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No. 54010-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re:

MARINA NICOLE TURNER, Respondent,

vs.

RANDOM ERIK VAUGHN, Appellant

Pierce County Superior Court

Cause Nos. 16-3-00665-4

The Honorable Judge Kathryn J. Nelson

Appellant's Reply Brief

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INTRODUCTION

This is in response to the respondent's introduction. RAP 10.3(a)(3) states "*Introduction*. A concise introduction. In the Respondent's Brief in this portion of the appeal, as well as in the prior appeal of this case, the same thing was done. That is, in the introduction, rather than focusing on a concise introduction to the matters inherent in the appeal, it focused on collateral matters in an effort to prejudice the Court against Mr. Vaughn in regard to issues that were not on appeal.

The brief begins by listing 3 things that are irrelevant to these proceedings. I would also note that these items and numerous others throughout the respondent's brief were rebutted in detail in a prior draft of this Reply Brief, but unfortunately, it put this over page limits to the point that our motion to exceed page limits was not allowed to the extent necessary to include it all. As a result, many things in the respondent's brief may be referenced summarily or not at all. I will therefore trust that this Court will see through inflammatory language and irrelevant allegations and recognize that there are 2 sides to the story and regardless, focus on those facts that pertain to the issues raised in this appeal.

The first respondent's brief tries to draw a link between an order to pay Ms. Turner \$9126 a month and Mr. Vaughn seeking custody of his children and seeking child support. There is nothing in the record indicating any correlation between those 2 events.

Secondly, she raises the issue of the Honda van. The van was registered in the name of Mr. Vaughn, had no insurance, and had never been ordered by the court to be in the possession of Ms. Turner.

In regard to the third example, Mr. Vaughn's financial declarations. Mr. Vaughn's basic living expenses are paid through Original Investments. Shelley Drury was hired specifically to review the records for Original Investments and Dank's Wonder Emporium to be able to present to the court what the full extent of those payments were. Her findings were that his monthly income was \$2720 a month. (EX 403, RP 2 557-554)

As stated in our opening brief, as well as the first motion to exceed page limits, the decision was made not to appeal the \$150,000 a month finding by the court due to the fact that we simply didn't have enough pages to do it. The only evidence for this amount of monthly earnings came from a transcript of a commissioner's court hearing on March 17, 2016 where a court

commissioner seemed to be summarizing an average of the money coming in from Square to Pacific Green Collective (not Dank's Wonder Emporium) and assumed that this was the monthly personal income of Mr. Vaughn. (EX 36 14-15) There is no declaration nor evidence beyond this except that Mr. Vaughn's attorney at the time didn't correct the Commissioner, and stated without any declaration or information to verify it that "that is the income that he makes". (RP2 859) The attorney was fired shortly after the hearing. A child support order that was entered on May 10, 2016, after a full hearing on the subject with Mr. Vaughn's new attorney, imputed income to Mr. Vaughn at \$20,042.55. (Exhibit 344) This was disputed and efforts were made to reduce the child support, but the motions were denied.

The next paragraph on page 3 of respondent's brief introduction states that a lay expert and Mr. Vaughn testified that his "medical collective received more cash than credit/debit card payments." It references RP2 734. This statement and the reference in the transcript for it, are false. The lay expert, Christine Morris only testified about her own collective garden's income. Mr. Vaughn **never** testified to this.

Respondent's brief argues that it makes no logical sense that Mr. Vaughn would assume on April 19, 2019 that Ms. Turner was only seeking a list of employees and some canceled checks. However, that is exactly what the transcript reveals and that is what the order entered on that date said. The transcript of the hearing notes the following:

MR. DICKINSON: I just want to make sure that I'm a hundred percent clear so my client -- so you want the cancelled checks for all the bank accounts for all the records that you got? I don't know what was or wasn't there fully.

MR. BENJAMIN: Just the checks reflected in this material that you most recently submitted on --

MR. DICKINSON: Okay. So all the cancelled checks for what was submitted, and then a list of employees and their compensation.

MR. BENJAMIN: Yes.

MR. DICKINSON: Okay.

MR. BENJAMIN: That's it. (RP2 53)

When Mr. Benjamin states "that's it", that confirmed that this was all that was needed at that point in time. He later requested additional information based upon what he received at that time. However, to that point in time, that was everything.

Following this exchange, Mr. Benjamin then stated that he would draft the order which read as follows:

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 RFP. Further Mr. Benjamin shall provide copies of all the checks referenced in the bank statements provided on or about April 11, 2019. (EX 236)

In short, Mr. Benjamin was clearly narrowing his request from material provided on April 11, 2019 to just a list of Mr. Vaughn's employees and their rates of compensation and checks to go with the bank statements. He was also clearly stating that this would fully update his interrogatory answers and RFP.

On page 4 of respondent's brief, we are accused of "intentionally" having not filed the petition in this case in violation of RAP 9.6. As this Court is well aware, the petition in this case was filed in the first appeal (CP 50-53) and by order of this Court dated October 7, 2019 Commissioner Bearse transferred those original clerk's papers to this case.

We are further accused of leaving out evidence that this Court needed. I would point out that the last sentence of RAP 9.6 (a) reads as follows: "Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court." We attempted to provide only those exhibits that we felt were relevant.

STATEMENT OF THE CASE

First of all, there needs to be a correction made to our original statement of facts. In discussing contributions that Mr. Vaughn made to the first collective garden he was involved with, on page 9, in the middle of the first paragraph, it states “He was contributing resources from his business, Original Investments”, Original Investments was in error, it should have read Original Productions (short for Random Original Productions). Original Investments did not exist at until August 25, 2016 and Original Productions began on February 9, 2010. (EX 289, 291)

In respondent’s statement of the case on page 6 the statement is made that “In 2014, Vaughn’s various cannabis businesses to include Pacific Green Collective became very successful”. This statement is misleading as Pacific Green Collective was the only revenue generating cannabis business that Mr. Vaughn was involved with. (RP2 774-781)

The Respondent’s brief again argues falsely in the statement of the case that Mr. Vaughn filed a retaliatory demand for custody. (Respondent’s Brief page 9) There is no citation to the record for this, it is false, and referenced as such in the introduction.

Shelley Drury was retained to do 2 things, determine Mr. Vaughn’s equivalent income based upon fringe benefits provided to him by Dank’s Wonder Emporium and Original Investments LLC (EX2 403) and an

analysis of the Chase bank account ending in #5526 (the joint bank account that the Square money went in). (RP2 580, EX2 404) This was the joint account Ms. Turner took money from. (RP2 724-725) In addition to what she was originally retained to do, she also did a general profit analysis, not an actual profit analysis for Dank's Wonder Emporium from April 2018 through March 2019 showing that it operated at an annual loss. (EX 440, RP2 618)

Ms. Drury testified regarding Mr. Vaughn's income and stated that she also looked at outside data because she had "QuickBooks records that weren't necessarily reliable". (RP2 618) Dani Espinda testified that she had helped Mr. Vaughn and the bookkeeper with the QuickBooks on 2 occasions because of the problems the bookkeeper was having with QuickBooks. (RP2 648-649) When Ms. Drury is quoted as saying "Their [Vaughn's] accounting records were unreliable." (RP2 619, Respondent's Brief 9), this was in reference to the QuickBooks.

On pages 10-11 respondent mentions Mr. Vaughn removing \$63,000 from the parties joint account on February 19, 2016. Respondent then states:

In truth, Vaughn decided to remove all of the funds (except \$1044) without notice, after separating from Turner to be with another woman, leaving Turner was \$1044 to live off of.

The only citation to the record for this is bank records Chase Account #5526 (EX 264) and the court's findings CP2 362. The truth, is that Mr. Vaughn did not summarily separate from Ms. Turner to be with another woman and leave her with only \$1044 to live on. They separated December 8, 2015 and he continued to allow her unfettered access to the account for over 2 months, at which time he "became aware that a large amount of money appeared to be missing from that account". (RP2 730)

Pages 11-13 deal with the \$1,128,600 (also listed as \$1,078,000) that were removed from the Chase account that was in Mr. Vaughn's name on March 16, 2016. Mr. Vaughn's testimony was that the money was withdrawn from the Chase account that was in his name, in four cashier's checks to avoid carrying the entire amount in cash. He then placed each check in 4 separate bank accounts and subsequently withdrew them in cash on different days and delivered them to Christina McCormick on behalf of Pacific Green Collective. (RP2 977)

Christina McCormick provided an accounting of the cash that was delivered to her in a declaration. (EX 226) It did include the 2 pieces of property that were purchased. (EX 226)

Ms. Turner on page 13 quotes a section of the record regarding a \$200,000 loan. This was the loan for \$200,743.98 to purchase the building at 1402 W Reynolds LLC. The records for this transaction were what Mr.

Vaughn was referring to. (RP2 885-86) However, these records were easily obtainable by Ms. Turner because the realtor for that property purchase was also John Douville. They subpoenaed the records for 6906 Martin Way and they could have also obtained everything from 1402 W. Reynolds as this property was listed in the material Mr. Douville provided in Exhibit 275 bate stamp pages 098, 100, and 103. (EX 275)

On page 13 of respondent's brief they quote Commissioner Dicke regarding "a million sitting around in cash" has to be taken in context. This was in a discussion regarding the money that he removed from the Chase bank account on March 16, 2016. (EX2 353 9-12) This was not in reference to a new amount of cash that was in the safe.

Pages 14 and 15 of respondent's brief presents inflammatory, single-sided material that is irrelevant to the issues before this Court. In a rejected overlength reply brief, much of this material was responded to, but it will not be responded to now due to page limits.

Respondent's brief beginning at the bottom of page 15 through the top of 16 again misstates the record. The concluding sentence at the end of the first paragraph on the top of page 16 says: "Most significantly, Vaughn testified that the "big majority" of Pacific Green's revenue was paid by cash [versus Square]. (RP 734)" However, this misrepresents the

statement made by Mr. Vaughn as well as the question he was responding to. The question and answer were as follows:

Q. Okay. Pacific Green Collective, did you -- did you keep track of all the *expenses* that you had for Pacific Green Collective?

A. I mean, obviously, our bookkeeping wasn't the best, but you know, we had some *pretty standard expenses*. You know, the *big majority* of it for the cannabis was paid in cash, and we kept as good of records as possible. (RP2 734, emphasis added)

In this statement Mr. Vaughn is clearly answering a question in regard to expenses. He says “the big majority of it for the cannabis was paid in cash”. (RP2 734 He was talking here about cannabis being paid for as product or inventory for Pacific Green Collective, not cannabis being sold to collective members.

Respondent’s brief page 16, presents a series of quotes. There was no context provided for the quotes, but the first exchanges dealt with the Edmonds store. (RP2 103-104) This was the first day of trial and Mr. Benjamin was complaining that he didn’t even know the Edmonds store existed until the contract was provided before the May 13, 2019 hearing. (RP2 70, 98) The court then asked me the questions in the quoted material regarding this. (RP2 103-104) Then, during the course of the trial, it was revealed through Ms. Turner’s testimony that the Edmonds store was

something that was discovered by her and she told her attorney about it in August of 2018. (RP2 190, 192)

On page 22 of respondent's brief they cite John Douville stating that "he had only seen marijuana business deal in cash only". Mr. Vaughn testified that he used cash to purchase marijuana for Pacific Green Collective. (RP2 734) John Douville was one of the people who sold marijuana to Pacific Green Collective and he testified that he received cash for the marijuana that he sold. (RP2 211-212) Mr. Douville testified that he never bought marijuana for personal use. He never went into a dispensary to make a purchase, only to sell marijuana. (RP2 212)

In respondent's brief on page 22 in regard to the sale of Christine Morris' marijuana dispensary to Mr. Vaughn it states that "Mr. Vaughn purchased one of her dispensaries". This is a misstatement of the facts because Christine Morris only owned one dispensary. (RP2 449)

Respondent's brief, on page 24, states that Mr. Vaughn's marijuana business "profits millions of dollars every year." There is nothing in the record that shows that Dank's Wonder Emporium "profits millions of dollars every year." Clerk's papers 395 cited by Ms. Turner to back this up is page 5 of the Final Termination Order/Decree and nowhere states that any business owned by Mr. Vaughn has profits of a million dollars a year. Exhibit 423, also cited by Ms. Turner, is the draft 2015 tax

return for Pacific Green Collective. It shows gross sales, but because of IRS Section 280E Mr. Vaughn could only deduct the cost of goods sold, and no other expenses. As a result, the tax return does not show profits. There is no evidence in this case to show that Mr. Vaughn profits millions of dollars every year. Shelley Drury testified that based on general costs and taxes in the industry, Dank's operated at a loss between April 2018 and March 2019. (RP2 618-619, EX 440)

The last paragraph states that Mr. Vaughn has a gross income of \$150,000 a month. Our response is found on pages 2-3 above.

ARGUMENT

1. THIS COURT SHOULD NOT UPHOLD THE TRIAL COURT'S DECISION TO GRANT DEFAULT, CONTEMPT AND ORDER TO STRIKE BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S FINDINGS OF FACT, AND IT DID NOT FAITHFULLY APPLY THOSE FACTS TO THE LAW. (THE ASSET AWARDED TO HIM WAS NOT AN ASSET FROM THE RELATIONSHIP AND NO CREDIBLE EVIDENCE ESTABLISHED THAT IT PROVIDES INCOME OF \$150,000 PER MONTH.)

In respondent's brief, the above argument is listed in the affirmative, in short, stating that since there was sufficient evidence to support the court's findings then this Court should uphold the discovery violation sanction. First of all, there was not sufficient evidence. Secondly, the law is clear that the Burnet factors must be followed.

The last part of their heading states that Mr. Vaughn was given the most valuable asset, apparently referring to Dank's Wonder Emporium which they claim without evidence gives him an income of \$150,000 a month. This assumes that Dank's Wonder Emporium was an asset from the CIR. The only identified assets were the money in the banks on the date of separation, December 8, 2015. On that date, money was identified in the following accounts. In the Chase account #3726 there was a total of \$1,017,228.04 (EX 263 baste stamp page 01079) and in the Chase account #5526 the amount of \$35,000.65. (EX 264 baste stamp 01510) There was also money in US Bank account #0586 in the amount of \$2634.80. (EX 269 baste stamp 01704) Lastly, in Alaska USA Federal Credit Union account #0568 there was a total of \$1760.32. (EX 255 baste stamp 00028) The grand total of all identified bank accounts on the date of separation was \$1,056,623.81.

Mr. Vaughn testified that Pacific Green Collective's only assets were the loans for 1402 Reynolds and 6906 Martin Way E. and six cars of which only three are operational. (RP2 769-770) The above identified bank accounts were the source of the funds from which those 2 pieces of property were purchased for a total of \$892,852.98. (EX 226) Ms. Turner was very well aware of those transactions, and counsel for Ms. Turner had copies of all the documents associated with the purchase of 6906 Martin

Way at the deposition of John H. Douville on November 26, 2016. (EX 275 pages 171-297) Mr. Douville also testified regarding this to the court in the trial. (RP2 208, 215-223) So, there was no mystery to Ms. Turner regarding the properties, nor prejudice in their case presentation.

But in regard to Dank's being considered an asset of the CIR, the recreational marijuana retail store of Dank's Wonder Emporium did not come into existence until after the CIR. Mr. Vaughn is the sole member of Dank's Wonder Emporium LLC. (RP2 846-847) It was originally incorporated on March 12, 2014 for the purpose of participating in the lottery for recreational marijuana, but Mr. Vaughn did not get a license. (RP2 847-849, Ex 292) When he did not get a license, he let the LLC lapse. (RP2 850) He then reinstated it when he got a license because he liked the name. (RP2 850)

He got a retail marijuana license in March 2016. (RP2 852) This was based upon his prior application to the lottery using Random Original Productions because it was incorporated before January 2013. Because Pacific Green Collective and Dank's were incorporated after that date, they could not be used to qualify for the subsequent retail opening. (RP2 740-741) The result was that the retail license he has is based upon a corporation that he owned prior to the relationship. (RP2 850, 852)

Lastly, in order to get a license, it was also required that he have a location. (RP2 743-745) Mr. Vaughn did not acquire the 2 properties until after the relationship ended. (RP2 745-747, EX 226 5-6) John Douville's attachments to his deposition show that work was being done to purchase the properties in April 2016. (EX 275 098) Therefore, it was this work done after the relationship ended that enabled Mr. Vaughn to acquire the license that enabled him to obtain a retail marijuana license that allowed Dank's Wonder Emporium to come into being. The properties themselves are the only remaining assets from Pacific Green Collective, but Dank's was the result of Mr. Vaughn's efforts after the CIR ended.

In terms of the analysis based on the factors from the case of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) as summarized by the case of *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) which stated: "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." (at 348)

In this case, in terms of consideration of a lesser sanction, it is clear that the court made no consideration. Simply stating "I can't imagine what other sanction I could have imposed because at every turn, Mr. Vaughn confused, omitted and was not credible." (RP2 56) is a conclusory argument without any analysis at all. How is this Court or the

rest of the world supposed to know what the court was thinking when she could not think of anything? There was no mention of any other sanction, nor how it would have not been sufficient.

In regard to the consideration of lesser sanctions the court in *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 220 P.3d 191 (2009) stated:

“Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.” Rivers, 145 Wash.2d at 696, 41 P.3d 1175. (at 590)

Respondent states in her brief that the above quote from the judge was sufficient because Mr. Vaughn “confused, omitted and was not credible.” (RP2 56, respondent’s brief page 41) However, when that is considered in light of the above quote from the Magana case, it can be seen that this is inadequate, even if the court also stated in her ordered that this was “the least restrictive in this case.” (CP2 399) All the court did was to state her view regarding Mr. Vaughn, but the point is not what she thinks of Mr. Vaughn, but why the sanction itself is the least severe and why a lesser sanction would be inadequate. There was zero analysis regarding this. As a result, as noted in Magana above, this was an abuse of discretion and this alone is sufficient to reverse and remand the case.

Regarding the willfulness in failing to provide discovery, in terms of property during the CIR, the question is what property did they not know about? Counsel for Ms. Turner had all the bank statements. The bank statements had been provided prior to the first trial. There was never a CR 26 (i) conference regarding any failure to provide bank statements during the term of the CIR. The first-time counsel for Ms. Turner implied he may not have those records was the Motion filed 11 days before trial. (CP2 303, page 15 and exhibit G) There was never a motion to compel disclosure of the statements for the time period of the CIR. The updated discovery for which motions to compel were filed all dealt with information after the original interrogatories were delivered on January 18, 2017 (EX 434), after the time period of the CIR. (EX 229, 230) Then, in the hearing on April 19, 2019, not only does counsel for Ms. Turner not raise the issue of any missing bank statements, but acknowledges on the record that they have the bank statements submitted by Mr. Vaughn. (RP 252) So, roughly 2.5 years after receiving the initial discovery they complain about bank records in a motion 11 days before trial. (CP2 303) However, they were provided with the bank records. (RP2 782-783)

The main argument regarding failure to disclose was in regard to new businesses. However, the Edmonds store was not owned by Mr. Vaughn, it was a contract to assist the store with paying employees, bills

not paid by cash, and marketing. (RP2 785-786, 870-871). The contract was disclosed pursuant to the court order dated May 3, 2019. (EX 239) However, Ms. Turner and her attorneys were aware of this in August 2018. (RP2 190, 192) The store was not a secret as it was disclosed on Dank's home page website. (RP 2 785-786) They could have followed up on this since August of 2018 and failed to do so.

The New Jersey store was disclosed within 30 days of its coming into existence, and as noted previously, it was still coming into existence contemporaneously with the hearing. (RP2 259, 563, 786-787)

Counsel for Ms. Turner cites quotes from 2 separate depositions done 2.5 years prior to the trial and slightly less than a year prior to the trial as proof of willfulness of discovery violations. (Respondent's Brief pages 33-38) However, there was never a motion filed with the court to do anything regarding this. For the first time, in the Motion filed 11 days before trial, a couple of the quotes were included for the first time. If there was a problem with the depositions that counsel for Ms. Turner believed was so serious that it merited the most severe sanctions the court can impose, why was nothing done until a motion 11 days before trial? Why was something as simple as a continuance to correct the problem not a potentially less severe sanction? More importantly, if there was a serious

issue with it, why should it not be considered waived if not raised for a time period of between 2.5 years to nearly one year after it occurred?

In terms of prejudice, the trial court only stated on the record that she thought “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”. (RP2 57) At the same time, Ms. Turner argues that they were prejudiced because they did not have enough information to do a business evaluation. (Respondent’s Brief 31, 40-41) The contradiction here is evident, the court claiming the prejudice is a lack of money on the part of Ms. Turner to hire an expert and Ms. Turner claiming that the prejudice is lack of information so she could do an evaluation. Furthermore, there was never any attempt made to do a valuation of either Pacific Green Collective, nor Dank’s Wonder Emporium.

They also knew about the Edmonds store since August of 2018 and did nothing to get an evaluation of that. In the hearing on April 19, 2019, counsel for Ms. Turner did not even mention or request information regarding the Edmonds store even though he had known about it since August 2018. (RP2 192) If there is a prejudice here, it is a prejudice of Ms. Turner’s own creation.

Nevertheless, there was no question regarding what the assets were that were acquired during the CIR. The cash in the banks and the 2 pieces of property that were purchased with the money that was in the bank. So ultimately, the 2 pieces of property were the only remaining assets from the money. (Not including the money that Ms. Turner had squirreled away that she took during the relationship of \$215,034.04. (RP2 542-543)) Therefore, there was no prejudice to Ms. Turner in regard to her presentation of the case nor her knowledge of what the assets from the CIR were. So, the result of ordering a default, striking the witnesses, and default giving Ms. Turner everything she asked for, was an abuse of discretion and must be reversed.

2. VAUGHN'S LEGAL ARGUMENTS REGARDING LAY WITNESS TESTIMONY AS EXPERT TESTIMONY IS MERITORIOUS. HE DID NOT TESTIFIED HIMSELF DURING TRIAL THAT HIS MARIJUANA COLLECTIVE RECEIVED MORE CASH THAN CREDIT/DEBIT CARD PAYMENTS.

Ms. Turner argues that Mr. Vaughn testified at trial that Pacific Green Collective received most of its revenue in the form of cash. As explained in the statement of facts, that is absolutely **false**. Mr. Vaughn never stated this. (RP2 734)

Likewise, Shelley Drury and Dani Espinda did not testify that collective gardens were mostly cash businesses. Shelley Drury testified

that she did not know if a collective garden was mainly cash, she only knew that retail marijuana was a cash industry. (RP2 581, 594) Dani Espinda only testified, that some collectives did not accept credit cards (RP2 677)

As noted above, Christine Morris only provided testimony as to her, one and only, collective garden percentages, nothing more. She was never asked to be, nor presented as, an expert in regard to collective gardens and their income.

Lastly, John Douville likewise, only testified that he sold marijuana to Mr. Vaughn and Mr. Vaughn paid him in cash. (RP2 211) Mr. Douville never purchased marijuana for his own use and confirmed in his testimony that he was not an expert in the marijuana industry and did not know any data behind his opinions. (RP2 227) As a result of the above, it is clear that there was insufficient evidence to substantiate the court's division of property and the trial court must be reversed.

Ms. Turner proceeds to ask for attorney fees based on intransigence citing the unpublished decision of *Van De Graaf v. Van De Graaf*, 10 Wn. App. 2d 1007, review denied sub nom. *Graaf v. Graaf*, 194 Wn.2d 1026, 456 P.3d 405 (Unpublished 2020) which stated the following:

A court may also base a fee award on a party's intransigence. *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007); *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). An award due to intransigence is an equitable remedy. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Among the remediable instances of intransigence is “when one party made the trial unduly difficult and increased legal costs by his or her actions.” *Id.* (at 13)

In the *Van De Graaf* case, the court upheld the trial court in its finding of intransigence, but did not find that the appeal was intransigent because of the significant amount of money that was at stake.

In the case of Ms. Turner and Mr. Vaughn, there is no intransigence on the part of Mr. Vaughn. However, there is intransigence on the part of Ms. Turner from this section, as well as much of the rest of the Respondent’s Brief. This section contained blatant misrepresentations of the record from the testimony of Mr. Vaughn and other witnesses. False and irrelevant innuendos have also been presented throughout this case which had caused us unnecessary time and effort (not to mention additional space) to respond to. This entire section of Ms. Turner’s brief is both frivolous and clear evidence of ongoing intransigence. If sanctions are merited, they are merited against Ms. Turner. We would therefore respectfully request attorney fees for having to respond to this section.

3. THE TRIAL COURT’S DIVISION OF ASSETS WERE NEITHER JUST, EQUITABLE, NOR CONSERVATIVE AFTER CONSIDERING THE EVIDENCE.

Ms. Turner is correct that the standard of review, after reviewing “findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law” (*In Re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) (at 602)), is for the court to then review “for abuse of discretion the trial court’s distribution of property at the end of an “equity relationship.” Long, 158 Wash.App. at 928, 244 P.3d 26.” (*Walsh v. Reynolds*, 183 Wn. App. 830, 841, 335 P.3d 984, 989 (2014)) In this case, the findings of facts are not supported by substantial evidence and the resulting property division was not equitable, therefore the court abused its discretion.

Ms. Turner takes the position in her response that the division of property was just and equitable because Mr. Vaughn failed to provide discovery. Again, other than speculation, the assets of the CIR were no mystery. It was the cash that accumulated in the bank from the credit card payments and the 2 pieces of property that were purchased with that money.

Ms. Turner, multiple times, claims that Mr. Vaughn was awarded a business that generates \$150,000 per month. As noted above, there is no

evidence to support this income amount and Dank's Wonder Emporium was not an asset of the CIR.

As we tried to emphasize in our opening brief, in the case of *In Re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) the state Supreme Court stressed the importance of the equitable underpinnings of a meretricious relationship (committed intimate relationship) and stated:

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.** (at 602 emphasis added)

In this case, Ms. Turner is asking this court to do exactly what Pennington said they have never done, that is, **divorce the meretricious relationship doctrine from its equitable underpinnings.**

This is being done by repeatedly attempting to divert the Court's attention from the division of property and attempting to characterize the party by whose labors the asset was acquired as hiding things (cash). They cannot articulate what things (what amounts of cash) are being hidden and they have no evidence other than speculation to suggest what that may be. This is then used as a justification to give the party who did not acquire the assets, all of the assets, even to the point of multiplying those by two (giving that party all the identified money that had

accumulated in the bank in addition to the properties that were purchased with those funds). Then ordering the party who acquired the assets to then be required to pay all of the debts totaling over \$700,000. This creates a clear unjust enrichment in the non-asset acquiring party by giving them all the assets acquired during the relationship plus and giving all the debt to the asset acquiring party.

During the parties' 4+ year relationship, Mr. Vaughn worked his video production business which phased into medical marijuana. (RP 34) During the entirety of the first 2+ years of their relationship Ms. Turner spent her time pursuing her career and working 40 hours a week at first and then in California she worked up to 3 jobs at a time, 6 days a week for 8 to 9 hours a day. (RP 33, 109, 114) Until Ms. Turner gave birth to Dean, the parties each paid half of all their regular bills. (RP 32, 34, 83, 231) Thereafter, Ms. Turner did not return to work for the last 2 years of the relationship and even after the end of the relationship until the summer of 2016. (RP 82, 265, 531)) When the Square money was coming into their joint account, all of her living expenses were covered and in addition to that she took \$215,034.04. (RP2 542-543) She was able to be a stay at home mom and take care of Dean. (RP 82)

With this as the backdrop, and under the mistaken belief based upon the testimony of one witness that her collective garden received 40%

of her revenue in credit cards and 60% in cash, it was assumed that Mr. Vaughn must have brought in 60% of his revenue in cash as well. As a result, the court ordered more than every identified asset accumulated during the relationship to Ms. Turner (\$1,919,500, not including the \$215,034.04 noted above and \$109,680 for the temporary order) and every identified debt to Mr. Vaughn (-\$760,523.26). This was not just, this was not equitable, this was a clear abuse of discretion.

4. THIS COURT SHOULD NOT AWARD ATTORNEY FEES TO MS. TURNER AS THIS APPEAL DOES NOT DEMONSTRATE INTRANSIGENCE ON THE PART OF MR. VAUGHN AND IS NOT FRIVOLOUS PURSUANT TO RAP 18.9; HOWEVER, THE COURT SHOULD AWARD FEES TO MR. VAUGHN BASED UPON THE INTRANSIGENCE OF MS. TURNER IN RAISING IRRELEVANT ARGUMENTS AS WELL AS FOR THE MISREPRESENTATION OF HER FRIVOLOUS ARGUMENT B WHEREIN THE TESTIMONY OF THE WITNESSES WAS BLATANTLY MISSTATED AND CITING IRRELEVANT MATERIAL IN THE INTRODUCTION WITHOUT ANY FURTHER CITATION IN EITHER THE STATEMENT OF THE CASE OR THE ARGUMENT WITH A CLEAR PURPOSE TO DO NOTHING MORE THAN CAST MR. VAUGHN IN A NEGATIVE LIGHT.

Ms. Turner argues for attorney fees on appeal based upon intransigence. The case of *Katara v. Katara*, 175 Wn.2d 23, 283 P.3d 546 (2012) stated that intransigence can be based on “ ‘foot dragging’ and ‘obstruction’... or simply when one party made the trial unduly difficult

and increased legal costs by his or her actions.” (At 42) Also, in the Katare case the fact that it was the 3rd appeal based upon similar arguments was not enough for attorney fees. (At 42-43)

The citation to irrelevant issues in the case in the introduction and other places created additional cost, time, and precious page space in this brief to respond to. In addition, the misrepresentation of the testimonies of 4 witnesses in addition to Mr. Vaughn also created additional time, cost, and page space to explain and respond to. These are all clear examples of intransigence that has occurred within this appeal by Ms. Turner. All of these should justify an award of attorney fees to Mr. Vaughn against Ms. Turner.

Generally speaking, the cases are fairly consistent that an award of attorney fees based upon intransigence on appeal is usually because of intransigence committed in the appeal. (See *Eide v. Eide*, 1 Wn. App. 440, 445–446, 462 P.2d 562 (1969); *Chapman v. Perera*, 41 Wn. App. 444, 456, 704 P.2d 1224, 1232 (1985); *Buchanan v. Buchanan*, 150 Wn. App. 730, 740, 207 P.3d 478, 483 (2009), as amended on reconsideration in part (July 21, 2009)) The actions of Ms. Turner cited above have all occurred within the confines of this appeal.

The above case of Katare also illustrates that simply because someone has sought recourse to the Court of Appeals on more than one

occasion in the same case is not alone sufficient to establish intransigence. This is especially true where the issues are meritorious and the case involves serious issues and significant financial assets. That said, in the context of requesting fees based upon a frivolous appeal, this is the second time that Ms. Turner has raised this issue. She raised the very same issue in the last appeal and the court denied her request. With that in mind, and in light of the following considerations for a frivolous appeal, it is requested that the court award attorney fees against Ms. Turner for her frivolous response brief.

In the case of *Kinney v. Cook*, 150 Wn. App. 187, 208 P.3d 1 (2009) in discussing RAP 18.9(a) stated:

RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” RAP 18.9(a). “Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wash.App. 680, 696, 181 P.3d 849 (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wash.App. 332, 342, 798 P.2d 1155 (1990)), review denied, 164 Wash.2d 1037, 197 P.3d 1186 (2008). “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wash.App. 899, 906, 151 P.3d 219 (2007), review denied, 162 Wash.2d 1009, 175 P.3d 1092 (2008). Further,

all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. Id.

While we have rejected the Kinneys' arguments, their appeal is not frivolous, as the term is defined above. "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Halvorsen v. Ferguson*, 46 Wash.App. 708, 723, 735 P.2d 675 (1986). Accordingly, we reject Mr. Cook's request for sanctions. (at 195–196)

In this case, there are certainly debatable issues. The severe discovery sanction of ordering a default, striking our witnesses and pleadings, and granting everything requested by the petitioner without properly following the *Burnet* factors. Giving the petitioner in a committed intimate relationship every identified asset times 2 and giving all the debt to the responding party is clearly neither just nor equitable as a division of property. However, even as noted above, in the event that the court were to rule against Mr. Vaughn, that in and of itself is still not a basis for determination that an appeal was frivolous. There is no basis for an award of attorney fees against Mr. Vaughn in this case based upon a frivolous appeal.

However, in regard to Ms. Turner, Argument B is clearly frivolous. To submit an argument that is clearly based upon fraudulent representations of the testimony of 5 witnesses is

dishonest to the Court of Appeals, and a frivolous response because it was completely devoid of merit. We would therefore also request attorney fees based upon the frivolous response.

CONCLUSION

In this case, the Burnet factors were not properly analyzed on the record which is an abuse of discretion. As a result, the trial court must be reversed.

There was clearly an abuse of discretion in the court's division of property and debts following the CIR as well as the acceptance of the testimony of one lay witness to then speculate that Mr. Vaughn had undisclosed assets. The trial court must be reversed.

Lastly, Ms. Turner's request for attorney fees must be denied as Mr. Vaughn's appeal is not frivolous and there is no intransigence. However, Mr. Vaughn should be awarded attorney fees due to Ms. Turner's intransigence reflected in her brief and her misrepresentation to this court as to the testimony of witnesses.

For all these reasons the trial court must be reversed.

Respectfully submitted on September 23, 2020.


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CERTIFICATE OF MAILING

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

Jason P. Benjamin
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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 September 23, 2020.



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