

NO. 49393-4 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHANTEL P. WAZNY,

Appellant,

v.

STEVEN D. WAZNY,

Respondent.

Respondent Wazny's Brief

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I. INTRODUCTION

Three years after the dissolution was finalized, Shantel brought near identical motions before the Court with different labels, which intertwined issues of enforcement, omission, term disagreement, and undisclosed assets.

Before bringing her motions to Court – she sought review of a professional forensic business evaluator, whose opinion, in part was,

“[Shantel’s attorney] suggests vacating the settlement agreement based on the issues above. I don’t believe the allegations have any validity and they demonstrate a lack of understanding of the financial aspects of the businesses in which Steve has an interest and the relationship he and his partner have.”

Not surprisingly, the Court found there was no cause to vacate for fraud because Shantel failed to overcome her burden and offered nothing more than mere assertions and speculation – with no evidence.

II. ISSUES

1. A CR 2A is an enforceable contract. Shantel signed the CR 2A and later the Decree her attorney drafted; Both documents made her responsible for paying the 2nd mortgage. There was no need for the Court to clarify, nor evidence to prompt vacating either because the document was clear on its face. Should the Court affirm the Court’s ruling that Shantel is responsible for paying the 2nd mortgage?
2. Courts only grant a motion to vacate under CR 60(b)(4) if clear and convincing evidence shows fraud or misrepresentation. Shantel made conclusory statements without providing any evidence resembling fraud or misrepresentation, despite knowing before she filed papers that Deaton’s report said she misunderstood. Should this Court Affirm the trial Court’s discretionary decision?
3. The Court properly found the UFTA does not apply and Shantel has offered no citations or arguments that should persuade a Court to extend the law to a spouse in a dissolution proceeding.
4. Attorney fees are entitled to the prevailing party under the CR 2A contract. The parties have a signed contract with agreed upon provisions that entitle the

prevailing party to attorney's fees should issues of omission, disagreement over terms, or clarification come up. Should this Court enforce the CR2A and affirm the of award attorney fees to Steve, who was the prevailing party on every issue?

III. STATEMENT OF THE CASE¹

A. PROCEDURAL HISTORY²

¹ RAP 10.3(a)(5) – “a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” The “facts” section in Shantel’s brief is filled with argument and unfounded assertions, backed up by not one shroud of evidence. A fact section is supposed to be neutral. As such, we are devoting a large portion of this brief to the facts.

² For a complete record, Steve requested transcribed the hearing date of March 11, 2016: “Hearing dates 3/11/2016 and 6/28/2016 [Commissioner’s Ruling] are not ordered to be transcribed because there was no testimony taken and the court orders entered sufficiently include the rulings of the Court and the procedures that are explanatory of the numerous motions that are subject to this appeal. CP 1134. Shantel did not request the Commissioner’s Ruling be revised, therefore, anything that occurred on June 28, 2016 is precluded from being referenced or appealed. In addition, as the transcript for the hearing dates on April 22 and July 1 were in the record Shantel did not designate each as part of the RP; therefore, the only RP referenced are for August 12. March 11 [Motion to Add to Record to follow] and citation to April 22 and July 1 are by CP, not RP. CP 1134.

The parties – Shantel and Steve are here because three years after the dissolution, Shantel filed two Motions requesting relief from the CR 2A and the Decree.³ Shantel filed this appeal on August 31, 2016.⁴ CP 3.

B. HISTORY

Shantel and Steve separated on October 23, 2011. CP 2. Steve filed the dissolution with Pierce County Superior Court on November 30, 2011. CP 2, see Court record. Business evaluations for NHG and AJP were required. *Id.* The parties agreed to an evaluation date of December 31, 2012. CP 788. On May 9, 2013, Shantel’s third attorney drafted a Motion to Continue the trial date, stating in part:

³ On February 17, 2016, she filed a Post Decree Motion and a Show Cause Motion. Steve filed a Motion to Dismiss the Post Decree Motion and Fees on March 3, 2016. CP 1. After hearing additional argument on March 11, 2016, the Court made its Oral Decision on April 11, 2016. On May 19, 2016, Shantel filed a Motion for Reconsideration, arguing for the first time that the Uniform Fraudulent Transfer Act should control the case and change the evidentiary standard. CP 892, 1065. In addition, the “purpose” of bringing the Motion was to “provide added legal citations regarding the issue of burden of proof and to analyze which issues belong to the Motion to Vacate...and the Post Decree Motions...noting that the issues were not previously argued or briefed.” CP 890. Then on May 23, 2016, she filed another Post-Decree Motion, with a partial list of issues including the second mortgage, undivided property, and undisclosed property of \$300,000.00, NHG was undivided and omitted, NHG had undisclosed profits, and attorney fees, requesting time for more discovery. CP 903. “There will be a need for a discovery period and a valuation period as to husband’s finances that were not disclosed or that need updating.” CP 911. Then on June 28, she filed a Motion for Reconsideration Supplement. CP 1010. The Court heard argument on July 11, 2016 and issued its denial on July 29, 2016. CP 4.

⁴ Shantel does not specifically claim or argue that any of the Findings of the June 29, 2016 Order are faulty. CP 1070, See Appellant’s Brief.

Listed as appealed on Notice of Appeal: (1) Judgment on Court’s order on wife’s post decree motions entered on 6/28/16, dated August 12, 2016; (which entered final judgment as to amounts awarded pursuant to the Motion to Vacate, Motion for Reconsideration, and Post Decree Motions). (2) Findings of Facts and Order on Motion to Vacate entered on July 29, 2016. (3) Order granting Motions to Enforce Decree and Divide Undisclosed Property entered June 28, 2016.

[T]he parties need to have the results of the valuation as well as an opportunity to review and digest the information received. Further, if the valuation process results in identification of other issues which need to be followed up on, there will need to be time to allow for follow-up with any discovery issues that arise from the valuation process...both parties agreed to retain Carey Deaton ["Deaton"]⁵ to perform a joint valuation of the business and services contract the parties have; however, given the volume of records involved, Deaton's valuation is not yet complete." CP 788-789.

Deaton provided a Valuation Calculation for NHG on July 10, 2013. CP 488-489. On July 12, 2013 a Valuation Calculation Report was issued for AJP. CP 490-501. Deaton invested approximately 32 hours on the business evaluations. CP 816. Deaton received "all of the information we requested of [Steve], which was substantial." CP 816.

Steve complied with all discovery requests. CP 775-786. All documents that came from AJP and NHG came from a CPA, who is independently audited by an outside CPA Firm. CP 825, 775-786. Steve provided at least six (6) banker boxes worth of discovery to Shantel's attorneys. CP 622. In addition to the six banker boxes, Shantel's attorney was also in receipt of reports from the business evaluator and more. CP 622. Shantel's attorney did not file any Motions to Compel Discovery. See Court Record. Shantel never claimed that Steve's responses to discovery were incomplete, deficient or evasive. *Id.* Shantel never requested any additional discovery after the businesses were evaluated. *Id.* Shantel never

⁵ As of 2016, Deaton has been a CPA for forty-two (42) years and has provided business valuations and litigation consulting for the last twenty-seven (27) years.

deposed anyone. *Id.* Four months after her lawyer drafted and filed the Motion to Continue the parties completed a mediation. *Id.* There was no trial. *Id.* The parties agreed to a settlement. CP 2. Two months after the settlement, Shantel's attorney drew up and filed the final agreed dissolution papers. CP 706 -709.

C. CR 2A AGREEMENT

Close to two years after the parties separated, on September 4, 2013 the parties signed a CR 2A Agreement. CP 2. The CR 2A states both parties were "satisfied that [they] have reached a fair and reasonable settlement." CP 2. There are four signatures on the CR 2A. CP 4. Shantel's signature is on the CR 2A. CP 4. On September 6, 2013, Shantel's attorney filed a Joint Notice of Settlement of all Claims, which was presented by Shantel's attorney. See Court Record.

On the CR 2A, the typed words that appear directly after the date of separation on October 23, 2011, is "Unless specified otherwise herein, each will keep his/her post separation acquisitions." CP 2. Steve and his business partner purchased one restaurant under NHG in December 2011. CP 837.

D. 2ND MORTGAGE

Shantel's attorney drafted the Decree. CP 709. In Shantel's February 17, 2016 Declaration, she wrote,

“[Steve] drafted the decree, and the decree does not separately recite our debts, it only states, ‘See CR 2A Agreement on file and incorporated herein by reference.’ When I signed the decree, I saw that the CR 2A agreement listed...” CP 730.

Under “liabilities to be paid by Respondent [Shantel],” the Decree explicitly stated as Shantel declared, “See CR2A Agreement on file and incorporated herein by this reference.” CP 707. What Shantel left out of her Declaration, directly under that line, is “[Shantel] shall be responsible for the 1st and 2nd mortgages on the family home awarded to her.” CP 707.

Shantel’s attorney presented the Agreed Decree to the Court on November 21, 2013. CP 709. There are four signatures on the Decree. CP 709. Shantel’s signature is on the Decree. CP 709. Shantel lists the 2nd mortgage on her Appellate Brief as “Sham Debt #2.” Appellant Brief, 15. Shantel does not acknowledge in her brief that her signatures are on both the CR 2A and the Decree.

Shantel requests relief from the 2nd mortgage in both Motions and the Motion for Reconsideration. In the Motion to Vacate, she asserts, “...today he claims that a handwritten interlineation that [I] never approved relieves him of \$42,419.00...” CP 721. Then, in her Post-Decree Motions to Enforce and Divide Undisclosed Property, Shantel argues in part:

A CR 2A is subject to not being enforced, or being equitably modified, in the event of fraud. [Citation omitted]. The issue of fraud is addressed in the motion to show cause to vacate parts of the CR 2A, a separate motion accompanying this motion.

This therefore leaves the Court in a position to interpret the CR 2A and compels it as a matter of law to enforce it as originally written, that is, to order that [Steve] must pay the 2nd [mortgage] on the residence. There are numerous equitable reasons connected to the omissions, misrepresentations, and fraud, more fully briefed in the Motion to Show Cause accompanying this Motion, that fortify the appropriateness of the husband paying this debt. CP 718.

Finally, in her Motion for Reconsideration, she argues, “The court should reconsider its findings regarding the vacate issues of community debt...”

The Commissioner ruled on June 28, 2016 (on Shantel’s drafted Order), “The CR 2A is clarified to state that the wife is responsible for the [2nd mortgage].” CP 1002, 1018. Shantel did not file a Motion to Revise the Commissioner’s ruling. See Court File, PCLR 7(a)(12)⁶. Shantel briefed the 2nd mortgage (“sham debt #2) in her Appellate Brief under the issues of vacate and enforcement. Appellate Brief, pages 14 – 15, 32-34.

Shantel was awarded no spousal maintenance in the CR 2A or the Decree, yet as a remedy for her Motions she requests spousal maintenance for life, three years after the dissolution. CP 3, 707. Shantel declares to have no money. CP 763. Steve paid Shantel \$250,000.00 in cash as settlement of the case (check for \$10,000.00, check for \$190,000.00, and retirement for \$50,000.00), plus replacement of the deck, and the cost of all the furniture, valued at \$50,000.00. CP 2, 6, 7, 708-709. If you calculate \$250,000.00 out over the last three years, it equates to \$6,944.44 per month.

⁶ Revision of Commissioner’s Order or Judgment.

Shantel also has \$200,000.00 in inheritance money that she received at an undisclosed time.⁷

E. POST DISSOLUTION FACTS

Shantel hired her current and fifth attorney in October 2014. CP 614. On March 26th, 2015, Shantel subpoenaed and received 10,982 pages of records of Steve's, AJP, and NHG's bank account information with Key Bank. CP 482-484. Eight months after receiving the records, Shantel's attorney contacted Deaton with additional information⁸ and asked for his professional opinion on whether the calculations or conclusions he made on

⁷ Now, I would assume that she has a trust account, which she's said she did have, which we knew nothing about that she was the beneficiary of a trust account when we went through this mediation. Nothing. Even if she's a beneficiary, might be her separate property, it is a potential asset that needs to be disclosed. She never disclosed it. So she's got all this money that she's never told anybody about. But they have never mentioned that anywhere in here. March 11, 2016 Transcript, 38.

⁸ CP 825-826: Correspondence

- August 2015 letter from Shantel's attorney to Steve's attorney
- September 2015 letter from Steve's attorney to Shantel's attorney
- January 2014 letter from Steve's attorney to Shantel's attorney
- March 2014 letter from Steve's attorney to Shantel's attorney

AJP

- Form 1065 – Partnership Federal Income Tax Returns 2012-2014
- CPA-Reviewed Financial Statements 2012-2014
- Detail schedule of Steve's Draws April 2012-October 2014
- Detail schedule of Steve's Management Fees March 2014- October 2015
- Copy of check from Steve to AJP for \$25,000.00
- Bank statements from AJP

Steve

- Form 1040 - Individual Federal Income Tax 2014
- Steve's personal checking January 2011 to February 2015

NHG

- Form 1065 – Partnership Federal Income Tax Returns 2012-2014
- Detail schedule Steve's Management Fees April 2012- December 2014
- Copy of check from NHG to Steve dated December 2013 \$31,733.33
- Bank statements from NHG

December 31, 2012 would change based on additional data and to “address certain allegations in her letter to Steve’s attorney.” CP 816-820.

On November 18, 2015, prior to Shantel filing her Motions with the Court, two (2) years after the dissolution was finalized, the professional forensic business evaluator’s opinion was:

Shantel’s attorney suggests vacating the [CR 2A], but I don’t believe the allegations have any validity and they demonstrate a lack of understanding of the financial aspects of the businesses in which Steve has an interest and the relationship he and his partner have. CP 829.

None of the additional information we have been provided subsequent to our Valuation Calculation Report dated July 12, 2013 (valuation date: December 31, 2012) indicates that ‘profits to which community was entitled’ were not disclosed in 2013.” [emphasis ours]. CP 827.

[Steve] has no control over the major decisions of the LLC. CP 830. He cannot dictate his salary or benefits or distributions. CP 830.

Shantel did not offer a different professional opinion. Shantel did not depose Deaton. March 11, 2016 Transcript, 49.

F. AJP

The Court found that Shantel did not show by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation so as to warrant vacating the portion of the CR 2A Agreement. CP 1029.

Chopra and Steve purchased eighteen (18) restaurants in September 2010 for close to nine (9) million dollars. CP 492. Steve’s buy in was \$75,000.00. CP 492. Steve paid \$50,000.00 in cash to buy in and Chopra loaned him \$25,000.00. CP 779, 837. ‘Prior to the Decree

and CR 2A being signed, Shantel filed a Declaration with the Court on January 12, 2012. CP 879. In this Declaration, she acknowledged that there were plans to “expand [AJP] by acquiring more restaurants.” Shantel declared, “I believe the business is worth hundreds of thousands of dollars, if not more than a million.” CP 877, 878-879. Six (6) months after Steve and Shantel separated, AJP did purchase twenty-six (26) additional restaurants in April 2012 for sixteen (16) million dollars. CP 492. The combined financing for all forty-four (44) restaurants was close to twenty (20) million. CP 492.

Shantel argued that, “Steve failed to disclose his true income from AJP – said it was \$8,750.” CP 916, 922. “Upon subpoenaing the paying account, I learned that Steve is a signatory on that account and he signed his own checks. CP 922. They are not payroll checks. CP 922. He chose how much to draw.” Steve has no control over the major decisions of AJP and cannot dictate a salary, benefits, or distributions. CP 817. Steve is a non-voting member of AJP. CP 493, 498. Deaton declared that while Steve does have a ten (10) percent interest in AJP, his interest can only be realized by sale of one of the AJP restaurants. CP 817, 823. Steve has no say in the decision to sell any of the restaurants. CP 817. Steve has a five (5) percent share in the profit or loss of AJP. CP 817.

Deaton declared that Steve's salary, drawn from AJP in 2011 and 2012 property followed the Service Agreement. CP 828. Steve received \$85,000.00 as a guaranteed payment in 2011. CP 493, 495. Steve received \$100,000.00 as a guaranteed payment in 2012. CP 495. Steve's equity balance at December 31, 2011 was \$33,188.00. CP 495. Deaton declared under penalty of perjury that he saw, "nothing unusual in [Steve's] history of salary and owner draws." CP 828. He further declared:

Shantel's "claim that Steve's compensation doubled and in some months tripled after March 2014 demonstrates a lack of understanding of the difference between Steve's salary and his draw." AJP's Service Agreement, dated July 2010 provides Steve a salary of \$85,000.00 per year and five (5) percent net cash flow (after capital expenditures and debt service). Steve's salary was increased to \$105,000 (\$8,750 per month) in 2012 when AJP stopped providing a car to Steve. Steve's salary from April 1, 2012 to October 1, 2015 was \$8,750.00 per month. As a result of Steve's draws against his five (5) percent share of the company results in a (negative) amount of (\$126,695.00) as of December 31, 2014. These deficit capital accounts will be carried forward and will likely reduce future distributions until such time as the deficit capital balances are eliminated. All Steve's draws have complied with the LLC and Services Agreement and have been proportional to his ownership interest. CP 828.

G. NHG

After the Court analyzed NHG under Shantel's argument, it explicitly ruled that there was no "undivided⁹, undisclosed property."¹⁰ CP 1029. The Court then found Shantel did not show by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation as to warrant vacating the CR 2A and including a revalued NHG. CP 1029-1035.

Shantel argued that NHG was not disclosed. The CR 2A states under fifteen (15), "any undisclosed property shall remain 50 % each to the parties as tenants in common and may be brought back to the Court. Prevailing party entitled to attorney fees and costs on court ruling." CP 3. Shantel

⁹ If this Court were to find any deficiencies with the Decree and/or the CR 2A not specifically making mention to NHG, even though it was acknowledged as being valued and agreed to in the CR 2A as being Steve's after separation acquisition, it could have been an error for the Trial Court to have granted a Motion to Vacate. *In re Marriage of Tang*, 57 Wn. App. 648 (1990). In *Tang*, the Court of Appeals reversed the trial Court's decision to grant a CR 60 Motion for failure to include property in a property settlement agreement: "Because the property is not listed in any of the documents, the Court does not have assurance that the (1) parties had in fact disclosed all of the property to each other...and (2) have assurance that the parties had enough knowledge of their property to meaningfully make the recital that 'both parties deem this agreement eminently fair and equitable...'" *Id.* 651. While the *Tang* case is factually distinguishable from ours because there is evidence both parties had knowledge of NHG, its value as of the December 31, 2012 evaluation date, and agreed that assets acquired after the separation date in 2011 were separate, the legal principles of the case could still apply. The Court of Appeals in *Tang* found that the failure to dispose of the property in the CR 2A and Decree would be an error of law, which may not be corrected by a motion pursuant to CR 60(b). *Id.* At 654, 656.

¹⁰ Court - Shantel primarily addresses her ownership rights in NHG through her Motion to Enforce the Undisclosed Profit Provision of the CR 2A, it should be noted that NHG was not undisclosed, but rather, Shantel is now disputing the accuracy, from my perspective, of Mr. Deaton's evaluation of NHG that was disclosed to her prior to her signing the CR 2A Agreement. Therefore any relief related to NHG would only be appropriate under the Motion to Vacate the CR 2A. RP 8.

jointly hired Deaton in 2012 to evaluate NHG. CP 816. Shantel received the valuation prior to signing the CR 2A and Decree. CP 622.

On the CR 2A, directly after the date of separation on October 23, 2011, is typed "Unless specified otherwise herein, each will keep his/her post separation acquisitions." CP 2. Two months after Shantel and Steve separated, Chopra and Steve purchased one restaurant under NHG in December 2011. CP 2, 837. The restaurant opened on December 17, 2012. CP 488. At the time of the Dissolution, there was only one restaurant owned under NHG. CP 488. Nine (9) months after the dissolution, in September 2014, NHG opened another restaurant. NHG also opened another restaurant in 2014, but Steve did not become a part of it until January 2015. Shantel claims she is entitled to profits from both restaurants that NHG opened – after the dissolution:

"as planned a second store in NHG opened during 2014, and like all the others, has stable cash flow. This asset paid a regular profit income of \$31,667.00 in distributions in 2014 and I claim therefore profits undivided for 2014 as well – 3 years at \$31,000.00 = \$93,000.00 -- \$46,500." CP 740.

The restaurant from 2012 was valued by Deaton. CP 488-489. Deaton issued a Valuation Calculation for NHG on July 10, 2013. CP 488. The restaurant had an operating loss for the year ending December 31, 2012. CP 488. NHG was in debt of approximately

\$400,000.00. CP 488. There was no equity. CP 488. Steve has a ten (10) percent interest in the equity and earnings/distributions. Deaton's opinion was that, "with no current equity and no historical earnings, it is likely Steve's ten (10) percent interest has little or no current value." CP 488. Steve had no decision making powers as a 10 percent shareholder. CP 488.

In making its ruling, the Court relied on *Maddix* and the fact that Mr. Deaton was commissioned by both parties to conduct the business valuations of AJP and NHG on December 31, 2012. CP 1031. The Court found that Shantel was, "afforded sufficient notice that Mr. Deaton's valuation of NHG was almost a year old when she entered into the CR 2A." RP 9. "She submitted no evidence that she sought an alternative valuation for NHG before signing the CR 2A, and operating funds in a bank account and a distribution to Steve at the end of 2013, which was after the CR 2A was signed, no not demonstrate that Mr. Deaton's finding of NHG being in the red for 2012, at least so to speak, was a product of fraud or misrepresentation." CP 1031-1032.

H. \$300,000.00 LOANS

Shantel argued Chopra's loans to Steve were sham. "This bank account was only discovered because it appeared on one of the transfers to [Steve] because the transfers were, in a sense, laundered

through Chopra's account." March 11, 2016 Transcript, 49. She argued the \$300,000.00 in both motions: "I would just like to mention on the vacate matter, the fact that money was hidden, in addition to being nondisclosed under the decree unenforceable, it is a fraud." Id. At 27. She claimed she was entitled to fifty (50) percent of \$300,000.00 in purported loans from Chopra to Steve, which she argued were a means of returning Steve's undisclosed profits. CP 1024-1025.

Shantel never deposed Chopra.

Court – but [Shantel] was aware of [Steve's] relationship with Chopra during the course of the negotiations and whatnot, correct?

She was aware and she suspected there were hidden assets, but the only thing she could put in the CR 2A was if something isn't disclosed, I get 50 percent, because he said, hey, I'm disclosing everything.'

Court – why not run to the ground – if you have a suspicion, then why not run that to ground before you sign the CR 2A?

...

Court – or go to trial and subpoena everybody...

Id. At 49.

Chopra declared under penalty of perjury that he gave Steve four (4) separate loans: (1) \$13,500.00 in December 2011, which he paid back in cash six (6) months later; (2) \$25,000.00 on July 2013, which he paid back when he received his portion of the AJP business distribution; Deaton's November 18, 2015 letter – Steve provided a copy of the \$25,000.00 check from AJP dated July 22, 2013 and a copy of his personal check to AJP dated

December 17, 2013 in repayment of the loan.¹¹ (3) \$190,000.00 on November 2013 for his settlement payment to Shantel per the Decree. CP 837-838. Steve wrote Shantel a check for \$190,000.00 on October 24, 2013. This personal loan from Chopra to Steve is still outstanding; (4) \$110,000 in February 2014 for a down payment for Steve's house; This personal loan is still outstanding. CP 837-838.

On March 11, 2016, the Court heard one (1) hour thirty (30) minutes of additional arguments concerning the Motion to Vacate:

"We're going to prove today, and we presented great deal of evidence, that [Steve] concealed about \$335,000.00 of community assets prior to the divorce that was never divided therefore in the divorce proceeding." Page 4 of 55. "So when Shantel is claiming \$300,000.00 from AJP, she also has a basis from the NHG account to claim the \$2,000.00, plus the three \$31,000.00 distributions or, or approximately another \$100,000.00. That's where she gets to the total of \$400,000.00 that was never disclosed or divided, and her request for fifty (50) percent of that amount, which is \$200,000.00.

Court – are you saying that [Steve] did not fully respond to what I presume would have been interrogatories about what his holdings were? March 11, 2016 Transcript, 17.

In its oral decision of April 22, 2016, the Court walks through Shantel's argument, "She raises two arguments in support of the proposition [that the \$300,000.00 were not loans from Chopra, but were undisclosed

¹¹ Shantel said Steve used his bonus to pay back a community debt of \$25,000.00 to Chopra. Steve declared, "In actuality, this \$25,000.00 was used to pay back a short-term loan taken from AJP to get me through the final push of the divorce. This was not a profit distribution, but a loan. Because this was through the company, I did sign a loan document. It was all done above board and disclosed to Deaton during the valuation process." CP.

profits 'secreted' away during the dissolution and returned as a means of giving him those undisclosed profits]"

- (1) two year's worth of Chopra's \$70,000.00 monthly payments totaling \$1,680,000.00 plus \$460,000.00 in what she refers to as exceptional amounts received by Chopra, divided by 10, ostensibly, because Chopra's monthly payments were \$70,000.00 each and Steve's monthly payments were \$7,000.00 each, at least before being discontinued, plus added to that is another \$80,000.00 and this equals \$294,000.00, which is close to the figure of \$300,000.00. CP 1025.

...neither Shantel's exhibit, the oral argument presented, nor the pleadings, actually explain, at least to the Court's satisfaction, where the \$460,000.00 and the \$80,000.00 figures come from. Shantel made it clear in both her declaration and in oral argument that her position was Chopra received at least \$700,000.00 to \$800,000.00 more than he should have in 2012 alone. But Shantel has not explained why Steve was entitled to only ten (10) percent of this \$460,000.00, plus another \$80,000.00, but 100 percent of the remaining exceptional amounts that Chopra received legitimately belonged to him. In other words, why did \$700,000.00 minus \$460,000.00 equal \$240,000.00 of these exceptional amounts belong solely to Chopra, but Steve was still entitled to ten (10) percent of the \$460,000.00. CP 1025-1026.

Steve responded that the additional amounts Chopra received during 2012, 2013, and the first part of 2014 were to repay a 2.2 million dollar loan Chopra made to AJP to help finance the purchase of additional fast food restaurants.¹² The additional amounts paid to Chopra were not income, but, rather, a repayment of his loan to the business. CP 1026.

Deaton's report acknowledged AJP purchased 26 additional restaurants on April 4, 2012 in the amount of 16 million. It cannot be said with a high degree of probability that this pattern of extra money going to Chopra and no distribution going to Steve was necessarily the result of Steve hiding community profits versus AJP repaying Chopra's loan. CP 1026-1027.

¹² Shantel argues in her Appellate brief that "during all of 2012 and 2013, Chopra received disbursements above his usual salary from the business totaling \$2,414,271.00, but the community received no regular distribution." Citing – see chart, CP 212-216 and CP 240-288." Next, she argues that the \$300,000.00 came without any explanation. There is no loan, no loan documents, and no payments. \$300,000.00 is not exactly 10 % of the distribution taken by Chopra...[but] it is in the financial neighborhood to equal the community profits that the husband had not taken." Brief, 13.

- (2) Deaton's report mentions a 2012 profit distribution of \$3,331,500.00 to the AJP owners and Shantel claims Steve is entitled to five (5) percent - \$165,000.00 of that under the terms of his service agreement with AJP. She then argues the business was consistent in generating cash flow in 2011, 2012, and 2013 so Steve would have again been entitled to approximately \$165,000.00 in 2013, thereby, entitling him to combined undisclosed profits for 2012 and 2013 in the amount of roughly \$300,00.00. CP 1027.

In response to this argument, it is not clear from the evidence that the 3 million distribution is the same profit distribution to which Steve was entitled under his agreement with AJP. On page 4 of Deaton's report, in summarizing the service agreement between Steve and Chopra, it specifically states, "instead of the distributions that Steve provided for in Section 6.2(a) of the LLC Agreement, Steve shall be entitled to receive 5 percent of the net cash flow of the company."... Shantel's calculations from Steve's profit distribution in 2013 is simply done by taking the 2012 figure and essentially doubling it. Shantel argues that the document she has shown the Court demonstrates Steve's business consistently generated cash flows in 2011, 2012, and 2013, thereby supporting her proposition that Steve was entitled to approximately the same profit distribution in 2012. However, Shantel does not cite to any specific documents or figures for her presumptive 2013 profit distributions, so that the 2012 value that makes up her roughly half the \$300,000.00 figure from Steve's total profit distribution cannot be verified. CP 1027-1028.

Next, Deaton's report specifically lists Steve's 2012 profit distribution as \$24,373.00. Deaton's declaration also reports an identical value for 2012 in the table that summarizes AJP's 1065 partnership task form. Now my understanding is that a Form 1065 is where partnerships file an information return to report their income, gains, losses, deductions, credits, etc. ...it does not appear that Shantel has submitted any financial documentation that specified exactly what profit distributions Steve was entitled to or any documentation that Steve claimed these additional loan amounts as income. Examples of that would be Steve's tax return for 2013 and 2014. CP 1028-1029.

I. DEBT DISTRIBUTION

Shantel argued that, "[A]lthough he paid the credit accounts listed in the CR 2A...there are not any payments to those accounts made after July 2014; they were paid in full 6 months after the decree was

signed. CP 868. The Court found the only evidence Shantel offered to support her argument that Steve was not personally liable for the debt was..."the only evidence Shantel has offered for the proposition is an inability to find payments to Steve's debt obligation in his subpoenaed bank statements.:" CP 1032-1033.

Shantel has not pointed to any specific documentation or evidence that a party other than Steve would ultimately been liable for these debts in the event they were not paid."¹³ CP 1032. "Additionally, the answers to Shantel's 2012 Interrogatories No.'s 14, 17, 23, 24, and Requests for Production No.'s 28 and 29 indicate she had sufficient notice of the amount and sources of debt being claimed by Steve. CP 1032. Therefore, absent any evidence Steve claimed debt that was not his own, it was incumbent upon Shantel under the *Maddix* criteria to resolve her disagreement with the amount Steve said he owed before she signed the CR 2A." CP 1032. I don't believe that she has shown by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation so as to warrant that portion of the CR 2A agreement being vacated. CP 1033.

LEXUS

Shantel filed a document with the Court with a handwritten sticky note on it saying, "letter came after mediation to show Lexus was not in

¹³ Court – so what you're saying is since there's no evidence that he paid on these debts, and the allocation of assets and debts was predicated on the notion that he would be taking these debts, that they were sort of sham debts with a view towards increasing his side of the balance sheet.

Shantel – and my expression is sham debts, exactly, I think I used that in my pleadings.

...
Court – Let's take the United card, what proof do you have that [Steve] knew that this United card was a sham debt and somebody else was going to pay the credit card bill for him?

Shantel - ...I'm left with the fact that there weren't debt disclosures. I didn't find any credit card disclosures prior to the dissolution...."

...
Court - ...in the absence of payment necessarily absence of debt?" March 11, 2016 Transcript, 28-30.

debt, but used as collateral for purchase of a Jeep Wrangler in 2012.” CP

422. Shantel’s asserts that the:

“Loan papers show the pay-off of the lien on the title of the Lexis was for a loan to purchase the jeep for the daughter.” CP 422-424, Appellant Brief, page 17.

CP 422-424 does not house any “loan papers.” CP 422-424. CP 422 is a document sent from USAA to Steve on March 18, 2014 regarding the Lexus and states, “the lien on the collateral described above has been satisfied.”

CP 422. CP 423 is a Title for the Jeep. CP 423. CP 424 is a document sent from USAA to Steve on June 19, 2013 regarding a name change on the Jeep.

CP 424. Shantel did not file any loan papers.

Chopra sold Steve his 2009 Lexus LS 460L for \$32,000.00, paid by wire from USAA Bank. CP 839. Steve declared that the Lexus was not collateral for their daughter’s Jeep; “The Lexus had a loan on it for \$32,000.00 and the Jeep had a loan on it for around \$25,000.00” CP 829.

Deaton Declared:

Steve had been provided a company car by AJP as part of his compensation agreement. This is the Lexus LS460L. Steve purchased the automobile from the Company and paid off the related debt. As a result, now that he is covering the cost of his auto, his salary was increased from \$85,000.00 to \$105,000. Item (g). CP 829.

J. ATTORNEYS FEES

The signed CR 2A explicitly houses two attorney’s fees provision in the event of a disagreement or conflict in the terms of the agreement or

any omission or need for clarification of the documents prepared or for any undisclosed property. CP 3. Under both provisions, the prevailing party is entitled to costs and attorney fees. CP 3. The Court found Steve was the prevailing party in regards to every motion Shantel has brought to Court since the dissolution, three years ago. The Court awarded Steve attorney fees and costs based on two explicit provisions under the CR2A as the prevailing party. RP 15. Shantel requested \$50,000.00 in attorney fees.¹⁴

Court - Well, okay, segregation -

John Miller - How do you segregate, you've seen all the pleadings?

Court - you don't have to ask me that question, I've been asking myself that question for about the last 72 hours as I slog through this case. RP 11.

...

Court - There was a CR 2A. The CR 2A agreement was inextricably tied to the other issues raised here. And what made this so laborious for everyone involved was that it was, and they are, inextricably tied. RP 15. I had an extern who's getting an MBA in finance in addition to his law degree who spent over 20 hours just trying to figure this out. RP 15. And I spent probably, roughly, another eight to ten hours with him trying to figure it out, part of which he spent trying to teach me what was going on because of all the business nuances here. RP 15. But at the end of the day, [Shantel] entered into an agreement in which she was agreeing...to that the prevailing party would get their reasonable attorney fees. RP 15. And the complexity of this task was significant. RP 15.

The Court found Steve was the prevailing party and the fees were intermingled. John Miller had an associate, who is a licensed attorney that

¹⁴ In Shantel's Declaration, dated January 8, 2016, she requests undisclosed property be divided and declares she "has the right under the decree to my attorney's fees for the need to prove the undisclosed property," and argues she also has the right to attorney's fees because of Steve's "intransigence." Further, she declared that "I insisted that our CR2A provide that undisclosed assets would be divided 50-50 plus attorney's fees to the person who had to go to Court." In January 2016, Shantel listed her attorney's fees as \$35,840.16 ("I should not have to continue to bear the financial burden when Steve has a greater ability to pay and when it is likely that I have a meritorious action for which I will be awarded fees. I ask for the total attorney's fees to date: \$35,840.16." In addition, Shantel asked that, "if this matter is not resolved by Motion, then I also ask for \$20,000.00 for attorney's fees and for the funds needed for further financial discovery, and depositions." CP 877.

works part time for him do work on the case; On the bill \$4,425.00 was not for “research,” it was for reviewing the record and drafting responses; specifically, it was listed as “review of file, research on attorney fees and motion to vacate, response motion to reconsider, memo, brief [work performed from March 1 – June 22, 2016”]. CP 1001, 1077, RP 17.

The Judge did not award fees for issues that went before the Commissioner, which were \$3,325 because “[Judge] sent these ancillary issues down [to the Commissioner], not the bulk of the case.” RP 18.

IV. ARGUMENT

- 1. The Trial Court Did Not have to Interpret the CR 2A to Assign a Debt to Shantel Because it was Clear and Unambiguous on its Face. Shantel Signed the CR 2A and the Decree, Which Both Explicitly Award the 2nd Mortgage to Her.**

Shantel refused to pay the 2nd mortgage, despite signing the Decree that awarded it to her. Steve paid the 2nd mortgage. In support of her argument, Shantel claimed that while her lawyer may have initialed the CR 2A line that housed the 2nd mortgage, she did not authorize it. There was no argument ever presented on how that argument withstood the fact that the Decree, signed after the CR 2A, which incorporated the CR 2A was signed by her and her attorney and awarded her the 2nd mortgage.

Shantel cannot have it both ways without facing the other side of the sword – if the Commissioner ruled (Order drafted by her attorney) that the

2nd mortgage was her debt and she was obliged to pay it, and she did not agree, her remedy for seeking review of that decision would have been through a Motion to Revise. Shantel did not file a Motion to Revise. If she wants to appeal this issue under the Judge's ruling (again Order drafted by her attorney), then she must acknowledge that she did in fact argue this issue under both Motions, thus entitling Steve to unsegregated/intertwined attorney fees.

2. The Trial Court Properly Ruled There was No Evidence, Let Alone any Convincing Evidence that Would Warrant Vacating Any Portions of the Three (3) Year Old Decree.

The Court correctly ruled that Shantel had not shown by clear and convincing evidence that Steve committed fraud or misrepresented information regarding AJP, NHG, or the alleged sham debt. Vacation is an extraordinary remedy. *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). The Court of Appeals reviews Motions to Vacate under CR 60(b)(4) for an abuse of discretion. *Id.* A reviewing Court will uphold the trial Court's discretionary decision unless the moving party proves by clear and convincing evidence that fraud or misrepresentation existed in obtaining the divorce decree. *Id.*

To successfully vacate the Decree, which incorporates the CR2A, Shantel would have had to show by clear and convincing evidence that the settlement agreement was procured by Steve's fraud

or misrepresentation. If insufficient evidence was presented, the Court has no choice, but to deny the Motion. That is exactly what happened. Shantel presented no evidence of fraud or misrepresentation and the Court ruled there was no evidence of fraud or misrepresentation. Appropriately, the Court denied the Motion.

a. 2nd mortgage

The CR 2A, on its face and the Decree both awarded Shantel the 2nd mortgage. Shantel signed the CR 2A and the Decree and none of her arguments ever reconcile her assertions that her initial was not on the CR 2A and thus someone frauded her with the facts that her signature appears on both documents. The bottom line is she signed the Decree, drafted by her attorney, which was clear on its face.

Shantel produced no argument or evidence that would allow a Court to vacate the 2nd mortgage portion (aka “sham debt #2”). What was produced as evidence is signatures. Shantel signed the CR 2A. Shantel signed the Decree that incorporated the CR 2A. Notwithstanding those two facts, explicitly written in the Decree was:

“Liabilities to be paid by [Shantel] – Wife shall be responsible for...the 1st and 2nd mortgages on the family home awarded to her.”

The Court could not have erred as a matter of law because Shantel agreed to pay the 2nd mortgage. Buyers remorse is not cause for the Court

to vacate the debt, nor cause for the Court to clarify (argued above) or provide some equitable remedy that awards the 2nd mortgage to Steve.

b. AJP Value

The Court ruled Shantel has not shown by clear, cogent, and convincing evidence that Mr. Wazny committed fraud or misrepresentation so as to warrant vacating the portion of the CR2A Agreement. Shantel argued AJP under both Motions. She claimed she was entitled to one-half of \$300,000.00 because Steve allegedly “hid, through fraud or misrepresentation, \$300,000.00 in community income, profits, distributions that remain undivided. She also claimed the loans from Mr. Wazny’s business partner to Mr. Wazny was a means of returning Mr. Wazny’s undisclosed profits, of which Shantel was entitled to 50 percent. The evidence presented showed CPA Deaton’s report lists profit distributions for AJP in 2012 as \$24,375.

Shantel argued in her Appellate brief that “during all of 2012 and 2013, Chopra received disbursements above his usual salary from the business totaling \$2,414,271.00, but the community received no regular distribution.” Citing – see chart, CP 212-216 and CP 240-288.” Next, she argues that the \$300,000.00 came without any explanation. There is no loan, no loan documents, and no payments. \$300,000.00 is not exactly 10

% of the distribution taken by Chopra...[but] it is in the financial neighborhood to equal the community profits that the husband had not taken.” Brief, 13. Steve and Deaton:

Steve responded that the additional amounts Chopra received during 2012, 2013, and the first part of 2014 were to repay a 2.2 million dollar loan Chopra made to AJP to help finance the purchase of additional fast food restaurants.¹⁵ The additional amounts paid to Chopra were not income, but, rather, a repayment of his loan to the business.

Deaton’s report acknowledged AJP purchased 26 additional restaurants on April 4, 2012 in the amount of 16 million. It cannot be said with a high degree of probability that this pattern of extra money going to Chopra and no distribution going to Steve was necessarily the result of Steve hiding community profits versus AJP repaying Chopra’s loan. Page 5 of 21.

The onus was on Shantel to provide evidence of fraud, omission, misrepresentation, etc. As she is not in a position to decipher business financials, and as she cannot assert as fact or give a professional opinion, it was on her to amass information that would show some wrongdoing; she did not do this. The only professional opinion here, compiled by someone jointly hired by her and Steve explained, prior to her filing any Motions with the Court that her opinions were wrong and she just did not understand the business aspect of what was occurring. Shantel argued Chopra used his

¹⁵ Shantel argues in her Appellate brief that “during all of 2012 and 2013, Chopra received disbursements above his usual salary from the business totaling \$2,414,271.00, but the community received no regular distribution.” Citing – see chart, CP 212-216 and CP 240-288.” Next, she argues that the \$300,000.00 came without any explanation. There is no loan, no loan documents, and no payments. \$300,000.00 is not exactly 10 % of the distribution taken by Chopra...[but] it is in the financial neighborhood to equal the community profits that the husband had not taken.” Brief, 13.

personal bank account to launder Steve's hidden profits and she only found the account post dissolution because it was hidden. Finding Chopra's personal bank account only adds weight to the fact that the money given to Steve was a personal loan from Chopra. To even dance around an idea that Chopra would put his close to 20 million dollar businesses in jeopardy by participating in shady and illegal acts is absurd.

Shantel also argued that Chopra received more money than Steve during a period of time and that shows a pattern of concealing money, but Chopra invested more money in the businesses than Steve – by 2.1 million dollars. Deaton's report acknowledged AJP purchased 26 additional restaurants on April 4, 2012 in the amount of 16 million and opined that:

It cannot be said with a high degree of probability that this pattern of extra money going to Chopra and no distribution going to Steve was necessarily the result of Steve hiding community profits versus AJP repaying Chopra's loan. CITE.

The Court correctly relied on *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985) in determining, In *Maddix*, the Court of Appeals gave the trial Court instruction that based on the rule of full disclosure, if the evidence proved the ex-wife had either knowledge of the true value of the business or sufficient notice to protect her interests prior to the entry of the decree, she bore the burden to look more closely into the books before finalizing the Decree. *Id.* 253. Just as the wife in the *Maddix* case had sufficient notice, Shantel also had sufficient notice to

protect her interests prior to the entry of the Decree, and it was her burden to look more closely into the books before finalizing the Decree.

c. The Trial Court Correctly Ruled Shantel Did Not Provide Any Evidence That Would Permit it to Vacate the Debt Portion of the CR 2A and Decree.

The Court ruled Shantel only showed absence of payments as her offers of proof. I don't believe that she has shown by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation so as to warrant that portion of the CR 2A agreement being vacated. RP 11. Shantel had three years and every opportunity to depose people and hire forensic evaluators if she did not agree with what Deaton opined in an effort to offer some evidence of wrongdoing. Having offered no evidence, the Court found Shantel had sufficient notice of the amount and sources of debt, based party off of "the answers to Shantel's 2012 Interrogatories No.'s 14, 17, 23, 24, and Requests for Production No.'s 28 and 29, " and under *Maddix*, she needed to resolve her disagreement with the amount Steve said he owed before she signed the CR 2A." RP 10.

Shantel also claims Steve's debt was "sham debt," because he was not personally liable for it. Yet, his business partner signed an affidavit under oath that denies this. Shantel relies on *Sedgwick*... unlike in *Sedgwick*, this is not the case where he transferred all his property to his business partner to avoid it coming back to Shantel - he took a

loan to pay Shantel what was due on the dissolution and that is exactly what he did - he paid Shantel \$190,000.00 (plus \$10,000.00 + \$50,000.00). That \$190,000.00 claimed to be undistributed profits can be tracked right into her bank account. Nothing Mr. Wazny did shows he placed anything beyond Shantel's reach - he used the loan to pay off Shantel.

The Court stated that "the only evidence Shantel has offered for the proposition is an inability to find payments to Mr. Wazny's debt obligation in his subpoenaed bank statements." The Court found that the "... answers indicate she had sufficient notice of the amount and sources of debt being claimed by Steve." Therefore, absent any evidence Steve claimed debt that was not his own, it was incumbent upon Shantel under the *Maddix* criteria to resolve her disagreement with the amount Steve said he owed before she signed the CR2A Agreement." Court "I don't believe that she has shown by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation to warrant that portion of the CR2A Agreement being vacated."

d. The Trial Court Correctly Found that NHG was Not Undisclosed, and it Properly Found there Was No Evidence to Support Vacating the CR 2A or the Decree.

Shantel argues that the Court erred in not awarding her a community interest in what she claimed was an undisclosed NHG. While it may be true

that NHG was not included in the Decree, it was valued in the negative and discussed at length prior to the settlement. The CR 2A also provided that after separation date of 2011, all assets acquired went to the party that acquired them. The Court properly found that Shantel knew of NHG and its value. It may have been a different case if NHG had not been evaluated, if Steve did not tell Shantel of the purchase, if Shantel did not have the documents prior to the settlement and Decree, if the value of the business wasn't negative \$400,000.00, if the settlement had not explicitly stated acquisitions after separation go to each respective party.

Shantel also asserts she was entitled to a split of profits from two restaurants Steve acquired post dissolution in 2014 and 2015. Shantel makes no argument backing up her assertion and cites no case law that would entitle her to a split of any profit from assets that were acquired after she was divorced.

Shantel also argued that Steve misrepresented NHG as having no value to Mr. Deaton, thereby depriving her of 50 percent of the true business value to which she was entitled. She further argued that NHG was not worthless because it had money in its bank account and Mr. Wazny received a distribution in December of 2013. The Court found that, "Shantel has not established that the funds in question were community property of which she was entitled to 50 percent under the

CR2A Agreement." Further, Deaton said she did not understand the business – before she ever filed any motions.

Citing *Maddix*, the Court ruled Shantel had not shown by clear, cogent, and convincing evidence that Steve committed fraud or misrepresentation to warrant vacating the CR2A or revaluing NHG because she had knowledge of the true value of the business or at least sufficient notice to protect her interest prior to the entry of the final decree:

Operating funds in a bank account and a distribution to Mr. Wazny at the end of 2013, which was after the CR2A was signed, do not demonstrate that Mr. Deaton's finding of NHG being in the red for 2012, at least so to speak, was a product of fraud or misrepresentation. At time of the report... operating loss at the end of 2012, and had \$400,000.00 in debt. I don't believe that Shantel has shown by clear, cogent, and convincing evidence that Mr. Wazny committed fraud or misrepresentation as to warrant vacating the CR2A Agreement and including a revalued NHG.

- 3. This Court used the correct evidentiary standard under CR60(b)(4), which is clear and convincing evidence of fraud or misrepresentation; The Trial Court Correctly Found that the UFTA Does Not Apply.**

As if her attempt at the trial level was not enough, she also brought this assertion to the appellate Court, yet offered not one case or argument that is cited to why any court should extend the law to a spouse in a

dissolution action. Her arguments to both Courts under the UFTA are frivolous and should entitle Steve to attorney fees.¹⁶

Shantel now brings to the Appellate level an argument she first brought in Motion for Reconsideration, "dissolution cases are analyzed under the standards set by the UFTA;" however, she cites to no case law that stands for this rule, and further the case she cites is inapplicable.

Shantel argues that the Court erroneously used the wrong evidentiary standard and it should use the "correct evidentiary standards to its factual findings as to fraud per the Uniform Fraudulent Transfer Act." Yet, Shantel does not explicitly inform the Court what standard it should have used or why the UFTA applies to this case. This Court used the appropriate standard under CR60(b)(4) - Shantel had to provide evidence that was clear and convincing that Steve committed fraud or misrepresentation. Shantel did not meet her burden.

Further; in dicta, the division two Court of Appeals noted in a 2008 case, *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008), "... we do not address whether a spouse in a dissolution action may also be a claimant under the UFTA." A Motion for Reconsideration is not the appropriate forum to argue that dicta in a case should be

¹⁶ RAP 18.9(a) ("The Appellate Court on its own initiative or on Motion of a party may order a party or counsel, who...files a frivolous appeal to pay terms...").

extended as the rule of law in another matter. If Shantel wanted the Court of Appeals to extend the law to spouses in dissolution actions, she should have provided briefing. None was provided.

Shantel mistakes the proper lens the Court is to review its prior decision and for the first time in her Motion for Reconsideration argued the Court should use the Uniform Fraudulent Transfer Act [UFTA] and a different burden in order to reach a different decision. Shantel misplaces her reliance on *Sedgwick v. Gwinn*, 73 Wn. App 879, 873 P.2d 528 (1994) to make this argument. A Motion for Reconsideration was not the appropriate place to introduce a UFTA claim.

In the *Sedgwick case*, the transfer at issue occurred after the parties dissolved the marriage during a post dissolution modification of the parenting plan. The ex-husband had assigned his interest in real estate to his parents to secure a loan because the litigation from the divorce and post-dissolution modification was wiping out his liquid cash flow. CITE. The trial Court granted a partial summary judgment. finding that the ex-husband had fraudulently transferred his interest. The ex-husband appealed, asserting that genuine issues of material fact existed in regards to the actual intent to defraud or constructive fraud under the UFTA. The Court of Appeals agreed and reversed.

Sedgwick does not control our case as it is factually and procedurally vastly different. *Sedgwick* was appealed after the Court granted a motion for partial summary judgment, not a motion to vacate under CR 60(b)(4). Shantel's argument that she has at minimum shown a genuine issue of material fact, therefore, the matter must be set for a hearing" is wrong. This case was not decided at the summary judgment level, this case was decided because of Shantel failing to overcome her burden of proof in providing any evidence of fraud or misrepresentation.

The good faith argument Shantel has attempted to assert does not apply to this case or any alleged transaction; the good faith principle is something that applies to a transaction between spouses. For example, Chopra could have asserted the principle for any transaction between Shantel and Steve, but Shantel cannot argue it applies between Steve and Chopra. See RCW 26.16.210 ("In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.") It would be the burden of the marital community to prove the good faith of any suspect conveyance.

4. This Court Found that the “Case Does Fall Within the Context of the CR2A and that the Attorney’s Fees Provision Does Apply.” Since Steve is the Prevailing Party, This Court Should Affirm the Trial Court’s Award of Attorney’s Fees and Award Him Fees for This Appeal.

Labeling an issue under something in an attempt to bring it outside or inside the realm of automatic attorney fees for the prevailing party, but still arguing it as if were under a different provision is not ingenuous. Shantel knew exactly what she was getting into when she filed numerous Motions and Declarations arguing under separate theories and mixing the arguments, three years after the dissolution was finalized. Shantel knew the risk for going to Court and not being the prevailing party. Shantel knew the attorney’s fees for these issues could be over \$50,000.00.

It should not have been a surprise to Shantel that she could not prove any wrongdoing on Steve’s behalf. A professional, who has been in the business for a minimum of 27 years of doing forensic business evaluations told her and her attorney prior to any motions being brought to Court that in his professional opinion there was no wrongdoing. Shantel knew, prior to bringing any motions that Deaton, the forensic business evaluator, hired jointly by both parties had the opinion that the settlement should not be reopened, there was nothing hidden or undisclosed, and she misunderstood the business. Shantel knew, based off her agreement and contract with Steve that the prevailing party would be entitled to attorney’s fees as a

matter of contract law; however, she expected the prevailing party to be her, not Steve. The fact that she was wrong in predicting who would be the prevailing party does not negate the fact that Steve is entitled to his attorney's fees for defending these actions in which the Court found that there was **"no undivided, undisclosed property."**

A. Attorney Fees Under the CR 2A and Intermingled Issues

On September 4th, 2013, Shantel and Steve entered a CR2A Agreement. The CR2A was incorporated into the Divorce Decree on November 21, 2013. The CR2A is a binding contractual agreement.¹⁷ The Waznys set out two provisions for the award of attorney's fees in the CR2A, both of which are for the prevailing party. One provision was for "any undisclosed property." The second provision was for "any disagreement or conflict of the terms of the agreement" or for "any omission or need for clarification." Shantel argued that there was undisclosed property, she was not the party responsible for paying the 2nd mortgage, and both businesses had undisclosed assets she was entitled to. The Court found that there was no undisclosed property, that Shantel was responsible for paying the 2nd

¹⁷ Under RCW 4.84.330, where a contract includes a provision that attorney's fees and costs incurred to enforce the contract shall be awarded, the prevailing party is entitled to reasonable attorney's fees and costs. See also 4.84.030. Costs include reasonable expenses incurred in obtaining reports and records such as tax records, personnel records, and bank records. RCW 4.84.010(5). Under RCW 4.84.185, the prevailing party is entitled to receive expenses for opposing frivolous actions.

mortgage, and there were no undisclosed assets. Every argument, no matter how it has been labeled brings the issues in the square context of the CR2A Agreement.

A CR 2A is subject to not being enforced, or being equitably modified, in the event of fraud. [Citation omitted]. The issue of fraud is addressed in the motion to show cause to vacate parts of the CR 2A, a separate motion accompanying this motion.

This therefore leaves the Court in a position to interpret the CR 2A and compels it as a matter of law to enforce it as originally written, that is, to order that [Steve] must pay the 2nd [mortgage] on the residence. There are numerous equitable reasons connected to the omissions, misrepresentations, and fraud, more fully briefed in the Motion to Show Cause accompanying this Motion, that fortify the appropriateness of the husband paying this debt. CITE.

The Court properly ruled that due to the arguments, complexities, and way the issues were argued, the fees fell under the CR 2A, based in part of the following (incomplete) examples of what Shantel argued throughout:

1. The Court made findings as part of its Vacate ruling, which may impact property that is also the subject of the Post Decree motion as undivided undisclosed property, as follows: (a) whether the business NHG was properly valued; (b) Whether the husband failed to disclose \$300,000 in community income that remain undivided; (c) Whether the wife is entitled to 50 percent of the undisclosed profits of the undivided business NHG for 2013, 2014, and 2015.
2. There was "no undivided, undisclosed property." Shantel' s Motions are duplicative and showcase a pattern of bad behavior that continues to have a negative impact on Steve, and is forcing him to rack up attorney's fees to which he should be reimbursed.
3. Shantel briefed the 2nd mortgage ("sham debt #2) in her Appellate Brief under the issues of vacate and enforcement. Appellate Brief, pages 14 – 15, 32-34.
4. "I would just like to mention on the vacate matter, the fact that money was hidden, in addition to being nondisclosed under the decree unenforceable, it is a fraud." March 11, 2016 Transcript, 27.

5. Shantel requests the Court clarify its ruling to limit the issues raised in the Motion to Vacate so that Shantel will be able to bring her motions regarding undisclosed and undivided property in the Post Decree Motions based upon the preponderance of the evidence:

The Court made findings as part of its Vacate ruling, which may impact property that is also, the subject of the Post Decree motion as undivided undisclosed property, as follows:

(a) whether the business NHG was properly valued; (b) Whether the husband failed to disclose \$300,000 in community income that remain undivided; (c) Whether the wife is entitled to 50 percent of the undisclosed profits of the undivided business NHG for 2013, 2014, and 2015.

The Court explicitly ruled that there was no "undivided, undisclosed property," and the only issue appropriate to go before the Commissioner was the Motion to Enforce the Decree concerning payments of the debt. CITE.

6. Shantel argued that Mr. Wazny concealed and misrepresented the profits of AJP in the amount of \$333,000 (argued in both Motions) to which she was entitled to one half (approximately \$ 166,000.00). Wife's Post-Decree Motion, page 1. Shantel also argued she was entitled to \$ 60,000 (argued in both Motions) in profits from NHG, which were undivided fraudulently because Mr. Wazny represented NHG had no value. Wife's Post-Decree Motion, page 1 ("husband knowingly and falsely misrepresented that the community asset, NHG, had no value and the asset was not divided in the decree...") ("by failing to disclose this information to the business evaluator, the husband produced a fraudulently low evaluation of the community businesses. He also knew at the time of the settlement conference in July 2013 that updated financial information would show the family business to be strongly profitable, yet he did not update the data for the most recent 6 months." Page 2 of 4 of Vacate Motion.
7. Shantel's 18 page Declaration, filed on February 17, 2016 was in support of both Motions. Cite.

In Addition to the Simple Contractual Agreement for Attorney Fees Per the CR 2A, There is Also A Showing of Intransigence that Could Provide Another Basis for Attorney Fees.

Steve is still entitled to attorney's fees under Shantel's intransigence, and bad faith. A trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

An award of attorney fees for intransigence may be granted when a party files frivolous motions, which causes the other party to incur additional legal services, regardless of financial abilities. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997). Intransigent conduct includes repeatedly filing unnecessary motions or making a trial unduly difficult with increased legal costs. *In re Marriage of Greenlee*, at 708. A Court does not exceed its authority when it awards attorney's fees if the losing party's conduct constituted bad faith. *Seals v. Seals*, 22 Wn. App. 652, 658, P.2d 1301 (1979).

Shantel filed unnecessary, duplicative motions, which caused Steve to incur a large amount of attorney's fees and costs. Steve should be awarded his reasonable fees and costs incurred. The Court found there was no undisclosed property, no hidden property, no fraud, no misrepresentation and no evidence to support those arguments. This case would be different had Shantel presented one ounce of evidence to back up any of her allegations. Shantel argued the need to clarify issues she already agreed on in attempts to skirt her obligations. The Court also found that Shantel agreed to the second mortgage. There was no need to clarify or argue she was not bound by what was explicitly housed on its face in the CR2A and decree – drafted by her attorney. There was no reason to attempt to argue that even though two separate documents contained the explicit provision

that Shantel was on the hook for the second mortgage. This was just another example of bad faith and intransigence.

B. If the Court Finds Steve Prevails at the Appellate Level, the Court Should Award Him Fees.

Not only should this Court affirm the award of Steve's attorney fees for the proceedings below under the CR 2A and RCW 4.84.330, but it should also award him fees for this appeal under RAP 18.1, and alternatively under fees for advancing a frivolous argument under 18.9(a). This case was not advanced under the dissolution statute, it was advanced under the terms set out in the CR 2A, a binding contractual agreement; there, the financial resources of the parties do not apply, nor do fees under RCW 26.09.140. RP 15. Steve should be found to prevail fully on this appeal or alternatively, substantially prevail and be entitled to attorney fees. A financial declaration filed under 18.1(c) for "financial need" should be found to not apply here. Shantel should not be awarded fees on any level for anything. She has not prevailed. She has caused needless expenses be incurred by Steve. Shantel knew before bringing her Motions that the only professional opinion on the matter believed there was no wrong doing and nothing was produced to warrant reopening the settlement agreement.

There were no undocumented fees. John Miller's associate, who is a licensed attorney, works part time; while it may be true that the billing for her chunk of work was not deduced artfully in an itemized fashion, it was documented. \$4,425.00 was not for "research," it was for reviewing the record and drafting responses; specifically, it was listed as "review of file, research on attorney fees and motion to vacate, response motion to reconsider, memo, brief [work performed from March 1 – June 22, 2016]". CP 1001, 1077, RP 17.

As a showing of segregation of the issues, the Judge did not award fees for issues that went before the Commissioner, which were \$3,325 because "[The Judge] sent these ancillary issues down [to the Commissioner], not the bulk of the case." RP 18.

V. CONCLUSION

The only thing that matters is the law and the evidence. Business matters are complicated and as lawyers or lay people we do not necessarily understand what numbers show or do not show. That is why people hire professionals – forensic business evaluators to tell us what is or is not happening. Instead of racking up over \$35,000.00 in attorney fees, a person trying to prove fraud or hidden assets ought to hire a professional evaluator. The only professional hired stated that Shantel and her attorney did not understand the complexities of the business and there was no indication of

wrongdoing, fraud, or evidence of undisclosed anything to support a basis to undo the settlement. Shantel was informed of this opinion before she filed any motion after subpoenaing over 10,000 financial documents, which accompanied the six (6) banker boxes that existed prior to the dissolution. The Court made the only decision it could make when it denied Shantel's Motion to Vacate and found there was no hidden or undisclosed assets.

The Waznys divorced three years ago, and separated five years ago, yet Shantel continues to drag Steve back to Court without providing evidence to back up her speculation and assertions. In all her attempts, Shantel has yet to come out as the prevailing party. Despite provisions for prevailing party attorney's fees, Shantel continues to argue fees should not be awarded to Steve because he does not have the need. Steve is entitled to fees under simple contract law based on the signed CR2A and/or in the alternative, based on intransigence and bad faith. Shantel knew the risk of taking this action to Court – three years after the dissolution was finalized. Shantel knew, based off her own attorney's fees and requests for those to be recovered as the prevailing party, that the attorney's fees were in the range of \$50,000.00. Steve respectfully requests this Court affirm the trial Court's rulings, affirm Steve was the prevailing party, affirm the issues were intermingled, affirm his attorney fees at the lower level, and grant attorney fees for this appeal.

Respectfully Submitted
this 22nd Day of February, 2017

A handwritten signature in black ink, appearing to read "John A. Miller", is written over a horizontal line.

John A. Miller

Attorney for Respondent
WSBA 5741

III BRANCHES LAW

February 22, 2017 - 4:31 PM

Transmittal Letter

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DECLARATION OF SERVICE

I, Lennette Natucci, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On February 22, 2017, I caused to be filed/served a true and correct copy of the foregoing: COA No. 49393-4-II Respondent Wazny's Brief by e-mail as follows:

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

<u>Original e-filed with:</u> Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA. 98402 coa2filings@courts.wa.gov	<u>Copy e-served:</u> Jean Schiedler-Brown jsbrownlaw@msn.com
<u>Copy e-served:</u>	

Dated this 22 day of February, 2017 at Fircrest, WA.


Lennette Natucci, Paralegal

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