

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 42657-9-II

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

GAIL DAVERN, an unmarried person,

Respondent

vs.

**TIM LIDDIARD and KRISTIN A. SHAUCK,
husband and wife,**

Appellants.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court committed error when it granted summary judgment against Liddiard and Shauck, and quieted title to the property in Davern.

1.1. The trial court committed error when it failed to consider whether a meretricious relationship, or as referred to in *Olver v. Fowler, infra*, a committed intimate relationship or “CIR,” existed between the parties, and granted summary judgment against Liddiard despite undisputed evidence that (a) a CIR did exist between Davern and Liddiard when the disputed Joint Venture Agreement (JVA) was signed, (b) Davern and Liddiard had made mutual contributions of resources during the CIR and to the renovation of Davern’s Utah property, (c) Davern and Liddiard mutually intended to continue the CIR at the time the disputed property was purchased, and (d) the disputed property was purchased in the names of both parties.

1.2. The trial court committed error when it failed to find that genuine issues of material fact existed regarding the procedural fairness of the circumstances in which the JVA was signed; and that the JVA is substantively unreasonable and unfair.

1.3 The trial court committed error when it granted Davern's motion for summary judgment and quieted title in the property in Davern. CP 30 and 31 [Order Granting Motion for Summary Judgment]

2. The trial court committed error when it entered judgment against Liddiard and Shauck for Davern's attorney fees and costs.

2.1 The trial court committed error when it found that Liddiard **and** Shauck acted in bad faith when Liddiard didn't sign the quit claim deed that Davern had asked him to sign.

2.2 The trial court committed error when it entered judgment against Liddiard for Davern's attorney fees and costs.

2.3 The trial court committed error when it failed to make appropriate findings of fact regarding the reasonableness and the amount of attorney fees requested by Davern and the costs that Davern sought to recover.

2.4 The trial court committed error when it awarded fees and costs to Davern on matters not related to or arising from the claims against Liddiard and Shauck.

3. The trial court committed error when it denied Liddiard's motion to amend his answer to assert that the statute of limitations bars enforcement of the JVA, and failed to find that enforcement of the JVA is barred by the statute of limitations.

B. Issues Pertaining to Assignment of Error.

1. Did genuine issues of material fact exist regarding the existence of a CIR at the time the JVA was signed? (Assignment of Error No. 1 and subparts.)

2. If a CIR existed, did genuine issues of material fact exist regarding whether the JVA was procedurally fair (entered voluntarily and intelligently)? (Assignment of Error No. 1 and subparts.)

3. Is the JVA substantively unreasonable and unfair because it allowed Davern to effectively forfeit Liddiard's interest in the property by simply refusing to proceed with construction of the home the parties planned to construct, or by causing a "breakup of the personal relationship"¹ with Liddiard? (Assignment of Error No. 1.)

4. Was there any basis to find that Liddiard or Shauck committed acts of bad faith at any time? (Assignment of Error No. 2.)

5. Should Davern have been awarded judgment against Liddiard for attorney's fees based on the provision in the JVA stating that the JVA "shall be construed and enforced under the laws of the State of Oregon"? (Assignment of Error No. 2.)

¹ Ex. C to CP 7 at section 11.01 on page 3.

6. Should Davern have been awarded judgment against Shauck for attorney's fees and costs based on Shauck's alleged "bad faith"? (Assignment of Error No. 2.)

7. Was there **any** legal basis for the award of attorney fees against Liddiard or Shauck? (Assignment of Error No. 2.)

8. Should Liddiard and Shauck have been allowed to amend their answer and assert as an affirmative defense that RCW 4.16.040 (six year statute of limitations) bars enforcement of the JVA? (Assignment of Error No. 3.)

9. Should Davern be barred by the statute of limitations from claiming under the JVA that Liddiard's interest in the property was forfeited? (Assignment of Error No. 3.)

II. STATEMENT OF THE CASE

A. Statement of Facts.

In 1992, Davern and Liddiard both resided in Utah. Liddiard was a 21-year-old college student and Davern was his 42-year-old college instructor. Their relationship progressed quickly. In early 1993, Davern invited Liddiard to move in with her at a house she owned. From that point on, for the next 11 years, Davern and Liddiard resided together and were domestic partners. CP 26.

In early 1993, Davern's home was in "great disrepair." Liddiard commenced performing routine maintenance and repairs. CP 26.

Davern and Liddiard lived in Davern's house as domestic partners and represented themselves as domestic partners. Their relationship was strong and Liddiard proposed marriage to Davern, but she declined, stating that she felt that marriage was unnecessary because their relationship was strong and she did not wish to change her name again. CP 26.

Liddiard worked as a construction contractor. Liddiard and Davern discussed filing tax returns separately, which he agreed to do to prevent any exposure to Davern from Liddiard's business. Liddiard contributed to household expenses and Davern used the money as she saw fit. CP 26.

Davern denied using Liddiard's name and denied that they pooled their resources during their cohabitation. Davern claimed to have paid all costs associated with the Utah property, including maintenance and upkeep costs, insurance costs and taxes. CP 4.

In 1998, after Davern and Liddiard jointly decided to sell the Utah property and move to a new location, Liddiard commenced making substantial repairs and renovations to the residence to prepare it for sale. Liddiard performed repairs and remodeling to bathrooms; repaired a fence; installed sod in the yard; renovated the garage and reroofed the garage; renovated the kitchen; completely reroofed the residence;

completely repainted the residence interior; and restored the basement walls that had been damaged by flooding. Liddiard also hired and paid for a gutter company to install new gutters and to complete some of the roof work. CP 26.

Liddiard estimated the value of the work that he did, including painting of the entire interior of the house, increased the value of the house in Utah by not less than \$38,000.00. Liddiard produced copies of building permits as further proof of the work that had been done to the house in Utah. The renovations took over a year to complete. CP 26.

Liddiard stated that: the renovations were done to enable Davern and Liddiard to “start a new phase of our lives in a place that was new for both of us”; they jointly searched for property in Oregon and Washington and, on June 26, 1999, both signed a purchase and sale agreement for property near Naselle, Washington (the “disputed property”); and the disputed property was purchased with the cash received from the sale of Davern’s residence in Salt Lake City. CP 26.

On November 30, 1999, shortly before Davern and Liddiard were to leave to go to the escrow office and sign papers for the closing², Davern told Liddiard that she wanted him to go to her attorney’s office to sign a

² The JVA is dated November 30, 1999. The deed to the disputed property was recorded on December 1, 1999. The date the documents were signed at the escrow office is not clear from the record. CP 7.

“will type document that would ensure that her children would receive her part of the property in the event of her death.” Davern then gave Liddiard a copy of a document prepared by an Oregon attorney Davern hired which was entitled “Joint Venture Agreement” (herein referred to as “JVA”), but Liddiard did not review the JVA until after he arrived at the attorney’s office. Davern told Liddiard he didn’t need a lawyer and that he could decide later who he wanted to receive his share of the property in the event of his death. CP 26.

When Davern and Liddiard were driving to Astoria, Oregon, to sign the JVA, Davern told Liddiard they were in a hurry “in order to drive to South Bend WA afterwards to record the deed”. Liddiard was allowed “just a few minutes to review the document.” Liddiard objected to “the statement indicating that plaintiff GAIL DAVERN was to purchase the property with her sole funds since we had purchased the property from the proceeds from the sale of the Salt Lake residence, the proceeds of which included my contribution of the renovation of the residence”. Liddiard underlined the statement and was told the statement would be removed and another version would be printed. CP 26.

Later, Davern handed the JVA to Liddiard and told him to hurry up and sign so they could drive to South Bend in time to record the deed. Liddiard signed. On the way to South Bend, Liddiard noticed that the

statement had not been removed. Davern assured Liddiard that “she was not trying to take my portion of the property, and that we would get the statement changed later.” The change to the JVA requested by Liddiard, that Davern agreed would be made, was never made. CP 26.

Liddiard did not understand the agreement and was not given the opportunity or enough time to seek legal counsel prior to signing. Liddiard stated he was deceived into signing the JVA “under false pretenses, duress, and without legal counsel.” CP 26. At closing of the purchase, title to the disputed property was conveyed by Statutory Warranty Deed to Davern, an unmarried woman, and Liddiard, an unmarried man. CP 7, Ex. D.

After the closing, Liddiard made improvements to the disputed property by limbing trees, planting over 400 trees, replacing a culvert, cutting the access road clear, and paying two years taxes. CP 26.

In reply, Davern stated she purchased the Utah property in 1983 with her deceased husband; she first met Liddiard in 1992; she used the proceeds from the sale of the Utah property and money she had been gifted by her mother to purchase the disputed property; and she and Liddiard moved to Washington in 1999. CP 46.

Davern and Liddiard's relationship continued until it terminated in October 2003, approximately four years after the JVA was signed and the Naselle property was purchased. CP 7; CP 22.

Approximately six years and five months after the relationship between Liddiard and Davern terminated, Davern's attorney wrote to Liddiard asking him to sign a quit claim deed to the property. CP 7, Ex. E. In a reply letter, Liddiard's attorney disputed the enforceability of the JVA claiming it was unfair, internally inconsistent, and unenforceable because it was procedurally unfair; and asserted that the property should be partitioned and asked that the property be divided fairly. CP 7, Ex. F. Davern then filed this lawsuit.

B. Procedural History.

When Davern sued Liddiard, she named Liddiard's wife, Christine A. Shauck, as a defendant, apparently based on Davern's belief that Shauck may have an interest in the property because of her marriage to Liddiard; and Davern named two timber companies and anyone else that claimed any interest in the subject property and sought to quiet title to the disputed property. CP 7.

In their answer, Liddiard and Shauck asserted that Liddiard and Davern had been in a meretricious relationship for 11 years; that the property was purchased during the ninth year of the relationship with

funds realized from their joint efforts³; the JVA did not reasonably and fairly provide consideration for Liddiard's interest in the disputed property; that the JVA was internally inconsistent; and that Liddiard had not entered the JVA freely and voluntarily. Liddiard and Shauck requested that all of Davern's claims be denied and that the court make an equitable division of the disputed property. Answer CP 5.

Davern filed a motion for summary judgment (CP 38), and her affidavit (CP 4); and moved for an award of attorney fees and costs (CP 37 and 11). Davern claimed the JVA was enforceable and that Liddiard and Shauck had acted in bad faith when they refused to capitulate to Davern's demand that Liddiard sign a quit claim deed transferring to Davern any interest he had in the disputed property⁴. CP 38. Davern claimed that Oregon law applied, that under Oregon law the intent of the parties controlled the property division, and that the JVA proved the intent to forfeit Liddiard's interest if the relationship ended. CP 38.

³ Utah recognizes common law marriages. Liddiard did not assert that a common law marriage was established while he and Davern cohabitated in Utah. Utah code section Title 30, Chapter 1, Section 4.5.

⁴ No evidence was presented that a demand was sent to Shauck that she sign a quit claim deed prior to the lawsuit.

Davern sought an award of attorney's fees, in part based on provisions in the JVA that stated that Oregon law would apply⁵. CP 37 and 11. Davern claimed that under Oregon law she was entitled to recover her attorney's fees based on a "recognized ground in equity" because Liddiard and Shauck had acted in "bad faith"; on Oregon's frivolous claim statute; and on Oregon's "small contract claim" statute⁶. CP 37 and 11.

Liddiard filed a responsive memorandum and affidavit stating the history of the relationship with Davern and the work he had performed on Davern's house in preparation for sale of the Utah property so they could move. Shauck filed a statement conceding that she has no interest in the subject property.

Davern filed a brief reply affidavit (CP 47).

On July 29, 2011, a hearing was held on Davern's motion for summary judgment. After hearing argument, the trial court stated it would take the matter under advisement. Later that day, despite a statement in

⁵ No evidence was presented indicating that either Davern or Liddiard resided in Oregon when the JVA was signed; the property is located in Washington; and no evidence was presented showing that Oregon has any interest in the contest between the parties.

⁶ No evidence of any improper motive or action by Liddiard or Shauck, other than failing to capitulate to Davern's demands, was presented. No finding that Liddiard and Shauck's answer was without factual or legal basis was made. No finding that the controversy was less than \$10,000.00, as required by Oregon's small contract claims statute, was made.

open court that a copy of the court's decision would be sent to counsel⁷, the trial court signed and filed Davern's proposed order (CP 30) that granted Davern's motion for summary judgment and no copy was sent to Liddiard's counsel. CP 30 and 31. (Liddiard's attorney did not learn that the trial court had signed Davern's order until more than ten days later.)

Liddiard filed a motion for reconsideration promptly after learning that the trial court had signed the order granting summary judgment. CP 24.

On August 25, 2011, Liddiard filed a motion to amend his answer to add the affirmative defense that enforcement of the JVA is barred by RCW 4.16.040 (six year statute of limitations). CP 25.

On September 7, 2011, after a hearing on Liddiard's motions, the court entered a duplicate order granting summary judgment (CP 31), two sets of Findings of Fact and Conclusions of Law (CP 16 and 17), a Decree Quieting Title (CP 14), and Judgment against Liddiard and Shauck for all of Davern's attorney fees and costs. CP 21.

Davern filed responses to Liddiard's motions to amend, Shauck's motion to be dismissed, and Liddiard's motion for reconsideration. CP 45, 44, and 43. On October 14, 2011, at the request of the trial court, Liddiard filed proposed Findings of Fact and Conclusions of Law (CP 41) relative

⁷ RP Page 34 lines 1 -10.

to his Motion for Reconsideration, Motion for Relief from Judgment, and Motion for Clarification (CP 24). Davern submitted countering Findings of Fact and Conclusions of Law (CP 19 and 20), which the trial court entered despite the absence of any fact finding hearing.

III. ARGUMENT

A. **Liddiard Presented Compelling Evidence of a Committed Intimate Relationship.**

“In a situation where the relationship between the parties is both complicated and contested, **the determination of which equitable theories apply should seldom be decided by the court on summary judgment.**” *Vasquez v. Hawthorn*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001). (Emphasis added.) Unresolved, genuine, issues of material fact exist regarding the existence of a CIR. Legal rights and duties existed between Davern and Liddiard from the relationship that existed when the JVA was presented by Davern to Liddiard.

The relationship that had existed between Liddiard and Davern was not disputed by Davern, but Davern claimed it was irrelevant because Oregon law only required a finding of the intent of the parties. But Oregon law does not apply if the JVA is unenforceable. The relevant factors of a CIR cannot be fully determined without a trial to determine the nature and

level of the relationship. If it is conceded that a CIR existed, the JVA should not be enforced and Oregon law is inapplicable.

The trial court made no notice of the existence of a CIR, despite the unrefuted evidence presented by Liddiard that described how the parties started their relationship, cohabitated, combined resources, made mutual plans, contributed to their combined wealth, and continued their relationship for over 11 years.⁸ Liddiard presented sufficient evidence of a CIR to require a trial.

As was observed in *Vasquez v. Hawthorn, supra*, the determination of the type of relationship that existed between Liddiard and Davern should not and could not be assessed and determined on summary judgment. Liddiard described the relationship one way, and Davern said little other than to deny that she and Liddiard presented themselves as husband and wife or filed joint tax returns. (Liddiard explained why they didn't share the same name and why they didn't file joint tax returns.)

The trial court did not have uncontested descriptions of the relationship from which it could conclude, *in a summary judgment proceeding*, that Liddiard had no equitable basis for his claim of ownership of a portion of the property; or that Liddiard had not presented

⁸ Liddiard was Davern's pupil, she was twice his age, and their relationship advanced very quickly. Davern invited Liddiard to move into her home within weeks of their first acquaintance. CP 26.

ample evidence to put in issue the sufficiency of the disclosures by Davern and whether Liddiard had signed the JVA voluntarily and intelligently.

The trial court was presented findings and conclusions by Davern in which she acknowledged that she and Liddiard had a personal relationship at the time they signed the JVA and purchased the disputed property.⁹ CP 16 and 17. It made no findings, nor could it since the matter was heard on summary judgment, regarding the nature and type of relationship that had existed. Liddiard's evidence that a CIR existed colored all of the allegations by Davern, put the validity and enforceability of the JVA at issue, and requires a trial.

In *Matter of Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986), at page 484 the Court observed:

To uphold the validity of a prenuptial agreement under Washington law still requires full disclosure by both parties of all aspects of each party's assets, with the agreement entered into fully and voluntarily on independent advice and with full knowledge by each spouse of the individual rights of each party. *Whitney*, 90 Wn.2d at 100, 579 P.2d 937.

In the second prong of the prenuptial agreement test, the circumstances or procedure surrounding the execution of the agreement are the crucial factors. The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are

⁹ Although findings of fact and conclusions of law are superfluous in a summary judgment proceeding, in the circumstances here, they confirm the arguments made by Davern.

some of the factors involved in the circumstances surrounding the document signing. **Thus, even though our state laws have, in theory, reached equality of the sexes (see, e.g., Const. art. 31 (Equal Rights Amendment) and RCW Title 26 (domestic relations)), the status of the relationship between the two parties entering into the agreement requires a procedural fairness necessary to allow both parties the knowledge and sufficient opportunity to act voluntarily and intelligently. The circumstances involved in each case become crucial.** (Emphasis added.)

In *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831, 836 (1995) it was observed that:

Once a trial court determines the existence of a meretricious relationship, the trial court then: (1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property. *Lindsey*, 101 Wn.2d at 307, 678 P.2d 328; *Community Property Deskbook* §2.64.

The importance of making the determination of whether a CIR existed was also recognized in *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), where the court observed at page 602:

Under *Connell*, we further established a three-prong analysis for disposing of property when a meretricious relationship terminates. **First, the trial court must determine whether a meretricious relationship exists.** Second, if such a relationship exists, the trial court then evaluates the interest each party has in the property acquired during the relationship. Third, the trial court then makes a just and equitable distribution of such property. *Connell*, 127 Wn.2d at 349, 898 P.2d 831. (Emphasis added.)

The presence of a CIR is material when Liddiard's contentions of substantive unfairness and the procedural unfairness are considered.

The evidence shows that a CIR existed when the JVA was signed. Liddiard described a long term personal relationship with all of the expected characteristics of a CIR, most of which was not refuted. Genuine issues of material fact existed regarding the nature and significance of that relationship. Davern did not meet her burden of proving at summary judgment that there was no genuine issue of material fact that no CIR existed; or that the JVA was enforceable despite its unfair provisions for forfeiture of Liddiard's interests in the disputed property; or that the JVA was enforceable despite evidence that Liddiard did not sign the JVA voluntarily and intelligently.

Washington courts have recognized that agreements between parties in CIRs deserve the same scrutiny as agreements made in contemplation of marriage. In *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790, 793 (1977), at page 654 the court observed:

The appellant assigns error to the acceptance by the trial court of a series of property status agreements as being a valid characterization of the property as community or separate. Both appellant and respondent urge that the validity of the property status agreements is determined by the standards set forth in *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972), and *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954). Although these cases involved prenuptial agreements and the trial court characterized the agreement here as **neither prenuptial, nor postnuptial, nor made in contemplation of dissolution but rather "analogous to a community property agreement,"** we believe the principles set forth in *Friedlander* and *Hamlin* are applicable here. The tests are: (1)

whether full disclosure has been made by respondent of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by the spouse of her rights. Both of these tests have been met. (Emphasis added.)

The JVA was an agreement prepared in contemplation of the purchase of the disputed property, which was intended to be the future home of Liddiard **and** Davern, and in which both Liddiard **and** Davern were to and did receive title. Had the JVA not been prepared, the parties would be in a partition proceeding¹⁰ and the court would be asked to make an equitable division. But, due to the shrewdness and cunning of Davern, who at the time was 21 years senior to Liddiard, and presumably more sophisticated, the JVA exists and Davern seeks to enforce it to her advantage, and Liddiard's disadvantage.

Evidence in the record established that (1) a CIR existed; (2) the JVA was secretly prepared at Davern's direction and characterized by Davern as a sort of will for the benefit of her children; (3) Liddiard was not provided reasonable time to review the JVA and seek legal advice; (4)

¹⁰ If the JVA is invalidated, either Liddiard or Davern could seek partition. RCW 7.52.010 provides: When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

the JVA incorporates Oregon laws, a state that had virtually no contact with the parties or the parties' property, the importance of which Liddiard had no means to appreciate; (5) Liddiard did not receive the advice of independent counsel; (6) the JVA gave Davern almost exclusive control over whether Liddiard ever received any portion of his equity interest in the property¹¹, and (7) Davern and Liddiard did not negotiate the terms of the JVA.

The JVA allowed Davern the luxury of continuing the relationship for so long as it suited her. Then she could send Liddiard packing without fear of him realizing anything for all the money, time, and labor he had contributed to assist Davern in realizing an enhanced price on the Utah house, which price enabled Davern and Liddiard to purchase the Naselle property.

The trial court should have recognized that the JVA was suspect. At the time the JVA was signed, the parties were in a CIR. Davern denied some of the circumstances and practices commonly found in such relationships, but she did not deny that she and Liddiard were in a CIR that started when she was 42 and he was 21, and that started

¹¹ The JVA gave Davern the sole right to determine what compensation to give to Liddiard for his improvements to the property if the house wasn't constructed; and if Davern chose to not construct a house or terminated the relationship with Liddiard, the terms of the JVA allowed her to effectively forfeit all of Liddiard's rights in the property.

approximately **six years** before the JVA was signed and continued for a total of **11 years**. In her reply affidavit and “Plaintiff’s Rebuttal to Defendant’s Response to Motion for Summary Judgment,” Davern effectively conceded that Davern and Liddiard were in a CIR, but she claimed there is no authority to apply the standards applicable to a prenuptial agreement to the JVA.

Liddiard’s trial counsel properly argued in his Response to Motion for Summary Judgment at page 3 that the Court should examine the validity of the agreement under the standards applicable to prenuptial agreements, which standards were provided, and are repeated here:

Washington courts have developed a two-pronged analysis for evaluating the validity of a prenuptial agreement. Under the first prong, the court is to consider “whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated.” *Whitney v. Seattle First National Bank*, 90 Wn.2d 105, 579 P.2d 937 (1978). The second prong of the analysis involves two tests. *Whitney* at 110. See also: *In Re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977). The two tests are (1) whether full disclosure has been made by [the parties] of the amount, character and value of the property involved, and (2) whether the agreement was entered

into fully¹² and voluntarily on independent advice and with full knowledge by [both spouses of their] rights....” *Whitney*, at 110 (quoting *Hadley*, at 654).

There is no obvious, legitimate, public policy interest served by lowering the standards for property status agreements entered by parties in a CIR below the standard required of prospective spouses entering such agreements. As has been observed in other cases, the prevalence of couples cohabitating, raising children, making estate provisions, and living out their lives without the benefit of marriage is well documented. Allowing a “cunning and shrewd”¹³ party in a CIR to take advantage of an unsophisticated and much younger companion, merely because they have not married, is not justifiable.

¹² In *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972), and *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954), the standard was “freely and voluntarily”. It is unclear why “fully and voluntarily” was used by the court in *Hadley* rather than “freely and voluntarily”.

¹³In *West v. Knowles*, 50 Wn.2d 311, at 316, 311 P.2d 689 (1957), Justice Finley, concurring specially, and addressing the application of the “Creasman presumption”, which presumed the title to property acquired prior to marriage was titled as the parties intended, stated: “The rule often operates to the great advantage of the **cunning and the shrewd**, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship.” (Emphasis added.) Justice Finley’s remark was quoted in *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984) which overruled the Creasman presumption. See *Olver v. Fowler*, 161 Wn.2d 655, 666, 168 P.3d 348 (2007).

The basic purpose for examination of the circumstances in which contested prenuptial agreements are entered is to assure that they are entered freely and voluntarily after full disclosure. That same purpose is applicable to agreements entered by participants in long term CIRs. The same devotion, trust, dependency, and expectation of honesty are present in a long term CIR as in any period between proposal and marriage. (Liddiard had proposed to Davern, but she elected to not marry and the relationship continued.) The level of trust between participants in a CIR is likely much higher in a CIR of six years duration, than the level of trust between prospective spouses days before a marriage.

One must ask if there is any reason to not require the same critical examination of the fairness of an agreement that affects the property rights of co-owners in a CIR, where the same risk of harm from deception, confusion, coercion, and unfair terms exists, simply because there is no scheduled marriage ceremony. This risk is especially present when, as here, there is no evidence the parties had negotiated the terms of the agreement, the agreement was prepared by the attorney for the party seeking enforcement of the agreement, the party contesting the agreement was not represented by an attorney when the agreement was signed, and the party seeking enforcement of the agreement will receive all of the disputed assets.

In *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007), our Supreme Court observed at page 668-669:

In sum, over the past 90 years, when dealing with property distribution between partners in a committed intimate relationship, Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married. But equity is limited; *only* jointly acquired property, but not separate property, can be equitably distributed. Finally, as the law of committed intimate relationships has developed, we have not objected to its application even where the relationship at issue terminated with the death of one partner, rather than the dissolution of the relationship.

Davern and Liddiard had **jointly** shopped for, negotiated the purchase of, and contracted to purchase the disputed property in both of their names; and they took title to the disputed property in both names. The purchase was to close the **next day** after the JVA was presented and Liddiard was pressured to sign, despite the fact that the purchase contract was signed on June 26, 1999, and the sale closed on December 1, 1999. Davern had secretly hired an attorney in a neighboring state to prepare an unfair and one-sided agreement with virtually no discussion with Liddiard about her intentions. Liddiard presented sufficient evidence to put in question whether the JVA should be enforced.

Davern, as the party seeking to enforce the JVA, had the burden of proving that the JVA was entered freely and voluntarily after full disclosure. See *Friedlander, supra*. Virtually no attempt by Davern to

meet this burden was made. Even if Davern had attempted to show that the JVA was entered freely and voluntarily after full disclosure (and an opportunity to consult with counsel), Liddiard's declaration disputed such claims and presented factual issues that require a trial.

If the JVA is unenforceable, Davern's argument that the law of Oregon, as stated in *Beal vs. Beal*, 282 Or. 115, 577 P.2d 508 (1978), is inapposite. If the JVA is unenforceable, Oregon law simply does not apply, nor should it apply. Although Liddiard resides in Oregon, Davern resides in Washington and the disputed property is located in Washington. Davern brought this action in Washington and Washington law should be the applicable law. In *Rutter v. BX of Tri Cities, Inc.*, 60 Wn.App. 743, at 746, 806 P.2d 1266 (1991) Division III observed as follows:

Washington courts will not give effect to an express choice of law clause if application of the law of the chosen state would be contrary to a fundamental policy of Washington and Washington has a materially greater interest in the determination of the particular issue. *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685-86, 586 P.2d 830 (1978), (citing Restatement (Second) Conflict of Laws § 187 (1971)), *adhered to on rehearing*, 93 Wn.2d 51, 605 P.2d 779 (1980).

[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power.

Davern's actions in obtaining the JVA without negotiation, and with virtually no prior notice to Liddiard, demonstrates Davern's superior

bargaining power and the oppressive use of that power of which Liddiard complains.

B. The JVA Was Unfair Procedurally and Substantively.

Summary judgment was improper because (1) the JVA was unfair; (2) Davern misled Liddiard regarding her intentions (she said she was preparing a will type document to protect her children); (3) Davern did not give Liddiard reasonable and fair opportunity to review the JVA; (4) Davern did not make full disclosure to Liddiard of the assets owned by Davern (nothing in the JVA identified any assets of either party other than the Naselle property, nor did it address Liddiard's contributions to Davern's property); (5) Davern misrepresented to Liddiard that a change in the JVA requested by Liddiard had been made; (6) Liddiard was not informed of the significance of the provision stating that Oregon law would apply; (7) Liddiard did not have legal representation prior to or at the time of execution of the JVA; and (8) the JVA was not the product of negotiation between Liddiard and Davern. The foregoing facts were presented by Liddiard, were essentially not refuted, and on summary judgment, are presumed to be true. These facts formed a solid basis to require a trial to determine if the JVA should be enforced, and to assure the division of the disputed property, purchased in the names of **both** Liddiard and Davern, is made in a manner that is fair and equitable. See

Olver v. Fowler, supra; Connell v. Francisco, supra; Vasquez v. Hawthorn, supra.

C. Enforcement of JVA Is Barred By The Statute of Limitations.

The grant of summary judgment against Liddiard and Shauck was error because the JVA is unenforceable due to the lapse of more than six years from the time of “the breakup of the personal relationship” between Davern and Liddiard and commencement of this lawsuit. Although belatedly, Liddiard did move the trial court to permit him to amend his answer to include the affirmative defense that RCW 4.16.040 barred the enforcement of the JVA. The JVA specifically provided that it would terminate upon the termination of the parties’ relationship, which Davern admitted ended in October 2003 (CP 4 at page 3). Davern commenced the action in October, 2010, more than six years later.

Nothing explains Davern’s delay, nor is there any showing of unfair prejudice if the amendment had been allowed. The motion to allow the amendment raised a legitimate legal issue that could have a direct impact on the outcome of the case, it was filed before entry of the judgment, it raised a narrow issue that could be easily examined and determined, and it should have been allowed in the interests of justice.

A similar motion was allowed **post trial**, in *E.R. Turpen v. Mose Johnson, et al*, 26 Wn.2d 716, 175 P.2d 495 (1946), and the moving party

was allowed to reopen the evidence and present testimony that showed that the action to set aside a tax sale was barred by the applicable three year statute of limitations. Here, the trial court had received declarations and heard argument on Davern's motion for summary judgment, and had ruled against Liddiard, but it had not entered judgment when the motion to amend and add the affirmative defense was made.

Considering that Davern's claim is that Liddiard's interest was forfeited under the terms of the JVA when their relationship ended, the trial court should have allowed the amendment to consider whether Davern's claim of forfeiture should be barred by the statute of limitations.

In *Turpen*, at page 732-733, the court stated:

The controlling element in the entire case was the application of the statute of limitations. **Why it was not pleaded earlier in the proceedings or raised during the trial by the trial court is not for us to answer. That it was raised eventually and is now the subject of final determination in this court is, we feel, in the interests of justice.** Certainly, no one's rights were prejudiced by permitting the reopening of the case for the submission of proof in connection with the statute of limitations. It is of scant moment whether this was done during the trial itself or seventy-two days later. Under our repeated rulings on the question, the trial judge was **required**, in the exercise of his judicial discretion, to reopen the case for the purpose of permitting the interposing of the statute of limitations as a defense by respondents Johnson and the receiving of evidence in support thereof. See *Richardson v. Agnew*, 46 Wn. 117, 89 P. 404; *Reiff v. Coulter*, 47 Wn. 678, 92 P. 436; *Norton v. Pacific Power & Light Co.*, 79 Wn. 625, 140 P. 905; *Godefroy v. Hupp*, 93 Wn. 371, 160 P. 1056, *Ann.Cas.1918E*, 494; *Shultz v. Crewdson*, 95 Wn. 266, 163 P. 734; *Mansfield v.*

Yates-American Machine Co., 153 Wn. 345, 279 P. 595; *Neimeier v. Rosenbaum*, 189 Wn. 1, 63 P.2d 424. (Emphasis added.)

The trial court should have allowed the amendment, permitted argument to be made on the application of the statute of limitations, held that the statute of limitations bars Davern's attempt to forfeit Liddiard's interest in the property through enforcement of the JVA, and denied Davern's motion for summary judgment and motions for award of attorney fees. If the statute of limitations bars enforcement of the JVA, Washington law is applicable, the parties hold the property as tenants in common, and no attorney's fee award is warranted.

In *Matter of Estate of Crawford*, 107 Wn.2d 493, 730 P.2d 675 (1986), the personal representative of a deceased spouse asserted the statute of limitations to prevent the challenge by the surviving spouse of the validity of a prenuptial agreement. The personal representative asserted that the statute began to run when the agreement was signed, but that argument was rejected. The Court observed at page 499:

The prenuptial agreement is a written contract subject to the provisions of RCW 4.15.040 requiring that actions upon a contract in writing or liability arising out of a written agreement must be commenced within 6 years. The 6-year period starts to run at the time that there is an assertion of rights under the agreement or an attempt to reform it. See *Chebalgoity v. Branum*, 16 Wn.2d 251, 133 P.2d 288 (1943).

In *Chebalgoity v. Branum*, 16 Wn.2d 251, 133 P.2d 288 (1943), the contract at issue was a real estate contract and the Court held at page 255:

Nor is his right to maintain it impaired by lapse of time, for the bar of the statute of limitations does not begin to run until the assertion of an adverse claim against the party seeking reformation.

But here, the parties hold title as tenants in common, and Davern is asserting that the JVA entitles her to a decree quieting title in her free from **any** claim by Liddiard. This case is distinguishable from *Matter of Estate of Crawford, supra*, and *Chabalgoity v. Branum, supra*, because the terms of the JVA state at section 10.1(c) that the agreement terminates on “the breakup of the personal relationship of the parties”, which Davern has conceded occurred more than six years prior to the commencement of this action. Upon the “breakup,” the JVA terminated and whatever rights Davern had to force Liddiard off the title to the property arose. She took no action on those rights for more than six years. Unlike the cited cases, there was no ongoing relationship or other circumstance that justifies the delay. The statute of limitations should be enforced.

D. The Award of Attorney Fees Was Unwarranted and Not Authorized By Law or Equity.

Entry of judgment against Liddiard and Shauck for attorney’s fees and costs incurred by Davern was without legal basis and was error. It is

axiomatic that in Washington no award of attorney fees will be made in the absence of a contract so stating, statutory authority, or a well recognized ground or principle in equity. Davern claimed several bases for an award of attorney fees, but it is apparent that the trial court made its awards based on its determination of Liddiard's and Shauck's alleged bad faith in not conceding to Davern's demands. Bad faith can be the basis for an award of attorney fees in three circumstances. At 25 WAPRAC § 14:19, the following guidance is found:

Attorney's fees may also be awarded where a party has acted in bad faith. There are three types of bad faith that justify an award of attorney's fees: (1) prelitigation misconduct, (2) procedural bad faith, and (3) substantive bad faith. Prelitigation misconduct refers to "obdurate or obstinate conduct that necessitates legal action" in order to enforce one's legal rights. Procedural bad faith is vexatious conduct during the course of litigation that is unrelated to the merits of the litigation. Substantive bad faith occurs when a party intentionally asserts a claim, counterclaim or defense for the purpose of harassment. (Citations omitted.)

The only evidence of alleged prelitigation misconduct by either Liddiard or Shauck is the correspondence that was exchanged between Davern's attorney and Liddiard's attorney. (No prelitigation communications occurred between Davern, or her attorney, and Shauck.) In the correspondence from Liddiard's attorney, Liddiard asserted his claim that the JVA was unfair, inconsistent, was signed under duress, and, if followed, would cause an unwarranted forfeiture of Liddiard's interest

in the property. Liddiard proposed a partition of the property. Davern filed suit and Liddiard asserted his defenses, none of which were found by the trial court to be frivolous.

Shauck merely admitted that because she is married to Liddiard she may have a community property interest in the property. And then, just prior to the hearing on the motion for summary judgment, Shauck conceded that she held no interest in the property and asked to be dismissed, to which Davern objected.

The objection by Davern was the first action taken by Davern against Shauck other than the inclusion of her as a party defendant. No additional argument or evidence was presented by Davern to support her motion for summary judgment against Shauck, and nothing was filed to indicate any conduct by Shauck that could be characterized as “bad faith” conduct. No finding was made that Shauck had asserted any unfounded claim for the purpose of harassment. In fact, Shauck could hardly have been more passive in the litigation. Entry of judgment against Shauck for Davern’s attorney fees was error.

Likewise, no finding was made by the trial court that Liddiard had done anything prior to the commencement of litigation that was “obdurate or obstinate misconduct.” Such conduct was described in *Rogerson Hiller*

Corp. v. Port of Port Angeles, 96 Wn.App. 918, 982 P.2d 131, 136 (1999),

at page 928 as follows:

Prelitigation misconduct refers to “obdurate or obstinate conduct that necessitates legal action” to enforce a clearly valid claim or right. *Mallor, supra* at 632; *see also* Jay E. Rosenblum, *The Appropriate Standard of Review for a Finding of Bad Faith*, 60 GEO. WASH. L. REVV. 1546, 1549 (1992). For example, the Fourth Circuit awarded attorney's fees for bad faith to a class of children and their parents when they were forced to sue the school district to implement desegregation following *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 1180 (1954). *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir.1963). The award of attorney's fees for prelitigation misconduct can be compared to a “remedial fine[] imposed by a court for civil contempt” in that the party acting in bad faith is wasting private and judicial resources. *Mallor, supra* at 633. This type of bad faith was recognized, but not applied, by our Supreme Court in *State ex. rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 105, 111 P.2d 612 (1941) (quoting *Guay v. Brotherhood Bldg. Ass'n*, 87 N.H. 216, 177 A. 409, 413, 97 A.L.R. 1053 (1935)).

When merit for a claim or argument exists, prosecution of the claim or argument is not the basis for a finding of bad faith, even if the claim or argument is denied. Both Liddiard and Shauck have a reasonable basis to challenge the enforceability of the JVA, and they took no aggressive actions prior to the litigation. Liddiard merely disagreed with Davern over the validity of the JVA and her demand that he simply relinquish to her any interest he has in the property¹⁴. The award of

¹⁴ It is interesting to also note that in his March 27, 2010, letter to Liddiard (attached to the Complaint as Exhibit E, CP 7), Davern's attorney recognized that Liddiard was entitled to reimbursement for his out of pocket expenses and labor in the improvement of the property, “amounts

attorney fees cannot be based on the alleged prelitigation misconduct of either Liddiard or Shauck.

E. Even If Davern Is Entitled to Attorney Fees, Fees Incurred In Prosecution of Claims Against Other Parties Should Not Have Been Included In The Award.

Entry of judgment against Liddiard and Shauck for attorney's fees and costs incurred by Davern in prosecuting claims against other named defendants in the action was without legal basis and was error. Over the objection of Liddiard and Shauck, the trial court entered judgment against them for all of the fees paid by Davern to her attorney, including fees incurred in quieting the title to the property from interests of record held by South Bend Mills and Timber Company and Brix Brothers Logging Company (the "Logging Companies"), entities in which Liddiard and Shauck held no interest. And, the trial court allowed Davern to include in the award the costs of publications of the summons to Logging Companies.

Davern made no attempt to segregate her attorney's fees and included in her cost bill the publication fees for the publication of the

to be determined in her sole discretion", but no inquiry was made regarding Liddiard's out of pocket expenses or labor in the improvement of the property, Davern denied any, and nothing was offered to Liddiard other than reimbursement for property tax payment made by Liddiard (which has never been paid or accounted for since). Davern's actions were no incentive for capitulation by Liddiard and can be equally criticized.

summons to the Logging Companies and “Court Telephonic Hearing Charges” of \$165.00, for which there is no authority to charge Liddiard and Shauck. Also, the billings contain charges for services that preceded the lawsuit, finance charges billed to Davern on unpaid invoices, time spent preparing motion and orders of default against the Timber Companies, and an expected additional five hours at \$225.00 per hour for “reviewing and replying to Defendant’s reply to the Plaintiff’s Motion for Summary Judgment and the anticipated time for the Summary Judgment hearing.”

Davern later filed a motion for supplemental award of attorney fees and costs that claimed that fees should be awarded for services provided after July 29, 2011, which was the date of the first summary judgment hearing. No new evidence was submitted to show the basis for such award and no new findings were made by the trial court that supports the supplemental award. Also, no accounting of the added five hours for “reviewing and replying” to Liddiard’s reply charged in the first motion for attorney fees was provided; finance charges were included; and the costs claimed included charges for mailing and postage, and for telephonic hearings, neither of which is a taxable cost. It is difficult to detect what review was made by the trial court and whether any discretion was exercised in making the fee awards.

F. Oregon Law Does Not Support an Award of Attorney Fees to Davern.

Even if the JVA is found to be enforceable, the terms of the JVA do not support the award of attorney's fees to Davern. In her memorandum in support of her motion for award of attorney's fees, Davern claimed that Oregon law supports the award to her of her attorney's fees and cited ORS 20.105 and ORS 20.082, neither of which would be applicable even if this action were filed in Oregon.

ORS 20.105 is the Oregon equivalent of Washington's frivolous claim statute, RCW 4.84.250. ORS 20.105 provides:

Attorney fees where party disobeys court order or asserts claim, defense or ground for appeal without objectively reasonable basis. (1) In any civil action, suit or other proceeding in a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court shall award reasonable attorney fees to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal.

Davern provided the trial court with no clear authority on how Oregon courts apply ORS 20.105, but it matters not because the issue is a legal question and bad faith is not an issue. The question is whether there was **any** objectively reasonable basis for the claim, defense or ground taken. In *Williams v. Salem Women's Clinic*, 245 Or.App. 476, 482, 263

P.3d 1072, 1076 (Or.App.,2011), an employee benefit case in which the court dismissed a counterclaim by the employer and the employee was awarded attorney fees by the trial court under ORS 20.105, the Court of Appeals observed:

The parties' arguments implicate two legal standards: (1) the standard that trial courts apply in considering motions seeking attorney fees under ORS 20.105(1); and (2) our standard of review. Both standards are well established. First, ORS 20.105(1) requires an attorney fee award if, and only if, the trial court finds that a party willfully disobeyed a court order or pursued a claim or defense with "no objectively reasonable basis":

...

A claim lacks an objectively reasonable basis only if it is "entirely devoid of legal or factual support," *Olson*, 237 Or.App. at 269, 239 P.3d 510, either at the time it is made or, "in light of additional evidence or changes in the law," as litigation proceeds, *Dimeo v. Gesik*, 197 Or.App. 560, 562, 106 P.3d 697 (2005).

Second, whether a claim lacks an objectively reasonable basis is a legal question, and we review the trial court's ruling on that question for legal error. *Olson*, 237 Or.App. at 264–65, 239 P.3d 510; *Morasch v. Hood*, 232 Or.App. 392, 403–04, 222 P.3d 1125 (2009). Barlow's contention that we review for abuse of discretion is incorrect.

In *Williams*, the Court of Appeals then examined the record and, rather than remanding the case back to the trial court, ruled that the record was not "entirely devoid" of support for the counterclaim, and reversed the award of attorney fees. If this court reaches this question, a like result should occur.

The record is sufficient to show that Davern and Liddiard were in a long term CIR, Liddiard has a basis to believe that the JVA was misrepresented, that he was coerced and pressured to sign it without a reasonable opportunity to review and understand the terms of the JVA, that the JVA is inherently unfair and was not knowingly and voluntarily entered, and that the statute of limitations bars enforcement of the JVA. Any of these bases of support is sufficient to warrant reversal of the award and judgment for attorney fees against Liddiard or Shauck.

Likewise, Davern's claim that she is entitled to recover attorney fees under ORS 20.082 is specious. In *Rymer v. Zwingli*, 240 Or. App. 687, 247 P.3d 1246 (Feb. 15, 2011), the Oregon Court of Appeals specifically commented on the requirement that a party's **pleading** contain the requisite notice of the intention to seek fees under ORS 20.082 and held that reference to the statute in motion papers was insufficient. At page 694 it stated:

Light Up's second amended complaint does not adequately allege the facts that provide the basis for an attorney-fee award under ORS 20.082. Accordingly, Light Up did not satisfy ORCP 68 C(2)(a) in the contract case and, therefore, is not entitled to an award of attorney fees in that case.^{FN6}

FN6. Light Up argues that the Rymers had **notice** of its intent to seek attorney fees under ORS 20.082 because it identified that statute as the source of its entitlement to attorney fees in its memorandum accompanying its motion for summary judgment, in its trial brief, and in its correspondence with the Rymers. That argument is foreclosed under the framework that

we adopted in *Page*¹⁵ because Light Up failed to adequately allege facts *in its pleadings* that provide a basis for its entitlement to an award under the statute, and, therefore, the initial *Page* inquiry is not satisfied.

Davern's claim for attorney fees under ORS 20.082 is also misplaced because it is a statute applicable to contracts that call for payment. Here, Davern sued for quiet title on a parcel of property for which she and Liddiard received title by payment of \$160,000.00. Since Davern did not cite to ORS 20.082 in her Complaint, and the Complaint did not seek payment of a sum under \$10,000.00, ORS 20.082 is inapplicable.

IV. CONCLUSION

Admissible evidence in support of the defenses to enforcement of the JVA was filed by Liddiard and Shauck in reply to Davern's motion for summary judgment. The evidence put in question the existence, nature, and effect of a long term CIR that involved the confidence and trust between Liddiard and Davern. The JVA is unfair because it punishes Liddiard for the termination of the relationship, which is contrary to the public policy of Washington favoring division of property without regard to fault in the failure of the relationship. On this basis alone, the JVA

¹⁵ *Matter of Marriage of Page*, 103 Or. App. 431, 797 P2d 408 (Or. App. 1990). At page 434 the court held: It is not necessary to specify the statutory basis of a request for fees when the facts asserted would provide a basis for an award of fees, the parties have fairly been alerted that attorney fees would be sought and no prejudice would result.

should be held to be void and the judgments entered below vacated.

Alternatively, the claim by Davern that Liddiard's interests in the property were forfeited when the relationship ended should be barred by the statute of limitations.

Alternatively, genuine issue of material fact exists regarding whether the JVA was entered freely and intelligently by Liddiard and a trial is necessary to resolve that issue. Entry of summary judgment was error, and the award of any attorney fees and costs to Davern was error.

The trial court's orders should all be reversed. Liddiard should be allowed to amend his answer to assert the statute of limitations as a defense; the JVA should be held to be unenforceable; Shauck should be dismissed from the proceedings; and the case should proceed to trial on the remaining claims of the parties.

DATED this 16th day of January, 2012.

OLSON ALTHAUSER
SAMUELSON & RAYAN, LLP
Attorneys for Liddiard & Shauck


T. Charles Althausen, WSBA #6863

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 42657-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GAIL DAVERN, an unmarried person,

Respondent,

vs.

**TIM LIDDIARD and KRISTIN A. SHAUCK,
husband and wife,**

Appellants.

DECLARATION OF SERVICE

I, CINDY ABBOTT, declare as follows:

That I am now and at all times herein mentioned was a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above action and competent to be a witness therein.

That I am an employee with the firm of Olson Althaus Samuelson & Rayan, LLP, P.O. Box 210, 114 West Magnolia, Centralia, Washington 98531.

That on January 16, 201, I served, by U.S. First Class Mail, *Appellants' Opening Brief* on the following:

1 Paul A. Neumiller
2 Attorney at Law
3 390 N.E. Midway Blvd., Suite B201
4 Oak Harbor, WA 98277-2680

5 The foregoing statements are made under penalty of perjury under the laws of the State of
6 Washington and are true and correct. Signed at Centralia, Washington, on January 16, 2012.

7 
8 Cindy Abbott