

No. 42657-9-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

GAIL DAVERN, an unmarried person,

Respondent,

v.

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

Appellants.

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION II

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A. INTRODUCTION

Gail Davern owned her own home from 1983 to 1999. In 1992, she began a personal relationship with Tim Liddiard. They were still together in 1999 when they decided to move to Washington. Davern sold her home and used the proceeds to buy some undeveloped land in Southern Washington. Liddiard did not contribute cash to the purchase, but promised to contribute labor to developing the land. Davern agreed to put him on title to the Washington land. She asked him to sign an agreement that, in the event their relationship ended before he contributed labor to the property, he would quit claim it back to her. Liddiard signed the agreement.

Parties to contracts should abide by those promises, regardless of their personal relationship status. Although marriage laws are sometimes applied by analogy when dividing the community property of unmarried persons, they cannot apply to override an express agreement that clearly and fairly allocates one party's separate property to that party.

Even assuming that Davern and Liddiard had a committed intimate relationship ("CIR"), that relationship is not before this Court, nor are any alleged community assets. Only the disposition of the Washington land, which is indisputably Davern's separate property, is at issue.

The trial court correctly ruled on summary judgment that Liddiard must abide by his agreement, and that his recalcitrance and deception constituted bad faith and warranted an award of attorney fees to Davern.

B. COUNTERSTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Should two parties, regardless of the status of their personal relationship, be bound to an express agreement they made that is both procedurally and substantively valid?

2. If there is no disputed issue of material fact regarding an agreement freely and fairly signed by two parties, and that agreement disposes of the only issue in the case, is summary judgment proper?

3. Even if a CIR exists between two parties, is summary judgment proper when the undisputed facts show that the only asset before the court for disposition is the separate property of one of the parties?

4. Will an award of attorney fees against a party as a sanction for bad faith be upheld on appeal, where there are specific findings supported by substantial evidence?

C. COUNTERSTATEMENT OF THE CASE¹

Davern bought her home in Utah (“the Utah property”) with her first husband in 1983. CP 100. After he died, the home became her sole

¹ Because this case was resolved on summary judgment, Davern recites here only the undisputed facts and facts that are indisputable from the record.

separate property. CP 71, 100. In 1992, Davern met Liddiard and they began a personal relationship. CP 78.² In 1993 Liddiard moved into Davern's home. *Id.*³ Davern did not require Liddiard to pay rent, contribute to the household expenses, or even buy food, although he did so voluntarily and "periodically." *Id.*⁴ They filed their taxes separately and never married. *Id.* They did not pool resources and kept separate bank accounts. CP 70. Davern paid all costs associated with her Utah home, including taxes, utilities, maintenance, and insurance. CP 71.

In 1998 Davern and Liddiard discussed moving elsewhere together. Liddiard did some repair work on Davern's home. CP 79-82. He contributed labor to re-roof it, and otherwise made minor repairs and improvements like painting and laying sod. *Id.*⁵ Davern sold her separate

² Liddiard asserts various "facts" in his attempt to demonstrate that the parties' relationship rose the level of a CIR. Br. of Appellant at 5. However, as explained *infra*, the existence of a CIR is immaterial to the legal issues on appeal. Therefore, Davern will not attempt to refute his assertions here. However, Davern does not waive the right to dispute these assertions should this case be remanded for trial.

³ Liddiard's citations to the record are improper. For example, when stating this same fact – that he and Davern began a personal relationship in 1992, he cites "CP 26." In fact, almost his entire statement of the case refers to "CP 26." CP 26 is "Plaintiff's Note for Motion Docket" noting her entry of an order for service of process by publication.

⁴ Liddiard claims that he "contributed" to household expenses but does not say how much or how often he did so. CP 78.

⁵ There was a significant issue regarding permitting at the trial court below, for which Liddiard had to apologize to the trial court. Liddiard submitted a series of permits that he claimed he paid in connection with work on Davern's home. CP 89-92. The cover sheet to the permits said "Permits Paid for by Defendant Liddiard." *Id.* at 89. However, when Davern pointed out that many of the permits long predated their

property home and, with the proceeds, she purchased undeveloped land in Washington (“the Washington property”). These funds constituted her entire life savings, and her children’s sole inheritance. CP 71. The plan was that Davern would use her funds and Liddiard his labor to build a home there. CP 82. Because Liddiard intended to contribute significant labor to developing the property, Davern agreed to put Liddiard on the title although he contributed no funds to the purchase. CP 71, 82-83.

Davern and Liddiard both signed a purchase and sale agreement for the Washington property on June 26, 1999. CP 86-88. On November 9, 1999, the seller prepared and signed a statutory warranty deed listing both Davern and Liddiard as the owners. CP 14.

Davern was concerned about the risk to her life savings their arrangement proposed, because she had agreed to share title with Liddiard based on his *future* promised labor in developing the property. CP 71. She asked Liddiard to enter into a Joint Venture Agreement (“JVA”) with her. *Id.* She proposed that if one of them predeceased the other, their

relationship, and many were actually taken out by other owners, Liddiard’s counsel had to file a declaration admitting that only one of the permits was actually in connection with any work done by Liddiard. CP 102-03.

Despite the confusion at the trial court about using the term “permits” as opposed to “permit,” and the resulting apology to the trial court, Liddiard repeats the misstatement on appeal. He claims that he “produced copies of building permits as further proof of the work that had been done to the house in Utah.” Br. of Appellant at 6 (emphasis added).

heirs would receive a share of the property, 75% for Davern's heirs and 25% for Liddiard's heirs, regardless of whether Liddiard had made any contribution to developing the property. CP 11. If the parties separated after Liddiard had contributed to developing the property, Davern would reimburse him for his out of pocket expenses and his labor. If the parties separated before Liddiard had made any contributions to the property, he would simply quit claim the property to Davern. *Id.*

Davern discussed the JVA with Liddiard, and then paid an attorney to draft the JVA. CP 71. Liddiard signed it on November 30, 1999, just before Liddiard and Davern signed the closing documents together. CP 12, 14. The agreement had an integration clause, and a choice of law provision citing Oregon law. CP 12.

Davern and Liddiard's relationship ended before any substantial improvements had been made to the property. CP 84.⁶ They went their separate ways. Liddiard eventually married another woman, Kristin Shauck. Davern continued paying taxes on the unimproved property. CP 84.

In early 2010, Davern contacted Liddiard about his commitment in the JVA to quit claim the property back to her, because he had never built

⁶ Liddiard states that he pruned and planted some trees, replaced a culvert, and cut firewood for use at their Washington residence, but admits that the property was never developed. CP 84.

a house on the land. CP 71. In response, Liddiard suddenly paid the taxes on the property for the first time. CP 16, 84. On March 27, 2010, Davern's attorney wrote to Liddiard asking him to abide by the JVA and sign a quit claim deed to Davern. CP 16. In exchange, Davern would reimburse Liddiard for the taxes he had just paid. *Id.* Liddiard refused, claiming that under meretricious relationship⁷ laws, he was entitled to a "just and equitable" distribution of the Washington property. CP 18. He claimed that under this "equitable" distribution the land should be partitioned. CP 19.

Davern filed a claim to quiet title and for declaratory judgment in Pacific County Superior Court. CP 1.⁸ The case was assigned to the Honorable Michael J. Sullivan. CP 105. Liddiard answered, admitting that "technically," the Washington property was purchased with Davern's funds. CP 32. He also admitted that a resident was never built on the Washington property, because Davern had not paid for it and he "lacked

⁷ Washington courts have dispensed with the anachronistic term "meretricious relationship" with its negative connotations, and substitute the phrase "committed intimate relationship." *Olver v. Fowler*, 131 Wn. App. 135, 140 n.9, 126 P.3d 69 (2006) *aff'd*, 161 Wn.2d 655, 168 P.3d 348 (2007). Oregon law now refers to these relationships as "domestic partnerships." *In re Greulich*, 238 Or. App. 365, 372, 243 P.3d 110, 114 (2010). However, the seminal Oregon case on the issue, *Beal v. Beal*, 282 Or. 115, 122, 577 P.2d 507, 510 (1978), refers to this kind of relationship using the term "meretricious." Because the parties used that term below, Davern will use it on appeal for clarity.

⁸ Because parts of the property were, decades earlier, allegedly owned by logging companies that were long since dissolved, she had to claim adverse possession against them and serve them by publication. CP 1, 35-44.

the funds to purchase materials to construct a residence.” *Id.* However, he asserted that because he made improvements to the Utah property, he “contributed” to the purchase of the Washington property. *Id.* He claimed that he was entitled to a just and equitable distribution of the property under meretricious relationship laws. *Id.* He admitted that Davern discussed in advance executing an agreement with him that would protect her heirs with respect to her investment in the property. CP 83. He admitted that he signed the JVA, but claimed that Davern asked him to sign it in haste. *Id.* He did not allege that Davern threatened him with any negative consequence if he refused to sign. *Id.* He admitted that the JVA required him to sign the quit claim deed, but claimed the JVA was unenforceable because he did not have an opportunity to consult an attorney before signing it, and because it did not provide him with “consideration.” *Id.* Liddiard did not file a counterclaim for contribution based on the Utah property, nor did he petition the trial court to dispose of all the alleged assets of the alleged CIR. *Id.* at 33. Instead, he simply requested “equitable division” of the Washington property. *Id.*

Davern moved for summary judgment, arguing that the JVA was controlling and that Liddiard had admitted all material facts in support of enforcement. CP 62. In response to Liddiard’s claim of a meretricious relationship and his request for equitable distribution, Davern argued that

the JVA was indisputable evidence under Oregon law of the express intent of the parties regarding the disposition of the Washington property. *Id.*

Liddiard responded by reciting all of his contributions to the *Utah* property, claiming that they gave him a right to equitable distribution of the *Washington* property under Washington CIR laws. CP 76. He claimed that the JVA was invalid because it was signed under duress. *Id.*⁹ He stated in his response on summary motion that this duress was created because Davern presented him with the JVA just “hours before closing on the property....” CP 76.¹⁰ His affidavit in support of the response stated that they were in a hurry because they were “scheduled to record the deed.” CP 83.¹¹ He did not allege that Davern threatened to abandon closing escrow, to end the relationship, or threaten any other consequences if he refused to sign the JVA.

⁹ Liddiard has abandoned this claim on appeal, now arguing that, under the common law governing pre- and post-nuptial agreements, that he did not sign the JVA knowingly, voluntarily, and intelligently. Br. of Appellant at 15-25.

¹⁰ On appeal, Liddiard’s factual representations are shifting. He now claims that “the sale closed on December 1, 1999.” Br. of Appellant at 23. Elsewhere in his brief, he claims that the closing date is “unclear from the record.” Br. of Appellant at 6 n.2. He then recites facts to suggest that the closing took place on November 30. *Id.* at 7-8.

¹¹ As Davern noted below, Liddiard’s statements regarding the circumstances of signing the JVA are questionable. He says he signed the JVA under “duress” because of the need to record the deed, and that they then hurried to the assessor’s office and got there “just a couple of minutes before they closed.” CP 83. However, his statements are contradicted by the documents themselves, which show the JVA was signed November 30, and the deed was recorded December 1. CP 12, 14.

Liddiard also claimed that Davern misrepresented the nature of the JVA by telling him it only protected her heirs as to “her portion” of the property.¹² He admitted that he read the provision stating that Davern had purchased the property with her sole funds, and even claimed that he negotiated a change to that provision based on his “contributions to the Utah property.” *Id.* at 83-84. He said Davern promised to change the provision, and that he signed it without checking to see if that change had been made. *Id.*¹³ However, Liddiard did *not* claim fraud in the inducement regarding these allegations, but stated that Davern’s actions, viewed in the context of their personal relationship, rendered the JVA unfair and unenforceable. *Id.*

The trial court entered summary judgment in favor of Davern on July 29, 2011. CP 104-05. Liddiard filed an admittedly untimely combined motion for reconsideration, clarification, and relief from judgment on August 19, 2011. CP 106-08. He claimed that the trial court should have analyzed the issues under Washington meretricious

¹² Since Liddiard did not contribute anything to the purchase, it is unclear what he considered “his portion” of the property.

¹³ Davern, of course, disputes all this, but that dispute is not material to the issues on summary judgment, because Liddiard did not plead fraud regarding the JVA.

relationship laws, not the laws of Oregon,¹⁴ and asked the court to “clarify that it has not yet ruled on Defendant’s affirmative assertion of the existence of a meretricious relationship.” CP 108. He also filed a motion to amend his answer to add a new defense: that the statute of limitations on the contract action had expired. CP 113. Liddiard’s wife, Kristen Shauck, for the first time in the case moved for her own dismissal, claiming that Oregon was not a community property state, and that she was not properly named as a defendant. CP 203.

The trial court entered the final orders, including the decree quieting title and judgment, on September 6, 2011, while Liddiard’s various motions were pending. CP 123-38.

Davern opposed both the untimely motion for reconsideration, clarification, or relief from judgment, and the untimely motion to amend. The trial court denied all of Liddiard’s post-trial motions and entered specific findings and conclusions regarding all of them. CP 196-209. Regarding the statute of limitations argument, the trial court concluded it was both untimely and futile. CP 208-09. The trial court observed that even assuming Liddiard’s meretricious relationship “defense” was

¹⁴ The summary judgment order contained no statement or conclusion regarding which state’s law applied on summary judgment. CP 104-05. Liddiard was apparently assuming that the trial court had rendered its judgment based upon Oregon law.

properly brought, Oregon meretricious relationship law was dispositive of the issue. *Id.* The trial court quieted title in Davern's favor. CP 135-36.

The trial court also awarded Davern attorney's fees in the amount of \$11,939.84 and costs of \$1,348.50. CP 169. The trial court awarded attorney's fees to Davern under (1) the common law principle of bad faith and (2) an Oregon statutory fee shifting provision that provides for fees for defenses made "without objectively reasonable basis." CP 55, 127. Specifically, the court found that Liddiard's refusal to sign the quit claim deed, and his defenses in the litigation, were in "bad faith" without any "objectively reasonable basis." CP 127. After Liddiard's flurry of post-trial motions, the trial court awarded Davern supplemental attorney's fees incurred in defending against those motions. CP 237-38.

Liddiard timely appealed from the trial court's final orders on September 29, 2011.

D. SUMMARY OF ARGUMENT

There are no disputed issues of material fact to necessitate a trial here, and Liddiard's claims at trial and on appeal are without merit. The factual question of whether a CIR/meretricious relationship existed between Davern and Liddiard is irrelevant to the legal issues before this Court. Regardless of whether the undisputed facts are applied under contract law or, by analogy, community property laws, the outcome is the

same. The JVA was reasonable and procedurally fair. There is no legitimate evidence of any procedural or substantive unfairness relating to the JVA.

Also, Liddiard was properly sanctioned for misstating facts and law in an attempt to manufacture a meritless defense to Davern's claim. Liddiard should have abided by the JVA, and should not have forced Davern to endure needless litigation.

The trial court's decision on summary judgment and attorney fees was correct, and should be upheld. Davern should also be awarded attorney fees for having to defend against Liddiard's frivolous appeal.

E. ARGUMENT

(1) Standard of Review

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Like the trial court, this Court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party and uphold the order if, from all the evidence,

reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437. The de novo standard also should apply to Liddiard's motion for clarification, since it essentially asked the trial court to affirm that it had, in fact, already dismissed all claims on summary judgment. CP 199.

When reviewing the trial court's denial of Liddiard's post-trial CR 59 and 60 motions, the standard of review is abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (CR 59 motion); *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660, 662 (2003) (CR 60 motion).

The disposition of motions to amend the pleadings is discretionary with the trial court, and its refusal to permit such an amendment will not be overturned except for manifest abuse of discretion." *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978).

(2) The Existence of a CIR Is Immaterial to the Legal Issues Here

Liddiard argues that summary judgment was erroneous because he presented "compelling evidence" of a CIR between himself and Davern. Br. of Appellant at 13-17. Liddiard claims that factual findings on the CIR issue are needed because if such a relationship existed, the JVA is unenforceable and CIR laws give him a right of partition of the Washington property. *Id.*

The existence or non-existence of a CIR/meretricious relationship here is not material. As explained *infra*, applying either Washington or Oregon law, applying either the laws governing intimate relationships or those governing contracts, the result is the same. The Washington property belongs to Davern as a matter of law, and summary judgment quieting title was correct.

Thus, Liddiard failed to raise a genuine issue of *material* fact for trial on the issue of whether a CIR/meretricious relationship existed between Liddiard and Davern. Summary judgment was proper.

(3) Contract Law, Not Marriage Law, Applies to Evaluate Procedural and Substantive Validity of the JVA

Analogizing to Washington's marriage laws, Liddiard avers that the JVA is unenforceable because of procedural and substantive "unfairness." Br. of Appellant at 15-33. He contends that the JVA is procedurally unfair because he did not have sufficient time to review it or consult counsel, and that Davern verbally agreed to make a change to the contract that was not made. Br. of Appellant at 18-25. He argues it is substantively unfair because it deprives him of his "equity" in the Washington land. He does not argue that the JVA is unconscionable under traditional principles of contract law. *Id.*

The rules for analyzing agreements between married persons differ from traditional contract law. *Matter of Marriage of Matson*, 107 Wn.2d 479, 483, 730 P.2d 668, 671 (1986). Pre- and post-nuptial agreements, as well as community property agreements, are examined for procedural and substantive “unfairness,” rather than for procedural and substantive “unconscionability.” *Id.* This heightened protection for married persons extends from the fiduciary relationship spouses owe each other. *Whitney v. Seattle-First Nat'l Bank*, 90 Wn.2d 105, 110, 579 P.2d 937 (1978). This fiduciary relationship arises not merely because of the parties’ intimacy, but because the law presumes that their acquired property is community owned and managed, rather than separate. *Matson*, 107 Wn.2d at 483-84.

Assuming *arguendo* Liddiard is correct about the application of CIR law, he provides no authority for the proposition that a contract signed in the context of a CIR should be examined using the same legal precepts as are applied to agreements between married persons. The case he cites for that proposition, *In re Marriage of Hadley*, 88 Wn.2d 649, 652, 565 P.2d 790, 792 (1977), does not so hold. As the name of the case suggests, *Hadley* involved married persons, not a CIR. *Id.*

Although, property distribution laws for married persons may be applied by analogy to CIRs, this Court and our Supreme Court have observed that not *all* marriage laws may be similarly applied. *Davis v.*

Dep't of Empl. Sec., 108 Wn.2d 272, 737 P.2d 1262 (1987) (“the extension of property distribution rights of spouses to partners in meretricious relationships does not elevate meretricious relationships themselves to the level of marriages for any and all purposes”); *W. Cmty. Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.2d 359, 362 (1987) (Washington attorney fee provision applicable to family law proceedings does not apply to unmarried parties).

This Court should not replace the contractual “unconscionability” standard with the marital “unfairness” standard in the context of CIRs. The unique circumstances of the marital relationship – particularly the community property assumption – do not apply to CIRs. The influence that one prospective or current spouse can exert by refusing to marry or threatening to divorce the other is not present in the context of a CIR.¹⁵ The rationale underlying the marital “unfairness” standard does not support extending that standard here.

(4) The Trial Court Properly Ordered Judgment in Accordance with the Express Terms of the JVA, Which Was Procedurally and Substantively Valid

Under traditional principles of contract law, Liddiard’s must demonstrate a genuine issue of material fact that the JVA was

¹⁵ This is not to belittle the emotional impact that a threat to end a CIR might have on a person. However, the same legal entanglements and stigma of ending a marriage do not necessarily attach to a CIR.

procedurally or substantively unconscionable.¹⁶ Because the JVA has a choice of law provision, this issue should be examined under *Oregon* law.¹⁷ See *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 700, 167 P.3d 1112, 1124 (2007).

Under Oregon law, whether the facts of a case support a finding of unconscionability is a question of law that must be determined based on the facts in existence at the time the contract was made. *Best v. U.S. National Bank*, 303 Or. 557, 560, 739 P.2d 554 (1987). The party asserting unconscionability bears the burden of demonstrating that clause or contract in question is, in fact, unconscionable. *W. L. May Co., Inc. v. Philco-Ford Corp.*, 273 Or. 701, 707, 543 P.2d 283 (1975). In Oregon, the test for unconscionability has two components—procedural and substantive. *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or. App. 553,

¹⁶ A contract may also be invalid if it is signed under “duress.” However, the standard for proving duress is stringent: the party seeking to invalidate the contract must show that he or she was “forced to do some act against his [or her] will” by other party’s “wrongful” act. *Pio v. Kelly*, 275 Or. 585, 589, 552 P.2d 1301, 1304 (1976), citing *Horn v. Davis*, 70 Or. 498, 505, 142 P. 544 (1914) and 13 WILLISTON ON CONTRACTS 671, § 1606 (3d ed. Jaeger 1970).

Again, Liddiard has *not renewed* his duress argument on appeal. He argues on appeal that, under Washington authority governing prenuptial agreements, he did not enter into the JVA “freely,” “voluntarily,” or “intelligently.” Br. of Appellant at 15-17, 22, 23.

¹⁷ Liddiard does not argue that the choice of law provision in the contract is itself invalid. He makes his arguments under Washington law on the grounds that the entire JVA is procedurally and substantively invalid. Br. of Appellant at 24.

566, 152 P.3d 940 (2007). Both must be present for the contract to be considered unconscionable. *Id.*

(a) The Circumstances Surrounding the Formation of the JVA Were Not Oppressive, Nor Was the Provision at Issue a Surprise—the Contract Is Procedurally Valid

Procedural unconscionability refers to the *conditions* of contract formation, and substantive unconscionability refers to the *terms* of the contract. *Id.* at 566–67. An analysis of procedural unconscionability focuses on two factors: oppression and surprise. Oppression arises when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. *Id.* Surprise involves the extent to which the supposedly agreed terms were hidden from the party seeking to avoid enforcement of the agreement. *Id.* at 567.

Even an employee required to sign a contract as a prerequisite to employment, under significant time pressure, cannot claim procedural unconscionability without more. In *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or. App. 610, 614, 156 P.3d 156, 160 (2007), the employee argued that (1) at the time of her hire she was only 19 years of age; (2) the arbitration clause was contained in a packet of approximately 70 new hire forms, 50 of which she had to read and sign; (3) she had less than two hours to

review all the documents; and (4) she would not have been hired if she had refused to sign any of the documents. Even in these circumstances, when the possibility of a job was on the line, the Oregon Court of Appeals found no procedural unconscionability. *Id.*

Liddiard attempts to create issues of material fact regarding oppression and surprise by misleading this Court. His description of the circumstances surrounding the signing of the JVA is flatly contradicted by the record. It is crucial to examine these misrepresentations in turn, to make it clear there is really no disputed issue of material fact on procedural unconscionability.

First, on the issue of oppression, Liddiard claims that Davern “shrewdly” presented him with the JVA on November 30, 1999, “shortly before Davern and Liddiard were to leave to go to the escrow office and sign papers for the closing.” Br. of Appellant at 6. Liddiard suggests that giving him the JVA in this manner deprived him of time to consider it, consult with counsel, or negotiate. However, he does not claim that Davern threatened to refuse to sign the closing documents, or impose any other negative consequence upon him if he refused to sign. His sole claim of pressure by Davern was that they were in a hurry to get to the closing and to then get to the assessor’s office to record the deed. CP 83-84.

As a matter of law, Liddiard has not alleged facts that a reasonable person could conclude deprived him of meaningful choice. He does not allege that Davern refused to put him on title unless he signed the JVA, or that she would have delayed or refused closing if he failed to do so. CP 83-84. She had already bought the property with him in June, and instructed the seller to put him on the statutory warranty deed in early November. CP 14, 88. He claims that he simultaneously did not understand the document, but then claims that he understood the critical provision, objected to it, and demanded that it be changed. CP 84.

Also, regardless of when the closing took place, Davern had *already agreed to put Liddiard on title* long before November 30, 1999, and the record reflects. The purchase and sale agreement was signed by both parties in June 26, 1999. CP 88. The statutory Warranty Deed was signed by the seller on November 9, 1999, and as instructed, the seller put both Davern and Liddiard on title. CP 14. If Davern was really so “cunning and shrewd” as Liddiard suggests (br. of appellant at 21) she would have insisted that sign the JVA *before* purchasing the property and putting him on title. Once he was on title, she had no leverage to force him to sign the JVA.¹⁸

¹⁸ Liddiard’s claim of oppression because they had to hurry to *record* the deed is equally puzzling. Recording a deed does not alter or affect the right of ownership, it merely announces that ownership right to the world. ORS 93.680(1). It is not as if

Even assuming that the JVA was signed in haste, from the standpoint of bargaining power, Liddiard was in an equal position to Davern, if not a stronger one. He was already on title to the Washington property, despite the fact that Davern supplied all of the funds from the sale of her separate Utah property. Had Liddiard refused to sign, Davern would have little recourse, and Liddiard does not claim that she threatened any negative consequences for his refusal to sign. Liddiard cannot claim oppression here.

Liddiard's claim of surprise also fails by his own admission. He claims that the objectionable provision is the one that states the Washington property was purchased with Davern's sole funds. Br. of Appellant at 7. He says that he read the document before signing it, noticed that provision, *underlined it*, and asked for it to be changed. *Id.* He says that Davern agreed to this change, and then gave him the JVA again to sign. He says he signed it, and then afterward "noticed that the statement had not been removed." *Id.*¹⁹

holding a threat of refusing to record the deed, or recording it later would have affected his ownership rights, nor does he so allege. Also, Liddiard's tale is belied by the fact that the JVA was signed November 30 and the deed was not recorded until the next day, December 1. CP 12, 14.

¹⁹ Although Liddiard's allegations would give rise to a claim of fraud by misrepresentation, Liddiard raises no such claim.

The crucial indicium of “surprise” is that the objectionable provision is “hidden.” *Livingston v. Metro. Pediatrics, LLC*, 234 Or. App. 137, 151, 227 P.3d 796, 806 (2010); *Sprague v. Quality Restaurants NW, Inc.*, 213 Or. App. 521, 525, 162 P.3d 331, 334 (2007). A party will not be bound to a provision buried in fine print when he or she was not given time to carefully review and negotiate it. *Id.*

Liddiard cannot claim to have been “surprised” by a “hidden” provision if he admits to reading, underlining, and specifically negotiating about that provision *before* signing. This clearly demonstrates that, as a matter of law, the provision was not “hidden” as required in cases of procedural unconscionability. The fact that he signed the document and looked for the allegedly requested change afterward does not constitute surprise.

The undisputed facts demonstrate that Liddiard experienced neither oppression nor surprise with respect to the JVA. He cannot claim procedural unconscionability, and summary judgment was proper.

(b) The JVA Is Substantively Valid — Liddiard Was Only Deprived of Equity in the Property if the Parties Separated Before He Had Made Any Contribution

Given that the JVA was procedurally conscionable, Liddiard’s claim of unconscionability fails as a matter of law, because under Oregon

law a party must demonstrate *both* procedural and substantive unconscionability. *Vasquez–Lopez*, 210 Or. App. at 566.

However, the JVA is also substantively valid and fair, and is not unconscionable. Therefore, regardless of whether this Court believes the JVA was procedurally unconscionable, it is still enforceable, and Liddiard’s arguments fail as a matter of law.

Substantive unconscionability is present when the disparity in bargaining power is “combined with the terms that are unreasonably favorable to the party with the greater power.” *Motsinger*, 211 Or. App. at 617 (2007). Whether a clause or contract is *substantively* unconscionable is an inquiry that focuses on the one-sided nature of the substantive terms. *Vasquez–Lopez*, 210 Or. App. at 567.

Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. *See Best*, 303 Or. at 561; *Cornitius v. Wheeler*, 276 Or. 747, 755, 556 P.2d 666 (1976); *Zemp v. Rowland*, 31 Or. App. 1105, 1110, 572 P.2d 637 (1977), *review denied*, 282 Or. 537 (1978) (concluding that early termination fee of \$185 in a residential lease was not “shocking to the conscience”). In those rare instances in which Oregon courts have declared contractual provisions unconscionable, there existed “serious procedural and substantive

unfairness.” *Vasquez–Lopez*, 210 Or. App. at 576; *Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 428, 125 P.3d 814 (2005) (declaring unconscionable a prepayment limitation that was “entirely disproportionate to its purpose” and “entirely fail[ed] to recognize [the homeowners'] interest in selling the house and recovering the equity that they had accrued”).

Liddiard cannot claim substantive unconscionability in the JVA regarding the provision that Davern paid for the Washington property with her sole funds. The JVA provided that Davern would purchase the property with her funds, and Liddiard would be put on title having despite having contributed no money toward the purchase. CP 10. Any future contribution Liddiard would make to the property with his “labor or expertise” would provide him with 25% equity in the property. *Id.* In the event their relationship should end, Liddiard would be reimbursed for his labor and expenses. CP 11. If Davern predeceased Liddiard, he would retain 25% of the property *regardless of having made any contribution*. If Liddiard predeceased Davern, his estate would retain 25% of the assets *regardless of his having made any contribution*. CP 11-12.

The JVA is fair based on the undisputed facts. Liddiard does not dispute that Davern paid for the Washington property using the funds from the sale of her sole property, the Utah home. Br. of Appellant at 4; CP

32.²⁰ Liddiard's only required contribution under the JVA was future labor on the Washington property, which he never contributed because a residence was never developed on the property. CP 10, 84. Davern paid for the property and put Liddiard on the title anyway. All the JVA provided was that if the parties' relationship dissolved prior to any actual contribution by Liddiard, Davern's sole investment would result in her sole ownership.

Liddiard's claim that he raised genuine issues of material fact that the JVA was unconscionable fails. The JVA was fair and equitable, was signed between parties of at least equal bargaining power, and is valid.

(c) Davern's Action Was Not Barred by the Statute of Limitations Because Davern Brought Her Claim Within Months of Liddiard's Breach

Liddiard claims that enforcement of the JVA is barred by the statute of limitations. Br. of Appellant at 26-29. He claims that the statute began to run when the parties' relationship ended, because "the JVA specifically provided that it would terminate upon the termination of the parties relationship..." *Id.* at 26. Liddiard did not plead this defense in his answer, and raised the issue of the statute of limitations for the first time in an untimely motion to amend his answer after summary judgment

²⁰ Liddiard's sole claim of contribution to the Washington property is his claim that he made improvements to Davern's *Utah* home. Br. of Appellant at 19. This claim is examined *infra* section E(5).

had been entered. CP 104, 113. He argues, however, that the trial court abused its discretion²¹ in refusing to consider his new argument, citing *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495, 496 (1946). Br. of Appellant at 26.

Absent extraordinary circumstances, a party loses the automatic right to amend a complaint or answer after the trial court grants summary judgment. *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wn. App. 736, 745, 577 P.2d 980 (1978). The disposition of motions to amend the pleadings is discretionary with the trial court, and its refusal to permit such an amendment will not be overturned except for *manifest abuse of discretion*. *Lincoln*, 89 Wn.2d at 577. “When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.” *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599, 607, *reconsideration denied* (2010), *review denied*, 170 Wn.2d 1002 (2010); *Doyle v. Planned Parenthood of Seattle–King County, Inc.*, 31 Wn. App. 126, 130–31, 639 P.2d 240 (1982). In *Doyle*, after the defendant was granted summary judgment, the plaintiff sought to amend the complaint to add a meritless new cause of

²¹ Actually, Liddiard uses the term “erred,” as if the trial court’s decision to consider his untimely raised argument was a matter of law. Even under Liddiard’s own authority on the subject, it is not. *Turpen*, 26 Wn.2d at 732 (decision to reopen case or accept new testimony “rests in the sound discretion of the trial court”).

action. *Doyle*, 31 Wn. App. at 131. The court concluded that because summary judgment had been granted, the motion was untimely, and the new theory of liability lacked legal support. This Court concluded that the trial court did not abuse its discretion in denying the plaintiff leave to amend the complaint. *Id.* at 132.

Contrary to Liddiard's assertion, *Turpen* does not contravene this principle that the decision to allow an amendment is within the trial court's discretion:

The opening or reopening of a case for the taking of further testimony is always a matter which rests in the sound discretion of the trial court and which we will not disturb, in the absence of a showing of abuse of discretion on the part of a trial judge, or the exercise of arbitrary and capricious action by him. We find no reason for disturbing the rule in this case.

Turpen, 26 Wn.2d at 732. Thus, in *Turpen*, the trial court's *discretionary decision* to accept the new argument was not disturbed.

Also, Liddiard's claim that the statute of limitations had expired is without merit. A statute of limitations does not begin to run until the cause of action accrues. RCW 4.16.005. Usually, a cause of action accrues when an injured party has the right to apply to a court for relief. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423, 428 (2006); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

The statute of limitations in a contract action begins to run at the time of the breach. *City of Algona v. City of Pac.*, 35 Wn. App. 517, 521, 667 P.2d 1124, 1126 (1983); *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353, 356 (2000); *Safeco Ins. Co. v. Barcom*, 112 Wn.2d 575, 583, 773 P.2d 56 (1989); *see also, Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 215, 859 P.2d 619 (1993) (a cause of action generally accrues when wrongful act takes place); *Bush v. Safeco Ins. Co.*, 23 Wn. App. 327, 329, 596 P.2d 1357 (1979) (a cause of action generally accrues for statute of limitations purposes when a party has a right to apply to court for relief). No justiciable controversy exists under a contract until a breach occurs. *Barcom*, 112 Wn.2d at 583.

Here, Liddiard did not breach the JVA until April 16, 2010, when he refused to sign the quit claim deed as Davern requested under the terms of the JVA. CP 11, 18. Contrary to Liddiard's assertion, the JVA was not dissolved when the relationship ended, the joint venture was: "The *Joint Venture* shall be dissolved upon the happening of any of the following events:...(c) The breakup of the personal relationship of the parties." CP 11 (emphasis added). In other words, the breakup ended the venture, not the JVA. The JVA was still in effect. Thus, Davern's action for breach of the JVA was well within the six-year statute of limitations on such actions.

Here, the trial court properly exercised its discretion to refuse to allow Liddiard's amendment. The statute of limitations defense he sought to add was based on undisputed facts that the parties had known since the commencement of the litigation. Liddiard offered no explanation as to why he did not raise the argument earlier, except that he discovered it researching in preparation for appeal. CP 114. Also, Liddiard *admitted that he had no excuse for bringing the motion earlier*, and even offered to accept sanctions for failing to do so. CP 115. Under these circumstances, the trial court was well within its discretion to deny amendment. The trial court, in a well-reasoned analysis, concluded that the amendment was both untimely and meritless. CP 205-09.

(5) Even If the JVA Is Unenforceable, the Property Is Davern's Separate Property Under CIR/Meretricious Relationship Laws

Liddiard's quest to invalidate the JVA is based on his assumption that under meretricious relationship/CIR laws, he will be entitled to partition of the Washington property. Br. of Appellant at 25. He states that because they "jointly shopped for, negotiated the purchase of, and contracted to purchase" the property, he is entitled to "equitable" partition despite his lack of contribution. *Id.* at 6, 23. He admits that the Washington property was "technically" purchased with Davern's money, and paid no taxes on it between 1999 and 2010. CP 32, 84. He claims

that equity demands partition of the Washington property because he contributed labor to renovations in the *Utah* property. *Id.* at 7; CP 84.

Liddiard is wrong that CIR common law gives him a right to partition of the Washington property. Thus even assuming his arguments about the JVA are correct, summary judgment was proper.

(a) Under Washington Marriage and CIR Laws, Liddiard Is Not Entitled to Any Part of the Property

Assuming *arguendo* that Liddiard is correct about the invalidity of the JVA, and about the application of CIR law, in order to defeat summary judgment he still would have to establish a genuine issue of material fact for trial regarding his rights in the Washington property under CIR common law.

For the purpose of dividing property at the end of a meretricious relationship, the definitions of “separate” and “community” property found in RCW 26.16.010–.030 are applied by analogy. Therefore, property owned by one of the parties prior to the CIR, and property acquired during the meretricious relationship by gift, bequest, devise, or descent with the rents, issues and profits thereof, is not before the court for division. All other property acquired during the relationship would be presumed to be owned by both of the parties. *See In re Marriage of Elam,*

97 Wn.2d 811, 816, 650 P.2d 213 (1982); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993).

However, the presumption of common ownership can be rebutted. *Connell v. Francisco*, 127 Wn.2d 339, 352, 898 P.2d 831, 837 (1995). A party “may overcome this presumption with evidence showing the real property was acquired with funds that would have been characterized as his separate property had the parties been married.” *Id.*

The character of property, whether separate or community, is determined at its acquisition. *Pearson-Maines*, 70 Wn. App. at 865. Property acquired before marriage is presumptively separate, property acquired after marriage is presumptively community. *Id.* The presumption may be rebutted by clear and satisfactory evidence. *E.I. DuPont de Nemours & Co. v. Garrison*, 13 Wn.2d 170, 174, 124 P.2d 939 (1942). If property was separate property at the time of acquisition, it will retain that character as long as it can be traced and identified. *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972).

It is undisputed that the Utah home was Davern’s separate property, acquired in 1983 long before she ever met Liddiard. CP 79, 100. It is also undisputed that the Washington property was purchased solely with proceeds from the sale of the Utah home. CP 32; Br. of Appellant at 6. Liddiard admits that he contributed no cash or labor to the purchase of

the Washington property. *Id.* Thus, the Washington land was purchased entirely with separate property funds traceable solely to Davern and is her separate property. Liddiard was placed on title in consideration of *future* labor he would contribute to the Washington property; labor which he never in fact contributed.

Liddiard's tries to manufacture his claim of "equity" in the Washington property with his assertion that his contribution of labor to Davern's *Utah* property improved its sale value, thus increasing the sale price of that home. Br. of Appellant at 19. He claims that the value of the labor he contributed to the home was \$38,000. CP 82. He tries to equate the alleged value of his labor with an increase in the sale price of the home, but he provides no evidence of this. *Id.*

It is true that when funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married, there may arise a right of reimbursement in the "community." *See, e.g., Pearson–Maines*, 70 Wn. App. at 869–70; Harry M. Cross, *Community Property Law in Washington* (Revised 1985), 61 Wash.L.Rev. 13, 61, 67 (1986).

Also, a court may offset the "community's" right of reimbursement against any reciprocal benefit received by the "community" for its use and

enjoyment of the individually owned property. See *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984).

However, the question of whether Liddiard had an equity interest in the Utah property was not at issue in Davern's quiet title action regarding the Washington property. CP 199. Liddiard did not bring a counterclaim for distribution of assets from the alleged CIR, nor did he file a counterclaim for contribution based on his improvements to Davern's Utah home. *Id.*; CP 33, 199. Even if Liddiard had attempted to counterclaim for a right of contribution based on his improvements to the Utah property, that claim would have been time-barred. Actions for the recovery of personal property must be commenced within three years. RCW 4.16.080(2).

Liddiard responded to Davern's quiet title action in the *Washington* property by asking for an "equitable division" based on a claimed interest in the *Utah* property. He has waived any claim to a right of contribution arising from his work on the Utah property by failing to plead it. CP 33. There is no legal basis for Liddiard to shoehorn any claim regarding the Utah property into a community right in the Washington property, to which he contributed nothing. CP 84.

Any alleged contribution Liddiard made to the Utah property did not convert the Utah property, or the Washington property, from separate

to community status. At best, it created a right of reimbursement, which Liddiard has not pleaded here.²²

Also, it is undisputed that Liddiard lived in Davern's Utah home from 1992 until 1999, during which time he was not required to pay any rent or household expenses.²³ Liddiard says he contributed \$38,000 to the in repairs to the Utah home. However, applying community property laws, that benefit would also be community, property and thus Davern would have a community share of that figure. Therefore, Liddiard's equitable interest would be \$19,000. Liddiard did not present any evidence that, had he been living on his own for seven years and been forced to meet rent and all household expenses, he could have done so for less than \$19,000.

Thus, even assuming Liddiard's alleged interest in the Utah home could be traced to the Washington home, and even assuming he had property pled a right of reimbursement, the \$19,000 right of reimbursement would have to be reduced by the amount of benefit he received living free of rent and expenses for seven years.

²² Again, any such claim would be time-barred. RCW 4.16.080(2).

²³ Liddiard claims to have "contributed" unspecified amounts to expenses. However, he provides no evidence or accounting of these alleged contributions, and certainly does not suggest that Davern required him to pay rent or expenses while they lived together. Br. of Appellant at 5.

Liddiard cannot create a right of partition in the Washington property by claiming a community interest in the Utah property. On the sole issue before the trial court -- quieting title in the Washington property -- Liddiard raised no genuine issue of material fact regarding Davern's separate ownership of the property. He also raised no issue of material fact regarding whether it would be "equitable" to grant him partition of the Washington property. Summary judgment was proper.

(b) Under Oregon Marriage and Meretricious Relationship Laws, the Property Belongs to Davern

Applying Oregon marriage law by analogy here, the result is the same as in Washington: the property is Davern's separate property that was not commingled and to which Liddiard admittedly contributed nothing. *Kunze and Kunze*, 337 Or. 122, 133, 92 P.3d 100 (2004) (presumption that property acquired during marriage is community "can be overcome by evidence that the other spouse's efforts during the marriage did not contribute equally to the acquisition of the disputed marital asset").

Also, as the trial court noted, the JVA constitutes express evidence of the parties' intent regarding disposition of the property under meretricious relationship laws, and is controlling. CP 207-08; *Beal v. Beal*, 282 Or. 115, 122, 577 P.2d 507, 510 (1978). In determining how

property should be distributed following the breakdown of a domestic partnership, the primary consideration is the express or implied intent of the parties. *Id.* at 122. The court can examine the evidence and inferences that can be drawn therefrom to determine whether the parties intended to pool their resources for their common benefit, but only “in the absence of an express agreement.” *Id.*

Here, there is an express agreement: the JVA. Regardless of whether the JVA is directly enforceable, it is evidence of the express intent of the parties that, under the undisputed circumstances here, title to the property should be quieted in Davern’s favor.

The trial court did not commit a manifest abuse of discretion by declining Liddiard permission to amend his answer post-judgment to allow his statute of limitations defense.

(6) The Trial Court’s Award of Fees to Davern Was Proper

The trial court awarded attorney’s fees to Davern under (1) the common law principle of bad faith and (2) an Oregon statutory fee shifting provision that provides for fees for defenses made “without objectively reasonable basis.” CP 55, 127.

Liddiard argues that the trial court should not have awarded Davern any attorney fees. Br. of Appellant at 30-38. He did not deny below, and does not deny on appeal, that Oregon and Washington laws

provide for attorney fees based on bad faith conduct and for raising unreasonable defenses. *Id.* at 30-35; CP 225-28. He simply claims that the record does not support the trial court's findings. *Id.* at 30-32. He also argues that fees and costs associated with serving the timber companies by publication should have been disallowed. *Id.* at 33-34.

This Court reviews the reasonableness of attorney fees awards under an abuse of discretion standard. *Progressive Animal Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). "A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* This Court has occasionally overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award. *Id.* (citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987)). Appellate courts should "give very considerable weight to the trial court's informed discretion in the amount of attorney's fees awarded." *Id.* at 689.

RCW 4.84.185, CR 11, and the inherent equitable powers of a court authorize an award of attorney fees in cases of bad faith or when a defense is advanced without reasonable cause. RCW 4.84.185; *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343, 349 (1998); *Public Util. Dist. No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976).

Courts are at liberty to set the boundaries of the exercise of the equitable power. *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974). Our Supreme Court has long recognized that bad faith litigation can warrant the equitable award of attorney fees. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342 (1976); *Kottsick*, 86 Wn.2d at 390.

A trial court must enter specific findings of bad faith in order to support an award of attorney fees. *Pearsall-Stipek*, 136 Wn2d at 267. If such findings are made, the award will be upheld if there is substantial evidence in the record to support them. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 127, 857 P.2d 1053, 1056 (1993). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Similar grounds for attorney's fees are also available under Oregon law. ORS 20.105, as Liddiard admits, is "identical" to RCW 4.84.185. CP 228; ORS 20.105 (fees mandatory if party "asserts claim, defense, or ground for appeal without objectively reasonable basis"). ORCP 17 is the parallel rule to Washington's CR 11, and requires that a party or attorney signing any document certify that the positions are warranted existing law

or a nonfrivolous argument, and that they are factual, and provides for attorney fees as a sanction for violation. ORCP 17C(1), (3).²⁴

Here, the trial court based its award of attorney fees on its finding that Liddiard acted in bad faith, specifically, by refusing to abide by the JVA, and then by raising a defense in the trial court that had no “objectively reasonable basis.” CP 127, 237.

The trial court’s specific findings are supported by substantial evidence in the record. Liddiard and Davern both signed the JVA in which he clearly and expressly promised to quit claim the property back to Davern if their relationship ended before he made any contribution. CP 10-12. Had he simply signed the quit claim deed as agreed, Davern would not have incurred the substantial attorney fees and costs associated with bringing suit to quiet title, *including* being forced to serve the defunct timber companies by publication as required by law upon the bringing of a suit to quiet title. RCW 4.28.100. Liddiard’s stated basis for refusing to quit claim the property, that the property was not purchased using Davern’s sole funds, was expressly contradicted by the JVA and his own admissions. CP 18, 82.

²⁴ It does not appear from research conducted that Oregon has a common law bad faith attorney fee doctrine similar to Washington’s. However, this is irrelevant, because the trial court’s fee award was based on statutory and common law. The contractual provision providing for Oregon law does not apply.

When Davern filed her complaint to quiet title, Liddiard largely admitted the material facts, but answered that he was nonetheless entitled to partition based on his alleged contributions to Davern's *Utah* home. CP 32. Yet he brought no counterclaim for contribution, nor did he petition to have the alleged CIR assets placed before the trial court. He simply requested an "equitable division," despite his express agreement to the contrary in the JVA. CP 33. As the trial court observed, neither the alleged CIR nor the Utah property were properly before it. CP 199.

Also, Liddiard's defense was not well grounded in fact or law, but instead was based on blatant misrepresentations. For example, his central argument for nullifying the JVA, duress, was a fantasy. Liddiard claimed that Davern pressured him to sign the JVA by presenting it to him just before closing. However, the parties had signed the purchase and sale agreement jointly months before, and Liddiard was already listed on the Statutory Warranty Deed on title. CP 14, 88. He offers no reasonable explanation of why, even if Davern presented him with the JVA on November 30, he was under any real pressure to sign. He does not claim that Davern had any particular power or leverage to force him to sign the JVA, or threatened any negative consequences for his refusal to sign.

Even after he lost on summary judgment Liddiard's bad faith continued. He filed meritless post-judgment motions, one of which he

admitted was untimely and without proper notice to Davern. CP 106-08. He tried to have his wife dismissed as a defendant post-summary judgment, based on the bare allegation that she had “no interest” in the property under Oregon law. CP 203. He admitted that he did not know the law of Oregon well enough to say if the motion was well-grounded in law. *Id.* He also tried to untimely amend his answer post-summary judgment to add a claim for contribution and a statute of limitations defense. CP 114-15.

Liddiard’s many misrepresentations to the trial court were also in bad faith. He swore under penalty of perjury that Davern presented him with the JVA while they were on their way to record the Statutory Warranty Deed, which he swears was recorded the same day as the JVA was signed. CP 83. This is impossible because the JVA was signed November 30, but the deed was recorded December 1. CP 12, 14. Liddiard misled the trial court by submitting permits that he claimed to have “paid for,” when it was clear on their face that he had not. CP 89-92. When faced with this deception, he was forced to retract it and apologize. CP 102-03.

There is substantial evidence in the record to support the trial court’s specific findings regarding Liddiard’s bad faith, and his lack of an objectively reasonable basis for defending the suit. The award of attorney

fees was well grounded in the applicable statutory and common law, and based on substantial evidence before the trial court. It should be upheld.

(7) This Court Should Award Davern Fees on Appeal

Under RAP 18.1, attorney fees may be awarded to a prevailing party on appeal if there is a basis in contract, law, or equity for such an award. There is a well-developed body of law in Washington for the imposition of sanctions against a party for filing a baseless lawsuit or defense to such a lawsuit, or filing a frivolous appeal. CR 11; RCW 4.84.185; RAP 18.9(a).

(a) Fees Are Warranted Under CR 11

CR 11 was adopted “to deter baseless filings and to curb abuses of the judicial system.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 is violated in any one of three ways in the case law. An attorney must (1) conduct a reasonable inquiry into the facts supporting the paper; (2) conduct a reasonable inquiry into the law to ensure that the pleading filed is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and (3) avoid filing the pleading for any improper purpose, such as delay, harassment or increasing the costs of litigation. *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988).

An array of factors may be considered by courts in assessing the reasonableness of counsel's pre-filing inquiry, including, "The time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues." *Bryant*, 119 Wn.2d at 220-21. This Court has framed the test this way: "The knowledge that reasonably could have been acquired at the time the pleading was filed, the type of claim and the difficulty of acquiring sufficient information, which party has access to the relevant facts, and the significance of the claim in the pleading as a whole." *Cascade Brigade v. Economic Dev. Bd. for Tacoma-Pierce County*, 61 Wn. App. 615, 620, 811 P.2d 697 (1991) (citations omitted).

Here, Liddiard's opening brief is not well grounded in the facts presented to the trial court. Many of the same misstatements of fact that Liddiard advanced at trial – which were debunked below and in this brief *supra* – are repeated here.²⁵ Liddiard has had ample time to examine and correct these misstatements, and has not. For example, Liddiard again claims that he "produced copies of building permits as further proof of the work that had been done," (br. of appellant at 6) despite having had to

²⁵ These misstatements are compounded by the fact that Liddiard has not properly cited to the record, forcing Davern and this Court to hunt down the proper citations in order to correct him.

retract the same statement below because only one of the permits could have even conceivably been purchased by him. CP 89-92.

Liddiard’s opening brief is also not well grounded in law. His central thesis – that Davern and Liddiard’s relationship requires this Court to apply the law surrounding the formation of prenuptial agreements to the JVA – is based on a misrepresentation of the law. Liddiard states, “Washington courts have recognized that agreements between parties in CIRs deserve the same scrutiny as agreements made in contemplation of marriage” citing *In re Marriage of Hadley*. Br. of Appellant at 17. *Hadley* involved property status agreements *between married persons during the marriage*. *Hadley*, 88 Wn.2d at 654. It said nothing about CIRs. *Id.*

Liddiard’s argument regarding marriage law hinges on another misstatement of fact—that the JVA was “prepared in *contemplation* of the purchase of the disputed property.” Br. of Appellant at 18 (emphasis added). As the record clearly shows, the purchase and sale agreement was signed in June, and the Statutory Warranty Deed on November 9. Davern had already agreed to purchase the property with Liddiard well before the JVA was signed, and simply asked him to enter into the JVA with her to protect her heirs and her life savings. CP 12, 14, 88.

Also, Liddiard cannot claim that Davern had any leverage over him based on the need to get to the assessor's office to record the deed. Br. of Appellant at 7. He already owned the property at that point. Recording the deed would not have affected his ownership right in the property that had already been established by being named as an owner on the statutory warranty deed. The fact that Liddiard feels the need to contradict his own affidavit and argue that the JVA was signed before "closing" rather than "recording" suggests that he know his argument about the pressure from the need get to the assessor's office is baseless.

Liddiard's opening brief violates CR 11. It is advanced without reasonable basis in fact or law. Davern has been forced to respond to it, incurring substantial attorney fees. Presumably, she will also have to pay for fees incurred at oral argument. Davern should be awarded attorney fees as a sanction for having to respond to Liddiard's appeal.

(b) Fees Are Warranted Under RCW 4.84.185 and RAP 18.9

For the reasons stated *supra* section E(6), Davern is also entitled to attorney fees under RCW 4.84.185 and RAP 18.9 for being forced to defend against Liddiard's baseless, bad faith appeal from a baseless, bad faith defense below.

F. CONCLUSION

The trial court correctly concluded here that, whether examining the issue under contract law or common law on CIRs, Liddiard was bound by his intention as expressed in the JVA to quit claim Davern's property back to her. Rather than abide by his own agreement, Liddiard attempted to conjure up a defense using misstatements of fact and baseless legal arguments. There was no *genuine* issue of material fact here, and summary judgment was proper.

The trial court's considered decision to impose attorney fees and costs on Liddiard should be upheld, and this Court should award Davern attorney fees for having to respond to this appeal.

DATED this 13th day of March, 2012.

Respectfully submitted,



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Division II

DECLARATION OF SERVICE 12 MAR 14 PM 2:15

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondent in Court of Appeals Cause No. 42657-9-II to the following parties:

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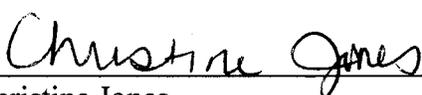
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 14, 2012, at Tukwila, Washington.



Christine Jones
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