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MAY 18 2011 3:02

No. 68266-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

CAROL ANN KENNARD, Appellant

v.

GABRIEL Y. LEE , Respondent

REPLY BRIEF OF APPELLANT

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I. Assignment of Error #1: Enforcement of the Child Support Escalator Clause

A. The Escalator Obligation Contains A Cap Contrary To Findings

The response brief represents at page 1 that the trial court did not find that the child support escalator clause contains no cap or lid. In fact, the trial court observed: “It follows that the escalator clause in this case is a proscribed term for both child support and maintenance. The escalator clause in this case ... did not contain a cap.” (12/12/11 RP 5).

B. No Concession By Counsel Was Made; No Error Was Invited

The response brief represents at page 8 the court found that Ms. Kennard’s counsel conceded the provision to be non-enforceable. Instead, the court stated, “Ms. Kennard appears to concede...” (12-16-11 RP 2). There was no finding of an actual concession.

The response brief argues that a comment by counsel constitutes invited error citing *State v. Young*, 63 Wn. App 324, 818 P.2d 1375 (1991). There the court held that for the State to argue on appeal that there was no evidence of payment of \$215,000 in life insurance proceeds, when it made an express representation at trial that payment was made, is to

invite error, *State v. Young* supra at 334 (1991). Neither that nor anything analogous occurred here.

At no time was counsel asked whether the enforceability of the child support escalator clause issue was conceded. The issue is whether she actively induced the court to commit error. (See, *Hymas v. UAP Distribution, Inc.* 167 Wn. App. 136, 272 P.3d 889 (2012).

As counsel for Ms. Kennard began her argument that the child support escalator clause cases to do not apply to agreed maintenance escalator clauses with no lid, she commented: “Assuming *In re Oliver* stands for the proposition as it seems to that an agreement that includes an escalation clause of the nature we’re discussing today is not enforceable, I would turn the Court and the focus of today’s – my argument to the maintenance clause” (12/09 RP 16). “Seems to” is not a clear and unambiguous concession that the child support order contains no lid, or that it is unenforceable as a matter of law. She did not induce the court to commit error.

C. Arguments Raised In The Response Brief For The First Time On Appeal Should Not Be Considered And Have No Validity If Considered.

The response brief also makes three other arguments that it could have raised below, but did not, and with respect to which no evidence was presented. RAP 2.5 prohibits consideration of such arguments on appeal.

1. The Defense of Laches Was Not Plead or Proven

Each month child support is due there is a 10 year statute of limitations as to its enforcement. (See RCW 4.16.020). “Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitation.” *Hunter v. Hunter*, 52 Wn. App 265, 758 P.2d 1019 (1988). Among the factors Dr. Lee needed to plead and prove were: “(2) there was an unreasonable delay in commencing the action and (3) there is damage to the defendant resulting from the delay”. *Hunter v. Hunter*, supra at 270 (1988). A delay, within the statute of limitations, must rise to the level of “unusual circumstances” to justify application of the laches defense. (See *In re Marriage of Capetillo*, 85 Wn. App 311 at 318, 932 P.2d 691 (1997); *Hunter v. Hunter* supra at 270 (1988).

Dr. Lee’s reply declaration (CP 261-268) did not deny that Ms. Kennard alerted him in an e mail in 2003 as to his obligation to pay the adjustment, and that she did so “...several times over the succeeding years via telephone. Each and every time I attempted to address this issue with

him, he would claim he was too broke to abide by the terms...He refused to provide me with financial information or even discuss the issue” (CP 267-268).

This would seem most analogous to the circumstances in *In re Marriage of Hunter* supra. There, the custodial mother did not pursue enforcement for 7 years due to the father’s lack of income, therefore her delay was not deemed to be unreasonable, *Hunter v. Hunter*, supra at 270 (1988). Dr. Lee presented no evidence demonstrating that there was anything unusual about her delay. Therefore he has not shown it to be unreasonable.

Even if her delay had been unreasonable, the defense of laches does not avail absent the additional showing that he, in fact, changed his position as a result of the delay. “More than an unreasonable delay is required: there must also be an intervening change of position on the part of the defendant, making it inequitable to enforce the claim.” *Hunter v. Hunter* supra at 270 (1988) relying upon *Arnold v. Melani*, 75 Wn.2d 143 at 147-48, 437 P.2d 908 (1968). The court held that owing what he was legally obligated to pay is not being “damaged” under a theory of laches *Hunter v. Hunter* supra at 270 (1988).

Dr. Lee argues, for the first time on appeal, that he would have filed for a modification of the postsecondary education obligation had she taken formal steps to enforce the obligation sooner. He presented no evidence saying that he would, nor, had he done so, that he would have prevailed. He has cited no authority that damages for purposes of a laches defense include a possible change in a legal obligation. Case law emphasizes that the change in position must be actual not merely possible.

The child support order provision as to postsecondary education did not place the exclusive burden on Dr. Lee after application of the GET credits. “Gabriel and Carol will share reasonable college educational related expenses. In no event shall the obligation of the parents go beyond any child reaching age 25. Each child will be responsible for his or her own post-graduate educational costs” (Appendix 2 from original brief, page 5). Thus, there would have been no need for a petition to modify.

2. The Defense of Equitable Estoppel Was Not Pleaded or Proven.

Dr. Lee must prove that the custodial parent by admission, words or actions induced the obligor parent not to pay his obligations, as a consequence of which he suffers harm. See, *Hunter v. Hunter* supra at 271 (1988). Thus, *In re Marriage of In re Marriage of Watkins*, 42 Wn. App.

371, 710 P.2d 819 (1985) the mother told the father, if you give up all your visitation rights, you need not pay any more support. In reliance on those entreaties, he stopped paying, and incurred obligations he proved he would not have otherwise incurred had he known the obligation would be owing. Here, Ms. Kennard repeatedly requested payment over the intervening years. There was no inducement not to pay.

3. The Obligations Under the Child Support Order Did Not Defy But Rather Expressly Implemented Existing Case Law

In re Marriage of Daubert, 124 Wn. App 483, 99 P.3d 401 (2004), was not the prevailing case law when the order in this case was entered in February 2000. Nor did *Daubert*, supra or the case law prior to the year 2000 hold, as the response brief argues at page 13, that an award beyond the maximum advisory amount constitutes a deviation, requiring deviation findings (see RCW 26.19.075). The governing case law as to awards beyond the maximum advisory amount, when the order in this case was entered, was *Leslie v. Verhey*, 90 Wa App 796, 954 P.2d 330 (1998).

Leslie, supra, held to two propositions. First, that an amount beyond the maximum advisory is not a deviation, *Leslie* supra at 804 (1998). Second, as to whether such an amount is appropriate "... the trial court must consider what additional amounts should be paid 'commensurate

with the parents' income, resources, and standard of living', in light of the totality of the financial circumstances" *Leslie* supra at 804 (1998).

The child support order here at section 3.20 provides, "The child support amount ordered in paragraph 3.5 is based upon the total financial circumstances of the parties pursuant to *In re the Marriage of Leslie*, 90 Wn. App 796, 954 P.2d 330 (1998), since the net monthly incomes of the parties exceed \$7000 per month" (Appendix 1 from original brief, page 3). Thus, instead of thwarting the existing law, the order expressly implemented it.

The escalator provision is also consistent with *In re Marriage of Edwards*, 99 Wn. 2d. 913, 665 P.2d 883 (1983) since it contains a cap. It is based upon the consumer price index which encompasses the rising costs of the children. It has always been modifiable. By late 2011, when the hearing occurred, the increase in that index was only 30.2% (CP 13). Dr. Lee's income increased from \$18,896 per month as of entry of the final child support order in February 2000 (appendix 3 from original brief, page 10), to an average of \$40,404 per month by mid October 2011 (CP 479 and Appendix 1 from original brief, page 3) an increase of 114%. (See page 15, *infra*). The order deeming the escalator provision voidable and unenforceable should be reversed and judgment entered.

II. Assignment Of Error #2: The Enforceability Of The Maintenance Escalator Clause

A. There Is No Existing Law That Prohibits Parties From Agreeing To Maintenance Escalator Clauses With No Lid

The response brief misconstrues the holdings in *Wagner v. Wagner* 95 Wn. 2d 94, 621 p.2d 1279 (1980) and *In re Marriage of Briscoe*, 134 Wn. 2d 344, 949 P.2d 1388 (1998) to make the following argument interspersed in various sections of the brief: “Spouses settling dissolution related issues are presumed to contract with reference to existing law; agreements to avoid existing law... (Sic. “existing statutes...” (page 17) and “case law” (page 21) “must be expressly stated” (page13). In fact, both *Wagner* supra and *Briscoe* stand for a significantly narrower legal presumption.

The State Supreme Court, in following *Wagner*, supra held: “As a general rule parties to a marriage settlement are presumed to contract with reference to existing statutes which directly bear on the subject matter of the settlement incorporated into and part of the decree.” *Wagner v. Wagner* (citation omitted). The parties however may exclude such relevant statutes ... but to do so they must expressly declare their intention to so exclude” *In re Marriage of Briscoe*, supra at 348 (1998).

By “directly bear on the subject matter” the court meant statutes that contain specific requirements. In *Wagner*, supra, the ex-husband convinced the trial court that when the house sold his maintenance obligation was to terminate under their agreed divorce decree. The appellate court reversed because RCW 26.09.170 requires proof of a contemplated substantial change in circumstances before maintenance can be modified. *Wagner*, supra at 443 (1980).

In *Briscoe*, supra, a father reduced the amount of his child support obligation by social security benefits received directly by the child. The court agreed because RCW 26.18.190 (2) requires the payments be credited against the child support obligation. Thus, parties are presumed to intend statutory provisions that directly bear on the issue, to wit, that impose requirements as to the issues in question, unless the parties expressly state otherwise.

The response brief proceeds to cite numerous statutes for requirements they do not contain and principles of case law for which they do not stand that, it further argues, the parties are presumed to have intended since the agreed decree did not state otherwise.

B. The Response Brief Cites Law That Does Not Exist or That Bears No Relation To The Enforceability Of The Maintenance Escalator Provision

The response brief at page 15 relies upon RCW 26.07.020, .030, 060 and .080. These statutes do not exist. It also references RCW 7.24 which contains provisions regarding the court's powers as it relates to contracts, but none of which pertain to the enforcement of contracts or agreed orders.

The response brief argues at page 18 that a court must approve an agreement only if it is fair and equitable in substance, relying upon RCW 26.09.040. That statute is entitled "Petition to have a marriage declared invalid...Procedure – Findings – Legitimacy of children". The statute has nothing to do with marital dissolution proceedings. There is no authority that agreements must be fair before they can be adopted by a court. For example, pre-nuptial agreements unfair in substance, but procedurally fair, are valid and enforceable in dissolution proceedings, *In the Matter of the Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668. RCW 26.09.070 (3) provides that a party can challenge the fairness of an agreement, but only before a Decree of Dissolution is entered.

The brief argues that Dr. Lee was under emotional strain since he had no attorney when the final agreement was signed and the Decree of Dissolution incorporating it entered. However, the court found he was

represented until two weeks before entry of the final pleadings, and was fully advised as to the points of contention before the court 12-16-11 (RP 3-4). Dr. Lee cites CP 45, a purported letter from 2000 claiming emotional strain. CP 45 is part of Ms. Kennard's Declaration in which there is no discussion of any emotional strain regarding Dr. Lee. CP 45 is the Consumer Price Indices attached to Ms. Kennard's Declaration. There is no letter or any other evidence that Dr. Lee was under emotion strain.

The response brief argues at page 16 that RCW 26.09.170 "...identifies the exclusive statutory grounds for an award of maintenance..." RCW 26.09.170 is the child support and maintenance modification statute. It has nothing to do with "exclusive ...grounds" to award maintenance. The response brief provides a quote of the factors contained in RCW 26.09.090, as if they are what the modification statute sets forth.

Those provisions are not "grounds", they are not "exclusive," and they do not set forth requirements as to the establishment of maintenance other than what a trial court is to weigh among other considerations. "...The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct after

considering all relevant **factors including but not limited to:**

...(emphasis supplied).

The response brief concludes its arguments as to presumed statutory prerequisites, by conceding that parties have the right to “contract the terms of spousal maintenance, but argues at page 21: “...this right is not absolute; maintenance awards must comport with RCW 26.09.170.” Neither the provisions of RCW 26.09.170, the modification statute, nor RCW 26.09.090, as this brief has explained, pertain to the issues on appeal which relate to the power of parties to impose spousal maintenance obligations on themselves that a trial court otherwise does not have the authority to impose.

The response brief then mischaracterizes the position Ms. Kennard has taken on this appeal, at pages 14 and 19 as follows: 1) that since the parties made spousal maintenance non-modifiable the court erred in voiding the automatic escalation clause (page 14 and 2) “...that the court’s declaration of the unenforceability of the severed clause constitutes a ‘modification’ of maintenance and thereby violates the Appellant’s right to enforce all maintenance provisions of the agreement” (page 19). It then states: “The argument is misplaced because the Agreement was not modified by this court’s decision.” Not only do those formulations

mischaracterize Ms. Kennard's position but the brief misstates the legal effect of the trial court's decision.

The court's order deeming the agreed spousal escalation clause of the decree voidable and unenforceable does in effect modify Dr. Lee's obligation to pay spousal maintenance because it takes away a right otherwise owing Ms. Kennard contained in the decree of dissolution. Modifications are an increase or decrease in the rights or obligations contained in a decree (See *Rivard v. Rivard*, 75 Wn. 2d 415, 451 P.2d 677 (1969)). However, Ms. Kennard did not base this appeal on that theory because a trial court can deem a provision voidable, but only if there is a mutual mistake of fact which was not plead nor proven here, or if public policy so requires. Whether public policy precludes the enforcement of the provision is the real question on this appeal.

C. The Trial Court's Decision Creates Anomalous Public Policy

Ms. Kennard's position is that a public policy that would empower parties to impose spousal maintenance obligations on themselves, that they might not be able to afford in the future, without recourse, through a non-modifiability provision, but would dis-empower parties from potentially doing the same thing to themselves by deeming unenforceable an escalator

provision based upon the CPI with no cap, is anomalous public policy. That is what the trial court has created here by its decision. Except here, by express provisions, the maintenance obligations would have reduced if Dr. Lee's income went down through no voluntary act of his own, to help ensure his ability to pay. It even contains a specific formula that defines what the reduction will be depending upon the extent of his reduced income, complete with a hypothetical example: "If husband's salary is reduced due to involuntary reduction of salary or full-time equivalent, spousal maintenance shall reduce proportionately, to-wit: as his actual reduced income on an annual basis bears to \$226,758¹ in gross annual income. To illustrate through a hypothetical example, let's assume husband's income is reduced to \$181,406. That figure is 80% of the annual salary on which the maintenance amount of \$9000 per month was based. His maintenance obligation would then reduce by 20% (\$7,200)." (Appendix 3 from original brief, page 10). Thus the escalator provision has a safety valve as it relates to Dr. Lee's future ability to pay even though it contains no lid.

¹ This equates to \$18,896 per month.

Indeed, his income increased from \$18,885² per month to \$40,404 per month, a 114% increase while his obligation only increased 30.2% (CP 13 and 42-52). He clearly has had the ability to pay.

D. The Defenses of Laches And Equitable Estoppel Not Raised

Finally, of note, the response brief does not argue that the defense of laches or equitable estoppel should be applied to Ms. Kennard's effort to enforce the past due amounts of spousal maintenance. Therefore, the reasons why neither applies, as related to past due child support, will not be repeated here.

III. Assignment of Error #3: The QDRO Presented On Behalf Of Ms. Kennard Was Consistent With The Agreed Decree.

A. Parties Are Not Presumed To Contract Consistent With "The Law"; They Are Presumed To Do So As To Statutory Requirements Unless They Express Otherwise

While not directly arguing its misconstruction of the holdings in *Wagner v. Wagner*, 25 Wn. App. 439, 607 P.2d 1251 (1980), and *In re Marriage of Briscoe*, 134 Wn.2d 344, 949 P.2d 1388 (1998), the arguments the response brief makes regarding the award to Ms. Kennard

² The most current pay stub submitted by Dr. Lee for the hearing in 2011 reflected that he had earned \$383,837.69 for the first 9 1/2 months of 2011, which averages \$40,404 per

of her portion of the retirement benefits, implies the notion that the parties are presumed to have intended to award her only one half the community portion. The response brief's argument, and the court's decision, imply that community property law, as to ownership of community and separate property, as defined under RCW 26.16 et seq., dictates how property is to be divided in a marital dissolution proceeding. Those statutes bear no relation to how property is to be divided.

The response brief cites no statute that "directly bears" on what portion of the Group Health pension the parties are presumed to have intended to distribute to Ms. Kennard. Nor does it cite any existing law that says that courts are to divide community property equally and award separate property to the owning spouse. This is because none exists.

The response brief at page 25 relies inaccurately on *Moore v. Moore*, 9 Wn. App 951 at 952, 515 P.2d 1309 (1973) for the proposition that separate property can only be invaded under "exceptional circumstances." *Moore v Moore*, supra and other reported decisions have been expressly overruled, and the exceptional circumstances doctrine has been rejected by *In re Marriage of Konzen*, 103 Wn. 2d 470, 693 P.2d 97 (1985), followed by *In re Marriage of Griswold*, 112 Wn. App 333, 48

month.

P.3d 1018 (2002). Thus, case law provides that courts can decide equitable divisions of property without regard to whether the property is separate or community.

In re Marriage of Bulicek, 59 Wn. App 630, 800 P.2d 394 (1990) is the only reported decision that discusses a permissible, but not a required, division of a pension that has both community and separate property features. The husband sought to overturn the trial court's division of a portion of his pension awarded to the wife. He argued that the formula ordered by the court awarded the wife part of his post-divorce earnings, and therefore a portion of his separate property. Division I of the Court of Appeals agreed that this is precisely what the wife was awarded. However, the court held it did not matter because to do so was within the discretion of the trial court, *In re Marriage of Bulicek*, supra at 638 (1990).

What has come to be known as the "*Bulicek* formula" was not even employed by the court here: "6(a) Alternate Payee is entitled to a portion of the amounts credited to Participant's accounts in the Plan as part of a just and right division of the estate of the parties. Such portion is hereafter defined as "Alternate Payee's Share of Plan Benefits." "Alternate Payee's Share of Plan Benefits" shall be 50% of the total amount held in Participant's accounts under the Plan, as of February 15, 1999... adjusted

for investment gains and losses attributable thereto, in accordance with the terms of the Plan, until distributed” (Appendix 3 from original brief, page 3).

The response brief does not deny that Dr. Lee presented no evidence disputing the evidence presented by Carol Kennard, that the QDRO presented by her attorney dividing the entire pension equally when her share would be distributed to her is what the parties intended.

B. Clear, Cogent, and Convincing Evidence Was Not Presented. Therefore, The Court’s Reformation Of The Agreed Decree Constitutes An Abuse Of Discretion.

The response brief argues that the trial court’s resolution of the portion of the pension awarded to Ms. Kennard can be based upon a preponderance of the evidence citing *Lopez v Reynoso*, 129 Wn App 165, 118 P.3d 398 (2005). However, *Lopez supra* holds “...a contract that is only partially integrated...may be supplemented by terms or agreements shown by a preponderance of the evidence (*Lopez v Reynoso*, *Supra* at 174 (2005)). There was no assertion or evidence that the parties divided their community property and debts equally. There was no assertion or evidence as to any supplemental agreement regarding whether the parties intended Ms. Kennard’s interest be limited to half the community portion

of the retirement benefit. The clear cogent and convincing standard of proof applies, and has not been met by Dr. Lee.

C. The Trial Court Erroneously Reformed The Agreement

The response brief argues, at page 22 that by not including what it calls a “segregation date,” that there exists an ambiguity so that the court’s decision does not constitute a reformation of the agreement. The brief supports this argument by misrepresenting that 26 USCA 414 (P) (2) requires a segregation date in all qualified domestic relations orders. In fact, the statute says nothing about a segregation date or any other date: “Orders must clearly specify certain facts...(B) The amount or percentage of the participant’s benefit to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined” 26 USCA 414 (P) (2)(B).

In this case, the agreement of the parties incorporated into the decree of dissolution is not silent as to what portion of the pension is awarded to the wife. The agreement expressly says “one-half the husband’s Group Health Retirement benefits” (CP 188). The only silence is as to when her half is to be distributed to her, rather than as to how

much of the benefit she was awarded. When the order was presented has no bearing on that issue.

The order's silence as to when her half of the benefit would be distributed to her is not an ambiguity justifying reformation by the court. Where an agreement merged into a decree of dissolution awarded the ex husband a lien in property awarded the wife, to be satisfied upon sale of the property its silence as to when the property would have to be sold was deemed not to be an ambiguity enabling the court to infuse a reasonable period of time. "There is no ambiguity...Mr. Mudgett would have this court add to the terms of the decree which incorporated the parties' agreement...Adding terms ... would amount to writing a new contract...A court may not create a contract for the parties which they did not make themselves." *In re marriage of Mudgett*, 41 Wn App 337 at 341, 704 P.2d 169 (1985).

Our State Supreme Court later clarified: "As in Mudgett, the problem is not one of ambiguity but rather unilateral mistake. The fact that Byrne may have believed the effect of her agreement to be different than it actually is, does not justify the court in rewriting the contract for her." *Byrne v. Ackerlund*, 108 Wn. 2d 445 at 454, 739 P.2d 1138 (1987).

That is precisely what the trial court did in this case except there was no allegation or evidence of a unilateral mistake. Dr. Lee presented no evidence to dispute Ms. Kennard's declaration that the Q.D.R.O. presented on her behalf was consistent with the requirements of the agreed decree. The court erred in failing to adopt the one sought on her behalf and signing the one proposed by Dr. Lee.

IV. Conclusion:

A. The Child Support Order and Spousal Maintenance Escalator Clauses

By its express recitation, the child support order was based upon the prevailing case law at the time to assure the children a standard of living commensurate with both parties after consideration of their total financial circumstances citing *Leslie v. Verhey* supra (1998) at section 3.20. The net incomes of both parties were equalized through the initial maintenance obligation. The child support escalation clause was based upon the consumer price index to help insure the increasing living expenses of both Ms. Kennard and the children would be met once every three years, with the required cap as to child support required in *In re Marriage of Edwards*, supra (1983). This provision was always

modifiable or adjustable every two years based upon the incomes of the parties under RCW 26.09.170.

The maintenance provision not only included a tri-annual escalation clause with no lid but also provided for automatic decreases in the otherwise non-modifiable maintenance to protect Dr. Lee against obligations he could not afford.

The consumer price index, the basis of the escalator provision rose 30.2% through 2011 while Dr. Lee's earned income increased 114% during the same period. He had the ability to pay. His refusal to honor her requests for compliance over the years that he could not afford to pay turned out to be disingenuous. There is no case law or statute that proscribes a presumed intent to be otherwise expressed. To conclude the provision unenforceable because it does not consider his ability to pay ignores the full dimension of the maintenance obligations imposed. The obligations are enforceable. The trial court's decision as to both the child support and escalator provisions should be reversed.

B. Division of the Group Health Retirement Benefit

There was no evidence to dispute that equal division of Ms. Kennard's share of the entire pension upon distribution to her was what the parties intended in their agreement. There is no law that directs or

even suggests that upon marital dissolution, divisions of property are limited to an equal share of community assets and no share of separate assets. The pension order signed should be vacated and the order sought by Ms. Kennard approved.

V. Attorney Fees.

King County Family Law Local Rules do not govern the requirements to obtain fees on appeal RAP 18.1(c) requires the submission of a financial declaration at least ten days before the hearing on oral argument.

Apart from RCW 26.18.130 and RCW 26.09.140, as to fees on appeal is the issue of intransigence. "Awards of attorney fees based upon the intransigence of one party have been granted when one party made litigation unduly difficult and increased legal costs by his or her actions. See, *In re Marriage of Morrow*, *supra* at 591, 770 P.2d 197" (*Matter of Marriage of Greenlee*, 65 Wn. App. 703 at 708, 829 P.2d 1120 (1992).

The response brief has made frivolous arguments, citing statutes to support arguments they do not support and even statutes that do not exist. The brief even represents facts as to reliance on non-enforcement of the escalator clauses and emotional distress when the separation agreement and decree of dissolution was entered causing the lawyer for

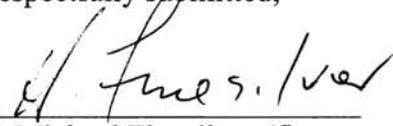
Ms. Kennard to spend needless time combing the record to look for evidence of these factual representations that do not exist.

The response brief construes case law to hold to propositions for which they do not stand or which have been overruled. It attributes arguments to Ms. Kennard that she has not made, and misconstrued many of those that she did make.

All of these acts have caused an enormous amount of work on this reply brief that should not have been necessary. Fees should also, therefore, be awarded for intransigence.

DATED this ____ day of November, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Michael Finesilver", written over a horizontal line.

H. Michael Finesilver (fka
Fields)

Attorney for Appellant
W.S.B.A. #5495

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No. 68266-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

CAROL ANN KENNARD,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
GABRIEL Y. LEE,)	
)	
Respondent,)	
_____)	

I, Amy Rebeiro, state and declare as follows:

I am a Law Clerk in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 13th day of November, 2012, I placed true and correct copies of the Reply Brief of Appellant to the Court of Appeals with Seattle Legal Messengers for delivery on November 13, 2012 to:

Janet Watson
108 South Washington Street #304
Seattle, WA 98104
(206) 340-1580

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

DATED at Seattle, Washington, on this 13th day of November,
2012.

A handwritten signature in black ink, appearing to read 'Amy Rebeiro', is written over a horizontal line.

Amy Rebeiro

Anderson, Fields, Dermody & Pressnall
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