No. **100529-6**

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 372642

Lincoln Superior Court No. 14-3-01151-7

In re:

AN NGOC NGUYEN,

Petitioner,

vs.

THAO THI THU NGUYEN,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is AN NGOC NGUYEN.

II. DECISION BELOW

Petitioner seeks review of the *Opinion,* entered by Division III on October 19, 2021,[1] and the *Order Denying Motion for Reconsideration* entered on November 30, 2021.[2]

III. ISSUE FOR REVIEW

A. Whether the *Opinion* conflicts with numerous decisions of this Court and with decisions of the Court of Appeals.

B. Whether the *Opinion's* refusal to provide any meaningful review was so complete that it resulted in a violation of An Ngoc's right to due process of law.

IV. STATEMENT OF THE CASE

Both parties are both immigrants from Vietnam who speak English as a second language; they were married in 2001, and they divorced by agreement, entering their decree on July 25, 2014.[3]

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[1] Appendix A.
[2] Appendix B.
[3] *Opinion*, pgs. 1-2; CP 13-36, 52-76; *Opening Brief,* pg. 4.

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Almost four years after entry of the decree, the wife, Thao, moved the superior court to vacate the parties' decree of dissolution.[4] She claimed that the parties had previously had an undisclosed oral agreement regarding a piece of real estate that they had not included in the filings and that she now believed her husband had violated the oral agreement.[5] She requested vacation pursuant to CR 60(b)(4), (5), and (11).[6] Thao requested that the superior court "correct" the distribution of assets because she "would never agree to such a bad deal."[7] (CP 92.)

The husband, An Ngoc, responded saying that they had had no such oral agreement, and that what had actually occurred is that Thao had demanded $50,000 in immediate cash because the

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[4] Thao's first *Motion to Vacate* was filed on March 15, 2018 – three years and almost eight months after entry of the decree. (CP 37-38; *Opening Brief,* pg. 5.) Her second *Amended Motion to Partially Vacate Judgment* was filed on June 26, 2018, three years and eleven months after entry of the decree. (CP 87-88; *Opening Brief,* pg. 8.)

[5] CP 87-101.

[6] *Id.*

[7] CP 92.

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real estate market had been in low and she did not want to maintain an ongoing property interest, but when the market picked up four years later, Thao had contacted him and demanded more money than they had previously agreed and threatened to invent legal problems for him if he did not comply.[8]

An Ngoc argued that Thao's motion was untimely under Washington law.[9] First, because it caused prejudice to him (the nonmoving party) due to delay, because he had paid the mortgage and the property taxes for *four years*, and because he had also managed the property (including taking responsibility for maintenance, repairs, and leasing the property to tenants) for that entire period.[10] The second reason was because Thao had alleged no good reason for failing to take appropriate action sooner (other than her claim of a secret oral agreement that

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[8] *Opening Brief,* pg. 6-12.

[9] Per Luckett v. Boeing Company, 98 Wn.App. 307, 312, 989 P.2d 1144 (1999).

[10] It is undisputed on appeal that An Ngoc paid the mortgage and property taxes for four years and that he solely managed the property during that time.

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inexplicably required her husband to maintain property in his name that actually belonged to her and to manage that property for her sole benefit over many years – an assertion that is prevented by the statute of limitation and the statute of frauds.)

The superior court partially vacated the decree based solely on the following language:

> *The real property located at 4100 Scoria Lane, SE, Lacey, WA was not properly described in the Quit Claim Deed signed by the Petitioner on March 29, 2014, and not referenced in the Decree of Dissolution entered on July 25, 2014; therefore, the Decree is hereby partially vacated as to such real property to be addressed at a trial to be subsequently determined.*[11]

The superior court made no findings of fact or conclusions of law pursuant to any of the bases available under CR 60 for vacating a judgment/order.

Almost a year later, on September 6, 2019, the superior court conducted a trial where it awarded the property in full to Thao.[12]

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[11] CP 134-35.
[12] RP 116-26.

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In doing so, the superior court took pains to confirm that (1) it believed the parties had received bad advice,[13] (2) that both parties were likely confused as to what their agreement was and what their paperwork said,[14] (3) that it believed An Ngoc thought he understood the agreement and the meaning of the paperwork even though that belief may have been mistaken,[15] and (4) ultimately, the problem was that the parties had had no meeting of the minds when they entered the decree by agreement.[16]

An Ngoc appealed.

In his opening brief, he assigned error to the court's decision to vacate the decree without making any findings or conclusions related to CR 60, noting that CR 60 provided the bases for vacating an order, and the trial court did not articulate any of them, choosing instead to vacate based on the existence of undistributed property which is not the appropriate legal

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[13] RP 117.
[14] RP 119.
[15] RP 123.
[16] Id.

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standard. An Ngoc also went through the evidence that was available at the time the trial court entered the order vacating the decree, and he confirmed that none of it was sufficient to support the vacation of the decree even if the trial court had made any findings or conclusions, which it had not.

The Court of Appeals reviewed the matter and affirmed the superior court's decision, finding that the order to vacate had been "premised on fraud, misrepresentation, and misconduct."[17] In doing so, it made the following statements:

> He argued that [Thao's] motion, filed **almost three years after the decree**, was untimely. He also argued that her assertions that she did not intend to convey her interest in the [] property to him violated the statute of frauds.[18]
>
> ***
>
> Here, [Thao] brought her motion to vacate soon after learning that her former husband would not buy out her equity in the [] property **as orally promised**.[19]

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[17] *Opinion,* pg. 11
[18] *Opinion*, pg. 4; emphasis added.
[19] *Opinion,* pg. 6; emphasis added.

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***

Further, it is uncontested that [Thao] did not know the March 2014 deed purported to convey her interest in the [] property.[20]

***

We conclude that **the trial court did not abuse its discretion in determining that [Thao's] motion was timely.**[21]

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In support of her motion to vacate, [Thao] asserted that [An Ngoc] tricked her into signing the March 2014 deed and later added both properties' legal descriptions. This assertion is supported by the language of the conveyance itself, which is limited to the Tacoma property. **She further asserted** that [An Ngoc] **had agreed to buy out her equity in the Lacey property after he sold the Tacoma property. This assertion is supported by evidence that [An Ngoc] offered her $50,000 after the sale of the Tacoma property.** Finally, had [Thao] known that [An Ngoc] added the legal description of the Lacey property to the deed after she signed it, she probably would not have trusted him and signed the July 2014 agreed decree of dissolution. We conclude that [Thao] presented clear, cogent, and convincing

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[20] *Opinion,* pg. 6. This is an inaccurate statement of fact that was later corrected in the Court's order denying reconsideration. (Appendix B.)

[21] *Opinion,* pg. 7; emphasis added. The trial court made no such determination. This is an inaccurate statement of fact.

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evidence that [An Ngoc] engaged in misrepresentation or misconduct to obtain her signature on the agreed decree of dissolution.[22]

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In his reply brief, [An Ngoc] faults [Thao] for often using the trial court's posttrial 2019 findings of fact to support its 2018 order partially vacating the decree of dissolution. We agree. The findings in 2019 cannot be used to support the 2018 order. Similarly, the 2019 findings cannot be used to *impeach* the 2018 order. For this reason, [An Ngoc] cannot use the trial court's 2019 finding that he (merely) failed to comply with his fiduciary duty to impeach **the factual basis of its 2018 order, premised on fraud, misrepresentation, or misconduct**.[23]

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Relatedly, [An Ngoc] asserts "the trial court granted the motion to vacate for untenable reasons when it did so without making any findings related to fraud, misrepresentation, or misconduct." Br. of Appellant at 20-21. **He does not argue this point beyond that one sentence, and he fails to cite any authority to support his implied assertion that reversal is the appropriate remedy.** We generally refuse to address issues not adequately briefed or argued. *Ameriquest Mortg. Co. v. Attorney Gen.*, 148 Wn.App. 145, 166, 199 P.3d 468 (2009), *aff'd on other grounds*, 170 Wn.2d 418, 241 P.3d 1245

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[22] *Opinion,* pg. 8; emphasis added.

[23] *Opinion,* pg. 11; emphasis added.

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(2010). We decline to address this related argument.[24]

An Ngoc filed a motion for reconsideration which was denied. He now seeks the review of this Court.

V. ARGUMENT

(1) The *Opinion* pervasively conflicts with numerous decisions of this Court and with decisions of the Court of Appeals -- so much so that it raises a significant Constitutional question, which is whether the *Opinion's* refusal to provide any meaningful review was so complete that it resulted in a violation of An Ngoc's right to due process of law.

"The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law." *Goss v. Lopez*, 419 U.S. 565, 572, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

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[24] *Opinion,* pg. 8; emphasis added.

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In this case, Appellant's property interest in his real estate is implicated by the Court's consideration of his appeal, which he filed as a matter of right.

An essential principle of due process is the right to a meaningful opportunity to be heard. *Downey v. Pierce County*, 165 Wn.App. 152, 164, 267 P.3d 445 (2011) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). A meaningful opportunity to be heard means "'at a meaningful time and in a meaningful manner.'" *Id.* at 165, 267 P.3d 445 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Here, Division III declined to meaningfully consider Appellant's arguments; it either ignored them or dismissed them based on statements that summarized them inaccurately. The *Opinion* ignores/dismisses Appellant's clear arguments, repeatedly misstates the record in favor of Respondent, and engages in fact-finding tasks that reviewing courts are traditionally forbidden from undertaking on appeal and clearly

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does so in favor of the Respondent, which it does seemingly with the purpose of denying the appeal without addressing its merits.

It is understood that as a general principle, reviewing courts are entitled to affirm underlying decisions on any proper basis, and so, in some sense, it is appropriate for a reviewing court to review a case with an eye toward "trying" to affirm the underlying decision; however, this undertaking is to be performed within the constraints of the rules that govern reviewing courts and it must be based on the evidence in the record. The role of a reviewing court is not *adversarial* to an Appellant in its review, and the *Opinion's* analysis gives that impression in this case.

In its eagerness to affirm the trial court, the Opinion simply went too far which violated An Ngoc's due process rights and requires reversal.

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1. The *Opinion* repeatedly misstated the record.

The Court of Appeals found that Thao filed her motion to vacate "almost three years after the decree."[25] This is inaccurate (and crucially so). In his appellate filings, An Ngoc provided the *exact* dates for entry of the decree and Thao's filing of her motions to vacate. The decree was entered on July 25, 2014. Thao's first *Motion to Vacate* was filed on March 15, 2018 – three years and almost eight months after entry of the decree.[26] Her second *Amended Motion to Partially Vacate Judgment* was filed on June 26, 2018, three years and eleven months after entry of the decree.[27] An Ngoc clearly stated that Thao's request had been made four years after entry of the decree approximately 28 times in his appellate filings.[28]

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[25] *Opinion*, pg. 4; emphasis added.
[26] CP 37-38; *Opening Brief*, pg. 5.
[27] CP 87-88; *Opening Brief*, pg. 8.
[28] *Opening Brief*, pg. 2, 5, 6, 7, 9, 10, 11, 17, 18, 23, 26, 28, 29, 34, and 35; *Reply Brief*, pgs. 9, 10, and 19.

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The *Opinion* indicated that the trial court did not abuse its discretion when it determined that Thao's motion was timely, but this misstates the record. The trial court never determined that her motion was timely. It made no findings or conclusions on that issue; rather, it ignored it entirely.

The *Opinion* stated that superior court's order had a factual basis premised on fraud, misrepresentation, or misconduct. This is a misstatement of the record. The superior court never made any findings or conclusions about fraud, misrepresentation, or misconduct in its order on the motion to vacate. It ruled solely on undistributed property.

The *Opinion's* numerous misstatements of the record confirm that it did not provide An Ngoc with meaningful review.

2. The *Opinion* failed to address An Ngoc's assignments of error or his arguments on appeal.

A court's failure to exercise discretion is an abuse of discretion. *Cf. Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn.App. 2d 621, 626, 439 P.3d 676 (2019).

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The vast majority of An Ngoc's argument (as reflected in his assignments of error 1-4, issue #1) is based on his argument that the *sole authority* governing the vacation of orders/judgments is CR 60, and the trial court vacated the parties' decree without making a single conclusion of law related to CR 60 or a single finding of fact related to any of the bases outlined in CR 60. Therefore, its vacation of the decree was done pursuant to the wrong legal standard (i.e., the existence of undistributed property ***NOT*** the bases outlined in CR 60), and it was therefore an abuse of discretion.

The *Opinion* completely ignores that argument which is the *entire thrust* of the appeal instead choosing to dismiss arguments for reasons that do not comply with RAP 2.5(a). Division III's refusal to exercise discretion was an abuse of discretion and prevented An Ngoc from obtaining meaningful review.

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3. The *Opinion* violates well-settled Washington law regarding appellate review by determining the credibility of the parties, weighing evidence, and substituting its judgement for the superior court's judgment.

Washington law also holds that the determination of credibility and the weighing of evidence is left to the trier of fact.[29] Courts of appeal are not permitted to substitute their judgment for the superior court's judgment, weigh evidence, or evaluate credibility, and they defer to the trial court on issues of conflicting evidence, witness credibility, and the persuasiveness of the evidence.[30] Courts of appeal are not the appropriate finders of fact for the same reason successor judges cannot find facts: only the judge who has heard evidence has the authority to find facts.[31]

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[29] *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).
[30] *Wilson v. Wilson*, 165 Wn.App. 333, 340, 267 P.3d 485 (2011); *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001).
[31] *In re Marriage of Crosetto*, 101 Wn.App. 89, 96, 1 P.3d 1180 (2000).

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Here, the *Opinion* (1) determined the credibility of the parties (making all findings in favor of Thao), weighed the evidence (determined whether it was sufficient to meet the clear, cogent, and convincing standard), and substituted its own findings of fact made for the first time on appeal in the complete absence of any findings entered by the superior court.

In doing so, the *Opinion* not only violated well-settled principles of appellate procedure, but it attributed findings to the trial court that the trial court not only never made but that it *expressly contradicted* in later findings; specifically, the trial court found that the parties had never had a meeting of the minds sufficient to form an agreement (thereby undermining the *Opinion*'s finding that an "oral agreement" existed) and that no one had acted fraudulently or engaged in misrepresentation or misconduct (thereby undermining the *Opinion's* finding that there was clear, cogent, and convincing evidence that An Ngoc had engaged in fraud, misrepresentation, or misconduct).

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The *Opinion* conflicts with well-settled Washington law governing appellate review as set forth in decisions by this Court and the Court of Appeals, as evidenced in each of the cited decisions in this section.

4. The *Opinion* repeatedly erred when it made findings of fact and conclusions of law for the first time on appeal.

a. Division III erred when it found an oral promise existed between the parties.

Questions of law are reviewed de novo.[32]

> Here, [Thao] brought her motion to vacate soon after learning that her former husband would not buy out her equity in the Lacy property **as orally promised**.[33]

The Superior Court never made a finding of oral promise, nor did it ever even address Thao's claim of oral promise or An Ngoc's defenses of statute of limitation and statute of frauds.[34] The *Opinion* explicitly acknowledged An Ngoc's objections and then ignored them, finding that an oral promise had been made.

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[32] Jametsky v. Olsen, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014).
[33] *Opinion,* pg. 6; emphasis added.
[34] CP 79-86.

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RCW 4.16.080(2) imposes a three-year statute of limitations on actions for recovery of real property, and a two-year statute of limitations on any action not specifically provided for by RCW 4.16. RCW 64.04 prevents an oral agreement for the conveyance of real property.

By finding an oral promise existed in violation of the statute of limitations on actions for recovery of real property and oral contracts and in violation of the statute of frauds prevents oral agreements for conveyances of real property, the *Opinion* erred as a matter of law.

b. Division III erred when it found that there was clear, cogent, and convincing evidence to find that An Ngoc had engaged in misrepresentation or misconduct.

Decisions on motions to vacate are reviewed for abuse of discretion.[35] Discretion is abused if it exercised on untenable grounds for untenable reasons.[36] A discretionary decision is

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[35] *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013).
[36] *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

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based on untenable grounds or untenable reasons if the court "relies on unsupported facts or applies the wrong legal standard."[37] A court that misunderstands or misapplies the law bases its decision on untenable grounds.[38]

Misrepresentation requires a false statement of an existing fact.[39] If a party demonstrates that the other party engaged in misrepresentation, a trial court may grant relief under CR 60(b)(4) *only* if the moving party presents clear and convincing evidence of at least two *additional* elements: first, the moving party must have relied on or been misled by the misrepresentation, and second, there must be some connection between the misrepresentation and obtaining the judgment. *People's State Bank v. Hickey*, 55 Wn.App. 367, 371, 777 P.2d 1056 (1989).

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[37] *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).
[38] *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007).
[39] *Landsiar Inway, Inc. v. Samrow*, 181 Wn.App. 109, 124, 325 P.3d 327 (2014).

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The *Opinion* identified three pieces of evidence that it believed met the "clear, cogent, and convincing" standard to show misrepresentation or misconduct.

The first is the testimony proffered by Thao claiming that An Ngoc had "tricked her into signing the March 2014 deed and later added both properties' legal descriptions," which the *Opinion* evaluated as being "supported by the language of the conveyance itself, which is limited to the Tacoma property." This information does not actually identify any false statement of an existing fact made by An Ngoc as required to prove misrepresentation; therefore, it does not meet the requirement to prove misrepresentation, which leaves misconduct. The mere fact that errors exist in a document is not sufficient evidence to prove that they exist as a result of misconduct by even a preponderance of the evidence standard, much less a clear, cogent, and convincing standard. Such evidence bears many potential interpretations, which is subsequently confirmed by the superior court's trial conclusion that neither party engaged in

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misrepresentation or misconduct but that both believed that they had acted in accordance with their agreement.

The second piece of evidence that the *Opinion* relies on is the testimony proffered by Thao claiming that she and An Ngoc had an oral agreement that was not evidenced in the decree, which the *Opinion* evaluated as being "supported by evidence that [An Ngoc] offered her $50,000 after the sale of the Tacoma property."

Thao's claims of an oral agreement must survive An Ngoc's affirmative defenses of statute of frauds and statute of limitations, which they do not (as discussed above), and such claims are therefore unenforceable. Further, if An Ngoc made an offer of settlement in order to avoid a legal proceeding, it ought not even to be admissible pursuant to ER 408, much less is it evidence sufficient to prove anything except the desire to avoid a legal proceeding.

The third piece of "evidence" relied upon by the *Opinion* is not evidence at all but simply the court's speculation that "had

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[Thao] known that [An Ngoc] added the legal description of the Lacey property to the deed after she signed it, she probably would not have trusted him and signed the July 2014 agreed decree of dissolution." The *Opinion's* conclusion that its own speculation is evidence sufficient to meet the clear, cogent, and convincing standard is an abuse of discretion.

The Court of Appeals abused its discretion when it entered findings based on unsupported facts and conclusions based on the application of the wrong legal standards; this Court should reverse the decisions of both the Court of Appeals and the superior court and enter an order denying Thao's motion to vacate.

VI. FEES

An Ngoc renews his request for attorney's fees on appeal. Under RCW 26.09.140, the appellate courts have discretion to order a party to pay the other party's attorney fees associated with the appeal of a dissolution action. 'In exercising our

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discretion, we consider the arguable merit of the issues on appeal and the parties' financial resources."[40]

However, when one spouse's intransigence causes the spouse seeking attorney fees to require additional legal services, then the financial resources of the party seeking the fees is irrelevant.[41]

In this case, Thao's request to vacate the decree was entirely without basis, and An Ngoc is entitled to attorney's fees for having to litigate this issue.

Thao's first motion to vacate was made entirely without basis in the law and filed in violation of CR 11; her own decision to withdraw that motion and file an amended motion with entirely different legal bases confirms that even she recognized that her first motion to vacate had no merit.

Her second motion was also entirely without merit. Despite arguing for vacation pursuant to CR 60(b)(4) and (11), she made

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[40] *Marriage of Aiken*, 194 Wn.App. 159, 174, 374 P.3d 265 (2016).

[41] *In re Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989); RAP 18.1.

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no effort to demonstrate that her motion was timely filed *four years* after entry and she made no argument that *the decree* was obtained by fraud, misrepresentation, or misconduct. Despite arguing for vacation pursuant to CR 60(b)(4), she did not specifically argue fraud, misrepresentation, or misconduct related to the decree. Despite arguing for vacation pursuant to CR 60(b)(5), she did not specifically argue that the decree was void. Despite arguing for vacation pursuant to CR 60(b)(11), she did not identify a single "extraordinary circumstance" that had already been determined insufficient pursuant to Washington case law.

Therefore, An Ngoc respectfully requests that he be awarded attorney's fees on appeal for having to defend against Thao's frivolous motions four years after the entry of the decree.

VII. CONCLUSION

The *Opinion* conflicts with numerous decisions by the Court of Appeals and the Washington Supreme Court – so pervasively that An Ngoc was prevented from receiving meaningful review

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of his appeal in violation of his due process rights.

The undersigned certifies that the foregoing brief contains 4,130 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

RESPECTFULLY submitted this 30th day of December, 2021:

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CERTIFICATE OF ATTORNEY

I certify that on December 30, 2021, I arranged for delivery of a copy of the foregoing PETITION FOR REVIEW to the following:

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Appendix A

FILED
OCTOBER 19, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of THAO THI THU NGUYEN, Respondent, and AN NGOC NGUYEN, Appellant.	)	No. 37264-2-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — An Ngoc Nguyen appeals after the trial court partially vacated the parties' decree of dissolution and, one year later, entered an amended property award. We affirm in part, but remand for the trial court to enter adequate findings of fact and conclusions of law to support its attorney fee award in favor of Thao Thi Thu Nguyen.

FACTS

An Ngoc Nguyen and Thao Nguyen were married in 2001. During their marriage, Ms. Nguyen owned a nail salon, and Mr. Nguyen initially worked at a lumber mill. After

being laid off from the lumber mill, he worked as the business manager for his wife's nail salon. The couple had two children.

During the marriage, the couple purchased three properties together: a vacant lot that was going to be used for the nail salon, a single family house in Tacoma, and another single family house in Lacey. At the time of the dissolution, there was no mortgage on the vacant lot or the Tacoma property. The Lacey property had an outstanding mortgage of $180,000.

In early 2014, the Nguyens agreed to an amicable divorce. They sold their vacant lot and agreed on how to divide the proceeds. In March 2014, Mr. Nguyen recorded a quitclaim deed in Thurston County, purportedly transferring Ms. Nguyen's interests in the Tacoma and the Lacey properties to him. We attach the deed as an appendix to this opinion.

In April 2017, the parties signed an agreed petition for dissolution of marriage and filed it in Lincoln County. With respect to the division of real property, the agreed petition stated: "All community [real] property, if any, has been divided without contest." Clerk's Papers (CP) at 11.

Three months later, in July 2014, the parties signed agreed findings of fact and conclusions of law, the decree of dissolution, and sent those pleadings to the Lincoln

County Superior Court where they were subsequently signed by a judge and entered. The pleadings again stated: "All community [real] property, if any, has been divided without contest." CP at 24, 35.

In March 2018, Ms. Nguyen filed a complaint, seeking to partially vacate the divorce decree pursuant to CR 60(c).[1] Her complaint was filed in the 2014 cause and the parties treated it as a motion rather than a separate proceeding.

The motion, based on CR 60(c) and (e), was supported by a declaration signed by Ms. Nguyen. She explained that in 2014, she and her former husband agreed that he would have the Tacoma property and she would initially keep her interest in the Lacey property. She explained that when Mr. Nguyen sold the Tacoma property, he would buy out her equity in the Lacey property and she would quitclaim that property to him. But three years later, when he sold the Tacoma property, he offered her only $50,000, despite the equity now being around $150,000. According to Ms. Nguyen, Mr. Nguyen tried to buy her out for less than agreed by claiming she had quitclaimed her interest in the Lacey property to him in the March 2014 deed.

[1] CR 60(c) provides that CR 60 does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

Mr. Nguyen responded that real estate prices had greatly appreciated in the past three years, and his former wife was attempting to obtain the increased equity in the property despite his payment of the mortgage, taxes, and other property expenses during that time. He argued that Ms. Nguyen's motion, filed almost three years after the decree, was untimely. He also argued that her assertions that she did not intend to convey her interest in the Lacey property to him violated the statute of frauds.

Ms. Nguyen then filed an amended motion, clarifying that she was now relying upon CR 60(b)(4), (5), and (11). She further explained the circumstances behind her signing the deed. According to her, the version of the deed she signed had only the first two pages without any legal descriptions. And although the top of the first page reflected two parcel numbers, the document said that it transferred only the Tacoma property.

In November 2018, the trial court partially vacated the divorce decree. In its written order, the court explained: "The . . . Lacey [property] was not properly described in the Quit Claim Deed . . . and not referenced in the Decree of Dissolution . . . therefore the Decree is hereby partially vacated as to such real property to be address[ed] at a trial to be subsequently determined." CP at 135.

The trial occurred one year later. The trial court heard testimony and entered findings of fact and conclusions of law. The court awarded the Lacey property to Ms.

Nguyen and valued the equity of that property at $100,000. It found the net property award to Ms. Nguyen was $151,500 and the net property award to Mr. Nguyen was $280,000. In addition, the trial court awarded Ms. Nguyen $12,000 in attorney fees. There are no findings of fact or conclusions of law supporting the award of attorney fees.

Mr. Nguyen timely appealed.

ANALYSIS

PARTITION ARGUMENT RAISED FOR FIRST TIME ON APPEAL

Mr. Nguyen first contends the trial court erred by granting the motion to partially vacate the decree. He claims the trial court concluded that the Lacey property was undistributed, that divorced persons own undistributed property as tenants in common, and the correct way of dividing such property is an action for partition in the county where the property is located. He did not raise this partition argument below.

In general, we decline to consider an argument raised for the first time on appeal. RAP 2.5(a). The purposes of this rule are to encourage parties to raise issues below so the trial court has an opportunity to correct any error before it becomes an issue on appeal and to promote the important policies of economy and finality. *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017). For these purposes, we decline to consider Mr. Nguyen's argument.

TIMELINESS OF MOTION

Mr. Nguyen next contends the trial court erred by granting the motion to partially vacate the decree because it was not brought within a reasonable time.

"A motion to vacate is addressed to the sound discretion of the trial court." *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Motions to vacate under CR 60(b)(4), (5), and (11) must be made within a reasonable time. CR 60(b).

Here, Ms. Nguyen brought her motion to vacate soon after learning that her former husband would not buy out her equity in the Lacy property as orally promised. The fact that Mr. Nguyen offered her $50,000 arguably shows he had a collateral agreement yet to fulfill. Further, it is uncontested that Ms. Nguyen did not know the March 2014 deed purported to convey her interest in the Lacey property. In fact, the only language in the deed that explicitly transferred property said the property being transferred was the Tacoma property. The conveyance language makes no mention of the Lacey property.

Mr. Nguyen argues he was greatly prejudiced by the trial court's decision to partially vacate the decree years after it was entered. He complains that he paid the mortgage, property taxes, and maintenance expenses on the Lacey property for four years.

But the property was leased during most of the time Mr. Nguyen paid these amounts. We are confident that he alone received the rental payments during that time.[2]

We conclude that the trial court did not abuse its discretion in determining that Ms. Nguyen's motion was timely.

LEGAL BASIS FOR MOTION

Mr. Nguyen contends that Ms. Nguyen failed to provide a factual basis for relief under CR 60(b)(4). We disagree.

To set aside a judgment under CR 60(b)(4), a moving party has the burden to show by clear, cogent, and convincing evidence that the judgment was obtained by fraud, misrepresentation, or misconduct of an adverse party. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989). The fraud, misrepresentation, or misconduct must cause the entry of the judgment. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990).

In support of her motion to vacate, Ms. Nguyen asserted that Mr. Nguyen tricked her into signing the March 2014 deed and later added both properties' legal descriptions. This assertion is supported by the language of the conveyance itself, which is limited to

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[2] If he had shared the lease payments with Ms. Nguyen, she would have said so to support her assertion that Mr. Nguyen recognized her continued interest in the Lacey property.

the Tacoma property. She further asserted that Mr. Nguyen had agreed to buy out her equity in the Lacey property after he sold the Tacoma property. This assertion is supported by evidence that Mr. Nguyen offered her $50,000 after the sale of the Tacoma property. Finally, had Ms. Nguyen known that Mr. Nguyen added the legal description of the Lacey property to the deed after she signed it, she probably would not have trusted him and signed the July 2014 agreed decree of dissolution. We conclude that Ms. Nguyen presented clear, cogent, and convincing evidence that Mr. Nguyen engaged in misrepresentation or misconduct to obtain her signature on the agreed decree of dissolution.

Relatedly, Mr. Nguyen asserts "the trial court granted the motion to vacate for untenable reasons when it did so without making any findings related to fraud, misrepresentation, or misconduct." Br. of Appellant at 20-21. He does not argue this point beyond that one sentence, and he fails to cite any authority to support his implied assertion that reversal is the appropriate remedy. We generally refuse to address issues not adequately briefed or argued. *Ameriquest Mortg. Co. v. Attorney Gen.*, 148 Wn. App. 145, 166, 199 P.3d 468 (2009), *aff'd on other grounds*, 170 Wn.2d 418, 241 P.3d 1245 (2010). We decline to address this related argument.

CLAIMS OF ERROR IN AWARDING LACEY PROPERTY TO MS. NGUYEN

Mr. Nguyen raises several claims of error under the general contention that the trial court erred in awarding property to his former wife. We address the claims in the order raised.

Mr. Nguyen first claims the trial court erred during its oral ruling when it stated that it had earlier vacated the quitclaim deed when it partially vacated the decree of dissolution. We agree. The trial court's order partially vacating the decree of dissolution did not vacate the deed. But the trial court did eventually award the Lacey property to Ms. Nguyen and this will require Mr. Nguyen to execute a quitclaim deed of that property to her.

Mr. Nguyen next claims the trial court erred because only a partition action was available to Ms. Nguyen. We previously declined to review this argument because it was not raised below.

Mr. Nguyen further claims the trial court erred when it equalized the parties' property pursuant to current property values rather than the values at the time of dissolution. He withdraws this argument in his reply brief.

Mr. Nguyen's final claim under this section is that the trial court erred by failing to address his request for reimbursement for the mortgage, tax, and other payments he made for the Lacey property after the 2014 decree. He cites no authority for his argument. Nevertheless, whatever right of reimbursement he had, it existed in equity only. *See Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 723-35, 197 P.3d 686 (2008) (discussing unjust enrichment and common law right of restitution). The first rule of equity is one who seeks equity must do equity. *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 581, 304 P.3d 472 (2013). Mr. Nguyen never offered to offset the rent payments he received from the Lacey property from his reimbursement claim. He was not entitled to equitable relief.

ATTORNEY FEES AT TRIAL

Mr. Nguyen contends the trial court erred when it awarded attorney fees to Ms. Nguyen. He argues there are no findings of fact or conclusions of law supporting why fees were awarded or how the trial court arrived at the amount ordered. We agree.

Where a trial court fails to enter adequate findings of fact and conclusions of law supporting an award of attorney fees, the proper remedy is to remand for entry of adequate findings and conclusions. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632

(1998). We therefore remand for this purpose. If the trial court believes the facts and the law do not warrant such an award, it has discretion to withdraw its award.

ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal and argue the other has been intransigent. We decline to award fees to either party. This is because, ultimately, the trial court did not find that Mr. Nguyen misrepresented anything to Ms. Nguyen.

The trial court concluded that both parties had a fiduciary duty toward the other in the agreed dissolution and found that Mr. Nguyen failed in this duty. It further found Mr. Nguyen "may have believed the intent of his Quit Claim Deed [was to transfer both properties] but there was no indication to others that the intent of said deed was to address the [Lacey] property." CP at 173 (Finding of Fact 17).[3] Because the trial court did not find intransigence, neither will we.

[3] In his reply brief, Mr. Nguyen faults Ms. Nguyen for often using the trial court's posttrial 2019 findings of fact to support its 2018 order partially vacating the decree of dissolution. We agree. The findings in 2019 cannot be used to support the 2018 order. Similarly, the 2019 findings cannot be use to *impeach* the 2018 order. For this reason, Mr. Nguyen cannot use the trial court's 2019 finding that he (merely) failed to comply with his fiduciary duty to impeach the factual basis of its 2018 order, premised on fraud, misrepresentation, or misconduct.

Affirmed in part; remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, A.C.J.

Staab, J.

APPENDIX

4585781 Page 2 of 5 03/31/2014 1..37 AM Thurston County WA

31 MAR '14 522995

Thurston County Treasurer
Real Estate Excise Tax Paid [illegible]
By [illegible] **Deputy**

Recording requested by: _____
When recorded, mail to:
NGUYEN AN NGOC
3114 S 56 TH ST
TACOMA, WA 98409

Space above for Recorder's Use Only
Title Order # _____
Escrow # _____
Document Prepared by: _____

Quitclaim Deed

The undersigned Grantor(s) declare:
The Document Transfer Tax is $ _____
Assessor's Parcel # 765200182000 & 11815120400
___ Unincorporated Area or ___ City of LACEY
___ Tax computed on full value of property conveyed, or
___ Tax computed on full value less value of liens or encumbrances remaining at time of sale

This Quitclaim Deed is made on _____, between NGUYEN THAO THI THU, Grantor(s), of 3114 S 56 TH ST TACOMA, WA 98409 (address), and NGUYEN AN NGOC, Grantee(s), of 3114 S 56 TH ST TACOMA, WA 98409 (address).

For valuable consideration, the receipt of which is hereby acknowledged, the Grantor(s) hereby quitclaims and transfers all right, title, and interest held by the Grantor in the following described real estate and improvements to the Grantee(s), and his or her heirs and assigns, to have and hold forever, located at 3114 S 56 TH ST TACOMA, State of WA 98409:

California Quitclaim Deed Pg 1 (11-12)

4585781 Page 3 of 5 03/31/2014 1. 57 AM Thurston County WA

Subject to all easements, rights of way, protective covenants, and mineral reservations of record, if any. Taxes for the tax year of 2014 shall be prorated between the Grantor and Grantee as of the date of recording of this deed.

Dated: 03 - 21 2014

Signature of Grantor

Signature of Grantor

NGUYEN THAO THI. THU
Name of Grantor

Name of Grantor

State of ~~California~~ WASHINGTON
County of PIERCE } S.S.
On 3/29/14, before me, TROY ALLISON
(name and title of notary), personally appeared THAO THI-THU NGUYEN,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the above instrument and acknowledged to me that they/he/she executed the instrument in their/his/her authorized capacity. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Witness my hand and official seal.

Notary Signature

Notary Public
State of Washington
TROY L ALLISON
MY COMMISSION EXPIRES
April 18, 2014

California Quitclaim Deed Pg.2 (11-12)

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE A
(Continued)

Order No.: 2054958
Your No.:

LEGAL DESCRIPTION EXHIBIT
(Paragraph 4 of Schedule A continuation)

LOT 187 OF STONEGATE AT AVONLEA DIVISION 5, AS RECORDED JUNE 9, 2006 UNDER AUDITOR'S FILE NO. 3836891.

IN THURSTON COUNTY, WASHINGTON

Filed for Record at Request of
Fircrest Escrow, Inc.
Escrow Number: 2415062

Exhibit

Statutory Warranty Deed

Grantor(s): GARY CROSTA and KAREN CROSTA
Grantee(s): AN NGOC NGUYEN and THAO THI THU NGUYEN
Abbreviated Legal:
PTN NW NE 15-18-1W
Assessor's Tax Parcel Number(s): 11815120400

THE GRANTOR GARY CROSTA and KAREN CROSTA, husband and wife for and in consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION in hand paid, conveys and warrants to AN NGOC NGUYEN and THAO THI THU NGUYEN, husband and wife the following described real estate, situated in the County of Thurston, State of Washington

THE NORTH 210 FEET OF THE EAST 105 FEET OF THE WEST 331.9 FEET OF THAT PART OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 15, TOWNSHIP 18 NORTH, RANGE 1 WEST, W.M., LYING EAST OF THE EAST LINE OF COUNTY ROAD KNOWN AS NEIL STREET; EXCEPTING THEREFROM THAT PART, IF ANY, LYING IN THE EAST 300 FEET OF SAID NORTHWEST QUARTER OF THE NORTHEAST QUARTER;
IN THURSTON COUNTY, WASHINGTON.

SUBJECT TO EASEMENTS, COVENANTS,CONDITIONS AND RESTRICTIONS AS PER EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

Dated December 7, 2004

GARY CROSTA

KAREN CROSTA

STATE OF Washington)
COUNTY OF PIERCE) SS:

I certify that I know or have satisfactory evidence that **GARY CROSTA and KAREN CROSTA**

is/are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledge it to be his/her/their free and voluntary act for the uses and purposes mentioned in this instrument.

Dated:

BARBARA J. KOVAL
Notary Public in and for the State of Washington
Residing at TACOMA
My appointment expires: 1-4-06

4385781 Page 5 of 5 03/31/2014 10:57 AM Thurston County WA

LPB-10

Appendix B

Tristen W. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
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November 30, 2021

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CASE # 372642
In re the Marriage of: Thao Thi Thu Nguyen and An Ngoc Nguyen
LINCOLN COUNTY SUPERIOR COURT No. 143011517

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's October 19, 2021 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen Worthen
Clerk/Administrator

TW/pb
Enc.

FILED
NOVEMBER 30, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of	)	**No. 37264-2-III**
	)	
THAO THI THU NGUYEN,	)	
	)	**ORDER DENYING**
Respondent,	)	**MOTION FOR**
	)	**RECONSIDERATION AND**
and	)	**AMENDING OPINION**
	)	
AN NGOC NGUYEN,	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated October 19, 2021, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

IT IS FURTHER ORDERED that the third full sentence in the third paragraph on page 6 that begins "Further, it is uncontested" shall be deleted and the following shall be inserted in its place:

> The trial court considered Ms. Nguyen's declaration, which stated that she did not know the March 2014 deed purported to convey her interest in the Lacey property.

PANEL: Judges Lawrence-Berrey, Siddoway, and Staab

FOR THE COURT:

REBECCA PENNELL
CHIEF JUDGE

THE LAW OFFICE OF JULIE C. WATTS, PLLC

December 30, 2021 - 5:00 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	In re the Marriage of: Thao Thi Thu Nguyen and An Ngoc Nguyen (372642)

The following documents have been uploaded:

- PRV_Petition_for_Review_20211230165839SC577235_9031.pdf
  This File Contains:
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Address:
505 W. Riverside Ave.,
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Spokane, WA, 99201
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