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COURT OF APPEALS
DIVISION 2
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No. 34840-3-II

**COURT OF APPEALS
DIVISION 2
OF THE STATE OF WASHINGTON**

In re the Marriage of

KIMBERLY ANN MOYER
(f/k/a KASSAB), Appellant,

and

ELIE G. KASSAB, Respondent.

REPLY BRIEF OF APPELLANT KIMBERLY ANN MOYER

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A. REBUTTAL TO RESPONDENT’S ARGUMENTS

1. *In re Marriage of Rideout* Does Not Apply to This Case. The Appropriate Standard of Review is *De Novo*.

Elie Kassab claims that the appropriate standard of review is one of substantial evidence, relying upon *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003). *Rideout* is not applicable. The appropriate standard of review is that claimed by Kimberly Moyer in her opening brief -- *de novo*. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (Div. 1, 2000).

Rideout involved a dispute between former spouses over visitation rights. The former husband sought to have his former wife found in contempt of court for her bad faith failure to comply with visitation provisions in a parenting plan. The former spouses in *Rideout* submitted numerous affidavits and other written submissions bearing on their dispute. The facts asserted in them apparently were in conflict. The trial court resolved the factual conflicts based upon its review of the paper record; thus, in effect, assessing the “credibility” of the evidence presented in the paper record. The trial court then made its determination based on its assessment of the “credibility” of the evidence in the written record. *Rideout*, at 349-50.

The former spouses quarreled regarding the appropriate standard of review when the case went on appeal. The husband prevailed at the trial court level and, on appeal (and not surprisingly), contended that the appellate court should not review the trial court decision on a *de novo* basis -- even though this is the conventional standard of review for trial court decisions based solely on a trial court's paper record -- but instead should adopt a more deferential standard of review and determine only whether there was substantial evidence in the trial court's record to support the trial court's decision. His former wife, of course, contended that the traditional *de novo* standard was the appropriate standard of review for the case.

The *Rideout* court decided that, under the rather unusual circumstances present in that case, the appropriate standard of review was the substantial evidence standard. However, the court carefully noted that its decision was founded on the premise that it was necessary for the trial court to assess the "credibility" of the written evidence in order to make the final determination in the case.

Sara correctly observes that there are cases that stand for the proposition that appellate courts are in as good a position as trial courts to review written submissions and, thus, may generally review *de novo* decisions of trial courts that were based on affidavits and other documentary evidence. See, e.g., *Progressive Animal Welfare Soc'y v.*

Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *In re Marriage of Flynn*, 94 Wn.App. 185, 190, 972 P.2d 500 (1999); *Danielson v. City of Seattle*, 45 Wn.App. 235, 240, 724 P.2d 1115 (1986), *aff'd*, 108 Wn.2d 788, 742 P.2d 717 (1987). The aforementioned cases differ from the instant in that they did not require a determination of the credibility of a party. Here, credibility is very much at issue.

* * * * *

We hold here that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases *de novo* because that court is in the same position as trial courts to review written submissions. See, e.g., *Smith*, 75 Wn.2d at 718-19, 453 P.2d 832.

Rideout, at 350-51. (Emphasis supplied.)

In the present case, voluminous documentary evidence was submitted to the trial court (though primarily by Elie Kassab, not by Kimberly Moyer). However, the trial court was not called upon to weigh "credibility" of this evidence or resolve conflicts within the evidence. When one reviews the documentary evidence and the declarations submitted by the parties, it becomes clear that, in fact, there are few serious differences between the parties as to the facts and those differences

are not material to the present dispute. There were and continue to be serious differences between the parties as to what should be made of the facts -- but little in the way of serious disagreement regarding the facts themselves.

This becomes evident when examining the so-called “contested facts” which Elie Kassab claims in his opposition brief (*Brief of Respondent*, pgs. 18 - 20) the trial court was called upon to decide. Eight of the nine so-called “factual disputes” identified in the brief are not discussed by the trial court in its *Ruling on Motion to Enforce Decree*. (CP 236 - 41.) (I.e., the trial court does not mention in its ruling any conclusion as to “[w]hether, during the dissolution, it was clear to all parties and counsel that Moyer’s March 2001 assertion that the transfer of the children’s interests had in fact occurred was “a mistake” as Moyer asserted[.]”, etc.)

The fact that eight of the nine so-called “fact disputes” were not mentioned by the trial court in its ruling shows that, to the extent there is a dispute between the parties regarding the particular matter, it was not relevant to the trial court’s decision. These “fact disputes” are make-weights put forward by Elie Kassab to try to make this case one to which

Rideout would apply. These “fact disputes” have no bearing on the outcome of this case.

The only so-called “contested fact” which was discussed by the trial court in its ruling is “[w]hether Moyer was authorized, as trustee, to cancel the children’s L.L.C. ownership[.]” The trial court judge concluded (erroneously, Kimberly Moyer contends) that she had such authority. This conclusion is not a factual conclusion, however, but a conclusion of law. Conclusions of law are reviewed by an appellate court on a *de novo* standard. *Regan v. Department of Licensing*, 130 Wn.App. 39, 121 P.3d 731 (Div. 2, 2005) (citing *Tapper v. Department of Employment Security*, 122 Wn.2d 397, at 403, 858 P.2d 494 (1993)).

Furthermore, the Washington appellate courts have continued since *Rideout* to adhere to the traditional standard of *de novo* review of trial court decisions made upon a paper record only. For instance, in *In re Estate of Bowers*, 132 Wn.App. 334, 131 P.3d 916 (Div. 1, 2006), Division One of the Washington Court of Appeals ruled in an appeal of a suit over whether to admit a lost will to probate that --

Decisions based on declarations, affidavits and written documents are reviewed *de novo*. *In re Estate of Nelson*, 85 Wn.2d 602, 605-06, 537 P.2d 765 (1975) (where the trial court did not have an “opportunity to assess the credibility or weight of conflicting evidence by hearing live

testimony,” appellate review of factual findings and legal conclusions is *de novo*).

Bowers, 132 Wn.App. 334, at 339. (Footnote omitted.) In *Bartusch v. Oregon State Board of Higher Education*, 131 Wn.App. 298, 126 P.3d 840 (Div. 2, 2006), Division Two of the Washington Court of Appeals held --

When the underlying facts are undisputed, we review *de novo* a trial court’s order on a motion for dismissal for lack of jurisdiction. *Raymond v. Robinson*, 104 Wn.App. 627, 633, 15 P.3d 697 (2001).

Bartusch, 131 Wn.App. 298, at 303. And in *Housing Authority of the City of Pasco and Franklin County v. Pleasant*, 126 Wn.App. 382, 109 P.3d 422 (Div. 3, 2005), Division Three of the Washington Court of Appeals held --

When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record *de novo*. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997).

Housing Authority, 126 Wn.App. 382, at 424-25.

The “credibility” of the documentary record was not assessed by the trial court in this case and the trial court did not resolve conflicts in the evidence. Therefore, the standard of review in this court is as Kimberly Moyer states in her opening brief -- *de novo*.

2. The Evidence in the Trial Court's Record – Whether Evaluated Under the Substantial Evidence Standard or the *De Novo* Standard –Does Not Support the Trial Court's Factual Findings and Does Not Support the Trial Court's Order.

Under either standard of review, this court should conclude that the trial court's factual findings which underpin its order granting Elie Kassab's motion are incorrect and, therefore, the order must be reversed. Kimberly Moyer will not extensively re-visit all the reasoning on this point discussed in her opening brief (*Brief of Appellant*, pgs. 19 – 22 and 25 - 35). A summary only is provided here.

Kassab now states in his own brief that, in the fall of 2000 (and thus before the parties signed Stipulation No. 1) –

- the parties' children owned 99% of Prestige Development, and
- he knew this to be the case.

("It is uncontested that Kassab knew that the children owned a beneficial interest in ninety-nine percent of the L.L.C. in the fall of 2000." *Brief of Respondent*, pg. 26.) How then does he believe that he is entitled to a court order now, more than four years after the dissolution of his marriage, directing his former wife to --

- sign a back-dated consent resolution in her alleged role as trustee for the parties' grown children – against their obvious desires and

interests – which, therefore, could be alleged by their children to be a gross breach of the fiduciary duty of a trustee;

- when, in the course of the parties dissolution lawsuit, he claimed that no such trust existed in the first place because the children’s interests were not funded (a position now he appears to have abandoned);
- therefore, concerning property which could not be allocated by the court in the course of the parties’ dissolution because it did not belong to the parties (since he now takes the position that it was trust property which belonged to their children);
- in a limited liability company in which she no longer has any ownership interest in her own right or management authority?

His explanation is that he “reasonably relied,” when deciding upon the property settlement, on his belief that Kimberly Moyer had the consent of the parties’ children to transfer their interest in Prestige Development to him. (*Brief of Respondent*, pg. 26.) The trial court accepted this explanation. (*Ruling on Motion to Enforce Decree*, pg. 2. CP 237.)

With all respect to the trial court and this court, it is not possible – given the undisputed evidence in the trial court’s record – to conclude that Elie Kassab reasonably relied on such a belief, if he had such a belief in

the first place. The undisputed facts prove that either he could not have believed this to be the case, or if he did so, that he did so unreasonably.

There is no dispute regarding the following facts:

Fact -- Stipulation No. 1 entered into on December 14, 2000, expressly provided that --

All terms of the stipulation are contingent on cooperation by any third parties who may claim or actually have an interest in any property in which the parties have an interest and which is the subject of this stipulation including but not limited to the parties' children.

(*Decree of Dissolution*, Ex. A, pg. 5, lns. 10 - 12. CP 21.) (Emphasis supplied.) This plain language made it clear to Elie Kassab, or should have, that his children's consent would be required to transfer of the entirety of Prestige Development to him.

Fact -- Stipulation No. 1 also committed both parties -- not just Kimberly Moyer -- to seek to obtain the children's consent. It provided --

Both parties shall execute all documents necessary to these transfers, and shall ensure that any necessary third parties do so as well.

(*Decree of Dissolution*, Ex. A, pg. 1, lns. 18 - 19. CP 17.) (Emphasis supplied.) Seeking the consent of the parties' children to the proposed transfer of their 99% interest in Prestige Development to Elie Kassab was

not Kimberly Moyer's sole responsibility – Elie Kassab was to be active in the effort also.

Fact -- On November 26, 2001, Kimberly Moyer (through her attorney, Mr. Runstein) warned Elie Kassab (through Ms. Mathews, his attorney, then and now) that --

As we discussed, the children are not parties to the dissolution and they will face the risk the children may maintain they individually own 33% of the theater property.

(*Runstein Dec.*, Ex. 2, Runstein Letter of 11/26/2001. CP 194.)

(Emphasis supplied.)

Fact – Stipulation No. 2 entered into on November 30, 2001, a few days before the dissolution decree was entered, specifically provided --

The parties acknowledge that their children are not parties to this agreement and that they may be subject to their claim of ownership in the property.

(*Decree of Dissolution*, Ex. B, pg. 2. CP 24.) (Emphasis supplied.)

No matter what communications may have gone back and forth between the two spouses (or through their attorneys) leading up to the signing of Stipulation No. 2, no matter what boilerplate may have been in the refinancing documents signed earlier in 2001, the above provision in Stipulation No. 2, if nothing else, definitively proves that Elie Kassab knew, or should have known, that in the end – when their dissolution was

completed -- Kimberly Moyer made no guarantee to him that he would acquire free and clear title to 100% of Prestige Development and he could not “reasonably rely” on anything to the contrary. This language was included in Stipulation No. 2 precisely for this reason -- to make it clear to Elie Kassab that he would be assuming the risk that his children might not accept his “version of history” that they had no interest in Prestige Development. (*Runstein Dec.*, pg. 3, para. 10. CP 188.)

Elie Kassab does not discuss in his brief, let alone explain, how he can say he “reasonably relied” upon supposed assertions by Kimberly Moyer regarding her authority to transfer the children’s interests in Prestige Development to him when he signed two stipulations which said in plain English that the parties’ arrangements were –

- “contingent on cooperation by * * * parties who may claim or actually have an interest in any property in which the parties have an interest and which is the subject of this stipulation including * * * the parties’ children[,]” and that
- “[t]he parties acknowledge that their children are not parties to this agreement and that they may be subject to their claim of ownership in the property.”

Likewise, Elie Kassab does not discuss in his brief, let alone explain, how he can say he “reasonably relied” upon supposed assertions by Kimberly Moyer that he would receive the entirety of Prestige Development when, just a few days before he signed Stipulation No. 2 on November 30, 2001, Kimberly Moyer’s attorney told his attorney –

- “As we discussed, the children are not parties to the dissolution and they will face the risk the children may maintain they individually own 33% of the theater property.”

Elie Kassab and his attorneys may have believed at the time the stipulations were signed that the inclusion of language in the parties’ two stipulations regarding the need and responsibility of both parties to secure the cooperation of their children and the fact that the children may not agree with Elie Kassab’s “version of history” was “immaterial” (*Brief of Respondent*, pg. 47). However, Elie Kassab and his attorneys had no justification for, or right to adopt, this rather cavalier interpretation of the black and white print language in the agreements he signed. Elie Kassab was not privileged to unilaterally decide that parts of the agreements that he signed were “immaterial” while other parts (such as those purporting to award him the parties’ interests in Prestige Development) were “material.”

The undisputed evidence in the trial court's record demonstrates that Elie Kassab knew, or should have known, that he was running a calculated risk that the parties' children might do exactly as they have done -- step forward later to assert their rights against his claim that he owned all of Prestige Development. As such, the trial court's order cannot be upheld. He has no legitimate quarrel with his former wife on this topic and no right to require her now, many years after the fact, to convey to him something which arguably is not, and never was, hers to convey to him -- the children's interest, if any, in Prestige Development.

3. Respondent's Argument is Founded on a False Assumption -- That the Evidence Proves the Parties' Children Consented to the Transfer of Their Interests in Prestige Development to Him.

To escape the predicament that, if his children owned 99% of Prestige Development, then "reliance" on alleged representations by Kim Moyer would be irrelevant insofar as a transfer of the children's interests, Elie Kassab argues "There is no evidence the children did not consent. There is evidence the children did consent." (*Brief of Respondent*, pg.. 43.) Elie Kassab argues that "Moyer's challenge to the court's conclusions that she, as trustee, had the authority to transfer the children's L.L.C. interests * * * fail[s] because there is no competent evidence to

suggest that the children did not authorize the transfer of their L.L.C. interests * * * .” (*Brief of Respondent*, pgs. 41-42.)

The trial court made no finding in its *Ruling on Motion to Enforce Decree* that the children had consented to the supposed transfer of their interests. The reason, of course, is that there is ample evidence the children did not consent to a transfer.

First, it appears Elie Kassab cannot produce a Bill of Sale or similar document of conveyance, signed by the children, conveying their interests to him. If such a document existed, surely it would have been produced by now to forestall the children’s lawsuit against him.

Second, the children have sued Elie Kassab for their claimed 99% of Prestige Development. (See the *Complaint* filed in *Sturgeon v. Kassab. Kassab Dec.*, Ex. 1. CP 45-58.)

Elie Kassab asserts that evidence proving or disproving his contention that the children authorized the transfer of their Prestige Development membership interests is uniquely within Kimberly Moyer’s control. This is incorrect. The most probative evidence on the topic would be the testimony of the children themselves. He had the same ability to obtain such testimony through depositions in the case at the trial

court level as Kimberly Moyer. He could have taken the depositions of the children in this lawsuit or in the children's lawsuit. He did not do so.

In reality, Elie Kassab wishes the court to join with him in hopeful speculation that the children consented to a transfer of their interests to him in 2000 and 2001. He phrases this as asking the court to adopt a "presumption" that the children consented to a transfer of their interests based on certain events. But there is no call for the court to presume anything in this case when the ability to produce evidence on the point was as much within his control as within Kimberly Moyer's control when this case was litigated in the trial court. And common sense dictates that, if the children had, in fact, consented to a transfer of their interests in Prestige Development, this present dispute between former spouses and the children's lawsuit against their father never would have occurred.

4. The Trial Court Has Ordered the Performance of a Useless Act – Either the Transfer an Asset Which Already Has Been Transferred or the Transfer an Asset Which Petitioner Cannot Transfer.

It simple logic that two possible states of affairs regarding ownership of 99% of Prestige Development existed in 2000 and 2001 when the parties were separating and dividing property – either Kimberly Moyer and Elie Kassab owned 99% of Prestige Development or their

children owned 99% of Prestige Development. If Kimberly Moyer and Elie Kassab owned 99% of Prestige Development, then Elie Kassab obtained complete ownership of the company when Kimberly Moyer signed the Consent of Members form (CP 151) in 2001 and all of the recent proceedings in the trial court and in this court have been useless arguments about nothing because Elie Kassab has owned all of Prestige Development since 2001. If their children owned 99% of Prestige Development (which Elie Kassab apparently now believes – see *Brief of Respondent*, pg. 26), then their property was not before the court for distribution in Kimberly Moyer and Elie Kassab’s dissolution lawsuit and the trial court then and now and this court now can do nothing in this legal proceeding to affect their ownership interests. To repeat a cliché, Elie Kassab might as well ask that the court order Kimberly Moyer to convey the Brooklyn Bridge to him. If Kim Moyer held 99% of Prestige Development in trust for the parties’ children, then she had then and has today no more authority to convey the children’s asserted interests in Prestige Development (if they exist) to Elie Kassab than she had or has authority to convey the Brooklyn Bridge to him.

Elie Kassab does not address this fundamental defect in his reasoning in his brief. The most Elie Kassab says in this regard is to argue that the evidence suggests that the children must have consented.

Moyer argues that she and Kassab could do nothing “as between themselves” to “deprive the children of their property interest.” That is not true if the children authorized her to make the transfer on their behalf. The uncontested evidence makes it highly probable that the children had authorized their mother to dump a financial albatross on their father.

(*Brief of Respondent*, pg. 38.) But the trial court made no determination the children consented to anything during 2000 and 2001 in its *Ruling on Motion to Enforce Decree*. And as discussed above, in fact it appears unlikely that the children consented to a transfer of their Prestige Development interests to their father.

The trial court also seemingly ignored this important defect in reasoning which undercuts its decision. The trial court glossed over the important question of “Whose property was it?” by saying “The fact that Petitioner’s efforts to comply with her promise may be legally ineffective does not relieve her of her obligation.” (*Ruling on Motion to Enforce Decree*, pg. 5 - 6. CP 241.) Elie Kassab does likewise. “The order does not determine the effect of the signing, either as to Moyer’s liability, or to transfer any interest in the L.L.C.” (*Brief of Respondent*, pg. 1.)

Kimberly Moyer will not repeat here all the reasoning on this point discussed in her opening brief (*Brief of Appellant*, pgs. 23 – 24 and 35 - 47) but will simply say this conundrum and its legal ramifications still exist. If the disputed 99% of Prestige Development belonged to Kimberly Moyer and Elie Kassab when they were separating, then Elie Kassab has owned it since the Consent of Members form (CP 151) was signed in 2001 and everything that has taken place more recently in this case has been a waste of time and money. If the disputed 99% of Prestige Development belonged to their children, then the trial court had no power to dispose of that property in the course of the parties' dissolution lawsuit in 2000 and 2001 and the trial court and this court have no power to do so today. *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951).

Kimberly Moyer in her role as trustee for her children (if the trust, in fact, existed) was not a party to the dissolution lawsuit. The court's current order to Kimberly Moyer to sign a document in her purported role as trustee for grown trust beneficiaries which purports to convey trust property against their obvious wishes to Elie Kassab, in effect ordering specific performance of an illegal bargain, is not proper and cannot be sustained. If the disputed property belonged to the parties' children, then the alleged "bargain" to transfer their interests to their father was an illegal

bargain. The court is not to aid a party to an illegal contract (in this situation – Elie Kassab) with the remedy of specific performance. *Cascade Timber Co. v. Northern Pacific Railway Co.*, 28 Wn.2d 684, 184 P.2d 90 (1947); *Sienkiewicz v. Smith*, 30 Wn.App. 235, 633 P.2d 905 (Div. 2, 1981).

Further, if 99% of Prestige Development is owned by the parties' children, then a conveyance of that interest by Kimberly Moyer as their trustee to their father, who cannot under these circumstances be considered to be a *bona fide* purchaser for value, would convey nothing and be useless. A court will not order performance of a useless act. *Yaw v. Walla Walla School Dist. No. 140*, 106 Wn.2d 408, at 412, 722 P.2d 803 (1986).

5. There is No Basis to Award Attorney's Fees to Respondent in This Matter.

Elie Kassab asserts in his opposition brief (*Brief of Respondent*, pgs. 46-49) that Kimberly Moyer should be held liable for his attorney's fees incurred in connection with this appeal on the basis that she has been "intransigent." This is an entirely new claim for relief made for the first time on appeal. This new claim for relief was not advanced in the trial court. No trial court findings were made on this point so there is no

factual basis on which this court can conclude that Kimberly Moyer is “intransigent.” Kim Moyer has had no opportunity, other than in this reply brief, to address the issue. This court should adhere to the conventional rule that claims advanced for the first time on appeal generally will not be considered.

Further, on the facts and on the law, Kimberly Moyer has not been “intransigent.” She did not initiate this latest chapter in the Moyer and Kassab dissolution -- Elie Kassab did so (four years after he apparently was satisfied with the documentation of the parties’ agreements). Kimberly Moyer simply has responded to actions taken by Elie Kassab and asserting her clearly stated and non-frivolous legal position. Kimberly Moyer is not liable for his attorney’s fees under the circumstances and no such award should be made.

A. Respondent Cannot Make a Claim for Attorney’s Fees for the First Time on Appeal. RAP 2.5 (a).

Elie Kassab made no request for an award of attorney’s fees at the trial court level. He did not cross-appeal from the trial court’s decision by filing a Notice of Appeal of his own as required by RAP 5.1 (d). He did not assign error to any trial court decision in his opposition brief as required by RAP 10.3 (b) if he intended to argue that the trial court erred

in some manner in its decision. His first mention that he believes that he is entitled to an award of attorney's fees for Kimberly Moyer's alleged "intransigence" is at this point in the proceedings -- in the filing of his opposition brief. (*Brief of Respondent*, pgs. 46-49).

RAP 2.5 (a) provides that an appellate court may refuse to review any "claim of error" which was not raised in the trial court. The term "claim of error" includes "arguments or theories." *Washburn v. Beatt Equipment Company*, 120 Wn.2d 246, at 290, 840 P.2d 860 (1992) ("Arguments or theories not presented to the trial court will generally not be considered on appeal."). It includes "issues." *State v. Lord*, 117 Wn.2d 829, at 849, 822 P.2d 177 (1991) ("The general rule is that appellate courts will not address issues not raised in the trial court."). According to Tegland, "Some cases, perhaps as accurately as any, have characterized the rule as barring consideration of contentions not made in the trial court." 2A Tegland, *Washington Practice: Rules Practice* 6th Ed., § RAP 2.5, at 195 (citing *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.App. 408, 814 P.2d 243 (Div. 1, 1991)).

The rationale for this rule is "[o]ut of fairness to the trial court and the opposing party, theories advanced for the first time on appeal generally

will not be considered. See RAP 2.5(a).” *Espinoza v. City of Everett*, 87 Wn.App. 857, at 872-73, 943 P.2d 387 (Div. 1, 1997).

No issue or contention is raised by Kimberly Moyer in her appeal which was not already addressed to the trial court. Kimberly Moyer is only exercising her right to appellate review of a matter of significance to her. Her arguments are not frivolous. Without a trial court record developed on the question of whether or not Kimberly Moyer has been “intransigent” as that term has been defined by the courts (see below), and with no evidence of such appearing in the pleadings filed with this court, it is fundamentally unfair for Elie Kassab to raise this issue for the first time on appeal. He should be considered to have waived any such claim. This court should deny his claim for attorney’s fees because it was not raised in the trial court.

B. There is No Basis for an Award of Attorney’s Fees Because Petitioner Has Not Been “Intransigent.”

Further, there is no basis to for an attorney’s fee award in this case because Kimberly Moyer has not been “intransigent.”

Intransigence” in this context has not been well-defined by the Washington courts. Division One defined “intransigence” as “the quality or state of being uncompromising.” *Schumacher v. Watson*, 100 Wn.App.

208, at 216, 997 P.2d 399 (Div. 1, 2000) (citing Webster's Third New International Dictionary 1186 (1993)). Awards of attorney's fees based upon the "intransigence" of a party in a dissolution lawsuit have been granted when the party engaged in "foot-dragging" and "obstruction," *Eide v. Eide*, 1 Wn.App. 440, at 445, 462 P.2d 562 (Div. 1, 1969); when a party filed repeated motions which were unnecessary, *Chapman v. Perera*, 41 Wn.App. 444, at 455-56, 704 P.2d 1224 (Div. 1, 1985), *rev. den.*, 104 Wn.2d 1020 (1985); when a party made the trial "unduly difficult" and increased legal costs by his or her actions, *In re Marriage of Morrow*, 53 Wn.App. 579, at 591, 770 P.2d 197 (Div. 1, 1989); when a party's failure to cooperate with his attorney and to appear at trial caused additional fees for the other party, *State ex rel. Stout v. Stout*, 89 Wn.App. 118, at 126-27, 948 P.2d 851 (Div. 1, 1997); and when a party filed frivolous motions, failed to appear for a deposition and refused to read correspondence, *In re Marriage of Foley*, 84 Wn.App. 839, at 846, 930 P.2d 929 (Div. 3, 1997).

There is no evidence in this case (and certainly none was found by the trial court in its ruling) that Kimberly Moyer has engaged in any of these dilatory tactics in this case. It simply is incorrect to say that Kimberly Moyer has been "intransigent" in this case and so there is no basis to assess attorney's fees against her.

In re Marriage of Sievers, 78 Wn.App. 287, 897 P.2d 388 (Div. 1, 1995), cited by Elie Kassab in support of his claim, is factually quite different from this case and is not in point. In *Sievers*, the husband and wife negotiated a written property settlement agreement in an informal manner at a point in time when the wife's attorneys (according to the trial court's findings) did not have a clear understanding of the tax issues involved in the anticipated settlement. *Sievers*, at 311. The settlement held potentially very adverse tax consequences for the wife due to the fact certain tax allocation issues were not specifically dealt with. However, the trial court concluded both spouses had the same understanding as to the desired tax consequences when they negotiated and signed their rather informal settlement agreement. These desired tax consequences were more favorable to the wife and correspondingly less favorable to the husband. *Sievers*, at 297. Several months later, a more formal property settlement agreement was drafted by the parties' lawyers. In the drafting process, the husband added a handwritten addition to the typewritten language which arguably bolstered the husband's position (adopted later) that the parties intended a settlement which would result in adverse tax consequences to the wife and correspondingly better tax consequences to him. *Sievers*, at 294. This was preceded by the husband seeking advice

from his accountant as to whether the language of the more formal property settlement agreement would allow him to claim -- after the fact -- that the wife was obligated to pay the income taxes due on sizeable amounts of income which he received under the settlement which was negotiated -- the adverse tax consequences which were possible given the ambiguity in the settlement agreement as first negotiated and then as more formally drafted. *Sievers*, at 294-95. Even with the handwritten language, however, the language in the more formal property settlement agreement also could be interpreted as consistent with what the trial court found was the spouses' subjective understanding of the settlement, and the trial court so ruled that the agreement would be interpreted in that manner. *Sievers*, at 297.

Of pertinence to this pending case, the *Sievers* trial court also concluded that the husband was obligated by his fiduciary duty to his estranged wife and by his duty of good faith and fair dealing to disclose to his wife during the settlement negotiations the nature and extent of the tax liability which he sought to impose on her, that he had not done so, and then he had attempted to perpetuate this state of affairs in the ensuing proceedings required to settle what the parties in fact had agreed upon. The trial court decided that these actions, along with his failure to produce

certain records pertinent to child support, showed “intransigence” and justified awarding the wife a very large attorney’s fees award. *Sievers*, at 301. Division One of the Washington Court of Appeals upheld this decision on appeal.

Sievers simply is a very different case factually than this pending case. In the pending case, there was full disclosure to Elie Kassab and his attorneys of the exact language included in the two stipulations (which were incorporated into the dissolution decree) and there was ample warning provided to Elie Kassab and his attorneys that the parties’ children might very well have a different opinion regarding ownership of Prestige Development than his “version of history.” This is discussed at greater length in Kimberly Moyer’s opening brief (*Brief of Appellant*, pgs. 25 - 30). There was no “last-minute” addition to the agreement by Kimberly Moyer in an attempt to “sandbag” Elie Kassab.

When one reviews the facts of this case, it is clear that this case is not another *Sievers* and its decision to award attorney’s fees to a spouse without regard to financial ability to pay is equally irrelevant to this case. Elie Kassab’s request for an award of attorney’s fees on the basis of “intransigence” should be denied by this court.

B. CONCLUSION

This court should reverse the decision of the trial court granting respondent Elie Kassab's motion to require appellant Kimberly Moyer to re-execute the 2001 consent resolution in her alleged capacity as trustee for the parties' children. Instead, this court should deny Elie Kassab's motion.

Respectfully submitted this October 9th, 2006.



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