Supreme Court No.

Court of Appeals No. 49007-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VINCENT L. BADKIN,
a divorced man,
Petitioner,
v.
SAMANTHA J. BADKIN,
a divorced woman,
and
HOWARD M. ALLEN and NANCY B. ALLEN,
husband and wife, individually and the
marital community composed thereof,
Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Vincent Badkin (hereinafter Vincent for clarity) asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals' unpublished opinion, No. 49007-2-II, was filed on June 13, 2017. A copy of the decision is in the Appendix at pages A-1 through A-11. Vincent's motion for reconsideration and motion to publish were denied on July 31, 2017. A copy of the order denying Vincent's motions is in the Appendix at page A-12.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust and held that the mere absence of listing the family home, as a community property, in the default decree of dissolution constituted a plain, strong, and unequivocal repudiation by the trustees of the resulting trust in the family home; is the Court of Appeals' decision contrary to Washington Supreme Court precedent in *Goodman v. Goodman,* 128 Wn.2d 366, 907 P.2d 290 (1995), which held that the issue of alleged repudiation of a trust is a question of fact that usually cannot be decided as a matter of law?

2. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust even though no evidence was presented suggesting repudiation by the trustees; is the Court of Appeals' decision contrary to Washington Supreme Court precedent, and Court of Appeals precedent in *O'Steen v. Estate of Wineberg,* 30 Wn. App. 923, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982), that a repudiation of a resulting trust only occurs when the trustees by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own?

3. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust; is the Court of Appeals' decision contrary to Washington Supreme Court precedent that community property not disposed of in a decree of dissolution continues to be held by the parties as tenants in common and requires a separate court action for partition?

4. Where the defendants moved with their CR 12(b)(6) motion to dismiss the complaint for a resulting trust on their allegation that the trust was based on an alleged oral agreement and had lapsed after three years – contrary to the facts of the complaint – and moved for sanctions for a frivolous complaint; should the plaintiff/petitioner be

awarded reasonable attorney's fees for the defendants' frivolous motion to dismiss and motion for sanctions and cross-appeal?

D. STATEMENT OF THE CASE

Petitioner, Vincent Badkin (Vincent), and respondent Samantha Badkin (hereinafter Samantha for clarity) were married in 1995. In 2004, Vincent and Samantha purchased their family home which is the subject of this case. The family home was purchased in the names of Samantha's parents (respondents Howard and Nancy Allen), for ease of financing, with Nancy Allen making the down-payment as a gift to Vincent and Samantha. However, it was intended by all parties that Vincent and Samantha would make the mortgage payments and all equity in the property belonged only to the marital community of Vincent and Samantha. (CP at 28-29.)

Vincent and Samantha Badkin resided at the family home, made the mortgage payments, insurance payments, utilities payments, paid the property taxes, and Vincent made all repairs and upkeep of the house with the belief that the house was their own community property. On May 23, 2008, Vincent and Samantha permanently separated and Vincent moved out of the family home, while Samantha continues to reside there. (CP at 28-29.)

On May 7, 2012, Samantha obtained a default dissolution of marriage from Vincent in which she failed to disclose to the court that their family home was their community property. *Id.* During Samantha's testimony at the default hearing, Samantha's attorney asked whether it is "a true and accurate statement" that she owns the family home in which she resides. Samantha responded only, "No, it is not." (CP at 55.) Samantha did not elaborate on whether she held a beneficial interest in the family home. Neither Vincent nor his attorney were present at the default hearing and therefore were unable to cross-examine Samantha on this issue. There was no other testimony regarding the family home. The court did not make any findings regarding the family home or divide the community property interests in it. (CP at 28-29.)

On October 6, 2015, Vincent filed a complaint for imposition of a resulting trust regarding the family home and for division of equity between the beneficiaries of the resulting trust (Vincent and Samantha), with Howard and Nancy Allen as the trustees of the family home. (CP at 27-31.) The defendants (respondents Samantha, Howard Allen, and Nancy Allen) never filed an answer but filed a CR 12(b)(6) motion to dismiss, alleging that Vincent's cause of action was for an

oral agreement and that the three-years limitation for oral agreements had expired under RCW 4.16.080(3). (CP at 8-11.)

Vincent responded that community property not disposed of in a decree of dissolution continues to be held by the parties as tenants in common, and requires an independent action for partition. (CP at 14-15.) For resulting trusts, the statute of limitations does not begin to run unless the trust is plainly, strongly, and unequivocally repudiated by the trustees and notice is given to the beneficiaries. (CP at 14-15.) Vincent pointed out that his complaint did not allege any repudiation and the defendants had not presented any evidence of repudiation. Nonetheless, the trial court granted the defendants' motion to dismiss, simply stating that the applicable statute of limitations is no greater than three years. (CP at 25-26.)

Vincent timely filed a motion for reconsideration in the trial court on the basis that the court's order was contrary to law. (CP at 32-38.) The trial court expressed no opinion, but signed the defendants' proposed order denying Vincent's motion, which stated that the resulting trust was repudiated by the trustees by virtue of not being listed as a marital asset in the default dissolution of marriage decree. (CP at 66-68.) The trial court's order also stated that it treated the defendants' motion as a motion for summary judgment and

considered court records from the default dissolution of marriage proceedings, even though no such records were filed in the present case. *Id*.

Vincent appealed to the Court of Appeals, which affirmed in an unpublished opinion. (Appendix at A-1 – A11.) The Court of Appeals held that Samantha's (who is a co-beneficiary, not one of the trustees) abrupt denial that her owning the family home "is a true and accurate statement," constituted a plain, strong, and unequivocal repudiation of the resulting trust by Howard and Nancy Allen (the trustees of the community home). (Appendix at A-9.)

The Court of Appeals further held that the mere absence of listing the community home in the default decree of dissolution constituted a plain, strong, and unequivocal repudiation of the resulting trust regarding the community home. *Id.* Lastly, the Court of Appeals held that "[t]he evidence . . . showed that the 'trustees' treated the property as their own when the parties separated," (*id.*), even though the defendants presented no evidence and the facts alleged in Vincent's complaint stated only that Vincent and Samantha permanently separated in 2008 and Vincent moved out of the family home, while Samantha continues to reside there as one of the co-beneficiaries of the resulting trust (CP at 28-29.)

Vincent filed in the Court of Appeals a motion for reconsideration and a motion to publish, arguing that the Court of Appeals' opinion was in conflict with multiple Washington Supreme Court cases. (Appendix at A-13 – A-22.) Nonetheless, the Court of Appeals denied Vincent's motions. (Appendix at A-12.)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust and held that the mere absence of listing the family home, as a community property, in the default decree of dissolution constituted a plain, strong, and unequivocal repudiation by the trustees of the resulting trust in the family home; the Court of Appeals' decision is contrary to Washington Supreme Court precedent in *Goodman v. Goodman*, 128 Wn.2d 366, 907 P.2d 290 (1995), which held that the issue of alleged repudiation of a trust is a question of fact that usually cannot be decided as a matter of law.

In *Goodman v. Goodman,* 128 Wn.2d 366, 907 P.2d 290 (1995), the Supreme Court held that the alleged repudiation of a trust as a statute of limitations defense to an action for an express trust presented a question of fact that could not be decided as a matter of law. *Goodman* was a family dispute involving an express trust to property. The jury entered a verdict for the plaintiffs, but the trial court granted judgment notwithstanding the verdict (JNOV) in favor of the defendant, having found as a matter of law that the plaintiffs

commenced the action after the limitations period had run because the trust had been repudiated more than three years prior to the commencement of the action. *Id*. at 371.

The Court of Appeals affirmed, but the Supreme Court reversed, holding that the issue of when the repudiation occurred was susceptible to more than one reasonable interpretation, and therefore presented a question of fact that could not be decided on a motion for a JNOV. *Id*. at 373–374. The *Goodman* court noted that "[w]hether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." *Id*.

Similar to the standard on a CR 12(b)(6) motion to dismiss or CR 56 motion for summary judgment, a motion for a JNOV admits the truth of the nonmoving party's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the nonmoving party. "No element of discretion is involved." *Id*. at 371.

The Court of Appeals erroneously ruled that the facts alleged in Vincent's complaint conclusively showed that there was a plain, strong, and unequivocal repudiation of the resulting trust by the

trustees, depriving Vincent of having this question decided by the trier of fact. The Court of Appeals failed to take as true the facts alleged in Vincent's complaint and construe the facts most strongly in Vincent's favor, as it was obligated to do. *Trujillo v. Nw. Tr. Servs., Inc.,* 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Instead, the Court of Appeals opined that "[t]he evidence . . . showed that the 'trustees' treated the property as their own when the parties separated," (Appendix at A-9), even though there is no evidence in record to base this assertion, and is contrary to the facts alleged in Vincent's complaint, which stated only that Vincent and Samantha permanently separated in 2008 and Vincent moved out of the family home, while Samantha continues to reside there, as one of the co-beneficiaries of the trust (CP at 28-29).

Here, as in *Goodman*, viewing the facts in the light most favorable to Vincent, the issue of alleged repudiation presents a question of fact that cannot be decided as a matter of law against Vincent. The Court of Appeals' decision is in conflict with the Supreme Court's holding in *Goodman* and should be reversed.

2. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust even though no evidence was presented suggesting repudiation by the trustees; the Court of Appeals' decision is contrary to Washington Supreme Court precedent, and Court of Appeals precedent in *O'Steen v. Estate of Wineberg,* 30 Wn. App. 923, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982),

that a repudiation of a resulting trust only occurs when the trustees by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own.

In this case before the Court, the Court of Appeals erroneously held that it is "irrelevant" that Samantha (one of the co-beneficiaries) and not Howard and Nancy Allen (the trustees/parents of Samantha) made the alleged repudiation of the trust – while there was no evidence of any communication from the trustees. (Appendix at A-9.) The Court of Appeals' decision here is contrary to Washington Supreme Court precedent because a repudiation of a resulting trust only occurs when the *trustees*, not one of the co-beneficiaries, by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own. *State, Dept. of Revenue v. Puget Sound Power & Light Co.,* 103 Wn. 2d 501, 509, 694 P.2d 7 (1985); *Arneman v. Arneman,* 43 Wn.2d 787, 797, 264 P.2d 256 (1953); *Goodman v. Goodman,* 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (citing *O'Steen v. Estate of Wineberg,* 30 Wn. App. 923, 932, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982)). Samantha is one of the co-beneficiaries, not a trustee. The defendants failed to provide any evidence of repudiation by the trustees.

The Court of Appeals also held that Samantha's denial that her

owning the family home "is a true and accurate statement," (CP at 55), constituted a plain, strong, and unequivocal repudiation of the resulting trust by Howard and Nancy Allen (the trustees of the community home). This ruling is contrary to the aforementioned Washington Supreme Court precedent because the trustees' repudiation of a resulting trust must plainly, strongly, and unequivocally deny the existence of the trust and claim the trust property as their own.

In *O'Steen v. Estate of Wineberg,* 30 Wn. App. 923, 932, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982)*,* the Court of Appeals considered the issue of alleged repudiation of an express trust. *O'Steen* is pertinent here because the rule for repudiation of a resulting trust "is the same as that which is applicable to express trusts." Restatement (Second) of Trusts § 409 Laches, cmt. a. The *O'Steen* court explained:

> A trustee may repudiate by words or other conduct by which he denies that there is a trust and claims the trust property as his own. The authorities are generally well agreed that a trustee's repudiation of an express trust must be plain, strong, and unequivocal to be sufficient to set the statute of limitations in motion against a beneficiary. It must be an open repudiation, and to be effective must be brought home to the beneficiary.
> . . .
> *A fundamental characteristic of a trust is that legal and equitable ownership of the trust property is divided between two parties; the trustee has bare legal title and*

> *the beneficiary has the equitable or beneficial ownership.*

O'Steen, 30 Wn. App. at 932-933 (emphasis added) (citations omitted).

As the *O'Steen* court noted, there is a distinction between the trustees' legal "ownership" and the beneficiaries' equitable "ownership." Samantha's (who is a co-beneficiary, *not one of the trustees*) denial that her owning the family home "is a true and accurate statement," (CP at 55), very easily can be interpreted as merely denying "legal ownership" of the home — not beneficial ownership, which she shared with Vincent. Without elaboration, it "certainly does not rise to the level of the plain, strong, and unequivocal repudiation [by the trustees] necessary to start the statute of limitations running." *O'Steen* at 933. It should also be noted that this was a default hearing, and neither Vincent nor his attorney were present. Therefore, Vincent did not have the opportunity to cross-examine Samantha and clarify her testimony on this issue.

The legal standard for consideration of the defendants' CR 12(b)(6) motion requires that all reasonable inferences be construed most strongly in Vincent's favor, and even hypothetical facts must be considered that could conceivably support Vincent's claim for a resulting trust. *Worthington v. WestNET,* 182 Wn.2d 500, 505-506,

341 P. 3d 995 (2015). Taking into account this standard and the facts presented, the Court of Appeals' conclusion that the trust was repudiated by the trustees is clearly contrary to Washington Supreme Court precedent that the trustees must plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own.

The Court of Appeals' decision is also contrary to its holding in *O'Steen*. O'Steen brought an action to impose an express trust regarding property (shares of a petroleum corporation) held by the estate of the deceased defendant Wineberg. Wineberg had owed O'Steen $25,000. Rather than repay this money, they orally agreed that O'Steen would have a 10 percent share of a petroleum corporation being founded by Wineberg in 1959. After Wineberg's death in 1975, O'Steen filed a claim against his estate for the value of his shares in the corporation, but the claim was rejected and litigation ensued. *O'Steen* at 925.

After a jury trial in O'Steen's favor, Wineberg appealed to the Court of Appeals, arguing that he had repudiated the trust, and that the repudiation had been communicated to O'Steen by 1967 at the latest. The statute of limitations, Wineberg argued, would therefore bar the action, which was not brought until 1976 (nine years later).

Wineberg argued that his repudiation of the trust was established by, inter alia, the following facts: 1. Wineberg inventoried the shares as community property in his wife's estate after her death in 1962; 2. O'Steen's wife testified that she did not want Wineberg to know that the written note he had signed (which provided proof of the oral agreement) had been lost, because she believed in 1964 that, in the absence of the note, Wineberg would not honor his agreement.

The Court of Appeals rejected all of Wineberg's arguments, affirming the jury's verdict in O'Steen's favor and holding in relevant part:

> [We do not agree] that Wineberg repudiated the trust by inventorying all his [] stock as community property in his wife's estate after her death in 1962. The purpose of the inventory required by RCW 11.44.015 is merely to furnish a list of property which appears to belong to the decedent. The inventory is not conclusive as to the decedent's ownership of that property. Therefore, although the inventory might suggest that Wineberg considered the shares to be his own, it is by no means conclusive. **It certainly does not rise to the level of the plain, strong, and unequivocal repudiation necessary to start the statute of limitations running.**
>
> [Wineberg] next argues that a repudiation was established by the testimony of Mrs. O'Steen that she and her husband deliberately refrained from telling Wineberg that the note evidencing the 1959 agreement had been lost. Mrs. O'Steen's testimony suggests that she believed that if Wineberg knew the note was lost he would disavow the trust. **However, repudiation**

> **must be by words or conduct of the trustee; in the absence of sufficiently plain, strong, or unequivocal conduct by the trustee there can be no repudiation, whatever the beneficiary's belief or understanding.**

O'Steen at 933 (emphasis added) (citations omitted).

3. Where the Court of Appeals affirmed the CR 12(b)(6) dismissal of the complaint for a resulting trust; the Court of Appeals' decision is contrary to Washington Supreme Court precedent that community property not disposed of in a decree of dissolution continues to be held by the parties as tenants in common and requires a separate court action for partition.

The Court of Appeals' holding that the mere absence of listing the family home in the default decree of dissolution constituted a plain, strong, and unequivocal repudiation of the resulting trust regarding the community home, (Appendix at A-9), is contrary to Washington Supreme Court precedent, where "[i]t is well settled that community property not disposed of in a decree of dissolution is owned thereafter by the former spouses as tenants in common." *In re Marriage of Molvik,* 31 Wn. App. 133, 135-36, 639 P.2d 238 (1982); *Yeats v. Estate of Yeats,* 90 Wn.2d 201, 203, 580 P.2d 617 (1978) (citing *Chase v. Chase,* 74 Wn.2d 253, 444 P.2d 145 (1968); *Northwestern Life Ins. Co. v. Perrigo,* 47 Wn.2d 291, 287 P.2d 334 (1955)).

"The adjudication of rights in property not disposed of in a dissolution decree requires an independent action for partition." *Marriage of Monaghan,* 78 Wn. App. 918, 929, 899 P.2d 841 (1995) (citing *Devine v. Devine,* 42 Wn. App. 740, 743, 711 P.2d 1034 (1985)). Thus, a former spouse is entitled to bring "a separate independent civil action" seeking partition or other declaratory relief after the dissolution. *Molvik,* 31 Wn. App. at 135; *Lambert v. Lambert,* 66 Wn.2d 503, 403 P.2d 664 (1965); *Olsen v. Roberts,* 42 Wn.2d 862, 259 P.2d 418 (1953).

The change in the classification of the family home after the default dissolution of marriage from being community property to property held in equal share by tenants in common does not by any means rise to the level of a plain, strong, and unequivocal denial of the existence of a trust regarding the family home. The Court of Appeals' holding is in conflict with the well-settled Washington Supreme Court precedent on this issue and should be reversed.

4. REQUEST FOR ATTORNEY'S FEES: Where the defendants moved with their CR 12(b)(6) motion to dismiss the complaint for a resulting trust on their allegation that the trust was based on an alleged oral agreement and had lapsed after three years – contrary to the facts of the complaint – and moved for sanctions for a frivolous complaint; Vincent should be awarded reasonable attorney's fees for the defendants' frivolous motion to dismiss and motion for sanctions and cross-appeal.

Vincent should be awarded reasonable attorney's fees in defending against the defendants' CR 12(b)(6) motion to dismiss and motion for sanctions filed in the trial court because it was frivolous, due to the defendants' failure to cite any of the applicable law on the statute of limitations regarding resulting trusts and failure to provide any facts or evidence showing that the defendants had repudiated the trust. (CP at 8-11.)

Vincent should also be awarded reasonable attorney's fees in defending against the defendants' motion for sanctions in the trial court (on the alleged basis that Vincent's complaint was frivolous), (CP at 79), and cross-appeal of the denial of sanctions in the Court of Appeals, (Brief of Respondents/Cross-Appellants at 13-16), because the defendants' motion and cross-appeal were themselves frivolous due to the obvious fact that Vincent's complaint and appeal were not frivolous and did not warrant a motion for sanctions.

Many courts have cautioned that a frivolous motion for sanctions is, in itself, sanctionable. *See, e.g., Foy v. First Nat'l Bank,* 868 F.2d 251, 258 (7th Cir. 1989) (sanctioning appellee for his frivolous argument that appellant should be sanctioned for filing appeal, because "it is obvious that the appeal is not frivolous"); *Alliance to End Repression v. City of Chicago,* 899 F.2d 582, 583 (7th

Cir. 1990) (motions for sanctions by attorneys who do not recognize the difference between vigorous advocacy and frivolous conduct are themselves sanctionable).

F. CONCLUSION

The Supreme Court should grant review, reverse the Court of Appeals' decision, reinstate Vincent's case, and award reasonable attorney's fees.

Respectfully submitted on this 28th day of August, 2017.

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DECLARATION OF SERVICE:
I certify under penalty of perjury under the laws of the state of Washington that on August 28, 2017, I served a true copy of this document on Respondents' counsel, Mr. Ronald D. Richmond, by e-mail to ron@rrlaw.pro via the Appellate Courts' Portal.

Erkan Chabuk

Appendix

Filed
Washington State
Court of Appeals
Division Two

June 13, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VINCENT L. BADKIN, a divorced man, Appellant/Cross Respondent, v. SAMANTHA J. BADKIN, a divorced woman, and HOWARD M. ALLEN and NANCY B. ALLEN, husband and wife, individually and the martial community composed thereof, Respondents/Cross Appellants.	No. 49007-2-II UNPUBLISHED OPINION

MELNICK, J. — Vincent Badkin appeals the trial court's dismissal of his claim for a resulting trust, and order granting ex-wife Samantha Badkin's CR 12(b)(6) motion to dismiss and denying his motion for reconsideration.[1] Samantha cross-appeals the trial court's denial of her CR 11 motion for attorney fees.

We conclude that the trial court did not err by dismissing Vincent's claim because even assuming that the family home was held in a resulting trust, the resulting trust was repudiated and the statute of limitations ran on his claim. Because the record is insufficient, we decline to review whether the trial court abused its discretion when it did not impose attorney fee sanctions on either party. We affirm.

[1] Because the parties share the same last name, we use the parties' first names for clarity. We intend no disrespect.

FACTS

On October 6, 2015, Vincent filed a lawsuit against Samantha and her parents to impose a resulting trust on the family home. Vincent alleged the following facts in his amended complaint. Vincent and Samantha married in 1995. In August 2004, the parties purchased a family home located in Bremerton, Washington. For "ease of financing," Samantha's parents, Howard and Nancy Allen, purchased the home in their names and held title to it. Clerk's Papers (CP) at 28. The Allens made the down payment as a gift to Vincent and Samantha. They intended that Vincent and Samantha would make the mortgage payments, and that the equity would belong to Vincent and Samantha's marital community.

Vincent and Samantha resided in the family home, made the mortgage and insurance payments, and made payments on property taxes and utilities. Vincent made repairs to and maintained the home, believing that the home was community property.

In 2008, the parties permanently separated and Vincent moved out of the family home. Samantha continued to reside there. On May 7, 2012, in a default proceeding, the Kitsap County Superior Court entered an order dissolving the parties' marriage. During the dissolution proceedings, Samantha testified, but never said that the family home was community property.[2] The court divided the parties' community assets, but did not address or divide the family home.

Vincent alleged in his amended complaint that even though the Allens had title to the family home, a resulting trust should be imposed because the parties' marital community supplied consideration for the home and did not intend the Allens to take the beneficial interest in the property. Vincent also alleged that the Allens were, instead, "trustees" of the resulting trust "to which the family home belongs for the benefit of the now-defunct marital community" of the

[2] The record does not include documents or transcripts from the dissolution proceedings.

parties. CP at 29. Vincent further alleged that he and Samantha, the trust "beneficiaries," were now tenants-in-common of the family home, and that he was entitled to 50 percent of its equity. CP at 29. Vincent also alleged unjust enrichment and bad faith, and stated that Samantha and her parents acted "in concert, fraudulently, under false pretenses, and with intent to mislead and misrepresent" by concealing the parties' marital interest in the home. CP at 30.

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Samantha did not file an answer to Vincent's lawsuit. Instead, she filed a motion to dismiss the complaint for failure to state a claim, arguing that the statute of limitations had run on Vincent's claims. She also requested attorney fees and costs for having to defend a meritless suit.

Samantha provided the trial court with "Additional Facts in [the] Court Record" concerning the parties' dissolution proceedings, including the cause number and the fact that, in June 2012, the trial court denied a motion to vacate the dissolution order. CP at 9. An amended dissolution decree was entered in August 3, 2012. Subsequent litigation, including a trial and an appeal,[3] resulted, but they had no effect on the findings of fact and decree regarding the division of property. Samantha argued that the latest possible date at which Vincent's cause of action could have accrued was on August 3, 2012, when the court entered the final dissolution decree and the distribution of assets occurred.

Vincent responded and moved for CR 11 sanctions based on Samantha's "frivolous" motion. CP at 13. He argued, among other matters, that Samantha failed to cite case law relating to the statute of limitations for resulting trusts and repudiation of trusts, and that she failed to meet

[3] *In re Marriage of Badkin*, No. 43900-0-II (Wash. Ct. App. Nov. 18, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2043900-0-II%20Order%20Amending%20Opinion%20and%20Denying%20Motions.pdf, *review denied*, 183 Wn.2d 1010 (2015).

her burden. He argued that his amended complaint correctly alleged the creation of a resulting trust, and that no evidence existed to support an unequivocal repudiation of that trust.

Samantha replied, countering Vincent's assertions regarding the statute of limitations and repudiation of the alleged trust. Samantha argued that Vincent alleged no facts under which she and the Allens treated the family home as being held for his benefit after he moved out. Even if there was a basis for imposing a resulting trust, Samantha and the Allens' actions plainly indicated that they had no intention of giving Vincent access or rights to the family home. Vincent knew about the divorce proceedings and knew that the family home had not been listed as a community asset.

After a hearing, the trial court entered findings of fact, conclusions of law, and an order dismissing Vincent's complaint with prejudice.[4] It found that a three-year statute of limitations applied, that Vincent did not assert the discovery rule and even if he had, it did not apply. The trial court further ruled that Vincent did not plead in the amended complaint any act or failure to act that occurred within three years of filing the complaint. The trial court dismissed the case.

II. MOTION FOR RECONSIDERATION

Approximately one week later, Vincent filed a motion for reconsideration. In the alternative, Vincent moved the court to amend the order and designate the documents that the court considered in its ruling. Samantha responded to the motion and additionally moved for attorney fees pursuant to CR 11.

Vincent replied and moved to amend his complaint for a second time. He wanted to clarify that the Allens' down payment was a gift to Vincent and Samantha for their first home in Oregon,

[4] Vincent moved to strike Samantha's reply. He argues on appeal that the trial court's failure to strike the reply constituted error. Because our disposition of the case does not rely on any of the materials he moved to strike, we decline to decide this issue.

not the family home at issue in this case. He argued that regardless of the down payment, he and Samantha obligated themselves to pay the rest of the purchase price of the home, and did so by making the mortgage, tax, and insurance payments, which created a resulting trust.

Vincent also argued that the only relevant testimony during the default divorce trial was given by Samantha as follows:

> [Trial court]: [Vincent's attorney] has claimed that you own the family home that you currently reside in; is that a true and accurate statement?
> [Samantha]: No, it is not.

CP at 55.

On March 28, 2016, the trial court entered an order denying Vincent's motion for reconsideration. The order stated that the court treated Samantha's CR 12(b)(6) motion to dismiss as a CR 56 motion for summary judgment. It also stated that the court considered the court documents from the parties' dissolution proceedings.[5]

The order stated that treating the family home, alleged to be held in a resulting trust, as though it was the sole property of the Allens "repudiate[d] any trust in" the home. CP at 67. The trial court found, "Once a beneficiary of a trust has notice of the repudiation of that trust by the trustee, the statute of limitations begins to run against the beneficiary." CP at 67. Based on the findings of fact and conclusions of law from the May 2012 dissolution, the court found that the Allens treated the family home as their own. It further found that the family home had not been listed as a marital asset in the May 2012 dissolution proceedings; therefore, Vincent had notice that the Allens treated the family home as their own and that it was not community property.

[5] The documents considered were as follows: Kitsap County Case No. 10-3-00847-6, May 7, 2012 findings fact, conclusions of law, and decree of dissolution; June 28, 2012 order on respondent's motion for relief from judgment or orders; August 3, 2012 amended findings of fact and conclusions of law; July 28, 2015 mandate from the court of appeals; and September 21, 2015 order on remand.

The trial court concluded that because Vincent filed this lawsuit more than three years after he received notice, the statute of limitations had run. The court did not impose attorney fees pursuant to CR 11 on either party and did not provide its reasoning in the order for declining to do so.

Vincent appeals and Samantha cross-appeals.

ANALYSIS

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Vincent argues that the trial court erred by granting Samantha's motion to dismiss because he pled sufficient facts to show that a resulting trust had been created in the family home.[6] He argues that Samantha did not meet her burden of showing that he could not prove facts consistent with his complaint that would entitle him to relief. We conclude that the trial court correctly dismissed the case because, even if we assume that a resulting trust arose in the family home, the resulting trust was repudiated and the statute of limitations ran on Vincent's claim.

A. STANDARD OF REVIEW

We review a trial court's dismissal of a claim under CR 12(b)(6) de novo. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Dismissal is proper unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would justify recovery. *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). We presume all facts alleged in the plaintiff's complaint as true and may consider hypothetical facts supporting the plaintiff's claims. *Kinney v. Cook*, 159

[6] Vincent also argues that Samantha failed to file an answer to his complaint, and omitted and misquoted significant facts provided in the complaint. The argument is without merit. A motion to dismiss may be brought before making further pleading. CR 12(b)(6). Additionally, the record shows that Samantha did not omit or misquote the facts of the complaint. The pertinent facts were provided in her response and she restated Vincent's allegations.

Wn.2d 837, 842, 154 P.3d 206 (2007). All reasonable inferences from the alleged facts are drawn in the plaintiff's favor. *Trujillo*, 183 Wn.2d at 830.

A CR 12(b)(6) motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. *Sea-Pac*, 103 Wn.2d at 802. Summary judgement is proper if there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 485, 309 P.3d 636 (2013). We review a trial court's order granting summary judgment de novo. *Bavand*, 176 Wn. App. at 485.

B. RESULTING TRUST & REPUDIATION

"A trust is the holding of property subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived." *State ex rel. Wirt v. Superior Court for Spokane County*, 10 Wn.2d 362, 369, 116 P.2d 752 (1941). "A trust in real estate implies a holding of the legal title by one for the benefit of another, who holds the equitable title–a separation of the legal estate from the beneficial enjoyment." *State ex rel. Wirt*, 10 Wn.2d at 369.

There are three types of trusts: express, resulting, and constructive. *Carkonen v. Alberts*, 196 Wn. 575, 578, 83 P.2d 899 (1938). Implied or "resulting" trusts are created by operation of law, "where the acts of the parties have no intentional reference to the existence of any trust." *Carkonen*, 196 Wn. at 578. Because a resulting trust is raised by implication of law, it is equitable in nature. *Stocker v. Stocker*, 74 Wn. App. 1, 6, 871 P.2d 1095 (1994).

A resulting trust arises when a person conveys a property's legal title to another under circumstances that reasonably shows that the person did not intend for the grantee to have a beneficial interest in the property. *Thor v. McDearmid*, 63 Wn. App. 193, 205, 817 P.2d 1380

(1991). Thus, where property is purchased by one person, but placed in the name of another, the person with legal title is presumed to hold it subject to the equitable ownership of the purchaser, absent evidence of contrary intent. *In re Estate of Spadoni*, 71 Wn.2d 820, 822, 430 P.2d 965 (1967).

The crucial element in a resulting trust is the intent of the grantor to transfer the property without the beneficial interest. *Thor*, 63 Wn. App. at 205. In the absence of other evidence of intent, a resulting trust is presumed in favor of a person who pays the consideration for real property deeded to another. *Engel v. Breske*, 37 Wn. App. 526, 529, 681 P.2d 263, *review denied*, 102 Wn.2d 1025 (1984).

An action based on a resulting trust is subject to a three-year statute of limitations. *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953); RCW 4.16.080(3), (4). The statute of limitations begins to run on a resulting trust not when the trust is formed, but "when the trustee repudiates the trust and notice of such repudiation is brought home to the beneficiary." *Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7 (1985). "A repudiation occurs when the trustee by words or other conduct denies there is a trust and claims the trust property as his or her own." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). "The repudiation must be plain, strong, and unequivocal." *Goodman*, 128 Wn.2d at 373.

We assume, without deciding, that a resulting trust arose regarding the family home.[7] However, we conclude that any resulting trust was repudiated and that Vincent had notice of the repudiation in May 2012 when the trial court entered the dissolution decree.

[7] Vincent assigned error to a number of the trial court's findings of fact. These findings involve whether or not a resulting trust arose. Because we assume that a resulting trust existed, we need not address these issues.

A petition for dissolution of marriage must specify community property which must be disposed of in the proceeding. RCW 26.09.020(1)(f). The trial court must then dispose of the property and the liabilities of the parties. RCW 26.09.080.

As Vincent alleged in his amended complaint, and as the court found, Samantha neither listed the family home as community property nor acknowledged it as a marital asset during the dissolution proceedings. On May 7, 2012, the trial court entered a dissolution decree which it amended on August 3, 2012. Samantha's testimony that she did not claim any ownership interest in the family home, and the failure to list the family home as community property in the dissolution proceeding was conduct evidencing a denial or repudiation of the existence of a resulting trust.

It is also irrelevant that the alleged "trustees," the Allens, were not parties to the dissolution proceedings. Vincent had clear and unequivocal notice that the home was not being held in trust for him. The evidence, therefore, showed that the "trustees" treated the property as their own when the parties separated, the family home was not partitioned, and the home continued to be held in the Allens' names. The repudiation was plain, strong and unequivocal.

We conclude that Vincent had notice of repudiation when neither party listed the family home in the dissolution proceeding. Because the trust was repudiated more than three years before Vincent filed his complaint, we conclude that the statute of limitations barred his claim, and the trial court did not err in dismissing his complaint

II. MOTION FOR RECONSIDERATION

Vincent next argues that the trial court erred by denying his motion for reconsideration because the court considered dissolution documents not in the record, and because there was no evidence of repudiation of the trust. Based on our discussion above and the record as a whole, we conclude that the trial court did not abuse its discretion by denying Vincent's motion for

reconsideration. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 752 n.1, 162 P.3d 1153 (2007).

III. CR 11 SANCTIONS – ATTORNEY FEES

Lastly, Vincent argues that the trial court erred by failing to impose sanctions for attorney fees because Samantha's arguments and CR 11 motion for attorney fees were frivolous. Because the record is insufficient, we do not review the issue.

We review CR 11 sanctions for an abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The party seeking review has the burden to perfect the record so that we have before us all of the relevant evidence. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). "An insufficient record on appeal precludes review of the alleged errors." *Bulzomi*, 72 Wn. App. at 525; RAP 9.2(b).

Vincent chose to not provide a verbatim report of proceedings for our review. The record before us shows that the trial court declined to impose sanctions and award attorney fees to either party. However, nothing in the record shows the trial court's reasoning for declining to do so. Without such a record, we can only guess at why the trial court declined to impose sanctions and award attorney fees. Because the omission of the hearing transcript affects our ability to review the issue, it is fatal.

IV. CROSS-APPEAL

In Samantha's cross-appeal, she argues that the trial court erred by failing to impose attorney fees pursuant to CR 11 because Vincent brought a groundless action. Because the record is insufficient, we do not review the issue.

As we discuss above, the party seeking review has the burden to perfect the record so that we have before us all of the relevant evidence. *Bulzomi*, 72 Wn. App. at 525. Samantha did not

provide a sufficient record for us to review her cross-appeal. No verbatim report of proceedings was filed and nothing in the record shows the trial court's reasoning for declining to impose sanctions. Because the record is insufficient, we can only guess at why the trial court declined to impose sanctions and award attorney fees. Therefore, we decline to review the issue.[8]

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

J.

[8] Samantha also asserts in passing that regardless of the trial court's ruling on CR 11 sanctions, we should award attorney fees pursuant to RAP 14.2. Because she does not provide argument in support of her request, and does not direct us to any statute or applicable law granting her the right to recover fees, she did not adequately brief her request for fees, and we decline to award them. *See* RAP 14.2; RAP 14.3(a)(8); RAP 18.1(a), (b); *In re Marriage of Coy*, 160 Wn. App. 797, 808, 248 P.3d 1101 (2011). To the extent that this case falls under RCW 26.09, we decline to consider Samantha's request because she failed to file an affidavit of need. RAP 18.1(c); *In re Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669 (1997).

Filed
Washington State
Court of Appeals
Division Two

July 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VINCENT L. BADKIN, a divorced man, Appellant/Cross Respondent, v. SAMANTHA J. BADKIN, a divorced woman, and HOWARD M. ALLEN and NANCY B. ALLEN, husband and wife, individually and the martial community composed thereof, Respondents/Cross Appellants.	No. 49007-2-II ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

Appellant/Cross Respondent, Vincent L. Badkin, moves for reconsideration and publication of this court's June 13, 2017 unpublished opinion. Upon consideration, the court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Lee, Melnick.

FOR THE COURT:

Melnick, J.

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Vincent L. Badkin, a divorced man, Appellant, v. Samantha J. Badkin, a divorced woman, et. al, Respondents.	No. 49007-2-II APPELLANT'S MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

A. IDENTITY OF MOVING PARTY

Vincent L. Badkin (Vincent), Appellant, asks for the relief designated in Part B.

B. STATEMENT OF RELIEF SOUGHT

Vincent requests that the Court reconsider and publish its decision terminating review filed on June 13, 2017.

C. FACTS RELEVANT TO MOTION

The facts in Vincent's opening and reply briefs filed with the Court of Appeals are incorporated in here by reference.

D. GROUNDS FOR RELIEF AND ARGUMENT

I. MOTION FOR RECONSIDERATION

1. The Court's decision is contrary to Washington Supreme Court precedent that community property not disposed of in a decree of dissolution continues to be held by the parties as tenants-in-common.

The Court's holding that the mere absence of listing the community home in the decree of dissolution constituted a plain, strong, and unequivocal repudiation of the resulting trust regarding the community home, (slip op. at 9), is contrary to Washington Supreme Court precedent. The Supreme Court has repeatedly held that community property not disposed of in a decree of dissolution continues to be held by the parties as tenants-in-common. *Yeats v. Estate of Yeats,* 90 Wn.2d 201, 203, 580 P.2d 617 (1978) (citing *Chase v. Chase,* 74 Wn.2d 253, 444 P.2d 145 (1968); *Northwestern Life Ins. Co. v. Perrigo,* 47 Wn.2d 291, 287 P.2d 334 (1955)). "The adjudication of rights in property not disposed of in a dissolution decree requires an independent action for partition." *Marriage of Monaghan,* 78 Wn. App. 918, 929, 899 P.2d 841 (1995) (citing *Devine v. Devine,* 42 Wn. App. 740, 743, 711 P.2d 1034 (1985)).

2. The Court's decision is contrary to Washington Supreme Court precedent that a repudiation of a resulting trust only occurs when the trustees by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own.

The Court's holding that Samantha's (who is a co-beneficiary, not one of the trustees) abrupt denial that her owning the family home "is a true and accurate statement," (CP at

55), constituted a plain, strong, and unequivocal repudiation of the resulting trust by Howard and Nancy Allen (the trustees of the community home), is contrary to Washington Supreme Court precedent. The Supreme Court has held that a repudiation of a resulting trust only occurs when the *trustees* by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own. *State, Dept. of Revenue v. Puget Sound Power & Light Co.,* 103 Wn. 2d 501, 509, 694 P.2d 7 (1985) (citing *Arneman v. Arneman,* 43 Wn.2d 787, 797, 264 P.2d 256 (1953)); *Goodman v. Goodman,* 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (citing *O'Steen v. Estate of Wineberg,* 30 Wn. App. 923, 932, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982)).

In *O'Steen*, the court stated:

> A trustee may repudiate by words or other conduct by which he denies that there is a trust and claims the trust property as his own. G. Bogert, Trusts and Trustees § 951 (2d ed. 1962). The authorities are generally well agreed that a trustee's repudiation of an express trust must be plain, strong, and unequivocal to be sufficient to set the statute of limitations in motion against a beneficiary. [The rule for repudiation of a resulting trust "is the same as that which is applicable to express trusts." Restatement (Second) of Trusts § 409 Laches, cmt. a.] It must be an open repudiation, and to be effective must be brought home to the beneficiary. Annot., 54 A.L.R.2d 13, 23 (1957). Accord, Rogich v. Dressel, supra; Meck v. Behrens, 141

> Wash. 676, 252 P. 91, 50 A.L.R. 207 (1927); Garvey v. Garvey, 52 Wash. 516, 101 P. 45 (1909).
> . . .
> *A fundamental characteristic of a trust is that legal and equitable ownership of the trust property is divided between two parties; the trustee has bare legal title and the beneficiary has the equitable or beneficial ownership*. 76 Am.Jur.2d Trusts § 2 (1975).

O'Steen, 30 Wn. App. at 932-933 (emphasis added).

As the *O'Steen* court explained, there is a distinction between the trustees' legal "ownership" and the beneficiaries' equitable "ownership." Samantha's (who is a co-beneficiary, *not one of the trustees*) abrupt denial that her owning the family home "is a true and accurate statement," (CP at 55), without elaboration, "certainly does not rise to the level of the plain, strong, and unequivocal repudiation [by the trustees] necessary to start the statute of limitations running." *O'Steen* at 933. Samantha's abrupt denial can very easily be interpreted as merely denying "legal ownership" of the house — not beneficial ownership, which she shared with Vincent. This was a "default" trial and neither Vincent nor his attorney were present at the default trial. Therefore, Vincent did not have the opportunity to cross-examine Samantha and clarify her testimony on this issue. As stated in section 4 below, the Court must interpret all reasonable inferences most strongly in Vincent's favor

and consider hypothetical facts that could conceivably support a legally sufficient claim.

The Court also holds that it is "irrelevant" that Samantha and not Howard and Nancy Allen (the trustees) made the alleged repudiation of the trust. (Slip op. at 9.) This is contrary to Washington Supreme Court precedent because a repudiation of a resulting trust only occurs when *the trustees, not one of the co-beneficiaries,* by words or other conduct plainly, strongly, and unequivocally deny there is a trust and claim the trust property as their own. *Puget,* 103 Wn. 2d at 509; *Arneman,* 43 Wn.2d at 797; *Goodman,* 128 Wn.2d at 373. In *Goodman,* the issue was when the trustee had repudiated the trust. In this case before this Court, there is absolutely no evidence of any repudiation by the trustees. Samantha is one of the co-beneficiaries, not a trustee.

3. The Court's conclusion that the evidence "showed that the 'trustees' treated the property as their own when the parties separated," (slip op. at 9), is erroneous and not based on any evidence in record, and is contrary to the facts alleged in Vincent's complaint.

There is no evidence in record showing that Howard and Nancy Allen (the trustees) treated the property as their own when the parties separated. This is also contrary to the facts alleged in

Vincent's complaint: "On May 23, 2008, Vincent and Samantha were permanently separated and Vincent moved out of the family home on Dishman Rd [in Bremerton] while Samantha continued and continues to reside there." (CP at 29.) Samantha, as one of the co-beneficiaries, continued and continues to reside at the community home. Vincent and Samantha continue to hold their beneficial interest in the community home as tenants-in-common, after they divorced without the community home being disposed of by the decree of dissolution. *Yeats,* 90 Wn.2d at 203. Vincent was not required to continue to reside in the community home to retain his beneficial interest in it as a tenant-in-common: "[T]here is a presumption that possession by one tenant is possession by all and inures to the benefit of all." *Peters v. Skalman,* 27 Wn. App. 247, 254, 617 P.2d 448 (1980). Therefore, contrary to the Court's conclusion, Howard and Nancy Allen (the trustees) did not treat the community home as their own and there is no evidence in record to suggest this.

4. The Court's decision is contrary to Washington Supreme Court precedent for a CR 12(b)(6) motion to dismiss, that the facts alleged in the complaint must be taken as true and all reasonable inferences must be construed most strongly in the plaintiff's favor.

The Court has erroneously decided for itself that the facts conclusively showed that there was a plain, strong, and unequivocal repudiation of the resulting trust by the trustees, depriving Vincent of having this question decided by the trier of fact, contrary to Washington Supreme Court precedent. In a CR 12(b)(6) motion to dismiss, the facts alleged in the complaint must be taken as true and all reasonable inferences must be construed most strongly in the plaintiff's favor. *Trujillo v. Nw. Tr. Servs., Inc.,* 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Additionally, the motion may be granted only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *Worthington v. WestNET,* 182 Wn.2d 500, 505-506, 341 P. 3d 995 (2015).

In *Goodman v. Goodman,* 128 Wn.2d 366, 907 P.2d 290 (1995), the Supreme Court held that the statute of limitations defense to an action for an express trust presented a question of fact that could not be decided as a matter of law. *Goodman* was a family dispute involving an express trust to property. The jury entered a verdict for the plaintiffs, but the trial court granted judgment notwithstanding the verdict (JNOV) in favor of the defendant,

having found as a matter of law that the plaintiffs commenced the action after the limitations period had run because the trust had been repudiated more than three years prior to the commencement of the action. *Id.* at 371. The Court of Appeals affirmed, but the Supreme Court reversed, holding that the issue of when the repudiation occurred was susceptible to more than one reasonable interpretation, and therefore presented a question of fact that could not be decided on a motion for a JNOV. *Id.* at 373–374. The *Goodman* court noted that "[w]hether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." *Id.* Similar to the standard on a CR 12(b)(6) motion to dismiss or CR 56 motion for summary judgment, a motion for a JNOV admits the truth of the nonmoving party's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the nonmoving party. "No element of discretion is involved." *Id.* at 371. Here, as in *Goodman*, viewing the facts in the light most favorable to Vincent, the issue of alleged repudiation presents a question of fact that cannot be decided as a matter of law against Vincent.

5. Scrivener's error in the Court's opinion at page 5.

Regarding Samantha's testimony during the default trial, the Court's opinion incorrectly quotes that the *trial court* asked Samantha about owning the family home (slip op. at 5) — it was asked by Samantha's attorney, not the trial court.

II. MOTION TO PUBLISH

For the foregoing reasons, the Court should publish its opinion because the decision determines an unsettled or new question of law, or modifies, clarifies or reverses established principles of law, regarding community property not disposed of in a decree of dissolution, repudiation of a resulting trust, and the application of the standard for a CR 12(b)(6) motion to dismiss. RAP 12.3(e).

E. CONCLUSION

For the above stated reasons, the Court should reconsider its decision and grant the relief requested in Vincent's briefs, as well as publish its decision.

Respectfully submitted on this 2nd day of July, 2017.

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DECLARATION OF SERVICE:
I certify under penalty of perjury under the laws of the state of Washington that on July 2, 2017, I mailed or hand-delivered a true copy of this document to the office of Respondents' counsel, Mr. Ronald D. Richmond, located at 1521 Piperberry Way SE Ste 135, Port Orchard, WA 98366-1231.

Erkan Chabuk

AHMET CHABUK

August 28, 2017 - 10:48 PM

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