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No. 54010-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**In Re:**

MARINA NICOLE TURNER, Respondent,

vs.

RANDOM ERIK VAUGHN, Appellant

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Pierce County Superior Court

Cause Nos. 16-3-00665-4

The Honorable Judge Kathryn J. Nelson

**Appellant's Brief**

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## ASSIGNMENTS OF ERROR

1. Judge Kathryn J. Nelson committed error in the entry of her Final Order and Findings on Motion for Default and for Contempt of Court, Order to Strike and for Attorney Fees Pursuant to CR 37. This error extended to finding of fact number 1 which found the facts set forth in the background section of the motion, pages 2-16. The court's finding number 2 that default, exclusion of testimony, exhibits, supporting or opposing claims or defenses, and striking respondent's pleadings were proper under Burnet and the least restrictive alternative before the court because the refusal to disclose financial information denied the court information needed to make a decision, as well as finding number 3, its award of \$125,000 as a fine and penalty for its finding of intransigence for discovery violations. As well as its order granting the motion.
2. Judge Kathryn J. Nelson committed error in her finding #4 where she found that Mr. Vaughn only provided bank records for those bank accounts he "chose to disclose".
3. Judge Kathryn J. Nelson committed error in her finding #6 wherein she found that Christine Morris's percentages of 60% cash and 40% credit cards and that Dani Espinda, Shelley Drury, and John Douville, all said that the cannabis industry was substantially a cash industry.
4. Judge Kathryn J. Nelson committed error in her finding #7 wherein she found that Mr. Vaughn "intentionally" never provided a cash receipts journal nor documentation of cash deposits.
5. Judge Kathryn J. Nelson committed error in her finding #8 wherein she found that Mr. Vaughn brought in at least 40% of his revenue in cash and therefore in 2014 earned \$1,344,994 in cash.
6. Judge Kathryn J. Nelson committed error in her finding #9 wherein she found that Mr. Vaughn's cannabis business brought in hundreds of thousands of dollars a month, referencing Exhibit 422.
7. Judge Kathryn J. Nelson committed error in her finding #13 that Mr. Vaughn was in constant application for medical and retail marijuana licenses from 2013 through 2016.

8. Judge Kathryn J. Nelson committed error in her finding #14 that Mr. Vaughn sold Killer Bee concentrates in his retail locations.
9. Judge Kathryn J. Nelson committed error in her finding #17 which assumed that the total credit card earnings represented 40% of Mr. Vaughn's revenue and therefore with his cash revenue his total revenue for 2015 was conservatively \$5,560,657 and again stated that he intentionally failed to keep a cash receipts journal.
10. Judge Kathryn J. Nelson committed error in her finding #18 which stated that the \$5,560,657 of income above did not include earnings from any other business of Mr. Vaughn (implying that he must have more money).
11. Judge Kathryn J. Nelson committed error in her finding #19 which stated that she took \$9140 a month by agreement and used it for personal expenses, family groceries, entertainment, transportation etc.
12. Judge Kathryn J. Nelson committed error in her finding #23 which stated that there was not a credible accounting provided for the \$1,128,600 removed from Mr. Vaughn's bank account on March 16, 2016.
13. Judge Kathryn J. Nelson committed error in her finding #30, #31, and #38 wherein the court stated that Mr. Vaughn had hundreds of thousands of dollars at his disposal but refused to pay child support, day care, and a monthly draw to Ms. Turner.
14. Judge Kathryn J. Nelson committed error in her finding #37 that the accounting for the \$1,128,600 removed from Chase Bank on March 16, 2016 false.
15. Judge Kathryn J. Nelson committed error in her finding #48 Mr. Vaughn is paying himself with unreported cash because it bank and visa records reflect little personal expenses.
16. Judge Kathryn J. Nelson committed error in findings #49 and #50 that Mr. Vaughn fails to keep books and uses LLCs to hide income to avoid paying child support, taxes and fees at the local, state and national level.

17. Judge Kathryn J. Nelson committed error in her finding #51 that Ms. Drury found Mr. Vaughn's records for Pacific Green collective "unreliable" and that he intentionally failed to provide her and Ms. Turner with all business and financial records including a cash receipts journal.
18. Judge Kathryn J. Nelson committed error in her finding #53 that Mr. Vaughn is not credible in disclaiming an ownership interest in a store in Edmonds that he is paying \$7800 a month rent for as well as payroll and other expenses.
19. Judge Kathryn J. Nelson committed error in her finding #58 that Mr. Vaughn has intentionally hidden and failed to disclose vast sums of cash and business interests.
20. Judge Kathryn J. Nelson committed error in her finding #60 that Ms. Turner introduced Mr. Vaughn to the cannabis industry for the testimony of Mr. Vaughn.
21. Judge Kathryn J. Nelson committed error in her finding #61 that Ms. Turner took substantial step to assist Mr. Vaughn in growing his cannabis business by getting a marijuana card supporting him emotionally, contributing to the relationship, and letting them use her Social Security number of bank account for credit card transactions.
22. Judge Kathryn J. Nelson committed error in her findings #62 that Ms. Turner gave up her career in Los Angeles to live with Mr. Vaughn and their child in Washington state for the sole purpose of supporting his successful cannabis business.
23. Judge Kathryn J. Nelson committed error in her conclusions #65, 66, and 67 regarding the presumption that any assets accumulated during a committed intimate relationship is presumed to be community like with rebuttal being only for assets that are traced, acquired as separate bequests or reenter profits or assets existing before the relationship; that the law does not require there to be any showing of contributions by the party not the legally named owner; and that Ms. Turner had an equitable role in the acquisition of Mr. Vaughn's assets acquired during the relationship.

24. Judge Kathryn J. Nelson committed error in her finding #68 regarding the distribution of assets that all of the marijuana business assets and expertise were gained during the relationship, that the petitioner's Social Security number and tax liability put her at risk in assisting the business, which made this community like under a CIR and the fact that children were born of the relationship.
25. Judge Kathryn J. Nelson committed error in her finding #70 that because cash was brought in the business, the tax returns, based upon the Square credit card money only must be completely discounted.
26. Judge Kathryn J. Nelson committed error in her finding #71 that respondent admitted he had not provided the information sought in discovery regarding cash receipts and bookkeeping.
27. Judge Kathryn J. Nelson committed error in her finding #73 that marijuana is primarily a cash business and that an expert by experience testified that cash compared to credit/debit cards was 60/40% and that as a result the total income in 2014 was \$2 million and in 2015 was \$5.5 million conservatively.
28. Judge Kathryn J. Nelson committed error in her finding #75 that is just and equitable for the petitioner to receive a judgment in assets totaling \$1,919,500 with no offset for any money spent by petitioner during or just after the CIR.
29. Judge Kathryn J. Nelson committed error in her finding #76 wherein it awarded to Mr. Vaughn assets which may have been spent already, that he should be responsible for all taxes incurred, that 6906 Martin and 1402 W. Reynolds be awarded to petitioner and ordered Mr. Vaughn to reimburse the petitioner for the taxes she is paying on the Square funds.
30. Judge Kathryn J. Nelson committed error in her finding #77 that sales of non-marijuana items can increase or double any sums invested.
31. Judge Kathryn J. Nelson committed error in her finding #78 that Pacific Green Collective charges a service/commission fee for marijuana sold before the grower was paid.

32. Judge Kathryn J. Nelson committed error in her finding in section 5, Separation Date, wherein she found that all businesses developed after separation were directly traceable to the committed intimate relationship and were therefore also community like property which should be divided by the court.
33. Judge Kathryn J. Nelson committed error in her finding and conclusion in section 8, Real Property, wherein it found that the division of 6909 (should be 6906) Martin Way, East and 1402 W. Reynolds in the final order was fair, (just and equitable).
34. Judge Kathryn J. Nelson committed error in her finding and conclusion in section 9, Community like Personal Property, wherein it found that the listed personal property as divided in the final order was fair, (just and equitable).
35. Judge Kathryn J. Nelson committed error in her finding and conclusion in section 11, Community like Debt, wherein she found that Mr. Vaughn in bad faith failed to disclose the community debt and that he should be responsible for the payment of all local, state, and federal taxes, fees, penalties and interest owing, including anything from the square proceeds and reimburse petitioner for any funds that she's expended towards those obligations.
36. Judge Kathryn J. Nelson committed error in her findings and conclusion in section 13, Fees and Costs, as it pertains to findings relative to failure to provide discovery.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion by imposing the harsh sanctions of granting a default, excluding testimony, exhibits, supporting or opposing claims or defenses, and striking Mr. Vaughn's pleadings for failing to update interrogatories regarding bank account statements and checks, and failing to provide updated information regarding new business involvements when the prejudice argued was that they could not value business interests that were developed after a committed intimate relationship ended and they did not have information sufficient to determine current income, when they actually knew about the business interests eight months earlier

and they failed to disclose they did not have bank statements until 11 days before trial even though they had noted a motion to compel seven months earlier and continued that motion for five months for hearing and then on the record over a month before trial stated that they only needed canceled checks and some employee information that was then provided in relevant degree on the date ordered?

2. Was it an abuse of discretion for the trial court to consider a lay witness's testimony as expert testimony by experience where there was no request to qualify the person as a lay expert and the person provided no opinion or testimony beyond the facts of what she did in her medical marijuana collective; as a result, there was insufficient evidence for the trial court to find that Mr. Vaughn had significant undisclosed cash assets based upon the testimony of one lay witness who testified that her medical marijuana collective generated 60% of its revenue from cash and 40% of its revenue from credit cards during the two years that she owned it and therefore, Mr. Vaughn's medical marijuana collective must have also brought in 60% of its revenue from cash and 40% of his revenue from credit cards?
  
3. Was it just or equitable for the court to divide assets following a committed intimate relationship to give more than every identified asset to Ms. Turner and give every identified debt to Mr. Vaughn when Mr. Vaughn developed the assets while Ms. Turner pursued her own career and her only contributions were introducing him to someone who worked in the marijuana industry which then got Mr. Vaughn interested in growing marijuana, her getting a medical marijuana card that was valid for a year so he could grow a few more plants at a time, one time she spent a small amount of time on a farm in Monroe helping to trim plants, she allowed Mr. Vaughn to run a credit card through their joint bank account using her Social Security number for a period of 17 months (15 months during the relationship and two months afterwards) while taking over \$9100 a month for herself from the credit card money coming into the joint account, and for a period of a little less than two years during the relationship she stayed at home caring for their firstborn son?

## **INTRODUCTION**

This was the second half of a bifurcated trial. The first trial was in February 2017 and dealt with the issue of whether or not there was a committed intimate relationship (CIR). The court in the first trial found that there was a CIR and that decision was affirmed by this Court on appeal.

The second trial was continued multiple times and ultimately was heard beginning on May 28, 2019. The trial dealt with two primary issues, the division of assets from the CIR and establishing Mr. Vaughn's income for purposes of child support. Although not in agreement with the Court's decision regarding child support, due to page limitations that issue is not being appealed. The Court's decision regarding division of assets was to award every identifiable asset (in some instances twice) totaling over \$1,919,500 to Ms. Turner and give Mr. Vaughn the federal and L&I tax debts and penalties totaling over \$760,523.26.

The Court did this by granting Ms. Turner's motion for default, for contempt, and for order to strike due to alleged discovery violations filed 11 days prior to trial and granted in the court's order following trial. The court ruled that in the event that this was not ultimately upheld, she then based it on 79 findings of facts which basically hinged on a lay witness's testimony that in her medical marijuana collective garden the percentages

of cash to credit card revenue was 60/40% and since the only definitive records for the CIR was from credit card records, as no cash journal was maintained, Mr. Vaughn must have a higher percentage of cash available to him than there were credit card revenues. This even though there was no testimony regarding any amounts of or accumulations of cash.

### **STATEMENT OF FACTS**

Random Vaughn and Marina Turner met in March of 2011 and moved in together in Lynnwood, WA in October. (RP 31, 35)<sup>1</sup> She was from New Mexico and Mr. Vaughn is from Washington. (RP 29, 116)

During this time, Ms. Turner worked 40 hours a week at True Spa at the Westin in Bellevue and she also worked for Aveda. (RP 33) When they first moved in together Mr. Vaughn was working in film production at his studio in Everett and they were splitting expenses. (RP 34) Although, he began working with medical marijuana while they lived in Lynnwood, Mr. Vaughn was not making much money in it. (RP 34)

Mr. Vaughn's involvement with medical marijuana began in 2011 when he got a medical marijuana card due to back pain. (RP 218) Ms. Turner testified that he learned about medical marijuana when she took

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<sup>1</sup> This appeal is based on both trials, so the transcript, clerk's papers, and exhibits will be listed RP, CP, EX for the first trial and RP2, CP2, and EX 2 for the second trial.

him with her to cut a friend's hair and the lady's boyfriend told Mr. Vaughn about his marijuana business in Colorado. (RP 35-37, RP2 144-146) Mr. Vaughn testified that he got involved through associates at his production company. (RP 220-223, RP2 510-520) He then became involved with a collective garden called "Your Own Garden". (RP 226) He was contributing resources from his business, Original Investments, to purchase things like nutrients for the plants, pay electric bills, he also leased a farm in Monroe to grow marijuana. (RP 223-226) Ms. Turner got a medical marijuana card, valid through February 10, 2013 so that Random could grow more plants. (RP2 147) Ms. Turner was never a member of Your Own Garden. (RP 242) However, on one occasion she did help trim plants on the farm in Monroe for a small period of time. (RP 103,106, RP2 440)

They lived in Washington together until August 2012 when Ms. Turner moved to California. (RP 35) She wanted to move to California because she thought it was a more ideal place for her line of work. (RP 115) Thereafter, Mr. Vaughn spent half his time in California with her and half his time in Washington. (RP 215, RP2 148-149)

In California Ms. Turner continued to pursue her career. (RP 109) She was working 3 jobs at a time, 6 days a week working 8-9 hours a day. She also did massages on the side. (RP 114) In Washington, Mr. Vaughn

continued to pursue his career in film production and continued his involvement with medical marijuana. (RP 242-247, 206)

Your Own Garden was shut down in December 2012 because it was running in the red every month as the donations that they were receiving were not sufficient to cover the bills to operate the collective. (RP 242) When Your Own Garden closed, Mr. Vaughn leased storage space in a warehouse in the City of Pacific to store property from Your Own Garden. (RP 243-244, RP2 695-696) The landlord told them of an available suite that he had for rent if they wanted to set up another collective garden and they decided to give it another try.(RP 245, RP2 696) At this time, Sam Becker, one of the former members of Your Own Garden, formed Pacific Green Collective, which included himself and Mr. Vaughn, among others. (RP 246, RP2 696-697) The articles of incorporation for the nonprofit Pacific Green Collective were filed by Sam Becker on February 28, 2013. (RP 246-247)

Their first child, Dean, was born on December 20, 2013 in California (RP 260). On March 10, 2014 Ms. Turner return to Washington. (RP 261) Ms. Turner did not work full time again from Dean's birth through the parties' separation on December 8, 2015. (RP 82, 265, 531)) Thereafter she returned to work in California. (RP2 393, 398)

In October or November 2011, Ms. Turner and Mr. Vaughn opened a joint checking account at Chase Bank. (RP 33) This account was used to pay household expenses from March 2014 forward. (RP 83)

Pacific Green Collective began accepting credit cards in August 2013. (RP 484) Prior to that they only accepted cash or donations of cannabis. (RP2 702) In order to accept credit cards they had to have a bank account. (RP 484) The company they were working with to do this was called Square. (RP 484) Square canceled their account because they did not like the products that Pacific Green Collective was involved in. (RP 546-547, RP2 724) Also, banks refused to provide services for businesses that work with marijuana. (RP 425, RP2 722) The account had been in Mr. Vaughn's name and therefore he needed a new bank account in which to place the Square funds. As a result, he talked with Ms. Turner and she agreed to allow those funds to be deposited into their joint account, Chase 5526. (RP 59, 547-548, RP2 724) The Square money began going into their account on September 15, 2014. (RP2 462)

Ms. Turner testified that after the credit card money from Square began being deposited into this account that she continued to have unlimited access to the funds and that Mr. Vaughn told her that she had no budget. (RP 83-84) She further testified that she withdrew on average \$9140 a month from the account. (RP 84-85) She was the only one who

had a debit card on the account and the only one who wrote checks on the account. (RP2 468-470)

Mr. Vaughn testified that at the time they discussed the money being deposited from Square into their joint account, he told her that the money was the proceeds of Pacific Green Collective and that she was not to take that money. (RP 573-574, RP2 725) Once the Square money went into the Chase bank account 5526, Mr. Vaughn would then periodically transfer those funds to Chase bank account 3726, which was the bank account used for Pacific Green Collective. (RP2 546, RP2 725,731) There were funds left in the account for household expenses that Ms. Turner could take from that account because Mr. Vaughn did receive rental income from Pacific Green Collective for the grow lights he rented them in the amount of a little over \$43,000 a year, which amount was noted by Shelley Drury in her review of the account. (RP2 726-727, EX 404 1) On the date of separation, December 8, 2015, Chase account 3726 total was \$1,017,228.04. (EX 263 Bates stamp 1079) The total in the Chase account 5526 on that date was \$35,000.65. (EX2 264 Bates stamp 01510)

Shelley Drury was acknowledged as a financial expert by the court and stipulated to by counsel. (RP2 537) She did a review of the Chase account ending in 5526 for the time period beginning September 15, 2014 through February 29, 2016. (RP2 538-539) Her report was admitted as

Exhibit 404. (RP 539-540) She determined that during this time period there was a total of \$117,292.79 in unauthorized debit withdrawals and \$97,741.25 in unauthorized checks written by Ms. Turner. (RP2 542-543) In addition, Ms. Drury determined that there was \$43,339.93 in withdrawns for personal living expenses. (Ex 404 1) She further confirmed that all the rest of the funds were transferred from Chase account 5526 to Chase account 3726 and no other account. (RP2 547) Mr. Vaughn advised her that this account was used for Pacific Green Collective. (RP2 546)

When Mr. Vaughn became aware that Ms. Turner was taking significant amounts of money out of the account after they separated, he took the balance of the funds out of the account taking it down to a thousand dollars. (RP2 733-734) Ms. Turner then filed this action and brought a motion for the return of the money to that account. (RP2 734) A commissioner in exparte ordered Mr. Vaughn to put the \$63,000 removed back into the account (EX2 365) and a few days later a different commissioner gave Ms. Turner \$30,000 from it. (CP2 144-146) In the hearing on March 17, 2016 the first commissioner awarded Ms. Turner a monthly draw from Mr. Vaughn in the amount of \$9140 a month beginning April 1, 2016. (EX 366 2) This draw continued from then

through the end of March, 2017 when Judge van Doorninck, on her own motion, ended it. (CP 151)

The ex parte order that was entered on February 23, 2016 also restrained the parties from “transferring, or removing, encumbering, concealing or in any way disposing of any property except in the usual course of business”. (EX2 365 2) Believing that the money in Chase account 3726 were business funds belonging to the collective, on March 16, 2016, he withdrew \$1,128,600 in two withdrawals. (EX 263 Bates stamp 01093) The next day the court ordered that the funds in the account for Pacific Green Collective were not to be reduced below \$625,000. (EX 366 2) It also stated that “Mr. Vaughn shall only use these funds in the due course of business or for the necessities of life and shall inform counsel for Ms. Turner through his counsel of an extraordinary expenditures.” (EX 366 3) The court ordered that Mr. Vaughn return the money or go to jail for contempt. (Supplemental Clerk’s Papers, Amended Contempt Hearing Order, CP2 498-502) Mr. Vaughn’s father testified in he first trial that he paid the money into the trust account of Mr. Vaughn’s attorney from his life savings. (RP 543-544, 597)

Christina McCormick, another member of Pacific Green Collective, provided an accounting to the court regarding the funds. (EX 226) Counsel for Ms. Turner indicated in his opening argument that they

believed that these funds were used to make a loan to Mr. Vaughn for \$692,000 to purchase property. (RP2 116) The accounting showed regular expenses for Pacific Green Collective, but also showed that \$692,109 was lent for 6906 Martin Way E. and another \$200,743.98 was lent for 1402 W. Reynolds. (EX 226 5-6)

The State closed all medical marijuana collectives as of June 30, 2016 and as a result they set up a priority to allow persons involved with medical marijuana collectives to obtain retail marijuana licenses. (RP2 706, 739-740) In order to get a retail marijuana license, the person seeking a license had to have an appropriate location for the business (had to be a thousand feet away from a school or park for day care, meet zoning requirements). (RP2 743-745) Due to the challenges of finding an appropriate location and the reluctance of landlords to lease to marijuana retail stores as some were fearful that the federal government may try to take their building, it was preferable to buy a building. (RP2 631-632, 745)

After much searching, Mr. Vaughn was finally able to find two locations to purchase, 1402 W. Reynolds and Lewis County and 6906 Martin Way E. in Thurston County. (RP2 745-747) By loan from Pacific Green Collective, 6906 Martin Way was purchased on May 5, 2016 and 1402 Reynolds was purchased on May 25, 2016. (EX 226 5-6) The

building at 6906 Martin Way became the location for Dank's Wonder Emporium. (RP2 845) These loans furthered the corporate purposes of Pacific Green Collective as stated in the articles of incorporation because it provided local access to patients for medical marijuana. (RP2 764-765, EX 65) That means that the retail store would have somebody medically certified to assist people, whereas a regular retail marijuana store does not. (RP2 764-765) Mr. Vaughn testified that the loans on these two pieces of property and six cars (three of which are inoperable) were the only remaining assets of Pacific Green Collective. (RP2 769-770)

The first trial began on February 15, 2017 (RP 4) and following a week interruption concluded on February 28, 2017. (RP 585, 648-649) Trial for the second half of the case was scheduled for August 7, 2017. It was then continued multiple times until it was finally scheduled for June 5, 2018. (CP2 178) On May 2, 2018, Ms. Turner's attorney filed a motion before Judge Nelson, who was then handling the case, to take Mr. Vaughn's deposition and to have him supplement his discovery requests. (CP2 177) That motion was opposed because discovery cutoff was January 2, 2017 (CP2 182) and Mr. Benjamin had already taken Mr. Vaughn's deposition on two previous occasions for a total of nearly 6 hours. (CP2 183) It was also noted that counsel for Mr. Vaughn could

recall no prior requests to update interrogatories and found no reference to them in any emails or records in his files. (CP2 182)

On May 9, 2018, the motion was heard. (RP2 1) At that time it was discussed that Mr. Vaughn had retained a CPA, Shelley Drury, to help clarify Mr. Vaughn's finances and that the parties had already agreed to the taking of her deposition regarding the issues of finances. (RP2 6-7) In light of the fact that a year and a half had passed and there would be a CPA analysis (RP2 8), the Court entered an order requiring the interrogatories to be updated regarding financial/business/income issues and that Mr. Vaughn appear for a new deposition. (CP2 186-188)

Pursuant to the deposition of Shelley Drury, counsel for Ms. Turner was provided with four notebooks of financial information comprising at least 2000 pages. (RP2 902) During cross-examination in the second trial, counsel for Ms. Turner argued with Mr. Vaughn that he did not provide it directly to him, at which point Mr. Vaughn apologized and said that he did not understand he was supposed to provide it twice. (RP2 903)

On the day of trial, the judge had a conflict and the case was subsequently continued multiple times and finally scheduled for May 28, 2019. On September 12, 2018 counsel for Ms. Turner filed a motion to compel updates to answers to interrogatories. (CP2 190) Counsel for Mr.

Vaughn provided a response explaining that the material requested in the motion filed on May 2, 2018 had all been provided to Ms. Turner's counsel during the deposition of Shelley Drury and that Mr. Vaughn had also provided updated information to Mr. Benjamin in his deposition. In addition, on September 18, 2018, the same dates that the declaration was filed, counsel for Mr. Vaughn provided counsel for Ms. Turner all of the updated bank statements for Mr. Vaughn from Wells Fargo and Bank of America from January through August 2018 just to make certain that they had everything to date. (CP2 192-194)

In response to that, counsel for Ms. Turner then rescheduled the hearing to October 12, 2018. (CP2 195) The day before that hearing date, counsel for Ms. Turner again rescheduled the hearing to November 9, 2018. (CP2 196) Two days before that hearing, counsel for Ms. Turner rescheduled the hearing to December 14, 2018. (CP2 197) The day before that hearing, counsel for Ms. Turner rescheduled the hearing to January 11, 2018. (CP2 198)

On December 14, 2018, counsel for Mr. Vaughn filed a motion to stop the deposition of Christine Morris and to exclude evidence that was obtained by Ms. Turner's counsel after discovery cutoff from Labor and Industries. (CP2 199) The motion was noted for the same date that counsel for Ms. Turner had rescheduled their motion to compel. (CP2 202)

Mr. Vaughn's issues with Labor and Industries and the judgment they obtained against him have been well known in this case since it began, however, nothing was done to obtain this discovery until after discovery cutoff. (CP2 200) Two days prior to that hearing, counsel for Ms. Turner filed a motion to extend discovery cutoff. (CP2 212) He also wanted to take a number of additional depositions. (CP2 213-215)

The motions were heard on January 25, 2019, but counsel for Ms. Turner never mentioned the motion to compel in his argument, only his motion to extend discovery cutoff. (RP2 3-22, 24) Counsel for Mr. Vaughn attempted to argue the motion to compel and requested to know specifically what Mr. Vaughn had not provided, but the court cut him off stating that she thought the only motion being heard from Ms. Turner was the motion to extend discovery cutoff. (RP2 23-24) The judge later stated in her ruling that counsel for Ms. Turner was not obliged to point out what interrogatories needed to be updated, Mr. Vaughn was simply under a continuing order to update interrogatories and requests asking for production if there was anything new. (RP2 34-35, CP2 218-219) The motion to strike the documents received from Labor and Industries was denied because the documents had already been received and the court declined at that point to extend the discovery cutoff. (CP2 218-219)

On April 10, 2019, counsel for Ms. Turner filed a new motion to compel. (CP2 221) The next day the updated interrogatories were provided. (EX 350) At the hearing on April 19, 2019 counsel for Mr. Vaughn advised the court that Mr. Vaughn was not able to get all of the employee records immediately because he was currently out of town for his visitation with his children. (RP2 51) In response to this, counsel for Ms. Turner narrowed his request for what he was yet needing to two things, a list of all employees and their rates of compensation (instead of all employee records) and copies of the canceled checks for the bank statements provided. (RP2 52) On the record, counsel for Mr. Vaughn made sure that it was clear that these were the only things that were needed at this point. (RP2 53) The order entered by the court stated:

Ordered, Adjudged and Decreed Mr. Benjamin narrowed his request regarding Mr. Vaughn's employees to a list of employees and their rate of compensation to allow Mr. Vaughn to fully update his interrogatory answers and request for production. Further Mr. Vaughn shall provide copies of all checks referenced in the bank statements provided on or about April 11, 2019. (CP2 225-226)

So, at that point, by providing the information Mr. Vaughn would be fully up-to-date on his interrogatories and requests for production. The court also set over the motion to compel to May 3, 2019 for hearing in the event that the above items were not provided. (CP2 226, RP2 52, 1024)

In the hearing on May 3, 2019 counsel for Ms. Turner began by acknowledging that he did receive the payroll information that was required and he also received canceled checks. (RP2 56) He then indicated that he needed more checks and the checks that he had demonstrate that money was paid for rent to a location he did not know anything about and there was also a payment to an accountant and he wanted information about that. (RP2 56-57) The order entered indicated that Mr. Vaughn needed to again update his interrogatories, provide the checks through April 30, 2019, provide tax returns, provide a lease or rental contract for S.J. Kim, information from an accounting firm to whom a check was paid with a review hearing on May 13, 2019. (CP2 227-228)

In the hearing on May 13, 2019, counsel for Ms. Turner complained that a day or two before the hearing he received a consulting contract for a store in Edmonds. (RP2 71, Ex 299) He also said that that he did not receive checks passed June of 2018. (RP2 78) Counsel for Mr. Vaughn corrected that on the record and advised that all the checks were there through 2019, but upon further review it was discovered that they had not been provided in numerical order. (RP2 78-79, 86-87) Counsel for Mr. Vaughn also clarified that the consulting contract was provided because there was no rental contract with the Edmonds store. The consulting contract basically allowed Mr. Vaughn to assist the store in

Edmonds. He had no ownership interest in it. (RP 82-83) The court entered an order stating that it would “entertain further relief regarding discovery, but petitioner must complete a Burnett analysis and state with specificity how the discovery responses are deficient.” (CP2 239)

On May 17, 2019 counsel for Ms. Turner filed a Motion and Argument for Default and for Contempt of Court, Order to Strike and for Attorney Fees Pursuant to CR 37 (CP2 241-313) Pages 2-12 of the motion contained a history of the case and a list of actions by Mr. Vaughn through the perspective of Ms. Turner unrelated to discovery. It is not until page 13 (CP2 253) that any mention is made of any issues with the interrogatories. At that point he says the following:

In Respondent's Updated Answers to Interrogatories dated April 11, 2019, he virtually responded to all interrogatories and RFPs with this phrase, "There has been no new information since the last answered interrogatories."

This is particularly concerning because Random registered a new business in Oregon on April 3, 2019, opened a second location for Dank Wonder Emporium in Edmonds, is offering franchises of Dank's Wonder Emporium, made a stock offering of his Dank's Wonder Emporium empire, has registered a corporation in Canada, has a consulting contract from June 2018, earning \$500 per hour and Original Investments has an address in Sun Valley, California. We became aware of all of the above in the last few days through our review of his inadequate discovery responses. For example, we saw the \$7 ,800 per month checks to Soo Ji Kim, which led us to the Edmonds location, which led us to his website, which showed the stock offerings and franchise opportunities. None of this

was provided in his updated interrogatory responses. Marina, through her own research in 2019, found his companies in Canada and Oregon. (CP2 253-254)

He also provided a list of all the canceled checks that were not produced and a table of 18 bank accounts claiming that he was missing statements from 11 of the accounts, 8 of which were statements that predated the original answers to interrogatories provided on January 18, 2017. (EX 434) The remaining part of the background section challenged the credibility of Mr. Vaughn's financial declarations. (CP2 255-256)

In response to the motion, Mr. Vaughn provided the 133 checks that were highlighted as missing by counsel for Ms. Turner the week before trial. (CP2 316, RP 96) These were all payroll checks as the only employee information requested was their names and rate of compensation. As a result, Mr. Vaughn did not believe that the payroll checks were necessary given that he provided the employee information requested. (RP2 785) When he learned that the payroll checks were needed, he provided them. (RP2 785)

On the morning of trial, the motion was heard as a motion in limine. (RP2 94) Following argument of counsel, the court indicated that she was not going to make a ruling at that time, but was going to hear everything first. (RP2 108)

Ms. Turner testified at trial that she found the information about the Dank's store in Edmonds in August 2018. (RP2 190) She let her attorneys know about the store in Edmonds around the same time that she discovered it. (RP2 192)

November 9, 2013 Mr. Vaughn filed for Dank's Wonder Emporium LLC (EX2 3) which he did in order to apply for the retail marijuana lottery. (RP2 772) At that time he did not get a license, so that LLC was allowed to expire on July 1, 2015. (RP2 774, EX2 443 1) He reinstated that on February 3, 2016. (RP2 774, EX2 292 5, EX2 443 2) He did this because of a change in the law which opened retail marijuana licenses to those who were currently running medical marijuana collectives because they were being closed out. (RP2 739) The licenses were being awarded on a priority basis and one of the priority criteria was to have applied previously in the lottery. (RP2 740) However ultimately, he obtained a better priority through his Random Original Productions LLC, but was still able to use Dank's for the name. (RP2 741, 774, 850)

On March 14, 2016, Mr. Vaughn formed Original Investments LLC. (EX2 292 11) This was formed to deal with the banking issues that Dank's had as a marijuana retail business. (RP2 790-791) Original investments LLC was able to get a bank account and from that things such

as payroll or anything that required a bank account or credit card could be dealt with. (RP2 967)

Due to the fact that retail marijuana is required to be cash only, ATM machines owned by Original Investments are located at Dank's Wonder Emporium from which customers can withdraw cash. (RP2 791) The cash in the machine is provided by Dank's and when the ATMs are used it transfers funds into the bank account of Original Investments. (RP2 791, 795-796) In that fashion Original Investments then has the funds in which to pay employees (who are all employees of Original Investments), rent, and basically any expense requiring a check. (RP2 967)

The consulting contract with the Edmonds store allows Original Investments to do the same thing for the Edmonds store that it does for Dank's. Original Investments has ATMs at the Edmonds store and from those funds pays the rent, such as the check to Ji Soo Kim for \$7800 a month. (RP2 870, 968-969) Original Investments also pays for payroll and marketing. (RP2 785-786) The owner of the Edmonds store is Mark who owns Malicious LLC. (RP2 871)

On the second day of trial, May 29, 2019, Mr. Vaughn revealed that he had another business in New Jersey, similar to the one in Edmonds, that had developed within the last 30 days, but the people he was working with in New Jersey backed out and he was now being stuck with the

business. (RP2 259, 263) This was being disclosed as it was unfolding out of an abundance of caution. (RP2 263) After they backed out, Mr. Vaughn then decided to work with the landlord (with whom at the time he testified he still did not have a signed lease) and opened a store selling CBD products only. (RP2 787) At that time the store was losing money. (RP2 787)

At trial, Mr. Vaughn testified regarding why his answers to his original interrogatories, did not list the LLC for Martin Way, East or the LLC for 1402 W. Reynolds, (RP2 355) He explained that he did not list the buildings because according to the question, the buildings did not fall within the parameters of what was asked. (RP2 780-781) Also, he believed that counsel for Ms. Turner was aware of the buildings because he placed liens on both of them during the course of litigation and he also asked questions regarding them in the depositions. (RP2 781-782)

In regard to bank accounts, the Chase bank accounts were ultimately all closed by the bank. St. Helens Credit Union was also closed by the bank. Mr. Vaughn opened a number of bank accounts when he had Pacific Green Collective because he never knew when the banks were going to close an account and he would need to have a backup. When that was no longer needed, he closed all additional accounts. (RP2 783-784)

To deal with this problem of having banks close accounts, when he opened Dank's Wonder Emporium, he set up Original Investments and a bank account was set up through it as opposed to Dank's Wonder Emporium. Thereafter he has had no problems with banks closing his account. (RP2 784) He only has two accounts for Original Investments, a checking account and the credit card. (RP2 181, 783)

When Mr. Vaughn was required to provide an update in May 2018, he had already provided all of the updated information to Shelley Drury for her determination of his income and he believed that all of this was provided to counsel for Ms. Turner at the time of Ms. Drury's deposition. (RP2 782-783, 906-907) Counsel for Ms. Turner, in cross-examination made a point of mentioning that the St. Helens bank account wasn't disclosed until he received four notebooks of at least 2000 pages from Shelley Drury. (RP2 902) Thereafter, Mr. Vaughn made the bank statements available monthly on a Google Cloud Drive and those were subsequently provided to counsel for Ms. Turner. However, these did not include the checks that were provided later. (RP2 783, 785) These updated statements were for all the bank accounts that were open. (RP2 783)

Christine Morris testified during the second trial, that on August 30, 2014 she sold her one and only medical marijuana dispensary to

Random Vaughn for \$17,000. He paid her with a personal check. (RP2 446-448) She had been in business a little over 2 years and in that time she had accepted credit cards for approximately her last year and a half. (RP2 448) In regard to what percentage of her sales were cash and which were credit cards she testified that 60% were cash and 40% were credit cards. (RP2 448-449) She commented that everybody paid cash, but when questioned about it clarified that in her dispensaries most of the transactions were in cash. (RP2 449) When asked how many dispensaries she had, she stated just the one. (RP2 449) She further clarified that when she said dispensaries she meant collective garden and she could not recall whether or not they had to pay any fees for using credit cards because she could not remember what they did five years ago. (RP2 452-454)

Mr. Vaughn did not keep good records and never kept a cash journal for Pacific Green Collective. (RP2 837) Mr. Vaughn was fined by L&I for unpaid employee taxes. (EX 347) Mr. Vaughn challenged this because the collective members were volunteers, not employees, but they lost. (RP 2 954-955) At the time of trial his current total with interest still running was \$185,786.26 and part of that was a fine for \$7000 for failing to keep records. (RP 2 248-249, 955-956)

Dani Espinda testified about 280E, which is an Internal Revenue Code section that basically says that if you are engaged in a business that

traffics in a schedule one or two drug, that you cannot deduct ordinary and necessary business expenses, only the cost of the product. (RP2 632-633) This applied to medical marijuana sales. (RP2 633) Because of this its costs, such as a lease, employees, advertising, office expenses, and anything other than the cost of product, were not deductible for tax purposes. (RP2 633) There was recent litigation that challenged this provision, but the court ultimately upheld it and it is the law that applies to both medical marijuana and retail marijuana. (RP2 633)

Dani prepared draft tax returns for Pacific Green Collective for the years 2013 through 2016. (RP2 634) The sales numbers reported were from Square, they were not including cash. (RP2 635)

The 2013 draft tax return for Pacific Green Collective was admitted as Exhibit 421. (RP2 635) For 2013 the reported earnings were \$90,173, the tax due was \$6087. (RP2 635, Ex 421 1) The draft return had a penalty listed of \$91, but the penalty was not fully calculated because there was not a filing date currently in place and their practice is to let the IRS calculate the amount of penalty. As a result, the actual amount of the penalty on the draft returns is not currently known but for that time it was 3% per month and on the draft returns it was calculated for a one year period of time. (RP2 636-638)

The 2014 draft tax return for Pacific Green Collective was admitted as Exhibit 422. (RP2 638) It showed that the gross receipts for 2014 were \$896,663 and the taxes due were \$166,602 including one year's worth of penalties. (RP2 639, Ex 422 1)

The 2015 draft tax return for Pacific Green Collective was admitted as Exhibit 423. (RP2 642) As currently prepared, the total amount of taxes with one year of penalty included was \$402,048. (RP2 645)

The 2016 draft tax return for Pacific Green Collective was admitted as Exhibit 382. (RP2 645) The total gross income for that year was \$252,311, but after deducting the cost of goods for the year, the total income was actually negative \$42,320. (RP2 646)

Mr. Vaughn testified that he only provided Dani Espinda with the numbers for Square. (RP2 736) The reason for the tax returns was to provide the court with information regarding what would be the minimum tax that would have to be paid, that is, the tax that would be paid from the Square funds. (RP2 736) Once the cash is included the taxes will clearly be higher. (RP2 738-739)

Following the trial, the court issued its decision by letter granting the motion by Ms. Turner stating the following:

These actions are the least restrictive in this case as it is impossible to set child support or equitably divide community like property in a CIR were the only party with knowledge refuses to disclose financial information the court requires to make a decision. (CP2 335)

The judge then went on to award Ms. Turner a judgment for \$625,000 for half of the funds removed from the Chase account on March 16, 2016, \$500,000 as the balance left in the attorney's trust account, 6906 Martin Way E., 1402 W. Reynolds, and the Honda pilot valued at \$2500. She calculated the total value of the above at \$1,919,500. She further awarded \$125,000 as attorney fees for intransigence. (CP2 336) In the event that this was determined to be improper, the court then also accepted Ms. Turner's proposed findings and conclusions about a committed intimate relationship and awarded the above pursuant to that. (CP2 337) In addition, Ms. Turner was ordered all of the above without any offset for any money that she had spent during or just after the CIR. (CP2 338) Mr. Vaughn was given his LLCs. (CP2 338)

As part of the rationale for awarding every identified asset to Ms. Turner, the court found that Ms. Morris was an expert by experience in regard to her proportions of cash to credit cards of 60/40%. In that fashion she then assumed that in 2014 the total money brought it was \$2 million and in 2015 it was \$5.5 million. (CP2 338)

In regard to the debts, Mr. Vaughn was ordered to be responsible for the payment of all taxes and reimburse Ms. Turner for any taxes that she has incurred. (CP2 339)

### **ARGUMENT**

**1. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING THE HARSH SANCTIONS OF GRANTING A DEFAULT, EXCLUDING TESTIMONY, EXHIBITS, SUPPORTING OR OPPOSING CLAIMS OR DEFENSES, AND STRIKING MR. VAUGHN'S PLEADINGS FOR FAILING TO UPDATE INTERROGATORIES REGARDING BANK ACCOUNT STATEMENTS AND CHECKS, AND FAILING TO PROVIDE UPDATED INFORMATION REGARDING NEW BUSINESS INVOLVEMENTS WHEN THE PREJUDICE ARGUED WAS THAT THEY COULD NOT VALUATE BUSINESS INTERESTS THAT WERE DEVELOPED AFTER A COMMITTED INTIMATE RELATIONSHIP ENDED AND THEY DID NOT HAVE INFORMATION SUFFICIENT TO DETERMINE CURRENT INCOME, WHEN THEY ACTUALLY KNEW ABOUT THE BUSINESS INTERESTS EIGHT MONTHS EARLIER AND THEY FAILED TO DISCLOSE THEY DID NOT HAVE BANK STATEMENTS UNTIL 11 DAYS BEFORE TRIAL EVEN THOUGH THEY HAD NOTED A MOTION TO COMPEL SEVEN MONTHS EARLIER AND CONTINUED THAT MOTION FOR FIVE MONTHS FOR HEARING AND THEN ON THE RECORD OVER A MONTH BEFORE TRIAL STATED THAT THEY ONLY NEEDED CANCELED CHECKS AND SOME EMPLOYEE INFORMATION THAT WAS THEN PROVIDED IN RELEVANT DEGREE ON THE DATE ORDERED.**

The standard for review of a sanction for discovery violations is abuse of discretion. In the case of *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) the court stated:

We review a trial court's sanctions for discovery violations for abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156

Wash.2d 677, 684, 132 P.3d 115 (2006). In punishing a discovery violation, “the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery.” *Burnet*, 131 Wash.2d at 495–96, 933 P.2d 1036. Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, “the record must show three things—the trial court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.” *Mayer*, 156 Wash.2d at 688, 132 P.3d 115 (relying on *Burnet*, 131 Wash.2d at 494, 933 P.2d 1036). This Court in *Mayer* stated, “[We] ... hold that the reference in *Burnet* to the ‘harsher remedies allowable under CR 37(b)’ applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party’s ability to present its case—but does not encompass monetary compensatory sanctions.” *Id.* at 690, 132 P.3d 115 (quoting *Burnet*, 131 Wash.2d at 494, 933 P.2d 1036 (quoting *Snedigar v. Hodderson*, 53 Wash.App. 476, 487, 768 P.2d 1 (1989), rev’d in part, 114 Wash.2d 153, 786 P.2d 781 (1990))). (at 348)

In further defining an abuse of discretion the court in the case of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), as amended on denial of reconsideration (June 5, 1997) stated that an abuse of discretion was:

discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976). (at 494)

In the case of Ms. Turner and Mr. Vaughn there was a clear abuse of discretion. The court is required on the record, to show that the court

considered lesser sanctions, that the discovery violation was willful, and that the other side was substantially prejudiced as a result of it.

In regard to the consideration of lesser sanctions, in the Court's letter ruling that the sanction was the least restrictive she stated:

it is impossible to set child support or equitably divide community-like property in a CIR where the only party with knowledge refuses to disclose financial information the court requires to make a decision. (CP2 335 1)

There was no further discussion nor any consideration of what any alternative sanction may be nor any analysis as to why that sanction would be ineffective. The focus of this appears to be on information that the Court wanted to make a decision, not on what if any prejudice to Ms. Turner suffered as a result of any discovery violation.

In the hearing on August 16, 2019 in regard to the issue of consideration of lesser sanctions the court stated:

I can't imagine what other sanction I could have imposed because at every turn Mr. Vaughn confused, omitted and was not credible. I had thought perhaps I would not find that to be the case, and that there would be enough to make a ruling on that (what sp) the court was confident represented all the assets brought into being by this community-like partnership. But even after a full trial, that wasn't the case, other than, you know, what I did do based on what I had.

But I do think the first proper thing is to strike the pleadings, award the default, which is the

amount requested by the other side. And that if that's a wrong decision, we've had a trial and the evidence and credibility of the witnesses was judged and the amounts were figured based on that. That's the best the court can do in a case like this.

I do think there was significant prejudice to a less economically affluent party to try to pay for the experts that would be necessary to sort through such an incomplete picture, and that significant prejudice is what enforces my ruling. And I don't know what a lesser -- I mean, no lesser sanction has been proposed, so I can't imagine what that would have been. (RP2 56-57)

Once again, there was no consideration or mention of any other possible or potential lesser sanction and why that sanction would be inadequate. In regard to the Court's comment that no one proposed any lesser sanctions, we argued there should be no sanctions and counsel for Ms. Turner asked for the sanctions that she received. The law seems to indicate that the court is to consider lesser sanctions, not that the parties need to request lesser sanctions for that to be considered by the court.

As noted above in the quote from *Blair* quoting from *Burnet*, the sanction imposed should be the least severe to adequately serve the purpose of the particular sanction but not so "minimal that it undermines the purpose of discovery." (Burnet, at 495-96, Blair at 348) In this case, what was the purpose of the sanction imposed by the Court? The trial was over and other than

excluding one witness, (Mr. Vaughn's father whose testimony involved some financial issues surrounding the children (RP2 684-687)) all of Mr. Vaughn's witnesses testified. The Court heard their testimony and considered it. She also considered the evidence presented by Ms. Turner and based upon that she made findings of facts, conclusions of Law, and entered her final order. Other than the shorthand effect of simply saying that Ms. Turner wins and gets everything, there was nothing accomplished by the Court's ruling other than to express her displeasure that she wanted to have more financial information from Mr. Vaughn. However, even that was presented in her findings and orders. There was no purpose for the Court to enter this discovery sanction and there was no consideration of any lesser sanction. This alone requires that this ruling be reversed.

In regard to the issue of willfulness. This trial was continued multiple times and the interrogatories were originally answered before the first trial in February 2017. Counsel for Ms. Turner never raised the issue of updating the interrogatories until May 2018. (CP2 117) Through the deposition of Ms. Drury, he received over 2000 pages of financial information. (RP2 902) Thereafter, Ms. Turner was provided with copies of Mr. Vaughn's

ongoing bank statements and visa statements. (CP2 192-194, RP2 783, 785) When counsel for Mr. Vaughn asked counsel for Ms. Turner what specifically they had not been provided, an answer was finally given in April 2019, that he needed the checks to go with the bank statements he had received and payroll information. (CP2 225-226, RP 52-53) That was provided on the date ordered of May 2, 2019. (RP 56) Counsel for Ms. Turner indicated that he knew nothing and was surprised by the Edmonds store, when it turned out that his client had advised him about it in August of the year before. (RP2 190, 192) Mr. Vaughn even disclosed the New Jersey store that had just become an issue within the last 30 days before trial because it was not something that had previously been finalized and at the point of disclosure he did not even have a signed lease. (RP2 259, 563, 786-787) What was willfully withheld from the requested discovery?

What was the substantial prejudice? On the record to the Court, counsel for Ms. Turner advised that if they would have known sooner about the Edmonds store, they could have done a business valuation and they were not able to figure out what his income was. (RP2 53-54) However, they had known about Dank's Wonder Emporium and Pacific Green Collective since their

inception, but they never did anything to try to value either of those.

The Court referenced as a significant prejudice that there was a less economically affluent party who could not pay for experts “to sort through such an incomplete picture” (RP2 57), but if Ms. Turner was unable to afford an expert, how would some disclosure have enabled them to do anything further regarding it? More significantly, what was the disclosure that was not provided that an expert needed to go through? Counsel for Ms. Turner brought a motion to compel in September 2018 and continued it monthly until January 2019 at which time it was not even argued. (CP2 190, 195-198, RP2 3-24) It was not until April 19, 2019 that the motion was finally heard and at that time counsel limited his request to checks for the bank statements that had been provided along with a list of employees and their rates of compensation. (RP2 52-53, CP2 to 25-226) If Ms. Turner was so prejudiced by the failure to provide discovery, why was not the motion even argued by counsel until seven months after it was originally noted?

In regard to the bank statements that were not provided, there was never a motion filed to compel their production. There was never a CR 26(i) conference for this discovery as required by

the court rules, it was simply raised for the first time in the motion to strike. Even though about a month earlier counsel had on the record narrowed his request to the checks for the bank statements provided. (RP2 52-53) How can willfulness or prejudice be argued if you fail to raise the issue until 11 days before a trial that has been pending and continued for over two years?

The court's ruling was clearly an abuse of discretion. There was no consideration of lesser sanctions either on the record or in writing. There was clearly no willfulness in failure to provide discovery that was requested as even counsel on the record noted receipt of current bank statements that were needed and narrowed his request to simply the checks from those statements and payroll information. There was no showing of significant prejudice or any prejudice as the only identified prejudice was the inability to do something that they had not attempted to do for any identified businesses. The trial court must be reversed and the motion to strike vacated.

**2. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO CONSIDER A LAY WITNESS'S TESTIMONY AS EXPERT TESTIMONY BY EXPERIENCE WHERE THERE WAS NO REQUEST TO QUALIFY THE PERSON AS A LAY EXPERT AND THE PERSON PROVIDED NO OPINION OR TESTIMONY**

**BEYOND THE FACTS OF WHAT SHE DID IN HER MEDICAL MARIJUANA COLLECTIVE; AS A RESULT, THERE WAS INSUFFICIENT EVIDENCE FOR THE TRIAL COURT TO FIND THAT MR. VAUGHN HAD SIGNIFICANT UNDISCLOSED CASH ASSETS BASED UPON THE TESTIMONY OF ONE LAY WITNESS WHO TESTIFIED THAT HER MEDICAL MARIJUANA COLLECTIVE GENERATED 60% OF ITS REVENUE FROM CASH AND 40% OF ITS REVENUE FROM CREDIT CARDS DURING THE TWO YEARS THAT SHE OWNED IT AND THEREFORE, MR. VAUGHN'S MEDICAL MARIJUANA COLLECTIVE MUST HAVE ALSO BROUGHT IN 60% OF ITS REVENUE FROM CASH AND 40% OF HIS REVENUE FROM CREDIT CARDS.**

The standard of review for admission of expert testimony under ER 702 is abuse of discretion. (*L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 134, 436 P.3d 803, 814 (2019); *Katare v. Katare*, 175 Wn.2d 23, 38, 283 P.3d 546, 553 (2012); *Lakey v. Puget Sound Energy, Inc.*, 176 Wash.2d 909, 919, 296 P.3d 860 (2013))

The findings of a trial court will not be disturbed on appeal as long as there is sufficient evidence to support them. (*Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572–73, 343 P.2d 183, 185 (1959); *Ferree v. Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900, 905 (1963); *Katare v. Katare*, 175 Wn.2d 23, 35, 283 P.3d 546, 552 (2012)). Therefore, if there is insufficient evidence to support a finding, that cannot be supported on appeal and should be reversed by this Court.

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For example, in the Katare case noted above, the wife hired a Mr. Berry to testify as to the risk factors for child abduction. The court found that although he was an attorney by profession, he had 17 years of experience handling abduction cases and therefore qualified as an expert by experience.

In this case, Christine Morris testified that she owned a medical marijuana collective garden for a little over two years and in her medical marijuana collective garden 60% of her sales were in cash and 40% were by credit card. (RP2 448-449, 452) She was never listed as an expert witness. (CP2 Supplemental Petitioner's Disclosure of Witnesses filed November 28, 2018, newly designated clerk's papers not yet prepared.) Counsel for Ms. Turner never requested that she be designated an expert witness. She never provided an opinion regarding the percentages of cash and credit card usage by medical collective garden's in general during the two years that she was in operation, she only testified as to what her percentages were. Even as to that, when asked a question as simple as did you pay any credit card fees, her answer was "I can't remember what we

did five years ago.” (RP2 453-454) Furthermore, she sold her only collective garden to Mr. Vaughn two weeks before Mr. Vaughn began using the parties joint bank account for the Square deposits. (RP2 446-448, 462) She was not even involved with medical marijuana during the time that most of the proceeds from the CIR were accumulated.

In the Court’s decision letter the court stated that “An expert by experience believes that cash compared to credit/debit cards is a 60/40 proposition.” (CP2 338) In the Court’s finding #6 the court stated:

Christine Morris testified that she ran a medical marijuana collective that was purchased by Mr. Vaughn and that she accepted credit and debit cards at her collective. She testified that 60% of her revenue came in as cash and 40% came in through the credit and debit cards. Respondent's expert witness, Dani Espinda, Certified Public Accountant, testified that she had extensive experience in the cannabis industry that that it is substantially a cash industry. Respondent's expert witness, Shelley Drury, Certified Public Accountant, also testified that the cannabis industry was substantially a cash industry. John Douville testified that when he worked in the cannabis industry it was substantially a cash industry. (CP2 465)

In regard to this finding of fact, it also needs to be noted that the other three witnesses listed for this did not support it. Dani Espinda testified, in response to a hypothetical which was basically the revenue intake percentages of Christina Morris, that these percentages did not surprise her because some collectives did not even accept credit cards, they were only cash. (RP2 677) She did not say that medical collectives

did not use credit cards nor that the percentages that Ms. Morris presented for her marijuana collective was something that was reflective of the medical marijuana collective industry in general.

Shelley Drury did not know if a collective garden was mainly cash, she only knew that retail marijuana was a cash industry. (RP2 581, 594) John Douville testified that he sold medical marijuana to Pacific Green Collective more than 10 times, not more than 50 times between 2013 and 2015. (RP2 209-211) He only sold to 1 or 2 other people besides Mr. Vaughn. He did not have a very large production or have do much with it. (RP2 211) He never purchased marijuana for himself and never used it. (RP2 212) He was unaware of marijuana being sold for checks or credit cards, he was only aware of marijuana being sold for cash. (RP2 211-212) Ultimately, counsel for Ms. Turner, confirmed with Mr. Douville that he was not an expert in the marijuana industry. (RP2 227)

Based upon finding of fact #6, the court then extrapolated Mr. Vaughn's income in findings #8 and #17 and found that in 2014 Mr. Vaughn must have brought in \$1,344,994 in cash (CP2 466) and that his total revenue for 2015 was "conservatively \$5,568,657". (CP2 467) Also, finding #73 repeated the above findings based upon the 60/40% cash to credit card ratio and based on that found that the 2014 revenue was \$2 million and 2015 was \$5.5 million. (CP2 474)

The above findings were basically used to justify the division of property, findings #75 and #76 which was to divide the property to give everything to Ms. Turner and require Mr. Vaughn to pay any and all taxes. (CP2 474-475) Additionally, the Court's finding and conclusion in section #11 that Mr. Vaughn should be responsible for paying "all local, state, and Federal taxes, fees, penalties and interest owing" along with reimbursing Ms. Turner for any of her because towards those obligations. (CP2 478) All of this essentially on the assumption that Mr. Vaughn must have an equal amount of cash somewhere because if he could accumulate the amounts he had from credit cards which only represented 40% of his income, he must have a like amount of cash in the amount of 60% somewhere that he had not revealed. This was the speculation that was used to justify what the Court felt was a "just and equitable" distribution of property. (CP2 474)

It was clearly an abuse of discretion for the court to consider Christine Morris an expert by experience as she was never listed as an expert, never presented as being an expert, never qualified on the record to be an expert, and only testified regarding her own personal limited experience. This abuse of discretion lead to the Court to create findings where there was insufficient evidence to substantiate them. That is, the evidence was insufficient to find that Mr. Vaughn's revenue came from

the same percentages of cash to credit cards that Ms. Morris's did. This led the Court to clearly divide the property in a manner that was both unjust and inequitable. As a result, this case must be reversed and remanded for a new trial.

**3. IT WAS NEITHER JUST NOR EQUITABLE FOR THE COURT TO DIVIDE ASSETS FOLLOWING A COMMITTED INTIMATE RELATIONSHIP TO GIVE MORE THAN EVERY IDENTIFIED ASSET TO MS. TURNER AND GIVE EVERY IDENTIFIED DEBT TO MR. VAUGHN WHEN MR. VAUGHN DEVELOPED THE ASSETS WHILE MS. TURNER PURSUED HER OWN CAREER AND HER ONLY CONTRIBUTIONS WERE INTRODUCING HIM TO SOMEONE WHO WORKED IN THE MARIJUANA INDUSTRY WHICH THEN GOT MR. VAUGHN INTERESTED IN GROWING MARIJUANA, HER GETTING A MEDICAL MARIJUANA CARD THAT WAS VALID FOR A YEAR SO HE COULD GROW A FEW MORE PLANTS AT A TIME, ONE TIME SHE SPENT A SMALL AMOUNT OF TIME ON A FARM IN MONROE HELPING TO TRIM PLANTS, SHE ALLOWED MR. VAUGHN TO RUN A CREDIT CARD THROUGH THEIR JOINT BANK ACCOUNT USING HER SOCIAL SECURITY NUMBER FOR A PERIOD OF 17 MONTHS (15 MONTHS DURING THE RELATIONSHIP AND TWO MONTHS AFTERWARDS) WHILE TAKING OVER \$9100 A MONTH FOR HERSELF FROM THE CREDIT CARD MONEY COMING INTO THE JOINT ACCOUNT, AND FOR A PERIOD OF A LITTLE LESS THAN TWO YEARS DURING THE RELATIONSHIP SHE STAYED AT HOME CARING FOR THEIR FIRSTBORN SON.**

The standard for review of a committed intimate relationship or meretricious relationship was stated in the case of *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) as follows:

We review findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Willener v. Sweeting*, 107 Wash.2d 388, 393, 730 P.2d 45 (1986). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 712, 732 P.2d 974 (1987). Credibility is determined solely by the trier of fact. *Kinder v. Mangan*, 57 Wash.App. 840, 846, 790 P.2d 652, review denied, 115 Wash.2d 1018, 802 P.2d 127 (1990).(at 38)

Conclusions of Law are then reviewed de novo, *In Re Marriage of Pennington*, 142 Wn.2d 592, 602-603, 14 P.3d 764 (2000).

In this case, the issue of whether or not there is a committed intimate relationship was determined by the court in the first trial. Therefore, at this point the issue before this Court is whether or not there was substantial evidence to support the trial court’s division of property and debts, and its conclusion that this was just and equitable. As noted in issue number two above, it was clearly based upon insufficient evidence.

In the case of *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) in determining whether or not a meretricious relationship (CIR) existed the court listed 5 factors to be considered. They were “continuous cohabitation, duration of the relationship, purpose of the relationship,

pooling of resources and services for joint projects, and the intent of the parties.” (at 346)

In the Pennington case the Court began their analysis of these factors by stating:

While property acquired during the meretricious relationship is presumed to belong to both parties, this presumption may be rebutted. *Connell*, 127 Wash.2d at 351, 898 P.2d 831. We have never divorced the meretricious relationship doctrine from its equitable underpinnings. For example, in both *Connell* and *Peffley-Warner*, we stated that “property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.” *Connell*, 127 Wash.2d at 349, 898 P.2d 831 (emphasis added) (citing *Peffley-Warner*, 113 Wash.2d at 252, 778 P.2d 1022). If the presumption of joint ownership is not rebutted, the courts may look for guidance to the dissolution statute, RCW 26.09.080, for the fair and equitable distribution of property acquired during the meretricious relationship. *Connell*, 127 Wash.2d at 350, 898 P.2d 831. (At 602)

Basically, the purpose of finding a meretricious relationship or committed intimate relationship is to avoid an unjust enrichment in property that was acquired during the relationship. The focus has been on determining what property the parties have an equitable interest in. Hence, the Court has “never divorced the meretricious relationship doctrine from its equitable underpinnings”, the point being to avoid a situation where the parties have jointly developed an asset and yet because of the fact that one person’s name was not on the asset, that person may not have a legal

interest in the asset to the unjust enrichment of the other. However, in the Turner v. Vaughn case that notion was turned on its head and the party in whose name the property existed, or with whom it was associated, was left with nothing but the debt.

The Court in Pennington went even further than they did in Connell in highlighting factor number 4, the “pooling of resources and services for joint projects” (Connell, at 346). The Pennington court in its analysis of both cases before it added the following requirements to ensure that the division of an asset acquired during a committed intimate relationship was appropriate. They added that there must be a showing that the parties pooled “their **time, effort, or financial resources** enough to require an equitable distribution of property”. (at 607 emphasis added) The Court in finding that Van Pevenage had “spent money on food, household furnishings, carpet and tile, and some kitchen utensils” (at 604) and that she “cooked meals, cleaned house, and helped with interior decoration.” (at 604), basically kept the house, stated:

Van Pevenage has no evidence to suggest she made constant or continuous payments jointly or substantially invested her time and effort into any specific asset so as to create any inequities. Given the evidence presented at trial, we cannot conclude the parties jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties’ property acquired during the course of their relationship. (at 605 emphasis added)

In regard to the Chesterfield portion of the Pennington case, the Court felt that even though the parties had a joint checking account for living expenses into which they both deposited money; the fact that each of them assisted the other with work-related issues, including assistance with travel logs, office emergencies, accounts payable, and office correspondence; the fact that they lived together in Chesterfield's home and jointly contributed towards the mortgage, but otherwise maintained separate bank accounts (other than a joint account to pay bills) and purchased nothing jointly; and the fact that they also maintained their own careers, financial independence, and contributed separately to their retirements; this did not show that they pooled "their time, effort, or financial resources enough to require an equitable distribution of property". (at 607)

Basically, to the 4th factor of pooling of resources and services for joint projects, the Court added the requirement that to establish this it must be shown that the parties pooled their time, effort, or financial resources into a particular asset. Without this there is no equitable basis upon which the court can establish an interest in property acquired during the relationship.

In this regard it would be helpful to consider in more detail the prior cases of *Matter of Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984) and *Connell*. In *Lindsey* the parties have lived together for 2 years prior to getting married. When the parties dissolved their marriage 5 years later, the wife claimed an interest in insurance proceeds for a barn that had burned down. The trial court had ruled that she was not entitled to an interest in that property as it had been acquired and built prior to the marriage, although during the time period of the meretricious relationship. The husband stated that the wife “did very little work” on the barn but she stated that she “helped in framing, cementing, siding, and roofing the barn/shop. Additionally, she stated she did almost all the painting.”(at 306) The Supreme Court remanded the case for the court to decide what her interest in the property would be in light of this. In short, it was the fact that she had put in time and effort towards the building of the barn that gave her the equitable interest, not just the fact that they lived together.

In the *Connell* case, the parties lived together from November 1983 until March 1990. During that time *Connell* continued to work as a dancer, but she also assisted *Francisco* with his businesses. In 1985 *Francisco*’s production company purchased a bed-and-breakfast on *Whidbey Island*. In June, *Connell* moved there and managed the bed-and-

breakfast. Francisco moved there shortly thereafter and they continued to reside there together until the relationship ended in March 1990. Connell received no compensation for her services for the first 2 years that she managed the bed-and-breakfast. She did however receive a wage for the last 21 months of their relationship. The court found there was a meretricious relationship and remanded the case to the trial court to determine the division of property. In doing so, the court stated: “To the extent one, or both, of the parties received a fair wage for their efforts, the “community” may have already been reimbursed.” (at 352)

Division II in the case of *Walsh v. Reynolds*, 183 Wn. App. 830, 335 P.3d 984 (2014), agreed with the trial court’s analysis in adding to the pooling of resources that the parties “contributed their time and energy to ... **raising ... their family**”. (at 846 emphasis added)

In *Muridan v. Redl*, 3 Wn. App. 2d 44, 413 P.3d 1072 (2018) Division II continued with this when commenting on pooled resources by stating that the parties contributed “resources into the relationship and to raising their son”. (at 59)

In light of the above, to equitably divide property there must be a pooling of resources in the assets. The parties must have combined their time, efforts, or financial resources into the asset. Raising a child can be considered a part of that pooling of time and efforts. However, the division

of property must be equitable. It must be reflective of the efforts of the parties. If someone has been paid for their efforts, wages can be considered as equitable compensation for what the party has done.

In the case of Ms. Turner and Mr. Vaughn, it is clear that for the first two years and two months of their four year and two months relationship, Ms. Turner spent all of her time pursuing her career. (RP 33-34, 109, 114, 260) During that time she introduced Mr. Vaughn to the boyfriend of a friend of hers who told Mr. Vaughn about medical marijuana sales. (RP 35-37, RP2 144-146) She got a medical marijuana card that for a year enabled Mr. Vaughn to grow a few more plants. (RP2 147) On one occasion she assisted in trimming plans at the Monroe farm. (RP 103, 106, RP2 440) Then, she agreed to allow their joint bank account and her Social Security number to be used to allow the Square deposits for Pacific Green Collective to be placed into that account, which then happened for a period of 17 months. (RP 59, 547-548, RP2 724) She also stayed home and cared for their first son Dean for two years. (RP 82, 265, 531)

During the time that the Square deposits were being made into the joint bank account, she took at least \$9140 a month in addition to the household expenses being paid. (RP 84-85) The total amount that she took in addition to household expenses was \$117,292.79 in debits and

withdrawals and the checks that she wrote for herself totaled \$97,741.25 for a total of \$215,034.04 she acquired in 17 months. (RP2 542-543) This certainly seems analogous to someone receiving wages.

During the same time period Mr. Vaughn transitioned from film production to medical marijuana production. With the help of someone at his film studio, he learned how to cultivate marijuana. (RP 220-223, RP 2 510-520) With others he helped form Your Own Garden which included leasing a farm in Monroe, but it ultimately went out of business in December 2012. (RP 226, 242-243, RP2 693-694) While Ms. Turner resided in California pursuing her career, Mr. Vaughn lived half of his time in Washington State working on medical marijuana. (RP 215, RP2 148-149) Thereafter, Mr. Vaughn with others, formed the Pacific Green Collective at a time when Ms. Turner no longer had a medical marijuana card and since she was not a resident of the State of Washington could not legally have been involved with a medical marijuana collective garden. (RP2 433-437) In fact, she did not even reside in the State of Washington for the first 13 months of Pacific Green Collective's operation. (RP2 437) While Ms. Turner stayed home to care for their first son Dean, Mr. Vaughn continued to develop Pacific Green Collective.

The question is, based upon the above facts, what is a just and equitable division of any accumulated assets during the relationship. Mr.

Vaughn spent the majority of his time developing and accumulating the assets. Whereas Ms. Turner spent more than half the time of the entire relationship pursuing her own career interests, including doing so in California for over a year. (RP 35, 261) It would have been literally and legally impossible for Ms. Turner to have developed this asset due to among other things her residence status. When she agreed to money being placed in their joint bank account, she was compensated with over \$9140 a month in addition to her living expenses all being paid. (RP 84-85, RP2 468-470, 726-727)

The total cash value of the assets awarded to Ms. Turner was \$1,919,500 with no offsets for the above money accumulated by Ms. Turner during the course of the relationship. (CP2 474) Mr. Vaughn was given the L&I tax lien of \$185,786.26. (RP2 955-956) He was also given the tax debt for the Square money as calculated by his accountant, Dani Espinda, which was \$6087 for 2013 (RP2 635), \$166,602 for 2014 (RP2 639), \$402,048 for 2015 (RP2 645). The total liabilities were \$760,523.26. This was neither just nor equitable.

It should also be pointed out that Ms. Turner was given the entirety of the cash that was identified at the end of the relationship, plus the properties that were purchased with that same cash. Thereby essentially giving her a double portion of the assets identified. As noted in the

previous issue, this was on the assumption that Mr. Vaughn must have significant undisclosed cash. This case must be remanded for a new trial and a just and equitable division of the assets.

### **CONCLUSION**

The court abused its discretion in imposing the harsh penalties of granting a default, excluding testimony, exhibits, supporting or opposing claims or defenses, and striking Mr. Vaughn's pleadings when she never considered lesser sanctions and impose this at a time when it served no purpose. Furthermore, there was no showing of willfulness as requested discovery was provided and even opposing counsel acknowledged on the record that he received the items of discovery that he had narrowed his request to a little over a month prior to trial. There was no prejudice shown as the only prejudice claimed was an inability to do a valuation of businesses that were unknown when they had done nothing to evaluate any of the businesses that were known.

The court abused its discretion in considering the testimony of a lay witness to be expert testimony when the person was never identified or requested to be an expert witness and only testified regarding the percentages of cash to credit cards for her medical marijuana collective as opposed to the industry in general. This error led to findings of fact that speculatively estimated that Mr. Vaughn had significant undisclosed cash

without any factual basis which led to conclusions regarding divisions of property that gave all assets to Ms. Turner on the speculative assumption that Mr. Vaughn must have significant undisclosed cash for which there was no evidence.

Lastly, the division of property in this CIR case was neither just nor equitable as it gave the party who accumulated the assets all of the debts and the person with whom he was in a committed intimate relationship, but he spent the majority of that relationship pursuing her own career and interests, all identified cash and property even though part of that identified cash had been used to purchase the property. For all of the above reasons this case must be reversed and remanded for a new trial.

Respectfully submitted on April 20, 2020.

  
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CERTIFICATE OF MAILING

I certify that I emailed a copy of Appellant's Brief Review to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Fircrest, Washington on April 20, 2020.



Clayton R Dickinson, WSBA No. 13723  
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