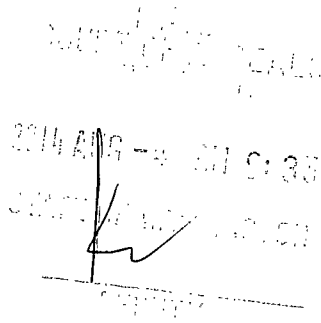

No. 45874-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

TODD E. SCHNEIDERMAN,

Appellant,

and

JULIE T. ROGERS,

Respondent.

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

BRIEF OF APPELLANT

BUCKLIN EVENS, PLLC

By: Bradley A. Evens
WSBA No. 23319

7525 SE 24th Street, Suite 600
Mercer Island, WA 98040
(206) 230-5777

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant

pm 8/1/14

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I. INTRODUCTION

The parties were divorced in summer 2011 after a four-day trial to a referee who the parties agreed would decide their property disputes and make a nonmodifiable award of maintenance. A major point of contention at trial was appellant Todd Schneiderman's predicted income from his medical practice. The referee addressed all components of Dr. Schneiderman's income, including quarterly profit distributions, before awarding respondent Julie Rogers over half the marital estate, no debt, and almost $1.2 million in maintenance over the next ten years. This court dismissed Rogers' appeal of the decree in October 2012 after she failed to file an opening brief.

More than two years after the parties were divorced, a new trial court judge with no prior exposure to these proceedings granted Rogers' motion to vacate the property division and maintenance award, on the grounds there was "clear and convincing evidence" that Dr. Schneiderman had engaged in "systematic misrepresentation regarding his income throughout the dissolution case." The trial court erred because Rogers did not move to vacate the decree in a "reasonable time," as required by CR 60. In any event, long before trial she, her attorneys, and her

experts were all well aware that Dr. Schneiderman received quarterly profit distributions that fluctuated depending on many factors, including hours worked, patients seen, and accounts receivable.

The trial court also erred in vacating the decree based on the misconduct of Dr. Schneiderman's former attorney in handling funds he held for the parties in trust. Dr. Schneiderman had no knowledge of his attorney's misconduct and should not be punished for it, especially when a new trial in these proceedings can in no way resolve whether the attorney misappropriated funds belonging to either party. This Court should reverse the order vacating the decree of dissolution, as well as the award of fees to Rogers, and reinstate the decree in full.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its December 24, 2013, Order Vacating Spousal Maintenance Provisions And Asset/Liability Division Of Decree Of Dissolution dated October 14, 2011 and in entering the findings and conclusions in that Order underlined in attached Appendix A. (CP 869-78)

2. The trial court erred in entering its June 23, 2014, Order Re: Attorney Fees. (CP 2272-74)

III. STATEMENT OF ISSUES

1. The wife filed a motion to vacate 364 days after the decree was entered, despite having known even before the decree was entered the basis for her motion – her oft-professed claim that the husband was concealing his true income. The wife then filed an "amended' motion to vacate, nearly two years after entry of the decree and eleven months after filing her original motion, raising entirely new arguments. Did the wife fail to move to vacate the decree within a "reasonable time" as required by CR 60?

2. The husband disclosed from the beginning of these proceedings that his income included quarterly profit distributions that by their nature varied in amount. Before trial, he provided financial documents to the wife that disclosed his entire income, including six years of tax returns, and explained at trial that his "total annual income" included more than his base salary of $35,000 per month from his medical practice. Did a new trial court judge, who did not preside over discovery or trial, err in finding that the wife had proven by clear and convincing evidence the husband's "systematic misrepresentation regarding his income throughout the dissolution case"? (CP 871)

3. The husband disclosed in discovery that his income included "[b]onus draws quarterly with actual bonus calculated annually based on each physician's production," and produced substantial documentation concerning his income, including six years of personal tax returns and balance sheets, five years of profit and loss statements, and a three-year cash flow projection for his medical practice. Did a new trial court judge, who did not preside over discovery or trial, err in finding that the husband committed "egregious and systemic discovery violations" that denied the wife the opportunity to fully and fairly present her case? (CP 873)

4. Years after trial in July 2011, the wife submitted as "newly discovered" evidence three different sets of documents, none of which had existed at the time of trial, concerning the husband's 2011 income and the misconduct of his former attorney. Did the trial court judge, who did not preside over either discovery or trial, err in concluding that these documents were "newly discovered" and that they would have changed the referee's prediction of the husband's future income at trial?

5. Without the husband's knowledge or authorization, his former attorney mishandled funds he was ordered to hold in trust for the parties and misreported his handling of those funds.

Did the trial court judge err in concluding that the misconduct of the husband's former attorney was a basis for vacating the decree of dissolution?

IV. STATEMENT OF FACTS

A. In preliminary proceedings, Superior Court Judge Haberly repeatedly addressed the husband's income, including his quarterly bonuses, and rejected the wife's allegations that he had failed to produce evidence regarding his income.

Todd Schneiderman and Julie Rogers married on April 29, 1990, and separated on October 17, 2009. (CP 96) Dr. Schneiderman is an eye surgeon. He owns Retina Center NW with his partner Dr. David Spinak. (CP 413, 581, 583) A third doctor joined the practice in 2010. (CP 424-25) At the time of their dissolution trial, Dr. Schneiderman's income from Retina Center NW consisted of two main components: (1) a $30,000 monthly draw, plus a $5,000 "management fee," and (2) quarterly distributions of profits, which the parties referred to as "bonuses." (CP 13-14, 413-15, 571-72, 575)[1] Unlike the monthly draws, the quarterly bonuses had neither set distribution dates nor amounts, but rather depended on a number of factors, including hours

[1] Dr. Schneiderman had also received an "income shift" from Dr. Spinak, the equivalent of a partnership buy-in, which gave Dr. Schneiderman 10% of Dr. Spinak's income for two years after Dr. Spinak became a partner in the practice in September 2008. (CP 420)

worked, patients seen, and accounts receivable. (CP 13-14, 415, 423, 572, 714) Dr. Schneiderman also owned minority interests in two other businesses, Medical Partners LLC and Kitsap Outpatient Surgery LLC. (CP 44, 294, 300)

Dr. Schneiderman petitioned for dissolution in December 2009. The case was assigned to Kitsap County Superior Court Judge Karlynn Haberly. In the parties' first Agreed Order, entered December 18, 2009, Rogers agreed that Dr. Schneiderman would pay joint expenses from his $35,000 monthly draws, and that the parties would divide equally any remaining amounts from those draws. They agreed "[d]ivision or use of Petitioner's future quarterly bonus income/dividend" would abide further order or agreement. (CP 414, 451) In a hearing the same day, Rogers' attorney (the first of five to represent her in these proceedings) confirmed Dr. Schneiderman's income structure, stating Dr. Schneiderman took "$30,000 as a base draw, $5,000 administrative fee ... and then draws quarterly, once again, historically, between [$]75[,000] and $80,000." (CP 416, 447)

At a March 5, 2010, hearing Judge Haberly set a fixed monthly maintenance amount of $10,000 for Rogers. (CP 414, 466, 524) Rogers' attorney again acknowledged that Dr. Schneiderman's

income consisted of more than his $35,000 monthly draws. (CP 414, 457-58: "he has a gross monthly income of just under $80,000 .... his net income ... is slightly in excess of $60,000 per month") In addition to awarding $10,000 monthly maintenance, Judge Haberly ordered that Rogers "should receive a minimum of $6,000" from Dr. Schneiderman's "quarterly bonuses," and that the remaining bonus amounts should be held in trust by Dr. Schneiderman's then attorney, James Province, to await further distribution. (CP 414, 466, 524)

In September 2010, Rogers filed a motion to compel, alleging Dr. Schneiderman had failed to answer discovery requests regarding his income. (CP 382-86, 397, 421) Shortly thereafter, Dr. Schneiderman filed a motion to allocate bonus funds. (CP 417) In orders dated October 22, 2010, and November 5, 2010, Judge Haberly addressed both motions. (CP 523-25, 532-35) Judge Haberly denied Rogers' motion to compel, rejecting her allegations that Dr. Schneiderman had concealed information regarding his income. (CP 421, 429, 523-25, 532-35) Judge Haberly also addressed Dr. Schneiderman's income, finding that he "continues to receive $35,000 per month from his practice and was allocated a first quarter bonus of $70,000." (CP 417-18, 525, 533) Judge

Haberly released $20,000 in bonus funds to Dr. Schneiderman and $5,000 to Rogers. (CP 525, 533-34)

On January 28, 2011, on Dr. Schneiderman's motion, Judge Haberly ordered an additional $40,000 in bonus funds awarded to Dr. Schneiderman, $18,000 to Rogers, and the rest placed into Mr. Province's trust account to await distribution after trial. (CP 419-20, 548-50) Rogers filed no other discovery motions. (CP 429)

B. After a four-day trial in July 2011, an agreed referee specifically addressed the various components of Dr. Schneiderman's income, including his quarterly bonuses.

The parties jointly hired Steve Kessler as a business valuation expert. (CP 42, 281, 423, 571) Rogers hired her own experts, Thomas Sadler and Sandy Voit, as well. (CP 281, 423) The parties gave Mr. Kessler all documentation he requested, and Dr. Schneiderman provided access to Becky Reitinger, who provided financial consulting services for the practice. (CP 410) Both Mr. Kessler and Mr. Sadler used internal financial reports to value Dr. Schneiderman's share of Retina Center NW. (CP 423, 581, 736-46) Mr. Sadler did not request any documentation in addition to that the parties provided to Mr. Kessler. (CP 423-24, 569)

The parties stipulated to trial by attorney Robert Beattie, acting as a referee pursuant to RCW 4.48.130. (CP 76-77) Rogers was represented by Gig Harbor attorney Jeffrey Robinson; Dr. Schneiderman by Mr. Province. (CP 592) The parties hotly contested the outlook for Dr. Schneiderman's future income in the four-day trial before Referee Beattie in July 2011. Dr. Schneiderman testified that his monthly $5,000 "managerial fee" would likely decrease and that he expected to earn additional quarterly bonuses between $150,000 to $200,000 in 2011. (CP 12, 572) Dr. Schneiderman also testified that he expected to earn less because his "income shift" from Dr. Spinak had ended in September 2010, and because of proposed cuts to Medicare. (CP 990-91) Rogers dismissed Dr. Schneiderman's "prophecy" that his income would decrease, testifying that based on her "intimate knowledge" of Dr. Schneiderman's income, which her expert calculated as $63,688 per month, it would increase. (CP 416, 570-71, 577-78) The parties submitted as joint exhibits their 2008-2010 tax returns. (CP 423, 593)

While commending the parties for their presentation of evidence (CP 581: "I have never actually seen so much information poured into a professional practice"), Referee Beattie recognized

that "[t]he dilemma always is to figure out what is future income." (CP 583) Emphasizing that he did not "have a crystal ball" (CP 580), Referee Beattie did not wholly adopt either party's position. Referee Beattie rejected Dr. Schneiderman's reduced income estimates and projected that his future income would be "$55,000 per month," relying on Dr. Schneiderman's 2010 income as "most reflective of future income." (CP 583-84) Referee Beattie adopted "wife's expert testimony regarding husband's medical practice" for determining the value of Dr. Schneiderman's share of Retina Center NW. (CP 98, 581)

C. Rogers was awarded over half the marital estate, debt free, and almost $1.2 million in maintenance, which the parties agreed would be nonmodifiable.

Referee Beattie awarded Rogers monthly maintenance of $11,000 from August 2011 through July 2018 and $7,000 from August 2018 to July 2021, totaling $1,176,000. (CP 81, 99) Referee Beattie found that this maintenance award would meet Rogers' needs "at 100 percent" and cover her "budget . . . in its entirety." (CP 432, 586-87)[2] The parties had stipulated that "any

[2] Based on the recommendation of a guardian ad litem, Dr. Schneiderman was designated the primary residential parent for their still dependent younger daughter, then age 15. (CP 97, 427-28) Dr. Schneiderman has full financial responsibility for both daughters, including their post-secondary education. (CP 282, 427-28, 433)

maintenance awarded shall be non-modifiable in amount or duration for any reason." (CP 77)

Referee Beattie concluded "that it is fair and equitable and appropriate to award all bonuses not paid out yet and all future bonuses from husband's medical practice to husband and wife shall not receive any portion thereof." (CP 99; *see also* CP 420, 588: "In the event there are any additional bonus payouts, those are awarded to Todd.") Referee Beattie also concluded that a "fair, equitable and appropriate" property distribution required a "disproportionate split of the community assets (with wife receiving 53% and husband receiving 47%)." (CP 98) Referee Beattie awarded Rogers $1,480,176 in assets, nearly all liquid, requiring Dr. Schneiderman to sign a $250,000 promissory note "to balance the net estate." (CP 84, 86-87, 98, 432) Referee Beattie also awarded Rogers all funds still held in trust by Mr. Province. (CP 86)

Judge Haberly confirmed Referee Beattie's decree and findings of facts and conclusions of law on October 14, 2011. (CP 79-100) The decree reflected the parties' agreement that maintenance would be nonmodifiable. (CP 81, 99) On October 19, 2011, Mr. Province issued a $125,296 check to Rogers' attorney,

representing that this was the amount he held in trust for the parties. (CP 185)

Rogers appealed Judge Haberly's order confirming Referee Beattie's decree. This Court dismissed her appeal in October 2012 after Rogers failed to file an opening brief. (CP 413)

D. Dr. Schneiderman's former attorney was found to have engaged in trust account misconduct.

Based on a grievance filed by Rogers, the Washington State Bar Association's Office of Disciplinary Counsel investigated Rogers' allegations of misconduct by Mr. Province, including trust account violations implicating these parties and others, after the parties' decree was entered. (CP 182-216) In a March 2013 letter, the WSBA told Rogers that it had found that Mr. Province had twice mishandled the parties' trust funds: Once when he transferred $14,000 of their money to his operating account between October and December 2010, when it was not clear he had earned those funds, and again on December 9, 2010, when he "wir[ed] $30,000 to [another client] drawn on the funds of Dr. Schneiderman and Ms. Rogers." (CP 184-86, 431)

The WSBA did not find that Mr. Province permanently deprived the parties of any funds, stating it was "unable to

determine . . . if Ms. Rogers ultimately received all money owed to her." (CP 185, 431-32) The WSBA found Mr. Province had engaged in other wrongdoing, including giving a false accounting of his transactions to Rogers and her lawyer, and delaying deposit of Dr. Schneiderman's income into his trust account. (CP 183, 186) On the WSBA's recommendation and pursuant to ELC 7.3, the Supreme Court suspended Mr. Province from practicing law on July 1, 2013. (CP 216)

Dr. Schneiderman had no knowledge of Mr. Province's wrongdoing. (CP 427) When the WSBA asked him to aid in its investigation, Dr. Schneiderman declined. He wanted to move on from the 19-month divorce, which had left him drained emotionally, physically, and financially. (CP 185, 427-28) The WSBA made no finding that Dr. Schneiderman was involved in Mr. Province's wrongdoing, noting only that he "declined to cooperate with the Association's investigation." (CP 185)

E. A new judge vacated the decree in December 2013.

On October 12, 2012, 364 days after the decree was entered, Rogers (through her fourth attorney) filed a motion seeking an order to show cause "why the Decree of Dissolution . . . should not be vacated" under CR 60(b)(1), (5), and (11), arguing that Dr.

Schneiderman had presented "patently false testimony" by "testify[ing] that he only made $35,000/month." (CP 1-6) Kitsap County Court Commissioner Thurman Lowans denied Rogers' motion to show cause and set it over for consideration by Judge Haberly. (CP 56, 167) On December 21, 2012, Judge Haberly ruled that she would not hear the merits of Rogers' motion to vacate due to her pending retirement. (CP 180)

Rogers took no action on her motion for eight more months. On August 12, 2013, Rogers (through her fifth attorney) filed an "amended" motion to show cause why the court should not vacate the property division and maintenance provisions in the decree of dissolution. (CP 57-74) Rogers argued that Dr. Schneiderman had lied about his income at trial by "repeatedly testif[ying] under oath that he had a net income of only $35,000 per month." (CP 69) Rogers also argued that a spreadsheet, prepared by the parties' CPA after trial for tax purposes, demonstrated that Dr. Schneiderman earned $108,686 per month in the first six months of 2011, purportedly contrary to his testimony at trial. (CP 70-71, 140) Additionally, Rogers argued for the first time that the decree should be vacated because of "Mr. Province's misconduct and criminal acts as they relate to the funds held in his trust account." (CP 67-68)

On September 13, 2013, Kitsap Superior Court Judge Jennifer Forbes granted Rogers' motion to show cause. (CP 901-02) The parties then engaged in a third round of briefing. (CP 399-611, 621-865, 884-1195) In her third motion to vacate the decree, Rogers submitted documents, obtained through a Freedom of Information Act request, regarding Medicare reimbursements Retina Center NW had received in 2011. (CP 893-94, 904-05)

On December 24, 2013, Judge Forbes granted Rogers' CR 60 motion and vacated the property distribution and spousal maintenance provisions in the decree of dissolution and set the matter for a new trial. (CP 869-78) Judge Forbes found that there was "clear and convincing evidence of Petitioner's misrepresentation and misconduct regarding his income throughout the dissolution case and at the trial before referee." (CP 870-71) Despite having not read the trial transcript (which had been filed in conjunction with Rogers' aborted appeal), nor having presided over discovery, Judge Forbes concluded that Dr. Schneiderman "regularly indicated to the court, Respondent, and the referee that his income was $35,000 per month and that any additional distributions were not predictable or reliable, even though the evidence shows that Petitioner consistently received

quarterly distributions." (CP 870) Judge Forbes also concluded that the decree should be vacated based on Dr. Schneiderman's "egregious and systemic discovery violations," Rogers' "newly discovered" evidence, and Mr. Province's misconduct. (CP 871-77)

On June 23, 2014, Judge Forbes awarded Rogers $58,467 in attorney fees for the CR 60 proceedings, finding Dr. Schneiderman "engaged in a pattern of intransigent conduct." (CP 2272-74)

Dr. Schneiderman appeals the orders vacating the decree and awarding fees. (866-79)

V. ARGUMENT

A. This Court owes no deference to Judge Forbes' order vacating Referee Beattie's decree, which she entered having not presided over the trial in which the alleged fraud was committed.

Judge Forbes did not preside over the trial in this action; Referee Beattie did. Nor did Judge Forbes confirm Referee Beattie's decree; Judge Haberly did. Judge Forbes saw no live testimony requiring her to assess witness credibility. Nor had she presided over discovery. Instead, Judge Forbes based her decision vacating the decree entirely on a documentary record that contained only limited portions of the proceedings before Referee Beattie and Judge Haberly.

This Court is in as good a position as Judge Forbes to decide whether Dr. Schneiderman engaged in fraud or other misconduct, and should review Judge Forbes' decision de novo. When appellate courts defer to a trial court's decision whether to grant a new trial, it is because the trial court presided over the trial, observing firsthand the testimony of witnesses and presentation of evidence. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993) (deferring to trial court on motion for new trial because "[t]he trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents"); *Atchison, T. & S.F. Ry. Co. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957) (deferring to trial court on motion to vacate because "[t]he trial judge saw and heard the plaintiff; saw his twitchings, what [t]hey were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the 'climate' of the trial").[3]

In contrast, this Court affords no deference to a trial court's "findings" where it was not the trier of fact and this Court is

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[3] Washington courts look to federal courts for guidance in interpreting CR 60. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056, *rev. denied*, 113 Wn.2d 1029 (1989).

reviewing the same record as the trial court. *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 671, ¶ 22, 266 P.3d 932 (2011) (affording "no deference to the superior court's decision" when reviewing hearing officer's factual findings), *rev. denied*, 174 Wn.2d 1004 (2012); *Willowbrook Farms LLP v. Dep't of Ecology*, 116 Wn. App. 392, 396-97, 66 P.3d 664 (2003) ("The findings of fact and conclusions of law entered by the superior court are superfluous because we review the same record.").

Judge Forbes did not preside over the trial in this action. She did not resolve pretrial discovery disputes. She did not hear any of the testimony regarding Dr. Schneiderman's income. Instead, Judges Forbes reviewed a small portion of the record of proceedings before Referee Beattie and documentary evidence that did not exist until after trial. That same "record" is now before this Court. This Court should give no deference to Judge Forbes' decision, and should decide de novo whether Rogers presented clear and convincing evidence justifying the extraordinary remedy of vacating the decree 26 months after the parties were divorced.

B. Rogers did not bring her motion to vacate within a "reasonable time" as required by CR 60(b).

With no explanation, Rogers delayed filing her initial motion to vacate until 364 days after the decree was entered. Because Rogers did not file her motion within a "reasonable time," this Court should reverse the order vacating the decree. At a minimum, this Court should not consider the allegations in Rogers' "amended" motion to vacate, filed nearly two years after entry of the decree.

CR 60 requires that motions to vacate a judgment "be made within a reasonable time." CR 60(b). CR 6(b) prohibits a court from "extend[ing] the time for taking any action under rule[] . . . 60(b)." Motions based on newly discovered evidence may not be made "more than 1 year after the judgment, order, or proceeding was entered or taken." CR 60(b).

A CR 60(b) motion may be untimely even if brought within one year of the judgment's entry. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311, 989 P.2d 1144 (1999) ("We will not interpret the reasonableness requirement to be equivalent to the one-year limitation for subsections (1), (2), and (3)"), *rev. denied*, 140 Wn.2d 1026 (2000). Rather, a court must determine what constitutes a reasonable time based "on the facts and circumstances of each

case." *Luckett*, 98 Wn. App. at 312 (motion to vacate filed 363 days after judgment was not filed within a reasonable time because moving party "fail[ed] to put forth any good reason for her attorney's four-month delay in bringing a motion to vacate" after learning of basis for motion).

Rogers did not file her motion to vacate within a "reasonable time" – as in *Luckett,* she filed just two days before the one-year limitation period expired, without any explanation for her delay. (CP 1) Rogers delayed filing for nearly a year despite having known the basis for her motion *before* the decree was entered – her unjustified belief that Dr. Schneiderman misrepresented his income by allegedly stating he earned only $35,000 per month. (*See, e.g.*, CP 482 (Rogers' attorney at 7/9/10 hearing: "he says he makes a gross of $35,000 a month .... He's understated the amount he actually makes according to his own accountant[]"), CP 513 (Rogers' 10/14/10 declaration: "Todd claims he earns a monthly gross income of $35,000. This bald assertion is not supported by any documentation.")) Rogers made this same argument to multiple judicial officers prior to Judge Forbes – all of whom recognized that Dr. Schneiderman disclosed all components of his income and that his monthly "draw" was just part of the income puzzle. (§ V.C.1,

infra) Rogers' delay in renewing this argument – at least three times the delay in *Luckett* – was not "reasonable." CR 60(b).

In August 2013, nearly two years after entry of the decree, ten months after filing her original motion, and eight months after Judge Haberly declined to rule on her original motion, Rogers filed an "amended" motion to vacate, raising for the first time the vast majority of the arguments Judge Forbes relied upon in vacating the decree. (CP 74) But a party may not file an "amended" CR 60(b) motion as a means for raising untimely arguments for vacating a judgment. *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1177 (10th Cir. 2005) ("to disregard the limited scope of Rule 15 and allow use of its amendment and relation-back provisions to permit a belated motion under Rule 60(b) would violate the unqualified directive in Rule 6 that the court 'may not extend the time for taking any action under Rule[ ] . . . 60(b)'"). This Court should refuse to consider these arguments – which, as with her original motion, Rogers inexplicably delayed raising.

For example, Rogers received a spreadsheet relied upon as a basis for vacation from the parties' CPA in April 2012, more than sixteen months before alleging for the first time in her amended motion that it was "newly discovered" evidence justifying vacation

of the decree. (*Compare* CP 68 *with* CP 654) Rogers likewise did not claim that Mr. Province's misconduct was grounds for vacating the decree until August 2013, despite having received the results of the WSBA's investigation in March 2013. (CP 182) Rogers did not argue until her "amended" motion that the decree should be vacated as a discovery sanction under CR 37(b)(2), despite having claimed since her December 2010 motion to compel that Dr. Schneiderman had violated discovery obligations. (CP 73) Rogers did not allege that documents she received in response to a FOIA request were "newly discovered" evidence until October 2013, more than two years after the decree was entered. (CP 893-94)

Rogers provided no justification for her one-year delay in filing her motion, or her two-year delay in raising most of her arguments for vacating the decree. At a minimum, this Court should refuse to consider the allegations Rogers neglected to raise until her "amended" motion as a basis for vacation.

C. CR 60(b)(4) does not justify vacation of the decree because Dr. Schneiderman fully disclosed that he earned variable quarterly bonuses and did not deny Rogers the opportunity to fully and fairly present her case by "misrepresenting" his income.

Washington has long recognized both the importance of finality in dissolution decrees, and that more than a claimed after-

the-fact disparity in the property distribution is required to justify vacating a decree:

> When the divorce decree is entered . . . and the parties go their separate ways to engage in business, there must be some finality to the divorce settlement upon which both can reasonably rely. To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. The uncertainties which would result would be devastating.

Peste v. Peste, 1 Wn. App. 19, 25, 459 P.2d 70 (1969); *see also* RCW 26.09.170(1) ("The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."); *Marriage of Curtis*, 106 Wn. App. 191, 198, 23 P.3d 13, *rev. denied*, 145 Wn.2d 1008 (2001). Partly as a consequence of this need for closure, the courts cannot countenance motions to vacate based on the claim, as here, that a prediction of future income was inaccurate when the parties provided full disclosure before trial.

Dr. Schneiderman disclosed both the existence and amount of his quarterly bonuses before trial. Even if Dr. Schneiderman "indicated" that his quarterly bonuses "were not predictable or

reliable," as Judge Forbes found (CP 870), that was not fraud – especially since Referee Beattie rejected Dr. Schneiderman's projections of his income based on his assessment of his likely bonuses. Dr. Schneiderman disclosed the *existence* of his bonuses, and the parties fully litigated before Referee Beattie their dispute over the likely amount of future bonuses.

A judgment can be vacated under CR 60(b)(4) only when the moving party proves "[f]raud . . ., misrepresentation, or other misconduct of an adverse party." The moving party must prove that the "adverse party has obtained a verdict through fraud, misrepresentation or other misconduct . . . by clear and convincing evidence." *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056, *rev. denied*, 113 Wn.2d 1029 (1989). Further, the fraudulent conduct or misrepresentation must have prevented the moving party "from fully and fairly presenting its case or defense." *Hickey*, 55 Wn. App. at 372 (*citing Atchison, T. & S.F. Ry. Co. v. Barrett*, 246 F.2d 846 (1957)). Since CR 60(b)(4) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect," *Hickey*, 55 Wn. App. at 372, "findings and conclusions with respect to each of the nine elements are required" to vacate a judgment for fraud. *Marriage of Maddix*, 41 Wn. App.

248, 252, 703 P.2d 1062 (1985). None of these bases for vacating a judgment under CR 60(b)(4) are met here.

1. Dr. Schneiderman consistently disclosed his entire income, including the existence and amount of his quarterly bonuses.

Judge Forbes erroneously found that Dr. Schneiderman "regularly indicated to the court, Respondent, and the referee that his income was $35,000 per month and that any additional distributions were not predictable or reliable," and that thus Referee Beattie had no "way to accurately determine Petitioner's true income." (CP 870; CP 871 (Dr. Schneiderman "systematic[ally]" misrepresented "both his total income and the consistency of his quarterly distributions.")) These findings cannot stand in light of the overwhelming evidence that Dr. Schneiderman fully disclosed his entire income throughout these proceedings, and that Referee Beattie had detailed knowledge of Dr. Schneiderman's "true income."

From the very beginning of this case in 2009, Dr. Schneiderman disclosed his bonuses, including their (varying) amounts. In the first temporary order, Dr. Schneiderman agreed that his "future quarterly bonus income . . . shall abide further [o]rder . . . or agreement." (CP 451; *see also* CP 8 (Dr.

Schneiderman's deposition: "And then you get checks, bonuses, quarterly, right? A. When there's bonus available, yes. Q. And last year you made over a million dollars including bonuses. . . . A. I want to say it was about $280,000 in bonuses."), 435-43, 560-64 (both listing bonus disclosures), 477 (declaration disclosing 2010 first quarter bonus), 544-46 (declaration disclosing remainder of 2010 bonuses)) Judge Haberly directly addressed the bonuses, ordering Rogers "should receive a minimum of $6,000" from Dr. Schneiderman's "quarterly bonuses." (CP 466, 524) Dr. Schneiderman thereafter filed multiple motions to allocate his bonuses – hardly the conduct of someone seeking to conceal those bonuses. (CP 417-20, 523-25, 532-34, 548-50)

Dr. Schneiderman's disclosures continued through trial, where he testified regarding all components of his income, including his quarterly bonuses. On cross-examination, Dr. Schneiderman went so far as to correct Rogers' attorney and clarify that his "total compensation" included more than his "monthly draws of $30,000:"

> Dr. Schneiderman: "So when you're talking about salary, you're talking about my monthly draws of $30,000?"
>
> Mr. Robinson: "I'm talking about your total annual income."

> Dr. Schneiderman: "I just want to be clear. Because that's different. I would refer to that as my total compensation, or the money that I take home."

(CP 415, 575; *see also* 572 (in addition to "base draw" of $420,000, Dr. Schneiderman expected to earn in 2011 "another [$]150[,000] to [$]200,000 in bonuses over the course of the year"))

As the testimony attached to Rogers' initial motion itself demonstrates, Dr. Schneiderman explained at trial how profits were divided amongst the doctors in his practice. (CP 13-14) Dr. Schneiderman's statements that his quarterly bonuses were not "predictable or reliable" (CP 870) was not inaccurate, let alone fraudulent – instead, it reflected the undisputed fact that bonuses were not set in time or amount, because they depended on a number of factors including hours worked, patients seen, and accounts receivable. (CP 13-14, 415, 423, 572, 714)

Rogers' post-trial allegation that she was ignorant of Dr. Schneiderman's income directly conflicts with her trial testimony that she had "intimate knowledge" of his income. (CP 416, 577-78; *see also* CP 623-24 (Rogers' post-trial declaration: "I repeatedly attested to the fact that Todd reliably received a substantial portion of his income in the quarterly distributions"; "distributions were typically at least $60,000 to $70,000"), 1147 (June 2010

declaration: "In 2009, [Dr. Schneiderman] earned a gross income of over $942,000")) Likewise, Rogers' trial expert acknowledged at trial that in addition to a base monthly draw of $35,000, "there's also distributions that are made," and calculated Dr. Schneiderman's monthly income as $63,688. (CP 570-71)

Rogers' experts received multiple years of tax returns, fully disclosing Dr. Schneiderman's income. (CP 44, 569, 593) Rogers' attorneys repeatedly confirmed that they understood that Dr. Schneiderman's income was more than his $35,000 monthly draws. (CP 414, 416, 447 (Rogers' attorney: Dr. Schneiderman took "$30,000 as a base draw, $5,000 administrative fee . . . and then draws quarterly, once again, historically, between [$]75[,000] and $80,000"), CP 457-58 (Rogers' attorney: "he has a gross monthly income of just under $80,000 . . . . his net income . . . is slightly in excess of $60,000 per month"))

Referee Beattie unequivocally understood that Dr. Schneiderman's income included substantial quarterly bonuses. Referee Beattie calculated his future monthly income would be $55,000 – $20,000 more than the amount Judge Forbes concluded Dr. Schneiderman represented was his entire income. (CP 584) Rogers herself recognized that Referee Beattie affirmatively rejected

the notion that Dr. Schneiderman's income was $35,000 per month. (CP 4 (declaration: "Mr. Beattie didn't believe Todd. He estimated that Todd made . . . $55,000/month"), 893 (motion to vacate: Referee Beattie "partially recognized" Dr. Schneiderman's "misrepresentation" "and set Petitioner's income at $55,000 per month")) Referee Beattie expressly addressed the bonuses in his decree, awarding future bonuses to Dr. Schneiderman and the bonus amounts remaining in trust to Rogers. (CP 99, 420, 588)

Dr. Schneiderman provided Referee Beattie with an indisputable basis for "accurately determin[ing] [his] true income," submitting the parties' 2008-2010 tax returns that fully disclosed his income, including his quarterly bonuses. (*Compare* CP 415, 423, 593 *with* 870) *See Stoulil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 299, 3 P.3d 764 (2000) (refusing to vacate judgment where nonmoving parties "produced their income tax returns for the years relevant to this case early in the trial"); *Nansamba v. N. Shore Med. Ctr., Inc.*, 727 F.3d 33, 41 (1st Cir. 2013) ("It is transparently clear that, regardless of what defense counsel may or may not have done, the plaintiff had at her fingertips the records that would have laid bare what she now asserts to be the true facts.").

Ironically, Rogers cited these very tax returns, which she had received long before trial, in arguing that Dr. Schneiderman concealed his income. (CP 70 ("At trial, petitioner provided tax returns from 2008, 2009, and 2010 which were in direct conflict with his testimony that he only netted $35,000 per month."); *see also* CP 31-32 (acknowledging that Dr. Schneiderman's 2008-09 tax returns reported income greater than $35,000 per month); CP 891 (motion to vacate: "historical data shows that Petitioner always received sizeable quarterly distributions in addition to his monthly distributions")) Judge Forbes' finding that "the evidence shows that Petitioner consistently received quarterly distributions" ignores that this "evidence" was produced by Dr. Schneiderman. (CP 870)

Judge Forbes also erroneously concluded that Dr. Schneiderman made "three times the income to which he testified" "in the first part of 2011" because he did "not provide[] any documentation to contradict the evidence provided by [Rogers] or to state what his income actually was for the first half of 2011." (CP 871) But Dr. Schneiderman *did* produce documents establishing his income for the first half of 2011. (CP 288, 355-56; *see also* CP 615-16 (2011 tax return)) Regardless, evidence of Dr. Schneiderman's annual income for 2011 was irrelevant to the CR 60

proceedings, because it was not an issue at the trial, which occurred halfway through 2011. Any evidence or testimony regarding Dr. Schneiderman's average monthly income for all of 2011 – submitted at a trial in the middle of 2011 – would have been speculation, as Referee Beattie and Rogers' own attorney recognized. (CP 426, 566-67, 580, 583; *see also* § V.C.2, *infra*).

Judge Forbes erroneously relied on a chart created by Rogers purporting to show examples of when Dr. Schneiderman made "misleading statements" regarding his income. (CP 870) In virtually all those statements, Dr. Schneiderman in fact disclosed his quarterly bonuses. (CP 928-31) Rogers' other allegations of "misleading statements" are demonstrably false. For example, Rogers accuses Dr. Schneiderman of falsely stating that a declaration from the parties' CPA disclosed his income. But both Rogers and her attorney acknowledged that the CPA did file a declaration disclosing Dr. Schneiderman's income. (*Compare* CP 928 *with* CP 1027, 1035, 1054, 1184, *see also* CP 1031)[4]

Similarly, Dr. Schneiderman did not falsely testify that he thought his 2011 income would be "'$550 to $600,000,' even

[4] The CPA's declaration was apparently provided only as a bench copy, and thus is not in this record. (CP 1027, 1053-54)

though the evidence shows Petitioner had already earned more than that during the first half of 2011." (CP 870) Judge Forbes based that conclusion on her faulty interpretation of a spreadsheet created by the parties' CPA after trial, which calculated Dr. Schneiderman's average monthly income by dividing his total 2011 income by twelve. (CP 430) That spreadsheet simply does not reflect what Dr. Schneiderman actually made in each month during the first half of 2011.

This overwhelming evidence refutes Judge Forbes' "finding" that Dr. Schneiderman "made deliberate, false representations" "to the court, Respondent, and the referee that his income was $35,000 per month and that any additional distributions were not predictable or reliable." (CP 869-70)

2. Judge Forbes' own findings demonstrate that Dr. Schneiderman disclosed the *existence* of his quarterly bonuses. That the parties disputed their value does not establish fraud.

Judge Forbes' finding that Dr. Schneiderman indicated that his "additional distributions were not predictable or reliable" confirms that she did not find Dr. Schneiderman concealed the *existence* of his quarterly bonuses, but rather that he disputed their amount and consistency. (CP 870; CP 871 (Dr. Schneiderman

misrepresented "the consistency of his quarterly distributions.")) But disputing the reliability of a source of income after disclosing its existence is not fraud. This Court should reverse the order vacating the decree even if it defers to the finding that Dr. Schneiderman indicated that his bonuses were not "predictable or reliable." *Littlefair v. Schulze*, 169 Wn. App. 659, 664, ¶ 8, 278 P.3d 218 (2012) ("Conclusions of law must flow from the findings of fact."), *rev. denied,* 176 Wn.2d 1018 (2013).

Disclosing the existence of an asset or income source and disputing its value is not fraud, and does not justify vacating a decree. *Marriage of Burkey*, 36 Wn. App. 487, 675 P.2d 619 (1984); *see also Marriage of Curtis*, 106 Wn. App. 191, 197, 23 P.3d 13 (2001) (refusing to vacate settlement where wife did "not claim that she was unaware of Dr. Curtis's medical practice, only that it was not properly valued"); *Marriage of Cohn*, 18 Wn. App. 502, 508, 569 P.2d 79 (1977) (refusing to vacate decree because although the wife "might not have known of the exact financial status of [the husband's] resources, circumstances were such that she reasonably should have had such knowledge.").

In *Burkey*, the trial court vacated a dissolution decree after concluding that the husband "breached a fiduciary duty to make

known to his wife the value of all of the property before the dissolution." 36 Wn. App. at 488. Division Three reversed because the trial court's findings did not support that conclusion; "all of the parties' property was made known to each other." 36 Wn. App. at 489.[5] Here, as in *Burkey*, Dr. Schneiderman did not commit fraud or other misconduct where the undisputed evidence establishes that he never concealed or disputed the *existence* of his bonuses. 36 Wn. App. at 490. Indeed, Judge Forbes' findings confirm that Dr. Schneiderman never concealed the existence of his bonuses. (CP 870-71; *see also* CP 714 (Dr. Schneiderman's disclosure that he receives "[b]onus draws quarterly with actual bonus calculated annually based on each physician's production."))

Dr. Schneiderman also did not commit fraud by focusing on the variable nature of his bonuses when arguing to various judicial officers how they should determine maintenance and divide the parties' property. *Nansamba v. N. Shore Med. Ctr., Inc.*, 727 F.3d 33, 40 (1st Cir. 2013) ("That the defendants did not scour the discovery materials for facts supporting the plaintiff's position is

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[5] The *Burkey* court correctly distinguished *Seals v. Seals*, 22 Wn. App. 652, 590 P.2d 1301 (1979), relied on by Judge Forbes (CP 874), because in *Seals* the husband had failed to disclose "the *existence* of certain property" rather than its value. *Burkey*, 36 Wn. App. at 490 (emphasis in original).

not a badge of fraud but, rather, a prudent refusal to make their adversary's case for her. That is simply good lawyering, and we reject the plaintiff's brash attempt to 'transmogrify advocacy into misrepresentation.'") (quoting *Rodriguez–Antuna v. Chase Manhattan Bank Corp.*, 871 F.2d 1, 3 n. 3 (1st Cir.1989)).

Indeed, Rogers' list of "misleading" statements confirms that she accused Dr. Schneiderman not of concealing the *existence* of his bonuses, but of disputing the weight judicial officers should give them in setting maintenance and dividing the parties' property. (CP 870, 928 (Dr. Schneiderman's attorney "*downplay[ed]* the significance and regulatory [sic] of the other major part of Petitioner's income, i.e. his quarterly distributions"; Dr. Schneiderman "*focuse[d]* the court's attention on the $35,000 per month"), 929 (Dr. Schneiderman's "attorney again *emphasizes* that Petitioner earns $35,000 per month and treats the other major source of Petitioner's income, i.e. his quarterly distributions, as fictional"), 931 ("Petitioner again *focuses* in a misleading manner on the $35,000 figure") (emphasis added))

That Dr. Schneiderman's predictions regarding his income ultimately proved inaccurate is not fraud. *Adams v. King Cnty.*, 164 Wn.2d 640, 662, ¶ 46, 192 P.3d 891 (2008) (allegedly

fraudulent statement must be a "representation of an *existing fact*") (emphasis added); *West Coast, Inc. v. Snohomish Cnty.*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002) (same); *Next Century Communications Corp. v. Ellis*, 318 F.3d 1023, 1027 (11th Cir. 2003) ("Fraud cannot consist of mere broken promises, unfilled predictions or erroneous conjecture as to future events.") (quotation omitted). At most, Dr. Schneiderman's higher income would support modifying maintenance, had the parties not agreed that spousal support would be non-modifiable. (CP 77) *In re Marriage of Hulscher*, 143 Wn. App. 708, 710, ¶ 1, 180 P.3d 199 (2008) (enforcing "nonmodifiable spousal maintenance provision embodied in the[] decree").

Likewise, that Dr. Schneiderman's income was ultimately higher than Referee Beattie's prediction is not a basis for vacating the decree. *Marriage of Knutson*, 114 Wn. App. 866, 872-73, 60 P.3d 681 (2003) (reversing order vacating decree because 401k plan lost value after trial; "The value of such a plan necessarily fluctuates with the ever-changing market"; court could not vacate decree "with every change in the plan's value"). Referee Beattie recognized that he was charged with making a prediction about Dr. Schneiderman's income, and that neither he nor either party could know with

certainty Dr. Schneiderman's future income. (CP 580 ("I don't have a crystal ball"), 583 ("[t]he dilemma always is to figure out what is future income")) Rogers' trial attorney acknowledged as much, telling Dr. Schneiderman's expert that "You don't really know what's going to happen in 2011 like nobody else in this room knows, or 2012, or any other time." (CP 566-67)

Dr. Schneiderman consistently disclosed the existence of his bonuses. He did not commit fraud or misconduct. Nor did he deny Rogers the opportunity to fully and fairly present her case by disputing the size or regularity of his bonuses based on undisputed evidence that they varied both in amount and distribution date.

D. The record is clear that Dr. Schneiderman did not violate his discovery obligations.

Dr. Schneiderman complied with his discovery obligations by producing all relevant evidence of his income and medical practice – a fact Referee Beattie recognized. (CP 581) Rogers was in no way prevented from fully and fairly presenting her case given Dr. Schneiderman's productions concerning his income, included six years of tax returns. This Court should reverse Judge Forbes determination that Dr. Schneiderman committed "egregious and systemic discovery violations" that justified vacating the decree.

1. Dr. Schneiderman did not withhold evidence of his income.

Far from concealing his bonuses, Dr. Schneiderman unequivocally disclosed them in response to Rogers' discovery requests. (CP 714 (stating that Dr. Schneiderman received "[b]onus draws quarterly with actual bonus calculated annually based on each physician's production."), 727 ("I have an interest in future bonuses from RCNW that are separate property."), 729 (referring to the "bonus money I have paid" to Rogers)) Dr. Schneiderman's undisputed disclosure of his bonuses directly refutes Judge Forbes' finding that he willfully misrepresented his income. (CP 784) *Darrin v. Gould*, 85 Wn.2d 859, 875, 540 P.2d 882 (1975) (reversing finding that "ignores . . . undisputed evidence").

Dr. Schneiderman also provided substantial records concerning his income and business interests, contrary to the allegations adopted by Judge Forbes. (CP 874) For example, Rogers alleged that Dr. Schneiderman failed to produce his 2009-2010 tax returns. (CP 750) But those tax returns were *jointly* submitted as exhibits at trial, and Rogers' experts acknowledged that they reviewed them. (CP 44, 569, 593)

Likewise, Rogers alleged that Dr. Schneiderman failed to provide documents for Medical Partners LLC, in which he owned a minority interest. But Dr. Schneiderman indisputably provided Rogers with five years of profit and loss and pro forma statements, as well as a balance sheet for Medical Partners. (*Compare* CP 45 *with* CP 706, 749-50 ("**No documents provided for MP**") (emphasis in original)) Dr. Schneiderman also provided Rogers six years of profit and loss statements for Kitsap Outpatient Surgery LLC, another business in which he held a minority interest. (*Compare* CP 45 *with* CP 750) These productions were in addition to five years of profit and loss statements, six years of balance sheets, and a three-year cash flow projection for Retina Center NW. (CP 749)

Dr. Schneiderman did not "produce income documentation for 2011 until after trial" for a very simple reason – Rogers did not request it. (*Compare* CP 870 with CP 426, 714 (request to produce pay stubs for last six months, *i.e.*, the first half of 2010), 715 (request to produce tax returns for 2005-2010))[6] Dr.

[6] Rogers submitted an interrogatory for information regarding expected bonuses for the "next 12 months," *i.e.*, through May 2011. (CP 714) Dr. Schneiderman had received only his first quarter bonus by the time of trial in July 2011, and he disclosed it as soon as Rogers raised her allegations of fraud. (CP 355, 424) With that first quarter bonus, Dr.

Schneiderman could not have violated his discovery obligations by not providing documents that were not requested. *In re Hope 7 Monroe St. Ltd. P'ship*, 743 F.3d 867, 875 (D.C. Cir. 2014) (no fraud because party "did not conceal any information it had an obligation to reveal"). Indeed, Dr. Schneiderman could not have produced a tax return or other "income documentation for 2011" because it did not exist at the time of the July 2011 trial before Referee Beattie.

Nor did Dr. Schneiderman fail to respond to discovery requests regarding funds that should have been in trust. (CP 874) When Mr. Province provided his trust accounting, Dr. Schneiderman had no basis for knowing that it was not accurate. Any inadequacy in disclosing information regarding the trust account falls on Mr. Province, not Dr. Schneiderman. (§ V.F, *infra*)

2. Any purported discovery violations did not prevent Rogers from fully and fairly presenting her case.

As with any fraud or misconduct under CR 60, a discovery violation must prevent the moving party from fully and fairly presenting its case in order to justify vacating the judgment. *In re Hope 7*, 743 F.3d at 875. Rogers had all the documents she needed to fully and fairly present her case. Additional documents would

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Schneiderman's average monthly income in 2011 through the time of trial was $43,786 – $10,000 below Referee Beattie's prediction. (CP 424)

have established only what Rogers, her attorneys, and her experts already knew – Dr. Schneiderman's income varied from year to year, depending on a number of factors. *Tunnell v. Ford Motor Co.*, 245 Fed.Appx. 283, 288 (4th Cir. 2007) (affirming refusal to vacate judgment because moving party "learned much of the information contained in the undisclosed Ford documents from other sources during discovery"), *cert. denied*, 552 U.S. 1231 (2008); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (affirming refusal to vacate judgment because withheld evidence was cumulative).

Dr. Schneiderman gave Rogers all the information she needed to fully and fairly present her case. For example, Rogers alleged that Dr. Schneiderman failed to produce documents regarding his income, including his "paystubs." (CP 750) But Dr. Schneiderman's income was fully disclosed in the parties' joint tax returns produced by Dr. Schneiderman. (*See, e.g.*, CP 619 (2009 tax return disclosing total income), 778 (2008 tax return disclosing total income), 849 (2010 tax return disclosing total income)) Referee Beattie had these returns, as well as other financial documents, and relied on them in projecting Dr. Schneiderman's future income. (CP 583, 593)

Judge Forbes' decision also ignored that most of the alleged discovery violations pertained not to Dr. Schneiderman's income, but to documents regarding the value of Dr. Schneiderman's business interests. (CP 748-50 (alleging Dr. Schneiderman withheld business financial documents)) Judge Forbes erred in vacating the decree based on claimed discovery violations irrelevant to the issue of Dr. Schneiderman's income. *Greiner*, 152 F.3d at 789 (distinguishing case in which judgment was properly vacated because there "the withheld evidence was highly relevant to and probative on the theory on which the case was decided").

Dr. Schneiderman did not violate his discovery obligations. His discovery allowed Rogers to fully and fairly try her case.

E. Judge Forbes erred in accepting "newly created" evidence as a basis for vacating the decree.

Because the newly discovered evidence relied on by Judge Forbes – a spreadsheet created by the parties' CPA, FOIA documents, and WSBA investigation materials – did not exist at time of trial, they cannot be a basis for vacating the decree under CR 60(b)(3). None of Rogers' newly created evidence could or would change the result of the 2011 trial.

CR 60(b)(3) protects litigants who were, through no fault of their own, denied the use of evidence that existed at the time of trial but was not discovered. It is not designed to allow perpetual retrial based on evidence that only comes into existence after the trial, which by its very nature cannot be "newly discovered." *Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003) ("CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later."). A contrary rule would encourage parties to continuously seek to vacate judgments because of post-trial events. *Knutson*, 114 Wn. App. at 872-73 (court could not vacate decree "with every change in the plan's value"). Because none of Rogers' "newly discovered" evidence existed at the time of trial, this "newly created" evidence cannot be a basis for vacating the decree.

Even had this evidence existed at the time of trial, Judge Forbes still erred in vacating the decree. To justify vacating a judgment on the ground of newly discovered evidence, the moving party must establish that the evidence (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, ¶ 90, 314

P.3d 380 (2013). Where the newly discovered evidence is "merely cumulative," a trial court correctly denies a motion to vacate. *Jones*, 179 Wn.2d at 361, ¶¶ 90, 92; *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002) (affirming denial of motion to vacate because moving party "himself knew most of the pertinent information contained in the" newly discovered evidence).

None of Rogers' "newly discovered" evidence would have changed Referee Beattie's decision. As Referee Beattie correctly recognized, his task was to predict Dr. Schneiderman's future income based on his historical income. Evidence of what Dr. Schneiderman's income *actually* turned out to be is not relevant to predicting it. The spreadsheet created by the parties' CPA in 2012, reflecting Dr. Schneiderman's actual 2011 income, could not have changed Referee Beattie's prediction of Dr. Schneiderman's future income in July 2011. Whether the parties and referee accurately predicted Dr. Schneiderman's income is no basis for vacating the decree. (§ V.C.2, *supra*)

Regardless, the spreadsheet does not support the trial court's conclusion that Dr. Schneiderman earned "an income of $108,000 per month from Retina Center NW for the first part of 2011, three times the income to which he testified." (CP 870-71) The

spreadsheet is a monthly *average* of income, *i.e.*, his total 2011 income divided by twelve. It does not reflect what Dr. Schneiderman actually made each month in the first half of 2011. (§ V.C.1, *supra*) In fact, the evidence is undisputed that Dr. Schneiderman did not receive the bonuses relied upon to establish this average until after trial. (CP 424)

Nor do the documents Rogers received in response to her FOIA request for documents related to Medicare payments to Retina Center NW "contradict . . . representations during the dissolution case and at trial before referee that his 2011 income was significantly lower than previous years." (CP 876) The FOIA documents reflect gross payments Dr. Schneiderman's *entire* practice received as Medicare reimbursements. (CP 422, 904-05) Most of these Medicare reimbursements are for expensive drugs that the practice administers with very little profit. (CP 422) Moreover, the documents themselves refute Judge Forbes' finding that "revenue from Medicare Payments . . . was *significantly higher* in the first part of 2011." (*Compare* CP 876-77 (emphasis added) *with* CP 905 (reflecting that 52% of Medicare payments came in the first six months of 2011 and 48% in the last six months))

Likewise, Mr. Province's misconduct would not change the result at trial, and has no relevance to Referee Beattie's prediction of Dr. Schneiderman's income. That evidence would be relevant in a claim against Mr. Province; not in a new dissolution trial against Dr. Schneiderman, who bears no responsibility for his attorney's misconduct taken without his authorization or knowledge. (§ V.F, *infra*) Judge Forbes erred in concluding that Rogers' "newly created" evidence justified vacating the decree.

F. Dr. Schneiderman cannot be liable for his former attorney's misconduct undertaken without his knowledge or authorization.

Mr. Province's misconduct is not a basis for vacating the dissolution decree. Rogers' remedy for any mishandling of funds is against Mr. Province, not Dr. Schneiderman.

CR 60(b)(4) allows a court to vacate a judgment due to the fraud, misrepresentation, or misconduct "of an adverse party." Washington has long recognized that an attorney's fraudulent conduct, unauthorized by the client, is not binding on the client. *Engstrom v. Goodman*, 166 Wn. App. 905, 916, ¶ 25, 271 P.3d 959 ("*Absent fraud*, the actions of an attorney authorized to appear for a client are generally binding on the client.") (emphasis added), *rev. denied,* 175 Wn.2d 1004 (2012); *see also Demopolis v. Peoples*

National Bank of Washington, 59 Wn. App. 105, 118, 796 P.2d 426 (1990) (client not liable for attorney's defamation undertaken without client's consent). Thus, an attorney's misconduct is not grounds for vacating a judgment in favor of a party who was unaware of the attorney's misconduct. *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) (refusing to vacate judgment "because none of the parties were aware of [the attorney's] misconduct, [and] vacating the judgment would 'punish' parties who are in no way responsible for the 'fraud'").

Any misconduct of Dr. Schneiderman's former attorney, without Dr. Schneiderman's knowledge or authorization, is not grounds for vacating the decree. (CP 427) The WSBA's investigation on which Judge Forbes relied found misconduct by Dr. Schneiderman's attorney, not Dr. Schneiderman:

> The WSBA investigation found that Mr. Province failed to establish a trust account until almost one year after he was ordered to do so, that Mr. Province used the parties' community funds to pay another client and possibly to pay off debt on his own home, that he took thousands of dollars of community funds for his own purposes, and that he provided a false accounting and ledger to Respondent and her attorneys of the funds in his trust account after numerous request from Respondent.

(CP 872) Although Judge Forbes states that "Petitioner and Mr. Province" provided a false ledger to Referee Beattie, she acknowledges that only "Mr. Province knew it was false." (CP 872)

Judge Forbes' only finding relating to Dr. Schneiderman's conduct was "that Petitioner was aware of his own failure to comply with the court order regarding funds in his control that were to be deposited into the Province trust account," referring to the delay in setting up the trust account. (CP 873) But Rogers was likewise "aware" of that delay, and at no point complained. Indeed, the delay allowed Rogers to access funds from the parties' joint account in violation of the temporary order. (CP 428, 582 (Referee Beattie: "Julie, you accessed funds you shouldn't have accessed.")) Any delay by Dr. Schneiderman in depositing funds in the trust account has no relation to Mr. Province's misuse of those funds once they were deposited.

Judge Forbes' finding that Dr. Schneiderman "took $119,000 from his 2010 distributions . . . that were ordered to be placed in the Province trust account" implies wrongdoing where none existed. (CP 873) As Judge Forbes acknowledged, Dr. Schneiderman used those funds to pay the parties' joint taxes and avoid a substantial penalty after Judge Haberly ordered the parties

to file a joint tax return for 2010. (CP 8, 544, 549, 856, 873) Dr. Schneiderman expressly informed Rogers that he would use the funds for that purpose and that Judge Haberly could "classify the tax payment and the remaining bonus money . . . in any manner she deems appropriate." (CP 545)

Judges Forbes acknowledged "[i]t is unknown the extent to which Petitioner was involved in the misconduct regarding the trust account." (CP 873) Ignoring the burden of proof, Judge Forbes then assumed that Dr. Schneiderman engaged in misconduct because he did not cooperate with the WSBA's investigation and the "entirety of the bank statements associated with the Province trust account have not been provided." (CP 872; *see also* CP 873 (information necessary to account for trust funds was "within the exclusive control of the Petitioner") But Dr. Schneiderman did not control the trust account, nor its records – Mr. Province did. (*Compare* CP 429 *with* CP 873) Moreover, Judge Forbes' finding that Dr. Schneiderman did "not provide[] any documentation" regarding the trust accounting ignores that he produced what records he had, including canceled checks and bank statements. (*Compare* CP 873 *with* CP 308-51)

Evidence of Mr. Province's misconduct is not "material and likely to change the result of the property division and maintenance awarded to Respondent at a new trial." (CP 875-76) Neither the WSBA nor Judge Forbes found that Rogers did not receive funds to which she was entitled. (CP 185, 873) A new dissolution trial will in no way resolve whether Mr. Province stole funds awarded to Rogers. Rogers' remedy, if any, is in an action against Mr. Province. *Guardianship of Karan*, 110 Wn. App. 76, 82, 38 P.3d 396 (2002). Dr. Schneiderman should not be punished for the misconduct of his former attorney.

G. The trial court erred by awarding Rogers her attorney's fees related to the CR 60 motion.

Because Judge Forbes erred in vacating the decree, she erred in awarding Rogers nearly $59,000 in attorney's fees for bringing her CR 60 motion. *Friebe v. Supancheck*, 98 Wn. App. 260, 269, 992 P.2d 1014 (1999) (vacating fees awarded as terms under CR 60(b) after reinstating judgment).

VI. CONCLUSION

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

Dated this 1st day of August, 2014.

BUCKLIN EVENS, PLLC

By: _____
Bradley A. Evens
WSBA No. 23319

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

Attorneys for Appellant

DECLARATION OF SERVICE

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

That on August 1, 2014, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
Bradley Evens Bucklin Evens, PLLC 7525 SE 24th St., Ste 600 Mercer Island, WA 98040-2300	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Janet Helson Skellenger Bender PS 1301 5th Ave., Suite 3401 Seattle, WA 98101-2605	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Patricia Novotny Attorney at Law 3418 NE 65th St., Ste A Seattle, WA 98115	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 1st day of August, 2014.

V. Vigoren

Victoria K. Vigoren

SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

In re Marriage of: TODD E. SCHNEIDERMAN, Petitioner, and JULIE T. ROGERS, Respondent.	NO. 09-3-01599-1 ORDER VACATING SPOUSAL MAINTENANCE PROVISIONS AND ASSET/LIABILITY DIVISION OF DECREE OF DISSOLUTION DATED OCTOBER 14, 2011

THIS MATTER came before the undersigned judge upon Respondent Julie T. Rogers' Motion to Vacate the Spousal Maintenance Provisions and Asset/Liability Division of the Decree of Dissolution dated October 14, 2011 pursuant to Civil Rule 60. The court considered Respondent's Motion and the supporting materials, Petitioner's Response and the supporting materials, Respondent's Reply and the supporting materials, along with oral argument from counsel on December 2, 2013.

I. FINDINGS OF FACT

The Court makes the following Findings of Fact:

A. Petitioner's Income. Petitioner's statements throughout the dissolution case and during the trial before referee regarding his income were fraudulent and are cause for this court to vacate the decree of dissolution. Petitioner made deliberate, false representations of a

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Seattle, Washington 98101-2605
(206) 623-6501

material fact (i.e. his income), which he knew to be false, with the intent of misleading Respondent and the Referee as to his actual income. Neither the referee nor the Respondent had a way to accurately determine Petitioner's true income because Petitioner and his CPA failed to produce income documentation for 2011 until after trial. Respondent suffered damages in terms of the maintenance award and property distribution.

There is clear and convincing evidence of Petitioner's misrepresentation and misconduct regarding his income throughout the dissolution case and at the trial before referee, including but not limited to the instances set forth at Exhibit B to Supplemental Declaration of Julie Rogers in Support of Motion to Vacate dated October 31, 2013. Petitioner regularly indicated to the court, Respondent, and the referee that his income was $35,000 per month and that any additional distributions were not predictable or reliable, even though the evidence shows that Petitioner consistently received quarterly distributions.[1] With the exception of the year in which the parties' dissolution was pending (2010), Petitioner regularly received quarterly income distributions from Retina Center NW.

Petitioner testified during the trial by referee that his income was declining for 2011 at a time when he knew or should have known that his 2011 income would be as high or higher than previous years. *See, e.g.*, Exhibit 2 to Petitioner's Reply Declaration at page 505 of arbitration transcript (Petitioner testified that he expected his total 2011 income to be "$550 to $600,000," even though the evidence shows Petitioner had already earned more than that amount during the first half of 2011). After the trial before referee, his CPA subsequently created a spreadsheet which he used as a basis for requesting the Respondent to pay taxes. The spreadsheet showed an income of $108,000 per month from Retina Center NW for the

[1] Petitioner asserted in his Declaration in Opposition to Respondent's Motion for an Order to Show Cause (filed 09/13/13) that "My income was first established by the court, than [sic] increased by Referee Beattie, based upon the evidence before him. I have never misrepresented my income. If the court established my income at $35,000, my relying on and repeating that decision cannot be fraud." Declaration, at 9:18-22. This statement is quite troubling to the Court, as it suggests that Petitioner felt justified in continuing to mislead the Court and Respondent due to a finding by the Court at a point in time where the Court had limited information.

first part of 2011, three times the income to which he testified and nearly twice the income the referee ultimately determined. Information obtained by the Respondent via FOIA request shows that the largest source of revenue for Petitioner's practice, Medicare, was higher in the first part of 2011. Despite having access to all of the information necessary to clarify the issue, Petitioner has not provided any documentation to contradict the evidence provided by Respondent or to state what his income actually was for the first half of 2011 (through the trial by referee).

Petitioner provided misleading, incomplete, and inaccurate information to the court and the referee regarding his true income throughout the case and up through the trial by referee in July 2011. Because Petitioner failed to provide his true and accurate income information to Respondent, the court, and the referee, the referee was unable to equitably set the maintenance payments at the trial before referee.

Regardless of whether Petitioner's statements regarding his income rise to the level of common law fraud, the court finds that Petitioner's systematic misrepresentation regarding his income throughout the dissolution case is sufficient basis to vacate the property division and spousal maintenance provisions of the decree of dissolution. *Marriage of Maddix*, 41 Wn.App. 248, 703 P.2d 1062 (1985). Petitioner consistently made false and misleading assertions regarding his income with intent to confuse and deceive. Petitioner's misrepresentation regarding both his total income and the consistency of his quarterly distributions was material, given that the court and the referee were induced to rely on Petitioner's misrepresentations in setting the spousal maintenance and property distribution.

B. Province Trust Account. There was significant misconduct, misrepresentation, and mismanagement of the funds that were to have been held in the trust account of James Province (Petitioner's attorney), which was ultimately awarded to Respondent. On December 18, 2009, the court entered a temporary order in the dissolution proceeding, drafted by Mr. Province, that required marital funds to be held in Mr. Province's trust account and only used

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by written agreement or by court order during the pendency of the dissolution. Notwithstanding the existence of this order, materials gathered as part of the WSBA investigation reflect that it was not until October 22, 2010 that any funds were deposited into Mr. Province's IOLTA account. *See* Letter from WSBA dated 3/21/2013 regarding Grievance of Julie Rogers against James Andrew Providence at Tab 9 to Motion to Vacate. Between October 22 and October 25, 2010, Petitioner provided Mr. Province with $105,794, which was deposited into Mr. Province's trust account. It is not known whether there are additional funds which should have been deposited to the account pursuant to the court's temporary orders because both Mr. Province and Petitioner failed to cooperate in the WSBA investigation and Petitioner failed to respond to discovery requests regarding funds that should have been in trust. *See* page 4 of Tab 9 Respondent's Motion to Vacate ("given Mr. Province's lack of cooperation, the Association is unable to determine as of today's date if Ms. Rogers ultimately received all money owed to her").

The WSBA investigation found that Mr. Province failed to establish a trust account until almost one year after he was ordered to do so, that Mr. Province used the parties' community funds to pay another client and possibly to pay off debt on his own home, that he took thousands of dollars of community funds for his own purposes, and that he provided a false accounting and ledger to Respondent and her attorneys of the funds in his trust account after numerous requests from Respondent. *See* complete findings at Tab 9 Motion to Vacate. Petitioner and Mr. Province also provided a false ledge to the referee at the time of trial before referee when Mr. Province knew it was false. Despite his knowledge of its falsity, Petitioner has continued to reference the false ledge to this court as part of the Motion to Vacate. *See* Tab 16 of Motion to Vacate. The entirety of the bank statements associated with the Province trust account have not been provided. The WSBA determined that Mr. Province had committed Theft in the First Degree and that he "appears to have engaged in serious criminal conduct involving fraud, theft, and dishonesty" during the dissolution case. In the formal

complaint, the WSBA lists nine counts against Mr. Province, including violations of RPC 8.4(b) RPC 8.4(c), RPC 8.4(i), RPC 8.4(n), and RPC 1.15A(h)(8). The WSBA investigation concluded that Mr. Province "knowingly and intentionally provided Ms. Rogers and her lawyer with false information," and that Mr. Province "caused serious injury." *See* page 10 of Tab 10 to Motion to Vacate.

It is unknown the extent to which Petitioner was involved in the misconduct regarding the trust account. At a minimum, this court finds that Petitioner was aware of his own failure to comply with the court order regarding funds in his control that were to be deposited into the Province trust account. Even after the trust account was established in fall 2010, Petitioner did not comply with the court's order requiring him to place all distributions received from his business into the trust account. For example, Petitioner took $119,000 from his 2010 distributions (received in early 2011) that were ordered to be placed in the Province trust account and instead paid a tax bill to the IRS before the court ruled on the matter.

As with the issue of his income before 2011, information which would allow this court to determine whether additional funds should have been placed into the trust account is within the exclusive control of the Petitioner; notwithstanding having access to the information, and being on notice since for at least 4 ½ months that there was a question of what funds should have been placed into the trust account, Petitioner has not provided any documentation regarding that issue, instead relying on the bald assertion that the parties have received all to which they were entitled from the Province account when it has been determined by the WSBA that Mr. Province has engaged in theft, misrepresentation and ethical violations.

C. Petitioner's Egregious and Systemic Discovery Violations. Willful discovery violations and failure to comply with discovery rules constitute misconduct under CR 60(b)(4). Vacating final orders is an appropriate sanction pursuant to CR 37(b)(2), which allows this court to "make such orders in regard to the failure [to comply with discovery orders] as are just." *Roberson v. Perez*, 12 Wn.App 320, 96 P.3d 420 (2004). Diligence is not

a consideration in determining whether a new trial is an appropriate remedy for a discovery violation. *Id.* And, even in newly discovered evidence cases, where diligence is a factor, "[w]here a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence." *Id.* During the separation period in which the parties were allocating and dividing the community estate and setting spousal maintenance, Petitioner continued to have a fiduciary duty to the Respondent. *See, e.g., Seals v. Seals*, 22 Wn.App. 652, 655, 590 P.2d 1301 (1979) ("A fiduciary duty does not cease upon contemplation of the dissolution of a marriage").

Petitioner's failure to provide the records of the trust account and regarding his income, and his misrepresentations regarding his business income, are willful discovery violations worthy of granting a new trial to Respondent under CR 37(b)(2). Respondent made numerous efforts to secure accurate information regarding Petitioner's income, including formal and informal discovery requests, motions to compel, taking depositions of Petitioner and other employees, and soliciting Petitioner's testimony at trial. *See, e.g.,* Declaration of Ed Hirsch and Supplemental Declaration of Respondent. Petitioner willfully violated the discovery rules by failing to supply complete and accurate information regarding his business income.

In response to Interrogatories and Requests for Production propounded to Petitioner by Respondent, Petitioner refused to provide many answers concerning his income and businesses directly to Respondent, instead indicating "provided to Kessler." *See* Exhibit H to Respondent's Reply Memorandum. Judge Haberly denied Respondent's Motion to Compel in October 2010 because she believed and relied on Petitioner and Mr. Province's false representations to the court that they had provided all of the documentation and information requested by Respondent to Steve Kessler (who was valuing one of Petitioner's businesses – Retina Center Northwest). The court finds that Petitioner and his counsel deliberately

misrepresented to the court the extent of documents provided to Mr. Kessler. *See* Declaration of Steve Kessler attached at Exhibit I to Respondent's Reply Memorandum. Although Petitioner's response to at least 22 of the discovery answers was "provided to Kessler," Mr. Kessler's file shows that Petitioner did not actually provide the vast majority of the information labeled "provided to Kessler" to Mr. Kessler. *See* Exhibit J to Respondent's Reply Memorandum.

The court rejects Petitioner's argument that the CR 60 Motion cannot be granted because Respondent could have used more diligence during discovery such as subpoenas. The "exercise of reasonable diligence does not require a requesting party to look behind the answers" of the other party in response to interrogatories in a dissolution proceeding. *Seals v. Seals*, 22 Wn.App. at 656 (citing *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964)). CR 26(e)(2), governing answers to interrogatories, kept Petitioner "under a duty seasonably to amend prior response" if a he knew that an answer was incorrect or was no longer true; and Petitioner's failure to amend the response is in substance a knowing concealment. Petitioner's deliberate concealment of property was a violation of his fiduciary duty to the Respondent and grounds for vacating the decree of dissolution.

D. Newly Discovered Evidence. The court finds that the following newly discovered evidence could not have been discovered in time to move for a new trial and is grounds to vacate the decree:

1. The newly discovered evidence of Mr. Province's misconduct and criminal acts as they relate to the funds held in his trust account, as set forth in the WSBA's Grievance Report and Formal Complaint at Tabs 9 and 10 to Respondent's Motion to Vacate. The Grievance Report and the evidence therein were not available to Respondent until March 21, 2013, well after the trial before referee had concluded. The evidence relating to Mr. Province's misconduct and theft of community funds from the trust account is material and likely to change the result of the property division and maintenance awarded to Respondent at

a new trial. This newly discovered evidence is particularly important given that Respondent received the funds in the Province trust account as part of her award of assets. As the WSBA investigation noted, pursuant to a temporary order of this Court, community funds and Petitioner's wages (after certain deductions) were to have been placed in Mr. Province's trust account starting in December 2009, but no funds were put in trust until nearly a year later, in October 2010. Petitioner refused to cooperate with the WSBA investigation and it is unknown the level of involvement or cooperation that he had in Mr. Province's fraudulent and criminal behavior.

2. The Allocations of Community Property spreadsheet for Tax Year 2011 provided to Respondent after trial by Petitioner's accountant Joseph Forde is newly discovered evidence related to Petitioner's income which warrants vacating the decree. *See* Tab 3C (Exhibit 1) of Motion to Vacate. This document shows that Petitioner's income from Retina Center NW alone was $108,686 per month in 2011 –nearly twice as much as the referee determined the Petitioner's monthly income to be ($55,000). Retina Center NW is not Petitioner's only source of income. He also receives income from his other business ventures, including Medical Partners and Kitsap Outpatient Surgery. The magnitude of the difference in income amounts to material evidence that would be likely to alter the maintenance and property division at a new trial. This Court does not find credible Petitioner's claims that the additional income was all earned after the trial by referee. Information related to that issue is in the exclusive control of the Petitioner and has not been provided to the Court.

3. The Medicare reimbursement summary sheet obtained by Respondent through a FOIA request, which directly contradicts Petitioner's representations during the dissolution case and at trial before referee that his 2011 income was significantly lower than previous years. *See* Exhibit B to Motion to Vacate. This evidence shows that revenue from Medicare Payments to Retina Center NW (Petitioner's medical practice), was significantly higher in the first part of 2011 prior to the date of trial, compared to revenue after trial, and higher than it

had been in previous years. Petitioner and his counsel indicated during the dissolution case that Medicare payments constitute anywhere from 65%-85% of total revenue for Retina Center NW. *See* Motion to Vacate at Exhibit C; *see also* Motion to Vacate at Exhibit D.

II. CONCLUSIONS OF LAW

A. There is clear and convincing evidence the asset/liability division and spousal maintenance provisions of the Decree of Dissolution dated October 14, 2011 should be vacated under CR 60(b)(4) based on Petitioner and his counsel's fraud, misrepresentation, and misconduct relating to Petitioner's income and the Province trust account. *See* Findings above.

B. The court finds that there is clear and convincing evidence the asset/liability division and spousal maintenance provisions of the Decree of Dissolution dated October 14, 2011 should be vacated under CR 60(b)(3) based on the newly discovered evidence. *See* Findings above.

III. ORDER

Having made the above Findings of Fact and Conclusions of Law, the court hereby ORDERS

A. Respondent's Motion to Vacate the Asset/Liability and Spousal Maintenance Provisions of the Decree of Dissolution dated October 14, 2011 is GRANTED.

B. Any and all provisions in the Decree of Dissolution pertaining to the allocation of assets/liabilities and to spousal maintenance are hereby VACATED.

C. A new trial is ordered to determine a fair and equitable property/debt allocation and spousal maintenance award to the Respondent. The date of the new trial shall be determined by agreement of the parties. If the parties cannot reach an agreement, the court shall determine the date of the new trial.

D; Judge Jennifer Forbes shall retain jurisdiction and all future matters shall be noted before Judge Forbes.

Dated: 12/24/13

JUDGE JENNIFER FORBES

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Seattle, Washington 98101-2605
(206) 623-6501

245 Fed.Appx. 283
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Fourth
Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,
Fourth Circuit.

John Witten TUNNELL, Plaintiff-Appellant,
v.
FORD MOTOR COMPANY, Defendant-Appellee.
John Witten Tunnell, Plaintiff-Appellant,
v.
Ford Motor Company, Defendant-Appellee.

Nos. 05-2112, 06-1799. | Argued:
May 24, 2007. | Decided: Aug. 1, 2007.

Synopsis

Background: Passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire brought products liability action against vehicle manufacturer, claiming that vehicle was defectively designed. After granting manufacturer's motion for directed verdict, and reviewing report and recommendation of Michael F. Urbanski, United States Magistrate Judge, 2006 WL 910012, the United States District Court for the Western District of Virginia, Norman K. Moon, J., 2006 WL 1788233, denied passenger's motion for new trial. Passenger appealed.

Holdings: The Court of Appeals held that:

[1] striking expert's testimony respecting manufacturer's failure to install battery cutoff device in vehicle was not abuse of discretion;

[2] striking of expert's testimony opining that battery cutoff device was reasonable solution to problem of post-collision electrical fires in vehicles was not abuse of discretion;

[3] district court did not violate the law of the case;

[4] establishing defectiveness required evidence that benefits of battery cutoff device outweighed risks associated with device; and

[5] district court did not abuse its discretion in denying passenger's motion for new trial based upon manufacturer's alleged discovery misconduct.

Affirmed.

West Headnotes (5)

[1] **Evidence**
⚭ Construction and Repair of Structures, Machinery, and Appliances
157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k513 Construction and Repair of Structures, Machinery, and Appliances
157k513(1) In General
Striking expert's testimony respecting automobile manufacturer's failure to install battery cutoff device in vehicle was not abuse of discretion in products liability action of passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire, given that expert failed to testify unequivocally that absence of device rendered vehicle defective for foreseeable uses, and instead appeared to conclude that device would be desirable added safety device, rather than necessary correction for defective product. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Cases that cite this headnote

[2] **Evidence**
⚭ Automobile Cases
157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.8 Automobile Cases
157k555.8(1) In General
Striking of expert's testimony opining that installation of battery cutoff device was

reasonable solution to problem of post-collision electrical fires in vehicles was not abuse of discretion in products liability action of passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire, given that expert did not test his prototype or other available cutoff devices to determine whether they would create safety problems in other scenarios or whether choice of critical circuits, to which power would be maintained, was sufficient to ensure passenger safety, and there was no evidence that expert's solution had been subjected to peer review or been generally accepted within automotive engineering community. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

[3] **Courts**

⇦ Trial or Evidence, Rulings Relating To

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(5) Trial or Evidence, Rulings Relating To

District court did not violate the law of the case in products liability action of passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire when, after determining that, as sanction for automobile manufacturer's discovery violation, it would give jury instruction allowing conclusion that consumers expected no fires in their vehicles if reasonable means were available to protect them, court required passenger to proffer evidence that consumers' expectations of no fires were reasonable, in that instruction given as sanction left to passenger task of showing that suggested safety device could prevent fires in feasible and practicable way that would not create new safety hazards outweighing their safety benefits.

Cases that cite this headnote

[4] **Products Liability**

⇦ Consumer Expectations

Products Liability

⇦ Automobiles

313A Products Liability
313AII Elements and Concepts
313Ak126 Design
313Ak130 Consumer Expectations
(Formerly 313Ak35.1)
313A Products Liability
313AIII Particular Products
313Ak202 Automobiles
313Ak203 In General
(Formerly 313Ak35.1)

To establish, in his products liability action against automobile manufacturer, that vehicle was defective due to absence of battery cutoff device, passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire had to proffer some evidence that benefits of device outweighed risks associated with device to support conclusion that vehicle's lack of device deviated from reasonable consumer expectations.

Cases that cite this headnote

[5] **Federal Civil Procedure**

⇦ Misconduct of Parties, Counsel or Witnesses

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2332 Misconduct of Parties, Counsel or Witnesses

Automobile manufacturer's alleged failure to produce documents related to battery cutoff devices manufactured by particular entity did not prevent passenger who was injured when vehicle in which he was riding collided with utility pole and caught fire from fully and fairly presenting his case in his products liability action against manufacturer, given that passenger had learned of much of the information in undisclosed documents from other sources during discovery, and therefore district court did not abuse its discretion in denying passenger's motion for new trial based upon manufacturer's alleged discovery misconduct. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

5 Cases that cite this headnote

*284 Appeals from the United States District Court for the Western District of Virginia, at Danville. Norman K. Moon, District Judge. (CA-03-74-NKM; 4:03-cv-00074-nkm).

Attorneys and Law Firms

ARGUED: Fred Dempsey Smith, Jr., Martinsville, Virginia, for Appellant. Wayne D. Struble, Bowman & Brooke, L.L.P., Minneapolis, Minnesota, for Appellee. **ON BRIEF:** Robert L. Wise, Bowman & Brooke, L.L.P., Richmond, Virginia, for Appellee.

Before MICHAEL, Circuit Judge, WILKINS, Senior Circuit Judge, and DAVID C. NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Opinion

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This is a products liability case brought by John Witten Tunnell, a severely injured automobile passenger, against Ford Motor Company. Tunnell was injured when the Ford Mustang in which he was riding collided with a utility pole and caught fire. Tunnell claims that the Mustang was defectively designed because it did not incorporate a collision-activated switch to cut off power to the electrical wiring that *285 started the fire. Before the case went to the jury, the district court determined that Tunnell had not proffered sufficient evidence to show that the Mustang was defective. The court concluded that Tunnell's expert did not establish that the proposed battery cutoff switch would result in a net improvement in the Mustang's safety. For this reason, the district court ordered that the expert's testimony be excluded and that a directed verdict be entered in Ford's favor. We agree with the district court's determinations. We further agree with the district court's denial of Tunnell's request for a new trial as a sanction for Ford's discovery misconduct. The district court's orders are therefore affirmed.

I.

In November 1999 Tunnell was seriously injured when the 1999 Ford Mustang in which he was riding collided with a utility pole and caught fire. He suffered severe burns that required amputation of both legs. The fire was caused by crush damage to the wiring and connectors of the Mustang's dashboard wiring harness. Tunnell sued Ford for breach of implied warranty, alleging that the Mustang was defective and unreasonably dangerous for foreseeable uses because it was not equipped with a battery cutoff device (BCO). He claims that a BCO would have prevented the fire by automatically cutting off power to the dashboard wiring harness upon impact.

Tunnell proffered the testimony of an automotive engineering expert, Jerry Wallingford, who explained how dashboard wiring harnesses present a fire hazard and how BCOs could effectively address the problem. Wallingford testified that Jaguar (a Ford company) had been using a BCO since 1988. He also presented the results of a test of a prototype BCO he had developed for the 1999 Mustang. In his test Wallingford separated from the dashboard wiring harness certain circuits he identified as critical for safety, including power windows, power door locks, and hazard lights. The test showed that, when triggered, the prototype cut off power to the dashboard wiring harness, while allowing power to flow to the critical circuits. Wallingford testified that similar BCOs were being manufactured, and used in BMWs and Jaguars, before 1999, and that any of these devices would prevent electrically generated post-collision fires. He concluded that the absence of a BCO made the Mustang unreasonably dangerous in the event of a collision, but it did not make the car defective.

The district court struck Wallingford's testimony as unhelpful and unreliable because (1) he was contradictory about whether the absence of a BCO rendered the Mustang defective; (2) he did not show that a risk-benefit analysis favored use of BCOs; (3) he confined his defectiveness opinion to collisions like Tunnell's rather than the full range of ordinary and foreseeable uses; and (4) his methods did not comply with several of the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Without the stricken evidence, the court determined that Tunnell had not proved that consumers had a reasonable expectation of no fires in their vehicles. The court therefore granted Ford's motion for a directed verdict.

Tunnell filed a motion for a new trial, claiming that the district court erred in striking Wallingford's testimony. The

district court denied the motion. Several months later, Tunnell discovered that Ford had failed to produce documents regarding a BCO manufactured by Tyco and moved again for a new trial. The court denied the motion because the evidence replicated ***286** information Tunnell already knew. Tunnell appeals.

II.

In a products liability action based on allegations of defective design, a plaintiff must prove that a defect rendered the product unreasonably dangerous for foreseeable uses. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073 (4th Cir.1974). A defective product is considered unreasonably dangerous if it violates government or industry safety standards or if it does not conform to consumers' reasonable expectations. *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir.1993). Consumer expectations may be established by evidence of actual industry practices, published literature, or direct evidence of what reasonable purchasers consider defective. *Id.* at 420-21.

No industry standards require automakers to install BCOs. Tunnell therefore sought to prove by Wallingford's testimony that consumers reasonably expected automakers to employ BCOs to prevent post-collision electrical fires. Tunnell argues that the district court erred in striking Wallingford's testimony and that, even if the decision to strike was proper, Tunnell did not need Wallingford's testimony to avoid a directed verdict.

A.

We review the district court's decision to strike Wallingford's testimony for abuse of discretion. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4th Cir.2001).

[1] A plaintiff may rely on expert testimony if it is relevant and reliable. Fed.R.Evid. 702. The district court determined that Wallingford's testimony did not satisfy either of these requirements. First, the court determined that his testimony was irrelevant because it did not establish that the Mustang was defective. Wallingford failed to testify unequivocally that the absence of a BCO rendered the Mustang defective for foreseeable uses. Instead, he stated that the Mustang was "unreasonably dangerous" in collisions, J.A. 3444, but that he would not "call it defective." J.A. 5371. A court may exclude testimony that does not tend to show that a suggested product change was necessary to meet existing standards or reasonable consumer expectations. *See Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 338 (4th Cir.1991). The district court thus did not abuse its discretion in striking Wallingford's testimony because he appeared to conclude that BCOs would be a desirable added safety device rather than a necessary correction for a defective product.

[2] The district court's second reason for striking Wallingford's testimony was his failure to employ sound methods to demonstrate that a BCO would be a reasonable solution to the problem of post-collision electrical fires. The reliability assessment of expert testimony is guided by a flexible analysis of several factors: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether a technique has a high known or potential rate of error and whether there are standards controlling its application; and (4) whether the theory or technique enjoys general acceptance within the relevant community. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (citing *Daubert*, 509 U.S. at 592-94, 113 S.Ct. 2786). Wallingford opined that his prototype would prevent electrical fires while avoiding some of the safety risks posed by BCOs that cut off power to all dashboard circuits. He did not, however, test the prototype (or any other available BCOs) to determine whether ***287** they would create safety problems in other scenarios or whether the choice of critical circuits, to which power would be maintained, was sufficient to ensure passenger safety. Wallingford conceded he had not analyzed whether circuits not identified as critical-including the dome light, car horn, taillights, radio, and power point-provided significant safety benefits that would be lost due to operation of the prototype. There was also no evidence that Wallingford's BCO solution had been subjected to peer review or had been generally accepted within the automotive engineering community. Absent more extensive testing by Wallingford or acceptance of the BCO solution by his peers, the district court's decision to strike Wallingford's testimony was not an abuse of discretion.

B.

In light of its decision to strike Wallingford's testimony regarding the Mustang's defectiveness, the district court determined that Tunnell had presented insufficient evidence of a product defect and directed a verdict for Ford. We

review *de novo* a district court's grant of a directed verdict "to determine whether the evidence presented at trial, viewed in the light most favorable to [the non-moving party], would have allowed a reasonable jury to render a verdict in [its] favor." *Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir.1997).

[3] Tunnell argues that the district court should not have directed a verdict against him because a prior discovery sanction against Ford in this case relieved Tunnell of the burden of proving a defect. The sanction took the form of an instruction that consumers "expected that there would be no fires in collision and noncollision situations where such fires could be prevented by design and construction, balancing known risk and dangers against the feasibility and practicability of applying any given technology." J.A.2086. In other words, the instruction allows the conclusion that consumers expected no fires in their vehicles if reasonable means were available to prevent them. The instruction answers one part of the defectiveness inquiry: what consumers expected. It does not, however, establish that a consumer's expectation of no fires would always be reasonable. The instruction leaves to Tunnell the task of showing that BCOs could prevent fires in a feasible and practicable way that would not create new safety hazards outweighing their safety benefits. The district court thus did not violate the law of the case by requiring Tunnell to proffer evidence that consumers' expectations of no fires were reasonable.

C.

[4] Tunnell alternatively argues that he proffered sufficient evidence of defectiveness independent of Wallingford's stricken testimony, and that the district court erred in requiring the evidence of reasonableness of consumer expectations to take the form of a risk-benefit analysis. Our court has stated that such balancing is needed to determine whether consumer expectations are reasonable. *See Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1181 (4th Cir.1997). Generally, a design change that avoids one danger while creating others of a similar or greater magnitude does not conform to consumers' reasonable expectations. *See id.* (unreasonable to consider a fire resistant safe defective because it was not burglar resistant where burglar resistance would decrease fire resistance). The district court correctly required some evidence that the benefits of BCOs outweighed their risks to support a conclusion that the Mustang's lack of a BCO deviated from reasonable ***288** consumer expectations. Because Tunnell's evidence did not show that the risks associated with a power cutoff were outweighed by the benefits from a decreased possibility of post-collision electrical fires, the district court correctly granted Ford's motion for a directed verdict.

III.

Tunnell's remaining argument relates to the district court's treatment of Ford's discovery misconduct. In December 2005, after the district court had issued the directed verdict, Tunnell moved for sanctions and a new trial, claiming that Ford had failed to produce documents related to BCOs manufactured by Tyco. The district court granted the motion for sanctions and denied the motion for a new trial.

[5] Federal Rule of Civil Procedure 60(b)(3) allows the district court to grant a new trial if a party engages in fraud, misrepresentation, or other misconduct. The moving party must (1) have a meritorious defense; (2) prove misconduct by clear and convincing evidence; and (3) show that the misconduct prevented the moving party from fully presenting his case. *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir.1994). The court then balances the policy favoring finality of judgments against the need to do justice to the moving party to determine whether a new trial is appropriate. *Square Constr. Co. v. Wash. Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir.1981). We review the court's decision for abuse of discretion. *Id.*

The district court denied Tunnell's motion for a new trial because Tunnell had not shown that Ford's discovery misconduct prevented him from fully presenting his case. Where a party is able to fully prepare and present his case notwithstanding the adverse party's misconduct, the district court may deny relief under Rule 60(b)(3). *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21-22 (1st Cir.2002). Although Ford may have failed to turn over documents related to the Tyco BCO and its use in Aston Martin vehicles, Tunnell had learned much of the information contained in the undisclosed Ford documents from other sources during discovery. We agree with the district court that this independent knowledge enabled Tunnell to pursue any further development of the evidence he desired. Ford's actions thus did not prevent him from fully and fairly presenting his case and the district court did not abuse its discretion in denying Tunnell's motion for a new trial.

IV.

In sum, Tunnell's evidence failed to support a finding that automobile consumers reasonably expected no electrical fires in 1999. We therefore affirm the district court's order granting Ford a directed verdict. We also affirm the district court's denial of Tunnell's request for a new trial based on Ford's discovery misconduct because it did not prevent Tunnell from fully presenting his case. The district court's orders are therefore

AFFIRMED.

Parallel Citations

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