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STATE OF WASHINGTON

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No. 45874-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

TODD E. SCHNEIDERMAN,

Appellant,

and

JULIE T. ROGERS,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE JENNIFER FORBES

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The record definitively refutes respondent's allegations of misrepresentation and fraud, which a newly elected judge who had not presided over the parties' dissolution trial erroneously accepted. For example, Rogers alleges that Dr. Schneiderman did not produce "business income tax returns" or disclose a profit distribution he received in the first quarter of 2011. (Resp. Br. 33-34) In fact, the tax returns were *admitted as exhibits at trial* (RP 3-4), and Dr. Schneiderman *brought a motion* to divide not only the April bonus but each profit distribution made before trial. (CP 2761-64) Rogers' other allegations similarly misstate the record, and do not justify the trial court's extraordinary decision vacating a decree entered over two years earlier after a full and fair 4-day trial to the experienced referee the parties agreed would resolve their property disputes. This Court should reverse the order vacating the decree and the award of fees to Rogers and reinstate the decree in full.

II. REPLY ARGUMENT

A. No deference is owed Judge Forbes' decision vacating a decree entered after a trial over which she did not preside.

Rogers does not – and cannot – dispute that none of the traditional reasons for deferring to a trial court apply here. She

nevertheless asks this Court to defer to Judge Forbes' "findings" – entered after hearing no testimony and reviewing only selectively "curated" documentary evidence from a trial over which she did not preside – and to ignore the findings of Referee Beattie, who with the benefit of all the evidence presented during a 4-day dissolution trial rejected the same baseless arguments inexplicably accepted two years later. This Court should reject Rogers' reliance on an incorrect standard of review that would evade, not facilitate, decision on the merits. RAP 1.2(a).

Deference is given to a trial court's decision to vacate a judgment or order a new trial when the judge has seen firsthand the witnesses, observed their demeanor, and evaluated the entire body of evidence in the context of trial. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993) (App. Br. 17); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985) (cited at Resp. Br. 22) ("only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said"). Where these reasons do not apply, deference is not due and should not be given. *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of*

Carpenters, 180 Wn.2d 54, 66, ¶ 22, 322 P.3d 1207 (2014) (courts apply precedent mindful of whether "the legal underpinnings of our precedent have changed or disappeared altogether").

Respondent relies heavily on *Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003) (Resp. Br. 20-23), but there the Court deferred to the *initial* decision-maker – an experienced superior court judge who considered whether the mother was in contempt for failing to abide by a parenting plan. Here, that initial decision-maker, to whom later courts should defer, was Referee Beattie, not Judge Forbes. *See also Anderson*, 470 U.S. at 574 (discussing "[t]he rationale for deference to *the original finder of fact*"), 582 (Blackmun, J., concurring because the trial judge had heard live testimony).[1] Referee Beattie, having "never actually seen so much information poured into a professional practice" (CP 581), *rejected* Rogers' contention that Dr. Schneiderman's "representations to the Court as to what his income was . . . [were]

[1] *Rideout* is also distinguishable because the issue here is whether Judge Forbes erred in vacating a judgment under CR 60, which is not the type of traditional family law decision that receives deference. To the contrary, Judge Forbes' decision vacating a dissolution decree two years after it was entered violates the strong public policy in favor of finality in family law decisions. (App. Br. 22-23)

misleading" based on the same evidence presented to Judge Forbes. (RP 685)[2]

Rogers does not cite a single case in which an appellate court deferred to a trial court's decision vacating a judgment entered after a trial over which the judge did not preside. This case is much more like administrative review, in which appellate courts defer to the actual trier of fact, rather than to the superior court's review of a cold record. (*Compare* App. Br. 17-18 *with* Resp. Br. 23) Nor was this newly-elected trial judge more "experienced" (Resp. Br. 21) than this Court in reviewing a documentary record selectively generated from a trial over which another decision-maker presided. *Cf. Baechler v. Beaunaux,* 167 Wn. App. 128, 133, ¶ 10, 272 P.3d 277 (2012) (appellate court on de novo review "consider[s] the same evidence that the trial court considered on summary judgment"). This Court should review de novo and give no deference to Judge Forbes' decision vacating a decree she did not enter.

B. Rogers did not bring her motion to vacate within the time limits prescribed by CR 60.

As Rogers concedes (Resp. Br. 16, 25 (citing CP 283)), Dr. Schneiderman argued below that Rogers was dilatory in bringing

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[2] As discussed in § II.E, *infra,* the only "new" evidence reviewed by Judge Forbes was generated post-trial and does not support her decision.

her motion to vacate, and that "the time to have dealt with [this] was to reconsider it or follow up on her appeal, which she did not." (12/2 RP 21; *see also* 12/2 RP 25: "These are issues for an appeal or reconsideration. . . . They're not issues for a CR 60 motion two years down the road.") Dr. Schneiderman objected to the timeliness of respondent's motion below, and this Court should hold that Rogers failed to bring it within a "reasonable time" as required by CR 60.

Rogers seeks to have it both ways, arguing that Judge Forbes properly ruled her allegations of newly discovered evidence were timely despite the one year limitation period under CR 60(b)(3) because they were sufficiently "interrelated" with her allegations under CR 60(b)(4), while at the same time arguing that by not invoking some magic incantation Dr. Schneiderman's objections to her diligence did not preserve the issue whether she brought her CR 60 motion within a "reasonable time." (Resp. Br. 16) "Reasonable time" does not have the talismanic value Rogers ascribes it; the timeliness of Rogers' motion was clearly raised below.

This Court also must reject Rogers' defense of her dilatory conduct. Rogers blames her delay on Dr. Schneiderman "play[ing] 'keep away' with the evidence." (Resp. Br. 26; *see also* Resp. Br. 28)

Yet in every instance Dr. Schneiderman either *gave her* or *did not possess* the evidence relied on in Rogers' "amended" motion brought almost two years after entry of the decree. Dr. Schneiderman gave Rogers the spreadsheet of his 2011 income in April 2012, more than 16 months before she alleged it was "newly discovered evidence" and more than six months before she filed her initial CR 60 motion. (CP 654) Dr. Schneiderman did not have the WSBA investigation results or the Freedom of Information Act documents Rogers obtained from the federal government after trial.

Rogers' contention that Dr. Schneiderman "baselessly" objected to her original CR 60 motion does not explain why she waited 364 days to file it in the first place. (Resp. Br. 28) And in any event Rogers concedes she did not raise the vast majority of her arguments or submit her "newly discovered" evidence until her "amended" motion in August 2013, almost two years after entry of the decree. (Resp. Br. 29)

Rogers fails to distinguish *Sorbo v. United Parcel Serv.*, 432 F.3d 1169 (10th Cir. 2005) (discussed at App. Br. 21), which rejected a similar attempt to bootstrap untimely arguments to an earlier CR 60 motion. Rogers argues *Sorbo* does not apply because there "only the one-year time limit applied." (Resp. Br. 30 n.18) But in fact

Sorbo rejected reliance on the "reasonable time" period for grounds for vacation governed by the one-year limitation. *Sorbo*, 432 F.3d at 1177 (one-year period applied to "three of the four subsections he invoked"). As *Sorbo* correctly recognized, when a party fails to timely raise arguments governed by CR 60's one-year limitation, considering them "violate[s] the unqualified directive in Rule 6 that the court 'may not extend the time for taking any action under Rule[ ] . . . 60(b).'" 432 F.3d at 1177. Under Rogers' contrary (and incorrect) interpretation, the "reasonable time" provision subsumes the one-year limitation in CR 60(b)(1)-(3). (*Compare* 9/17 RP 33 (Judge Forbes: "I think the rule contemplates that when you discover fraud, you are probably discovering newly discovered evidence.") *with Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) ("Statutes must be interpreted and construed so that all the language used is given effect"))

Finally, Rogers' unjustified delay clearly caused Dr. Schneiderman substantial prejudice, contrary to her claims. (Resp. Br. 27) Dr. Schneiderman was forced to retain new counsel, unfamiliar with the case's complex procedural history, after his trial attorney was suspended. Judge Haberly, the experienced superior court judge most familiar with the case, retired and was unavailable

to rule on Rogers' motion. Had Rogers brought her motion in a timely fashion it might have been returned to the actual trier of fact, Referee Beattie. This Court should reverse the order vacating the decree based solely on the untimeliness of Rogers' motions.

C. The record definitively refutes Rogers' allegations that Dr. Schneiderman misrepresented his income.

1. Dr. Schneiderman disclosed *all* income earned prior to the July 2011 trial, including his 2011 first quarter bonus.

Throughout these proceedings Dr. Schneiderman repeatedly and consistently disclosed his *entire* income, including both the amount and timing of his quarterly bonuses. Judge Forbes' conclusion that Rogers presented clear and convincing evidence of fraud and misrepresentation based on allegations refuted by the record before and at trial must be reversed.

For example, Rogers alleges that Dr. Schneiderman did not disclose his first quarter bonus for 2011 prior to the July 2011 trial even though he *filed a motion* in April 2011 asking the court to divide the "undisclosed" bonus between the parties. (*Compare* Resp. Br. 34-36, 41 (Dr. Schneiderman did not "reveal bonuses received in 2011") *with* CP 2761-64 (April 2011 Motion: "The first quarter bonus for 2011 for Todd Schneiderman from Retina Center

Northwest is $61,506."))[3] Rogers was well aware of this bonus, and cited Dr. Schneiderman's motion in her trial brief to Referee Beattie. (CP 2786) Dr. Schneiderman's April 2011 pre-trial disclosure also was consistent with the documentation he submitted post-trial. (CP 319 ($61,506 check for "Q1 2011 Bonus"), 355)

Rogers' related implication that Dr. Schneiderman concealed bonuses he received for 2010 likewise ignores that he also brought a motion before trial to allocate those bonuses. (*Compare* Resp. Br. 6 n.5, 40 *with* CP 419, 2757-60)[4] Moreover, those bonuses were included on the parties' joint 2010 tax return submitted to Referee Beattie, and Dr. Schneiderman provided Referee Beattie updated financial information concerning them on the final day of trial. (CP 415, 423, 428-29; RP 715 (Referee Beattie: "I have looked at all of these financials, including the updated one that was provided . . . today."))

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[3] Dr. Schneiderman correctly pointed out in the opening brief that when Rogers raised her allegations of fraud he submitted documentation of his first quarter 2011 bonus. (App. Br. 39 n.6) That was not a "concession" he failed to disclose it prior to the 2011 trial, as Rogers argues. (Resp. Br. 35 & n.20, 41)

[4] Rogers implies Dr. Schneiderman fabricated accounting software problems to explain the delay in distribution of his 2010 bonuses. But Judge Haberly accepted his explanation (CP 419, 541; *see also* RP 193), and Rogers dismissed the appeal in which she could have challenged Judge Haberly's ruling.

Thus, contrary to Judge Forbes' finding that Dr. Schneiderman did not disclose his income through the time of trial and that he presented "incomplete" and "inaccurate" information regarding his "true income" (CP 870-71), Dr. Schneiderman brought a motion to allocate *each and every* bonus he received – just as Judge Haberly had instructed him to do. (CP 417-20, 477-78, 523-25, 532-34, 548-50, 933, 2757-64) Rogers' claim that she and Referee Beattie had no knowledge of these bonuses (App. Br. 29) conflicts with her prior sworn testimony (CP 416, 514, 577-78, 623-24, 1147) and with Referee Beattie's award of these bonuses *to her*. (CP 86 (awarding remaining bonus amounts held in trust to Rogers); *see also* CP 99, 420, 588)

Rogers' focus on Dr. Schneiderman's 2011 income is a red herring. As both parties – and Referee Beattie – recognized in the July 2011 trial, evidence or testimony regarding Dr. Schneiderman's income for all of 2011 would have been speculation. (CP 426, 580, 583; App. Br. 31) Indeed, Rogers' trial attorney objected to testimony regarding Dr. Schneiderman's 2011 income. (CP 566-67 ("You don't really know what's going to happen in 2011 like nobody else in this room knows, or 2012, or any other time")) (*See* § II.C.2, *infra*)

Rogers' other allegations of fraud and misrepresentation are similarly false. There was no "evidence" that Dr. Schneiderman "had already earned more" than the "$550,000 to $600,000" he told Referee Beattie he would earn for all of 2011. (Resp. Br. 34-35, 44; CP 870) Dr. Schneiderman's second quarter bonus had not yet been calculated or paid at the time of trial (CP 424; RP 199), and his disclosures (both before and after trial), show that he had earned $306,560 by the time of trial in July 2011 (7 months at $35,000 plus bonus of $61,506) – roughly half the amount he told Referee Beattie he believed he would ultimately earn in 2011.[5]

Judge Forbes ignored Dr. Schneiderman's table[6] showing his income through trial (CP 288, 355-56), instead erroneously relying on a spreadsheet created by the parties' CPA after trial in 2012 that *averaged* all 2011 income. This calculation failed to distinguish

[5] Rogers asserts that an undated distribution of $50,000 should be included in calculating Dr. Schneiderman's average monthly pre-trial income in 2011. (Resp. Br. 35 n.20) The table listing Dr. Schneiderman's income is arranged chronologically; the undated $50,000 distribution, listed last, was after trial. (CP 355) Regardless, even including the $50,000, Dr. Schneiderman would have earned $356,560 in June 2011, far less than the $600,000 Judge Forbes concluded he "had already earned" by then. (CP 870)

[6] Rogers asserts that this table lacked "indicia of reliability" despite Dr. Schneiderman's sworn (and uncontroverted) testimony based on his personal knowledge. (Resp. Br. 41; *cf.* CR 56(e) ("affidavits shall be made on personal knowledge")) In any event, the fact that it is consistent with his pre-trial disclosure in April 2011 is an indication of its reliability. (*See also* CP 319 (check for April 2011 bonus))

between pre- and post-trial income. As Dr. Schneiderman explained, his income after trial increased because he dedicated himself to his practice, (mistakenly) believing he could put this divorce behind him. (CP 54, 425) Indeed, Dr. Schneiderman had little choice but to "double down" at work, as Referee Beattie's decision left him with no liquid assets, an "underwater" house, and an $11,000 monthly maintenance obligation. (CP 81, 83-85)

Rogers' assertion that she "could not discover . . . what amounts [Dr.] Schneiderman was earning (as well as distributing to himself) or what his other sources of income were producing" (Resp. Br. 39), ignores that she, and Referee Beattie, had the parties' joint tax returns – an indisputable basis for "accurately determin[ing] [his] true income." (App. Br. 29) Rogers herself cites these tax returns and notes the amount of Dr. Schneiderman's distributions. (Resp. Br. 6 n.5) Rogers provides no explanation for how these documents disclosing Dr. Schneiderman's entire annual income were an insufficient basis for determining his "actual" or "true" income. (*Compare* Resp. Br. 39; CP 870 *with Stoulil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 299, 3 P.3d 764 (2000) (no grounds to vacate judgment where nonmoving parties "produced their income tax returns for the years relevant to

this case early in the trial"); *Nansamba v. N. Shore Med. Ctr., Inc.*, 727 F.3d 33, 41 (1st Cir. 2013) (both discussed at App. Br. 29))

In conflict with her original motion to vacate, which alleged that Dr. Schneiderman concealed the *existence* of his bonuses by "testify[ing] he *only* made $35,000/month" (CP 4 (emphasis added); *see also* CP 2715), Rogers now concedes that Dr. Schneiderman accurately testified that $35,000 was his "base salary," and that he never "disguised *the fact* of bonus income." (Resp. Br. 4, 39 (emphasis added)) That about-face, and the ever-evolving nature of her allegations, confirm that they are meritless. Because the undisputed evidence, as well as Rogers' own concessions, establish that Dr. Schneiderman fully disclosed all elements of his income (*see* App. Br. 33-34), Judge Forbes erred in vacating the dissolution decree.

2. A prediction of future income is not fraudulent simply because post-trial events show it to be inaccurate.

That Dr. Schneiderman's prediction of his future income was ultimately inaccurate does not establish fraud, or any other basis to vacate the decree. Dr. Schneiderman testified at trial that he believed his income would decline based on published anticipated decreases in Medicare reimbursement rates. (RP 418-21, 506; *see*

also RP 67, 76-77, 85-86, 187-95; RP 570 and 579 (Rogers' attorney's cross-examination of Dr. Schneiderman regarding Medicare rates)) That those rates were ultimately not adopted does not mean Dr. Schneiderman misrepresented what he *believed* his income would be. (Resp. Br. 8; *see also* App. Br. 35-36)

Dr. Schneiderman explained at trial that his practice's 2009 income was inflated because he and his partner took on additional patients in anticipation of hiring a third doctor who would care for those patients. (RP 162-63, 169, 224-25; *see also* CP 424-25) Dr. Schneiderman never testified that his bonuses "should not be counted," but accurately testified that they were not set in time or amount and depended on a number of factors including hours worked, patients seen, and accounts receivable. (*Compare* Resp. Br. 40; CP 870 *with* CP 13-14, 415, 423, 572, 714; RP 84) And Rogers does not dispute that his bonuses varied in amount or time of distribution. (Resp. Br. 6)

This case was no different than the typical dissolution of an entrepreneurial professional in which the spouses submit competing predictions of future income. Referee Beattie weighed Dr. Schneiderman's testimony that his income would likely decline and Rogers' testimony that his income would likely increase (*e.g.*,

RP 637-38) and rejected *both* predictions, finding that Dr. Schneiderman's income in the future would be consistent with his 2010 income. If the decree here can be vacated, virtually any decree could be vacated after post-trial events disprove the trial court's prediction of income or valuation of an asset. But that is not the law. (App. Br. 36) The trial court erred in relying on supposedly poor prognostication of future income as "fraud" justifying vacation of the decree.

D. Dr. Schneiderman did not violate his discovery obligations and provided voluminous information regarding his business, including its tax returns.

Rogers never provides any explanation of the *facts* Dr. Schneiderman purportedly withheld, and instead asserts he failed to produce various documents of unexplained significance. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 698, ¶ 16, 295 P.3d 239 (2013) ("The purpose of discovery is to allow production of all relevant *facts*"). Even if Rogers could establish that Dr. Schneiderman failed to provide requested documents – which she cannot – the record overwhelmingly establishes that she, and her multiple experts and attorneys, had more than enough information before trial to evaluate Dr. Schneiderman's income and determine the value of his practice.

As with her other allegations of misconduct, the record refutes Rogers' allegations of discovery violations. For instance, Rogers alleges that Dr. Schneiderman failed to produce his "business income tax returns" (Resp. Br. 33) even though these returns were *admitted as exhibits* at trial. (RP 3-4 (exhibit 12: "2009 Partnership Tax Return"; exhibit 13: "2008 Partnership Tax Return"; exhibit 25: "2010 Federal Partnership Income Tax Return")) Rogers' attorney cross-examined Dr. Schneiderman on these returns, as well as business profit and loss and balance statements that he also produced. (RP 572-77; *see also* RP 156, 158 (distinguishing "personal" and "professional" tax returns); CP 749 (detailing profit and loss and balance statements produced))

Both the expert hired jointly by the parties, Mr. Kessler, and Rogers' own expert, Mr. Sadler, performed an in-depth valuation of the practice based on the documents Dr. Schneiderman produced, without ever stating they needed additional information. (RP 288 (Mr. Sadler: "It was considerable discovery documents, most significantly financial information, legal documents, tax returns, financial statements . . . provided to me."), 292, 302 (Mr. Sadler: "it's quite an informative worksheet, and it comes from their own documents"); *see also* RP 377 (Rogers' financial planning expert:

"From tax returns Dr. Schneiderman has additional business income and financial investments"))

Rogers' allegation that Dr. Schneiderman failed to provide documents concerning other minor business interests (Resp. Br. 33, 39) is likewise without merit. At trial, Rogers' financial planning expert, Sandy Voit, testified to these interests and their value, and submitted a report recommending a property distribution based on those values. (RP 257 (listing expert's "Financial Analysis" as exhibit 31), 357-59) After trial, Mr. Voit declared that Dr. Schneiderman provided "[m]any reports, including K1s" from these interests, as well as multiple years of profit and loss statements, and acknowledged that a month before trial Dr. Schneiderman informed him of the value of his interest in these businesses.[7] (CP 44 (listing values of Dr. Schneiderman's interests in Kitsap Outpatient Surgery and Medical Partners), 45-46)

Rogers' arguments on appeal confirm that she was not prejudiced by any purported discovery violation. She alleges that

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[7] Rogers alleges that Dr. Schneiderman misled her by stating he provided tax returns for his other businesses to Mr. Kessler. But in fact Dr. Schneiderman did not state he had given Mr. Kessler the tax returns for his other business interests. (*Compare* Resp. Br. 33; CP 874 *with* CP 705) Mr. Kessler was charged only with valuing the practice, RCNW, not the other businesses. (CP 282, 423)

Dr. Schneiderman prevented her from arguing to Referee Beattie that Dr. Schneiderman consistently had a $1 million income between 2008 and 2011. (Resp. Br. 4, 37 ("what Rogers has discovered post-trial [] is that [Dr.] Schneiderman's income did not vary; rather, it has consistently averaged $1,031,758"), 40, 42) But Rogers made that precise argument to Referee Beattie. (CP 2771 ("inquiry has shown Todd's true earnings to be consistent with his historic earning capacity of $1 million per year")

A motion to vacate should only be granted where fraud or misrepresentation prevented the moving party "from fully and fairly presenting its case or defense" *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056, *rev. denied*, 113 Wn.2d 1029 (1989) (App. Br. 24). That was simply not the case here. This Court should reverse Judge Forbes' conclusion that Dr. Schneiderman violated his discovery obligations.

E. No "newly created" evidence supported vacating the decree.

Rogers acknowledges that the only "new" evidence she submitted was 1) a spreadsheet, created by the parties' CPA in 2012, averaging Dr. Schneiderman's 2011 income on a monthly basis, 2) Freedom of Information Act documents listing gross Medicare 2011

reimbursement amounts to his practice, and 3) the results of the WSBA's 2012 investigation of Dr. Schneiderman's trial counsel. (Resp. Br. 29) Rogers argues that the conduct underlying this "evidence" had already occurred at the time of trial and thus was not "newly created," ignoring that the spreadsheet and FOIA documents concern Dr. Schneiderman's income for *all* of 2011. Indeed, Rogers expressly directs this Court to *post-trial* Medicare revenue as evidence of misrepresentation *at trial.* (Resp. Br. 46) This Court should reject reliance on this "newly created" evidence. *Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003) ("CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later.") (App. Br. 43).

In any event, Rogers' reliance on documents showing Medicare reimbursements to the practice mistakes "revenue" with "profit." (Resp. Br. 19, 45-46) As Dr. Schneiderman explained to Referee Beattie (and again after trial), Medicare reimbursements are primarily for expensive drugs on which the practice makes little profit. (RP 76-77, 209-10, 228, 329, 570; CP 422, 425) Moreover, Rogers ignores that the Medicare reimbursements are for the entire practice, and what profit is actually earned is split among Dr. Schneiderman and his two partners. (CP 422, 425) Even assuming

the Medicare revenue directly translated to Dr. Schneiderman's income (which it does not), Rogers does not and cannot defend Judge Forbes' finding that Medicare payments were "*significantly higher* in the first part of 2011 prior to the date of trial." (*Compare* CP 876-77 (emphasis added) *with* CP 905 (52% of Medicare payments came in first half of 2011 and 48% in the last half))[8]

Reliance on a spreadsheet reflecting Dr. Schneiderman's entire 2011 income is likewise mistaken. (Resp. Br. 45; CP 870-71) That spreadsheet – created in 2012 – takes Dr. Schneiderman's entire 2011 taxable income and divides it by twelve, listing an identical amount as monthly "income." Rogers does not argue that the spreadsheet actually reflects what Dr. Schneiderman earned each month, or that it accurately distinguishes between the amounts Dr. Schneiderman earned before and after trial. (Resp. Br. 45) Instead, she alleges "no evidence supported [Dr. Schneiderman's] claim" that he earned the majority of his 2011 income after trial, ignoring the uncontroverted evidence detailing

[8] Rogers also blames Dr. Schneiderman for "fail[ing] to provide . . . information" regarding Medicare reimbursements (Resp. Br. 43-44), but she did not request that information from him – perhaps because at trial her attorney (correctly) recognized that this revenue was not an independent source of *income*. (CP 697-734) As noted above, the consequence of Medicare reimbursements to the practice was the subject of extensive trial testimony in any event.

his pre-trial income and Dr. Schneiderman's sworn testimony that he earned the majority of his income after trial. (CP 288, 355-56, 424-25)

Evidence of Dr. Schneiderman's *entire* 2011 income, from Medicare or elsewhere, did not exist at the time of trial in July 2011. Rogers' arguments to the contrary defy common sense and the calendar. This Court should reverse because Judge Forbes erred in relying on "newly created" evidence in vacating the decree.

F. Dr. Schneiderman cannot be punished for his former attorney's misconduct.

Judge Forbes found that "[i]t is unknown the extent to which [Dr. Schneiderman] was involved in the misconduct regarding the trust account." (CP 873; *see also* CP 876) In other words, there was *no evidence* that Dr. Schneiderman knew of or authorized his attorney's misappropriation of the parties' funds. Rogers presented none below, cites none on appeal, and in fact confirms that *Mr. Province's* misconduct, not Dr. Schneiderman's, caused any injury she claims she suffered. (Resp. Br. 47 (WSBA "ascrib[ed] misconduct only to Province"))

Rogers submits as "evidence" of wrongdoing her speculation that Dr. Schneiderman must have engaged in wrongdoing because

he did not "cooperate" with the WSBA's investigation. (Resp. Br. 47; CP 876) Dr. Schneiderman's decision reflects nothing more than his understandable desire to move on from his divorce. (CP 427-28)[9] Rogers cites no authority to support her novel argument that a client's decision not to participate in an investigation into his former attorney's misconduct is affirmative evidence that *the client* engaged in misconduct, and Judge Forbes' ruling based on that premise wrongly inverts the burden of proof. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989) (moving party must demonstrate by clear and convincing evidence that nonmoving party obtained "a verdict through fraud, misrepresentation or other misconduct").

Rogers also speculates that Dr. Schneiderman withheld funds he was ordered to place in trust based on Mr. Province's delay in setting up the trust account. (Resp. Br. 18, 47-48; CP 876) In fact, Rogers was well aware of the location and amount of these funds, which were held in the parties' *joint account*, to which she had full access, pending Mr. Province's establishment of the trust

[9] Although authorized to do so (*see* ELC 5.5), the disciplinary counsel investigating Mr. Province declined to issue a subpoena to Dr. Schneiderman and confirmed in her report that it was "Mr. Province's lack of cooperation," *not* Dr. Schneiderman's, that impeded the investigation. (CP 185)

account. (CP 428, 582, 962; RP 643-44) Indeed, far from objecting to any "delay," *Rogers* in violation of a temporary order took funds *from the joint account* before they were placed in trust. (RP 488-91, 497, 523-24, 643-44, 711; CP 428, 582) Dr. Schneiderman also used the delay, but only to pay *agreed* expenses identified in the temporary order, including the parties' joint taxes, and fees for the parties' joint valuation expert, both parties' attorneys, and the guardian ad litem. (CP 544-45, 933, 961-62)[10] Regardless, whether Dr. Schneiderman "delayed" deposit of funds into trust by *with Rogers' agreement* paying the parties' joint obligations has no relation to Mr. Province's later misuse of those funds.

Rogers also speculates that Dr. Schneiderman must have engaged in misconduct because he "has exclusive control over the necessary information, yet he refuses to provide it." (Resp. Br. 47; *see also* CP 872-73) But Rogers concedes elsewhere that Mr. Province, not Dr. Schneiderman, had the "necessary information" – an accounting of the funds he held in trust. (Resp. Br. 10

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[10] Judge Forbes was flat wrong when she found wrongdoing on the grounds that Dr. Schneiderman "took $119,000 from his 2010 distributions . . . that were ordered to be placed in the Province trust account." (*Compare* CP 873 *with* App. Br. 48-49; *see also* CP 544-45, 856, 2757-60) In fact, as noted above, *by agreement* he used those funds to pay the parties' joint tax obligations.

("*Province* was not forthcoming with an accounting of the trust account."), 14 ("*Province* promised . . . a correct accounting."), 26 (complaining of "*Province's* dissembling") (emphases added); *see also* CP 429) Dr. Schneiderman could only – and did – provide the information *he* had. (*Compare* Resp. Br. 48; CP 873 *with* 308-51 (canceled checks and account statements)) Both Rogers and Judge Forbes blindly ignore that indisputable fact. That Dr. Schneiderman believed his long-time attorney's representation that he had returned the money he misappropriated, as evidenced by a ledger provided by Mr. Province, does not establish that Dr. Schneiderman knew of or authorized the misappropriation. (Resp. Br. 49; CP 872)

Rogers' claim that a client can be liable for an attorney's misconduct, undertaken without the client's knowledge or consent, goes too far. *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999) (CR 11 sanctions should be imposed on party only "if the party is responsible"); DeWolf and Allen, 16 Wash. Prac. § 12.12 at 348 (3d ed. 2006) (liability can only "be imposed upon a defendant to the extent that his actions were a proximate cause of the plaintiff's harm"); *see also* App. Br. 46-47. Rogers' remedy, if she has been harmed, is not a new dissolution trial that will not resolve whether Mr. Province stole funds from her, but to bring an action

against Mr. Province.[11] This Court should reverse Judge Forbes' unprecedented decision to hold a client responsible for his attorney's unauthorized misconduct by vacating the parties' decree of dissolution.

G. Rogers is not entitled to her attorney's fees.

Rogers does not dispute that if this Court reinstates the decree, it must also reverse the fee award. This Court should reject her appellate fee request, a perfunctory incorporation of her arguments below. *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 890, ¶ 75, 251 P.3d 293 ("We do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b)."), *rev. denied*, 172 Wn.2d 1025 (2011). Regardless, this appeal is not intransigent and does not "drive up the costs;" that was accomplished by the senseless vacation of a decree that fully and fairly resolved the parties' divorce more than three years ago.

III. CONCLUSION

This Court should reverse Judge Forbes' order vacating the decree, her order awarding attorney's fees, and reinstate the decree.

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[11] Rogers has in fact filed an action against Mr. Province for that precise relief. Kitsap County Superior Court, Case No. 14-2-01996-5.

Dated this 30th day of December, 2014.

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DECLARATION OF SERVICE

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

That on December 30, 2014, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 30th day of December, 2014.

V. Vigoren

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