compliance and/or non-compliance with Rule 56 T.R.C.P. and grant the moving party a money judgment without reviewing the existing pleadings an determining whether there was in fact a genuine basis for the judgment requested.

The calculation of the amount of \$4526.91, which was the judgment, granted cannot be calculated from the Statement of Undisputed Facts.

Paragraph 28 of that documents makes a allegation that the amount is due as the sum of some transactions with Incentive, however that amount cannot be accurately calculated from the statement.

In fact there is absolutely no mention in the statement regarding the lower court's award of the plaintiff's judgment against Enoble in the amount in excess of \$10,000. Therefore, at a minimum there should be no summary judgment as to that suit.

The Court pointed out that the Incentive did not file any affidavits. Rule 56.02 does not require any affidavits from the defending party (P35,L10).

Counsel for Incentive requested a continuance of the case on or about May 9, 2015 in that he had just gotten employed. The Court would not reset the trial date which was set for May 13, 2015, which was 3 business days after the request, not counting the week-end. There was no mention of the Motion being set for the same day. Counsel was ready to go to trial and his client had flown in from California for the trial. Instead the Court heard the Motion for Summary Judgment.



Rule 56.03 of the T.R.C.P. allows 5 days before the hearing date for counsel to file a response to the Statement of Undisputed Facts.

If the weekend is counted it was 4 days and therefore it would have been impossible for new counsel to comply with the rule.

It should also be noted that part of the money judgment that the court was inclined to give to Enoble consisted of multiple "\$35.00 missing proof of delivery of document fees" when there is no contractual document between the parties that would obligate Incentive to pay that amount. That fact would have been discovered had the Court reviewed those documents prior to ruling, (the copies of the purported agreements between the parties attached to the Statement of Undisputed Facts are unreadable on the copies furnished Incentive.)

Further there is no evidence upon which the Court could determine that Enoble d/b/a National Banker's Trust Corporation had any authority to litigate any of the contractual commitments of NBT.

#### **LAW**

Where a dispute exists as to facts which are deemed material by the trial court, or where there is uncertainty as to whether there may be such a dispute, the duty of the trial court is to overrule any motion for summary judgment because summary judgment proceedings are not in any sense to be viewed as a substitute for a trial of the disputed factual issues. Hibbon v. Grabowski, 2005, 195 S. W. 3d 48

Courts reviewing summary judgment motions must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Davis v. Campbell, 2001, 48 S. W. 3d 741.

#### **CONCLUSION**

The Statement of Undisputed Fact filed by the moving party makes a lot of allegations but fails to state exactly why the Court should grant a summary judgment because the amount sought cannot be calculated from the pleadings or the exhibits. Further, there is no mention as to the

judgment that was recovered by the original plaintiff which was likewise appealed by the moving party. Finally, there is no explanation supported by documentation as to why or how Enoble was substituted as the real party in interest in these proceedings.

For these reasons, the Motion for Summary Judgment should be overruled and the matter set for trial.

RESPECTFULLY SUBMITTED

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ROBERT A. WAMPLER #7559  
ATTORNEY FOR PLAINTIFF  
P O BOX 3410  
MEMPHIS, TN. 38173-0410  
901 523-1844

CERTIFICATE OF SERVICE

I, THE UNDERSIGNED ATTORNEY, CERTIFY THAT I HAVE FORWARDED A COPY OF THIS PLEADING VIA U S MAIL AND FAX TO ADVERSARY COUNSEL THIS \_\_\_ DAY OF AUGUST 2015.

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ROBERT A. WAMPLER

IN THE SUPREME COURT OF TENNESSEE

KAREN ABRAMS MALKIN,

APPELLANT/RESPONDENT

VS.

NO.: \_\_\_\_\_  
NO.: W2014-00127-COA-R3-CV

REED LYNN MALKIN

APPELLEE/ PETITIONER

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APPLICATION FOR PERMISSION TO APPEAL

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Respectfully submitted:

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Robert A. Wampler, #7559  
Attorney for Petitioner  
150 Court Avenue  
P.O. Box 3410  
Memphis, TN 38173-0410  
901 523-1844

IN THE SUPREME COURT OF TENNESSEE

KAREN ABRAMS MALKIN,

APPELLANT/RESPONDENT

VS.

NO.: \_\_\_\_\_  
NO.: W2014-00127-COA-R3-CV

REED LYNN MALKIN

APPELLEE/ PETITIONER

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APPLICATION FOR PERMISSION TO APPEAL

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Comes now the Appellee/Petitioner, Reed Lynn Malkin, through counsel of record, and pursuant to **Rule 11 of the Tennessee Rules of Appellate Procedure** respectfully makes application to this Court for permission to appeal the Order of the Court of Appeals entered April 10, 2015 (**Exhibit 1**) denying the unopposed Motion of Petitioner to Rehear (**Exhibit 2**) the judgment of the Court of Appeals entered March 26<sup>th</sup> 2015 (**Exhibit 3**), requesting the Appellate Court to remand the Petition to Modify Alimony in Futuro rather than the dismissal of the Appellee's Petition to Modify Alimony in Futuro. After due diligence and research, this appears to be a matter of first impression in the state of Tennessee.

QUESTION PRESENTED FOR REVIEW

**SHOULD THE COURT OF APPEALS HAVE DISMISSED THE PETITIONER'S PETITION FOR MODIFICATION, OR REMAND THE PETITION FOR FURTHER PROOF CONSISTENT WITH T.C.A. 36-5-121(I).**

FACTS

The Opinion of the Court of Appeals found that the Chancellor had committed error in applying a percentage downward adjustment consistent with the decrease in income of the Petitioner at his retirement (specifically, a mathematical error in the calculation of the percentage reduction of Petitioner's income due to retirement and business factors) regarding the Petitioner's alimony in futuro obligation instead of utilizing the criteria in **T.C.A. 36-5-121(i)**. The Petitioner's income had decreased by two-thirds after his retirement, and therefore the Trial Court reduced the Petitioner's alimony obligation by two-thirds.

The Court of Appeals did find two substantial and material changes of circumstances that may have otherwise entitled the Petitioner to a reduction in his alimony in futuro obligation if the Chancellor had employed the correct analysis.

Those changes in circumstances were 1) the Respondent (recipient of the alimony) was receiving a net of approximately \$1,150.00 in social security benefits per month which she was not receiving at the time the current alimony obligation was set (Pg.11) and 2) the Petitioner's retirement was reasonable based on foreseeable and unforeseeable circumstances and constituted a substantial and material change in the Petitioner's circumstances. The Petitioner's alimony obligation was reduced due to the facts that he had beyond retirement age (he was 67), the area of his practice had significantly diminished over the years, and he had not done mediation in months. Further, although the Chancellor applied the wrong criteria in reducing the alimony, the Court of Appeals did not find any abuse of discretion by the Chancellor in his ruling. (Pg. 11).

That the Court of Appeal's dismissal of the original modification petition denies the Petitioner the ability to assert the "material change of circumstances" that may entitle him to a reduction in his alimony payment when the trial court applies the correct analysis to determine whether the Petition for Modification has merit.

### **LAW IN SUPPORT OF APPLICATION**

Counsel for the Petitioner can find no Tennessee case or statute, which sets out objective criteria to guide appellate courts and counsel in determining whether a matter should be dismissed or remanded.

There needs to be criteria for uniformity of decision for that determination by the appellate courts and for counsel in exercising judgment as to whether to appeal a matter from the trial court.

Whether a matter is dismissed or remanded is an important question of law for which there needs to be a certainty of objective criteria.

The question of when to remand or dismiss exhibits the need for this Honorable Court to exercise supervisory authority.

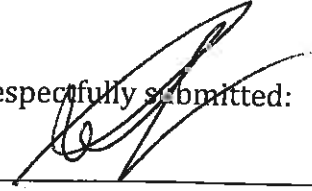
Further, from a textual reading of **T.C.A. 27-3-128**, the legislature has mandated that "the Court" without specific definition, when, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties or oversight without culpable negligence remand the cause for the court below for further proceedings. It is nowhere asserted that the Petitioner is in any way "culpably negligence", but rather it was the trial court that the Appellate

Court found applied incorrect criteria, accordingly this cause should be remanded for the correct analysis to be applied by the Trial Court, and not simply dismissed.

**RELIEF REQUESTED**

The question of whether a matter before the Appellate Court should be dismissed or remanded is one that apparently had not been definitively answered by Tennessee Courts. These issues meet the criteria of **Rule 11 (a) (1)(2)(3) &(4)** of the Tennessee Rules of Appellate Procedure and the Petitioner should be granted permission to appeal the Court of Appeal's opinion of March 26, 2015 and April 10, 2015 to this Honorable Court.

Respectfully submitted:

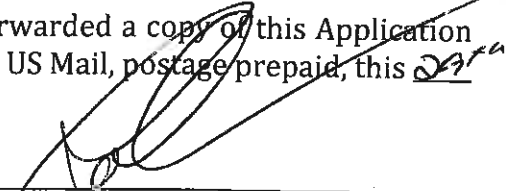


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Robert A. Wampler, #7559  
Attorney for Petitioner  
150 Court Avenue  
P O Box 3410  
Memphis, TN 38173-0410  
901 523-1844

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, that I have forwarded a copy of this Application for Permission to Appeal to adversary counsel via US Mail, postage prepaid, this 29<sup>th</sup> day of May, 2015



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Robert A. Wampler

**IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON**

**KAREN ABRAMS MALKIN v. REED LYNN MALKIN**

**Shelby County Chancery Court  
D27924**

**No. W2014-00127-COA-R3-CV**

**Date Printed: 04/10/2015**

**Notice / Filed Date: 04/10/2015**

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**NOTICE - Order - Petition to Rehear Denied**

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The Appellate Court Clerk's Office has entered the above action.

If you wish to file an application for permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and six copies with the Appellate Court Clerk. The application must be filed "within 60 days after the denial of the petition or entry of the judgment on rehearing." **NO EXTENSIONS WILL BE GRANTED.**

James M. Hivner  
Clerk of the Appellate Courts



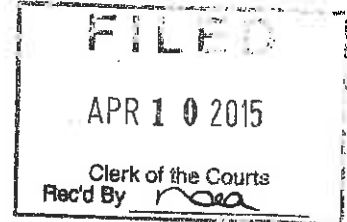


IN THE COURT OF APPEALS OF TENNESSEE  
AT MEMPHIS

**KAREN ABRAMS MALKIN v. REED LYNN MALKIN**

Chancery Court for Shelby County  
No. D27924

\_\_\_\_\_  
No. W2014-00127-COA-R3-CV  
\_\_\_\_\_



**ORDER**

The Appellee, Reed Lynn Malkin, has filed a Petition for Rehearing in this matter. After due consideration, the petition is denied.

Costs are taxed to the Appellee, Reed Lynn Malkin, for which execution may issue if necessary. **It is SO ORDERED.**

**PER CURIAM**

IN THE CHANCERY COURT OF TENNESSEE FOR THE  
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

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KAREN ABRAMS MALKIN,

Respondent,

v.

No.: 27924-1

REED LYNN MALKIN,

Petitioner.

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PETITIONER'S MOTION TO SET INSTALLMENT PAYMENTS

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COMES NOW your movant, REED LYNN MALKIN, by and through counsel of record, and respectfully requests an order establishing payment plan for the reinstated alimony in the amount of \$9,175, and in support would show:

1. On or about December 4, 2013, an Order on Petition for Modification of Alimony in Futuro modifying alimony from \$2870.00 to \$1035.00 per month, effective January 1, 2014.
2. On or about April 10, 2015, the Tennessee Court of Appeals reinstated the alimony amount back to \$2870.00 per month.
3. Petitioner would request a payment plan to pay the balance of \$31,195.00.

Respectfully submitted,

WAMPLER & PIERCE, P.C.



ROBERT A. WAMPLER #7559

Attorneys for Petitioner/Movant  
150 Court Avenue, 1<sup>st</sup> Floor  
Memphis, TN 38103  
901-523-1844

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing Motion has been forwarded via U.S. Mail, postage prepaid, this \_\_\_\_\_ day of May, 2015, to the following:

Lori R. Holyfield  
Attorney for Appellant  
2255 S. Germantown Road  
Germantown, TN 38138

and

2820 Summer Oaks Drive  
Bartlett, TN 38134

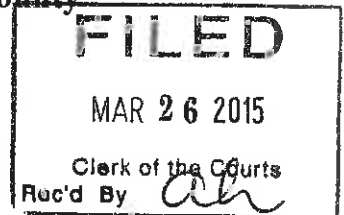
\_\_\_\_\_  
ROBERT A. WAMPLER

IN THE COURT OF APPEALS OF TENNESSEE  
AT MEMPHIS  
February 24, 2015 Session

**KAREN ABRAMS MALKIN v. REED LYNN MALKIN**

**Direct Appeal from the Chancery Court for Shelby County**  
**No. D27924 Walter L. Evans, Chancellor**

\_\_\_\_\_  
**No. W2014-00127-COA-R3-CV**  
\_\_\_\_\_



This appeal involves an obligor's petition to modify or terminate his alimony obligation due to his retirement. The trial court found that the obligor's income had decreased to approximately one-third of his previous income level, so the trial court reduced the alimony payments by a corresponding percentage, to roughly one-third of the previous obligation. The recipient appeals. We hold that the trial court applied an incorrect legal standard when considering the petition to modify and also erred in its factual findings. Based on our review of the evidence, the obligor failed to demonstrate that modification of his alimony obligation was warranted. Consequently, we reverse the trial court's decision, reinstate the previous alimony award, dismiss the petition for modification, and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded**

BRANDON O. GIBSON, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

Lori Renee Holyfield, Bartlett, Tennessee, for the appellant, Karen Abrams Malkin.

Sarah Johnson Carter and Robert Alan Wampler, Memphis, Tennessee, for the appellee, Reed Lynn Malkin.

**OPINION**

**I. FACTS & PROCEDURAL HISTORY**

Reed Lynn Malkin ("Husband") and Karen Abrams Malkin ("Wife") were married for approximately nineteen years before they were divorced on April 27, 1998. Wife was granted a divorce based on Husband's inappropriate marital conduct. Wife was also



granted custody of the parties' minor child. At the time of the divorce, Husband was a practicing attorney. It is not clear where Wife worked, but her social security earnings statement reflects that she earned \$21,349 in 1998. The statement also indicates that Wife earned no income between 1979 and 1987, which includes a lengthy period during the marriage. Regarding alimony, the final decree of divorce stated:

That the Court finds, after considering all of the relevant factors set forth in T.C.A. § 36-5-[121],<sup>1</sup> such as the length of the marriage, [Wife's] age, [Wife's] education, and other relevant factors, that she is so economically disadvantaged that rehabilitation is not feasible or possible, so that the Court awards [Wife] alimony in futuro in the sum of \$3,500 per month, which shall be paid beginning April 1, 1998, and the first of every month thereafter until her death or remarriage[.]

Five years after the divorce decree was entered, in 2003, Husband filed a petition to modify or terminate his alimony obligation. Husband claimed that he had experienced an 88% decrease in income from his law practice since the entry of the divorce decree, and he claimed that Wife had an earning capacity that would enable her to maintain a reasonable standard of living. Thus, Husband claimed that a substantial and material change in circumstances had occurred to warrant a reduction in his alimony obligation. Following a hearing, the trial court entered an order granting Husband's petition on January 20, 2004. The trial court found that Husband's income was approximately \$273,000 at the time of the divorce and that it had averaged \$221,894 during the past five years, for a reduction of 18 percent. The trial court also found that Wife's monthly expenses had decreased by approximately 25 percent (from \$6,248 to \$4,705). As a result, the trial court modified the final decree of divorce to reduce Husband's monthly alimony obligation by 18 percent, from \$3,500 to \$2,870, beginning February 1, 2004.

On February 22, 2007, Husband filed a petition for further modification or termination of his alimony obligation. In response, Wife filed a counter-petition to increase the alimony obligation. These petitions were litigated over the next three years. Husband filed an amended petition in 2009, and the trial court eventually heard all of the petitions over six days in late 2009. The trial court entered an order on April 12, 2010, describing the "numerous days of testimony" and "excessive amount of legal energy, talent, and expenses consumed and invested into this proceeding on both sides[.]" The court found that Husband's average income over the past five years from his law practice, interest, and dividends from investments was \$265,397.20, almost as much as he earned at the time of the divorce. The court found that Wife's "relevant monthly expenses" were approximately \$6,200 per month, again comparable to the amount that existed at the

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<sup>1</sup>The factors relevant to the alimony analysis are now found at Tennessee Code Annotated section 36-5-121 rather than section 36-5-101. We have cited to the current version of the statute to avoid confusion.

divorce. However, the court also found that Wife was “capable of working part-time” and was in fact earning about \$1,300 per month from part-time employment. The court also noted that Wife, age 64, was qualified to receive social security benefits. The court ultimately concluded that although Wife needed “continued financial support” from Husband, the alimony obligation “should not be disturbed considering the additional sources of income available to Former Wife” since the entry of the previous order setting support at \$2,870.

Husband filed the instant petition to modify three years later, on May 31, 2013. In this petition, Husband alleged that his income from his law practice had substantially decreased over the past five years and that he had recently retired. Husband stated that he was drawing social security and funds from pension. Husband also noted that Wife was drawing social security benefits. For these reasons, he claimed that his alimony obligation should be further reduced or terminated.

Following a hearing, the trial court entered an order on December 16, 2013, granting Husband’s petition and modifying the alimony obligation. The trial court found that Husband had retired and “suffered at least a 2/3’s decrease in income and therefore the alimony in futuro heretofore awarded should be modified to the sum of \$1,035.00 per month effective January 1, 2014.” Wife timely filed a notice of appeal.

## **II. ISSUES PRESENTED**

Wife presents the following issues, as slightly reworded, for review on appeal:

1. Did the trial court err in granting Husband’s petition for modification of alimony and/or in determining the appropriate amount of alimony that Husband should be required to pay under the facts of this case;
2. Should Wife be granted her reasonable attorney’s fees and costs incurred as a result of this appeal.

For the following reasons, we reverse the decision of the chancery court, reinstate the previous alimony award, dismiss the petition for modification, and remand for further proceedings.

## **III. STANDARD OF REVIEW**

“Because modification of a spousal support award is factually driven and calls for a careful balancing of numerous factors, a trial court’s decision to modify support

payments is given wide latitude within its range of discretion.” *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001) (quotations omitted). On appeal, we are “generally disinclined to second-guess a trial judge’s spousal support decision.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). “[T]he role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.” *Id.* (citing *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). We will find an abuse of discretion “when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.” *Id.* (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010)).

#### IV. DISCUSSION

This case involves an award of alimony in futuro. This type of alimony “is intended to provide support on a long-term basis until the death or remarriage of the recipient.” *Gonsewski*, 350 S.W.3d at 107 (citing Tenn. Code Ann. § 36-5-121(f)(1)). Alimony in futuro can be awarded “when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible.” Tenn. Code Ann. § 36-5-121(f)(1). In other words, alimony in futuro is appropriate when one spouse “is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse’s standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse[.]” Tenn. Code Ann. § 36-5-121(f)(1).<sup>2</sup>

An award of alimony in futuro remains in the court’s control for the duration of the award and “may be increased, decreased, terminated, extended, or otherwise

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<sup>2</sup>In *Gonsewski*, the Tennessee Supreme Court explained that

Alimony in futuro “is not, however, a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse.” *Riggs [v. Riggs]*, 250 S.W.3d 453, 456 n. 2 (Tenn. Ct. App. 2007)]. In many instances, the parties’ assets and incomes simply will not permit them to achieve the same standard of living after the divorce as they enjoyed during the marriage. *Robertson [v. Robertson]*, 76 S.W.3d 337, 340 (Tenn. 2002)]. While enabling the spouse with less income “to maintain the pre-divorce lifestyle is a laudable goal,” the reality is that “[t]wo persons living separately incur more expenses than two persons living together.” *Kinard [v. Kinard]*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)]. “Thus, in most divorce cases it is unlikely that both parties will be able to maintain their pre-divorce lifestyle....” *Id.*

*Gonsewski*, 350 S.W.3d at 108.

modified, upon a showing of substantial and material change in circumstances.” Tenn. Code Ann. § 36-5-121(f)(2)(A). The party seeking modification of the alimony award “bears the burden of proving that a substantial and material change in circumstances has occurred.” *Wiser v. Wiser*, 339 S.W.3d 1, 12 (Tenn. Ct. App. 2010) (citing *Freeman v. Freeman*, 147 S.W.3d 234, 239 (Tenn. Ct. App. 2003)). “[W]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court.” *Bogan*, 60 S.W.3d at 727 (quoting *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)).

It is well-settled that “when an obligor’s retirement is objectively reasonable, it does constitute a substantial and material change in circumstances - - irrespective of whether the retirement was foreseeable or voluntary - - so as to permit modification of the support obligation.” *Bogan*, 60 S.W.3d at 729. However, it is equally clear that “an obligor cannot merely utter the word ‘retirement’ and expect an automatic finding of a substantial and material change in circumstances. Rather, the trial court should examine the totality of the circumstances surrounding the retirement to ensure that it is objectively reasonable.” *Id.* In the case before us, the trial court found that Husband “retired at sixty seven (67) years of age from the practice of law,” but the court did not make any finding regarding whether Husband’s retirement was objectively reasonable. On appeal, Wife seems to imply that Husband’s retirement either was not “bona fide” or was not objectively reasonable, noting that he maintained his law license in “active” status and continued to advertise his services as a mediator. Husband testified that he officially closed his law office on March 1, prior to the filing of his petition for modification on May 31, 2013. He testified that he would be interested in doing mediation work but said he had not received any calls for such work. Husband testified that his law practice essentially “dried up” because his work was primarily worker’s compensation cases involving employees of Northwest/Delta, and Northwest/Delta no longer maintained a workforce in Memphis. He testified that he experienced periods of several months without any new clients, and he did not earn enough to cover his overhead during the last five months he practiced. Husband also testified that he shared office space and expenses with a gentleman who was retiring, and the building they leased had been sold, so in order to continue practicing he would have been required to lease a new office and hire new staff. Husband was 67 years old and dealing with some health issues. Considering these circumstances, Husband’s retirement was bona fide and objectively reasonable. We also hold that Husband’s retirement constituted a substantial and material change in circumstances since the last modification of the alimony obligation. *See Bogan*, 60 S.W.3d at 725 (“a bona fide retirement need only be objectively reasonable under the totality of the circumstances to constitute a substantial and material change in circumstances”). However, this finding does not end our inquiry.

“[E]ven when an obligor is able to establish that a retirement is objectively



reasonable, and therefore that it constitutes a substantial and material change in circumstances, the obligor is not necessarily entitled to an automatic reduction or termination of his or her support obligations.” *Bogan*, 60 S.W.3d at 730. The alimony statute provides that an award of alimony in futuro “may” be modified upon a showing of a substantial and material change in circumstances. Tenn. Code Ann. § 36-5-121(f)(2)(A). “As evidenced by its permissive language, the statute permitting modification of support awards contemplates that a trial court has no duty to reduce or terminate an award merely because it finds a substantial and material change in circumstances.” *Bogan*, 60 S.W.3d at 730. Instead, the change in conditions resulting from retirement merely allows the obligor the opportunity to demonstrate that reduction or termination of the award is appropriate. *Id.* The “actual modification of the award, if any, is addressed to the trial court’s discretion after considering the relevant factors listed in Tennessee Code Annotated section 36-5-[121(i)].”<sup>3</sup> *Id.* at 727. Although the statute lists numerous factors for consideration, “the two most important considerations in

<sup>3</sup>Tennessee Code Annotated section 36-5-121(i) provides:

- (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:
  - (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
  - (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earnings capacity to a reasonable level;
  - (3) The duration of the marriage;
  - (4) The age and mental condition of each party;
  - (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
  - (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
  - (7) The separate assets of each party, both real and personal, tangible and intangible;
  - (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
  - (9) The standard of living of the parties established during the marriage;
  - (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
  - (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
  - (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

modifying a spousal support award are the financial ability of the obligor to provide for the support and the financial need of the party receiving the support.” *Id.* at 730.

In the case at bar, the trial court made few findings to justify its decision to modify Husband’s alimony obligation. The order states, in pertinent part:

[Husband] has retired at sixty seven (67) years of age from the practice of law. That the [Husband’s] only income comes from a retirement account of approximately \$5,500.00 per month and social security of \$2,500.00 a month for a total of \$8,000.00 per month. That the evidence introduced indicates that [Husband] was earning approximately \$271,000.00 per year at the time of the previous modification of alimony setting that amount at \$2,870.00 per month and he is now earning approximately \$98,000.00 per year. That [Husband] has suffered at least a 2/3’s decrease in income and therefore the alimony in futuro heretofore awarded should be modified to the sum of \$1,035.00 per month effective January 1, 2014.

IT IS, THEREFORE, ORDERED ADJUGED AND DECREED that [Husband’s] obligation for the payment of alimony in futuro to [Wife] is reduced effective January 1, 2014 to the amount of \$1,035.00 per month beginning January 1, 2014.

We perceive two flaws in the trial court’s analysis. First, the trial court found that Husband was earning \$271,000 per year at the time of the previous modification of alimony when the obligation was set at \$2,870 per month. This finding is factually incorrect. When the alimony obligation was reduced to \$2,870 in 2004, the trial court found that Husband’s income was approximately \$273,000 *at the time of the divorce*, and during the past five years, it had averaged \$221,894, for a reduction of 18 percent. Therefore, at the time of the previous modification of alimony, Husband was earning around \$221,894 (not \$271,000 as the trial court found). Husband did not experience a “2/3’s decrease” in income from \$271,000 to \$98,000; instead, his income decreased from \$221,894 to \$98,000.

The second flaw in the trial court’s analysis is its sole reliance on Husband’s decrease in income as the basis for modifying the alimony obligation. The trial court did not make any findings regarding Husband’s expenses, Wife’s income, Wife’s expenses, or any other factors relevant to setting an alimony obligation. After the trial judge announced his oral ruling that Husband’s alimony obligation would be modified, counsel for Wife asked for clarification regarding whether the trial judge found an inability to pay or a mere decrease in income. The following exchange ensued:

[Wife’s attorney]: Are you finding specifically that he lacks the ability to

pay?

THE COURT: No, I'm finding that his income has been reduced from -- by two-thirds, from what it was the last time in which the Court heard the matter.

[Wife's attorney]: Okay. So you're not finding that he has the inability to pay?

THE COURT: No. He has --

[Wife's attorney]: Okay. And --

THE COURT: -- the ability to pay the one thousand thirty-three twenty.

[Wife's attorney]: But does he --

THE COURT: The 1,035 dollars.

[Wife's attorney]: The question that I'm asking Your Honor is are you finding that he has the inability to pay the 2870 that was previously awarded?

THE COURT: The inability -- I -- I'm finding that his income has been substantially reduced --

[Wife's attorney]: I understand.

THE COURT: -- and that the amount of his obligation for payment of alimony in futuro is consistently reduced by the same percentage as his income.

The trial judge added, "there is no indication that either of these parties have the same ability to pay or the needs, but the fact of the matter is that the history of this case showed that the award of alimony has been based primarily on [Husband's] income, which has been substantially reduced by two-thirds." The judge concluded by stating, "the Court is really not addressing the ability to pay, except the -- the income upon which the alimony is based, you know."

The trial court applied an incorrect legal standard, and therefore abused its

paying off his daughter's student loan, which totaled \$20,000, and he said he had always paid "everything" for his children, including "tuition, clothes, cars, health insurance, education, whatever it is, plane tickets, I paid for it." Husband was asked about his deposition testimony in which he estimated that he and his wife spend \$1,500 per month on groceries. He responded,

All right. You asked me a bunch of questions about expenses in the deposition. . . . And to be honest with you, I wasn't prepared to answer those because I only thought the only issue involved in this was the fact that my income had dropped while I was -- a significant amount and the fact that my ex-wife had done nothing in terms of rehabilitation.

Still, even at the hearing on Husband's petition for modification, he was unable to provide evidence regarding his expenses. He testified, "I would be guessing at what each expense is. . . . I couldn't break down exactly what my expenses are." Husband did say that after he pays his bills at the beginning of the month, he has less than \$1,000 in the bank, so he waits until he receives his social security check to pay Wife's alimony. He said he had been charging some expenses to credit cards, but he also acknowledged that he is able to pay off the credit card balances at the end of every month. Husband claimed that he and his wife "cut back" on some "social things" but were still able to pay all of their bills. Husband's lifestyle indicated that he had no trouble paying for luxuries in addition to meeting his obligations. Husband testified that he had been traveling to France every year "for years," and he rents an apartment there because it doesn't cost "much." When asked about his deposition testimony that he spends \$6,000 per year on travel, Husband said, "If I did, that's fine. I mean, I wouldn't know. That's a possibility." Our review of the evidence presented leads us to conclude that Husband still has the financial ability to pay Wife's current level of alimony in the sum of \$2,870 per month.

Consideration of Wife's financial need also weighs in favor of leaving the alimony obligation undisturbed. Wife was 69 years old at the time of trial. Her most recent full-time employment was in 2009 when she worked as a secretary at a ballet school, earning \$22,728 annually. She testified that the ballet school "let [her] go" when a new executive director was hired and brought in his own staff. In 2010, Wife earned \$3,585; in 2011, she earned \$1,023; and in 2012, she earned \$312. Wife testified that she had a real estate license "[a] long time ago" but did not renew it because she was not good at selling real estate.<sup>5</sup> She testified that she had inquired about working at some real estate agencies

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<sup>5</sup>Husband also testified as to some jobs Wife held in the past, but it is not clear from his testimony whether all of these jobs were prior to the parties' marriage. He said, "before we were married, she owned a ballet school for a number of years. It was hers. She ran a restaurant that her brother and father had purchased for a number of years." He also mentioned that she was an executive assistant at another company but acknowledged that she ceased working at some point during the marriage.

without much success. She had been working at a real estate company for \$12 an hour, but she was replaced by someone with an accounting degree. At the time of trial, Wife was working at a yarn store approximately three to six hours per week. Wife attributed her lack of meaningful employment to her age, some health issues, her lack of education, and the high unemployment rate. Wife had begun drawing social security benefits in the past year and was receiving around \$1,150 per month after her Medicare costs were deducted. Aside from her social security benefit, alimony payment, and minimal paycheck, Wife had no other source of income. She had no savings and no retirement.

Wife testified that her monthly rent was \$840, which included the cost of her utilities. She testified that she lives “[v]ery frugally” and is unable to afford vacations or other luxuries. She acknowledged that she had recently visited the parties’ daughter in Portland but said her daughter purchased her plane ticket because Wife was unable to afford it. When asked whether her monthly expenses had decreased since the last hearing, Wife simply said, “I can promise you it’s less. I don’t do anything extra.” She said she “had to tighten up.” Wife testified that some months she has a deficit, and some months she has a surplus, but she uses any surplus to pay on a \$150,000 tax debt she owes to the IRS or for attorney’s fees from defending against Husband’s petitions to modify “every couple of years.” She also had \$1,000 in credit card debt. She testified that if her alimony was significantly reduced, she would have to live with one of her children. When asked about her net worth, Wife said, “I don’t really have anything” besides thirty-year-old furniture and an old car. These facts demonstrate that Wife had continued financial need for her current level of alimony. Husband is correct in his assertion that Wife’s expenses had decreased in an unspecified amount since the previous order reducing her alimony payment. However, considering the totality of the circumstances, this fact does not require a further decrease in her alimony payment. *See Richards v. Richards*, No. M2003-02449-COA-R3-CV, 2005 WL 396373, at \*11 (Tenn. Ct. App. Feb. 17, 2005) (“Wife’s frugality should not be held against her.”); *Claiborne v. Claiborne*, No. C/A 744, 1988 WL 5684, at \*2 (Tenn. Ct. App. Jan. 29, 1988) (declining “to penalize wife for being prudent and frugal”).

In sum, we hold that Husband’s retirement constituted a substantial and material change in circumstances, but Husband failed to prove that the change in circumstances significantly diminished his financial ability to pay alimony or Wife’s need for it. “[E]ven a material change of circumstances does not necessarily require a reduction of alimony, if the payor still has the ability to pay the support awarded and the need of the payee has not diminished.” *Willet v. Taeubel*, No. E2014-00364-COA-R3CV, 2014 WL 5812338, at \*8 (Tenn. Ct. App. Nov. 10, 2014). Despite Husband’s retirement, he is financially able to continue to pay spousal support at pre-retirement levels. We reverse the trial court’s reduction of alimony to \$1,035 and reinstate the previous spousal support order setting Husband’s monthly obligation at \$2,870. If Husband has been paying

\$1,035 during the pendency of this appeal, Wife is entitled to recover the difference between what Husband actually paid and what he would have owed if the obligation remained at \$2,870.

Finally, we consider Wife's request for an award of her attorney's fees and expenses on appeal. Tennessee Code Annotated section 36-5-103(c) provides for awards of "reasonable attorney fees incurred in enforcing any decree for alimony," in the discretion of the court. Pursuant to this statute, a court may award attorney's fees to an alimony recipient who is forced to defend an action to reduce or terminate that alimony. *Henderson v. Henderson*, No. M2013-01879-COA-R3-CV, 2014 WL 4725155, at \*12 (Tenn. Ct. App. Sept. 23, 2014) (citing *Evans v. Evans*, M2002-02947-COA-R3-CV, 2004 WL 1882586, at \*13-14 (Tenn. Ct. App. Aug. 23, 2004)); *see also Owens v. Owens*, No. M2012-01186-COA-R3-CV, 2013 WL 3964793, at \*6 (Tenn. Ct. App. July 30, 2013) *perm. app. denied* (Tenn. Nov. 13, 2013) ("Reasonable fees may be awarded pursuant to § 36-5-103(c) in actions to enforce a decree for alimony, which has been interpreted as including the situation where an alimony recipient is forced to defend an action to reduce or terminate that alimony."). The statute authorizes awards of attorney's fees incurred at trial as well as on appeal. *Henderson*, 2014 WL 4725155, at \*12. The decision of whether to award attorney's fees incurred on appeal is a matter within the discretion of this Court. *Yattoni-Prestwood v. Prestwood*, 397 S.W.3d 583, 597 (Tenn. Ct. App. 2012) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995); *Seaton v. Seaton*, 516 S.W.2d 91, 93 (Tenn. 1974)). We have previously recognized that

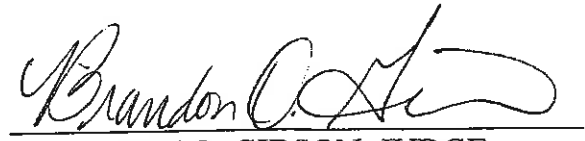
"Alimony is only awarded in the first instance to an economically disadvantaged spouse who has a demonstrated need for the support. Absent a showing in a modification proceeding that the need no longer exists, requiring the recipient to expend that support for legal fees incurred in defending it would defeat the purpose and public policy underlying the statute on spousal support. Additionally, the possibility of being burdened with a former spouse's attorney's fees helps deter unwarranted or unjustified attempts by an obligor to evade or reduce an existing support obligation."

*Henderson*, 2014 WL 4725155, at \*12 (quoting *Evans*, 2004 WL 1882586, at \*13).

Considering these observations, in addition to the nature of the issues involved in the instant litigation, the respective financial positions of the parties, and Wife's success on appeal, we conclude it is appropriate to exercise our discretion to grant Wife's request for an award of her reasonable attorney's fees and expenses for appellate work. On remand, the trial court will set these fees.

## V. CONCLUSION

For the aforementioned reasons, the decision of the chancery court is hereby reversed, the previous alimony award is reinstated, the petition for modification is dismissed, and this matter is remanded for further proceedings. Costs of this appeal are taxed to the appellee, Reed Lynn Malkin, for which execution may issue if necessary.

  
BRANDON O. GIBSON, JUDGE