No. 45874-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of

TODD E. SCHNEIDERMAN
Appellant

and

JULIE T. ROGERS
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

Judge Forbes labored through a mountain of pleadings before concluding Todd Schneiderman misled the court and his wife as to his finances. The judge's findings are supported by substantial evidence, which is the standard that applies to review of CR 60 orders. In so finding, the judge accounted for Schneiderman's conduct overall, as the sum of its parts, whereas on appeal, Schneiderman cherry-picks instances where he alluded to the truth, arguing his many other misleading, misdirecting, and minimizing statements were mere persuasion. However, when a magician appears to pull a rabbit from a hat, we do not call that persuasion; we call it a trick. In a courtroom, unlike a theater, tricks defeat the purpose, which is to achieve just outcomes. Here, Schneiderman persistently dissembled and deflected; over-complicated, so as to obfuscate; buried in paper in order to obscure; remained silent when he was in the best or only position to know the facts, as with his 2011 income and the attorney trust account. His conduct disserves the court and the opposing party and obstructs justice. Even as between arms-length adversaries, this conduct is unconscionable; between spouses, who owe a fiduciary duty to one another, it is worse. Judge Forbes properly exercised her discretion when she vacated the portions of the decree tainted by Schneiderman's misconduct and discovery abuse.

II. RESTATEMENT OF ISSUES

1. The court reviews a CR 60 order for an abuse of discretion, with deference to the trial court's findings of fact.

2. Because Schneiderman did not dispute in the trial court that Rogers' motion was filed within a "reasonable time," the parties did not fully develop the facts and circumstances pertinent to the challenge raised first on appeal. In any case, the record shows the motion satisfied CR 60's timing requirements.

3. The court properly vacated the decree on proof that Schneiderman violated his discovery obligations.

4. The trial court properly vacated the decree on proof of Schneiderman's misrepresentations and misconduct.

5. The trial court properly vacated the decree on proof of newly discovered evidence that would have changed the trial's outcome.

6. The court properly held Schneiderman responsible for his misconduct, not his attorney's, related to the trust account.

7. The court properly awarded fees to the wife in the CR 60 proceeding.

8. This Court should award the wife her appellate fees and costs on the same basis as in the trial court.

III. RESTATEMENT OF THE CASE

Rogers and Schneiderman were married for 19 years, a long-term marriage; they separated 10/17/09. CP 96; RP 701.[1] They have two children, both now adults. Schneiderman is 50 and Rogers is nearly 53. Both are in good physical health, though Rogers struggles with mental health issues which affect her employability (i.e., PTSD, depression and anxiety), as do her years as a homemaker. CP 98; RP 697-698.

Schneiderman is a medical doctor and owns a highly lucrative surgical ophthalmology practice, Retina Center Northwest (RCNW), to which Rogers contributed. RP 217-218, 697-698, 701. Schneiderman also owns interests in two other medical related entities, Medical Partners, LLC (20%), and Kitsap Outpatient Surgery, LLC (8%). CP 701.

The finances of Schneiderman's practice, and his finances in general, are very complex and he employs a consultant to structure them (Reitinger), as well as a CPA (Forde). CP 910-915.[2] He has a partner in the practice (Spinak) and they have complete control over distribution of income (i.e., when, how much, etc.). CP 649. For example, they agreed

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[1]The trial transcript will be referred to as "RP," or "CP" if excerpted in the pleadings, while transcripts from the motion hearings will include the dates.

[2] In December, 2010, Schneiderman blamed the complexity of his practice's finances for the delay in making an accounting of expenses and revenues, an explanation the court accepted. See, e.g., CP 540, 541 (note: when Schneiderman excerpted this, he misidentified Yelish as speaking when it is Province, as the context makes obvious).

on a monthly draw ($35,000 for Schneiderman); they decide quarterly how much of their excess earnings to distribute as "bonuses." CP 13-14.

For the four tax years 2008 through 2011, Schneiderman's total income as reported on tax returns averages $1,031,758 annually, or $85,980 monthly. CP 670, 1453-1463).[3] This income figure does not include items expensed through the business, such as family vehicles, health benefits, cell phone costs, etc., or other wealth accumulations (e.g., equity) or cash received (portions of installment loan payments) not included on tax returns. CP 31-32, 514 ($14,961/quarterly expenses), 624-625. However, throughout the dissolution proceedings, Schneiderman insisted his income was much lower, as will be discussed further below.

Schneiderman filed a petition for dissolution on 12/11/09. CP 199. A week later, the parties stipulated to payment of certain expenses from Schneiderman's base salary of $35,000/month, with the balance split equally between them. CP 933. At the time, Rogers did not know Schneiderman's actual income, but she knew it was substantial. CP 463, 514. The stipulated order also required the "current checking account"

[3] After Spinak joined the practice, for the two years preceding separation, Schneiderman's income as reported on tax returns was just over $1 million annually. The year following separation (2010), his income dropped substantially (to $769,147). The following year (2011), his income exceeded $1.3 million. When 2010 and 2011 are averaged, they are consistent with the two prior years, so that his annual income is just over $1 million for each of the four years. CP 670. Schneiderman told Judge Haberly the lack of bonuses in 2010 (i.e., the low income) was not due to the litigation. CP 520.

contents to be held in the trust account of Schneiderman's attorney (Province), allowing for certain disbursements. CP 934. Finally, the parties agreed "[d]ivision or use of [Schneiderman's] future quarterly bonus income/dividend shall abide further Order of the Court or agreement of the parties through counsel." CP 933. Subsequent orders required quarterly bonus funds to be placed in trust. E.g., CP 549, 1057. Schneiderman later conceded he violated these orders. CP 961-962.

From the start, the parties litigated intensely, appearing in 17 hearings in the 19 months from petition to trial before referee Robert Beattie in July 2011.[4] The parties hotly disputed the income available for temporary support and, relatedly, disputed whether Schneiderman was fully disclosing his income. He insisted the only reliable measure of his income was the $35,000 monthly draw he receives from RCNW. See, e.g., CP 8 ("I do make $35,000 a month"); 10-14 ($30,000); 19 (gross income is $30,000+$5,000 monthly); 928-931 (chart). For example, to Judge Haberly he refers to this figure as "set" (CP 461) and having "no ambiguity" (CP 947). He repeatedly claimed his quarterly "bonus" income "should not be considered" because it was not reliable. See, e.g.,

[4] The trial was reported at Rogers' insistence and cost. CP 77, 87. It was transcribed for Rogers' appeal and has been transferred from that cause to this one. Without making clear the import, Schneiderman complains that Judge Forbes did not read the entire trial. Br. Appellant, at 15. She did receive excerpts in the parties' pleadings. It bears noting the judge had no other access to the entire transcript, since it was no longer in the superior court file, but was in this Court (hence, the motion to transfer).

CP 8 (gets bonus when "there's bonus available"); 14 ("some quarters over the last three years where there hasn't been a bonus"); 459 ("nobody knows what kind of money is going to be available beyond that $35,000 per month); 460 (not "reliable"); 510-11 ("not regular nor reliable").

While Schneiderman claimed his bonuses sometimes were "zero" (CP 297), Rogers testified they had received a distribution of profits every quarter since 2008, when Dr. Spinak joined the practice, until 2010, when Schneiderman said there was a problem with the accounting software that prevented them from making distributions. CP 539-540, 624. (Before 2008, they took profits whenever they needed them. CP 624.) He said the practice "needed to identify and fix the accounting problems before [Spinak] or I could take a bonus…" CP 419. However, tax returns show that Spinak took all his 2010 distributions, while Schneiderman took only a portion. CP 624; 852-853.[5]

The lack of bonuses in 2010 weighed heavily in Judge Haberly's analysis of the disputed income issue. For example, in the October 15, 2010 hearing, where she notes she does not have 2nd and 3rd quarter bonus information for 2010, Schneiderman presses his point that his income is

[5] The 2010 K-1s show Spinak withdrew $687,863 of $689,753 in distributions and Schneiderman only $432,159 of $659,081. CP 852-853. Later he admitted the $215,000 bonus he took in January 2011 "actually represented second, third and fourth quarters" of 2010). CP 419. He does not explain why Spinak took all his profits earlier. See, also, CP 1935 (K-1 for 2011 has Schneiderman taking all his profits in the same year earned).

merely $35,000 a month. CP 519.[6] When the judge asks whether there is no bonus because of the litigation, Schneiderman denies it. CP 520.

Schneiderman persuaded Judge Haberly, who ruled on a variety of temporary motions, including family support, to leave the income figure at the $35,000 level used in the early agreed order drafted by Province. See, e.g., CP 525 (on 10/21/10 finding Schneiderman's 2010 income "is unknown"). As she noted, "I don't have a real feel for what money is available..." CP 461. On 11/05/10, she said, "it does not appear that he will even be close to earning $57,000 per month." CP 533. Finally, she noted "it's been a lot of time getting to the point" reached in her 10/21/10 order, and "that's where it's going to sit until things change or there's some other quarterly bonuses that have come in front of me ..." CP 529.

Schneiderman did not take any further bonus distributions until several months later, in 2011, when he had to make a large tax payment and took distributions for all three of the last 2010 quarters. CP 419. He did not deposit these "bonuses" into the trust, as required, but paid the tax directly. CP 8, 961-962. When he later requested permission to withdraw funds from trust to pay additional tax, Judge Haberly denied his request without proof of the liability from his CPA. CP 2695-2696.

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[6] Rogers points out there was no verification of even the 1st quarter bonus. CP 519.

Rogers continued her efforts to obtain an accurate financial picture, without success. Because Schneiderman resisted production of materials she needed, she sought and received from Judge Haberly an order requiring Schneiderman to provide "all documents necessary" to value all his businesses, first to Rogers, then to CPA Kessler, who was retained to value RCNW. CP 1056. Because that did not work, Rogers moved to compel Schneiderman to answer interrogatories, which was resolved by agreed order. CP 1029-31. When Schneiderman failed again to comply, Rogers moved again to compel.[7] CP 1123-24. She explained, for example, that many of Schneiderman's incomplete answers stated only that the information had been given to CPA Kessler. CP 1125-30. The judge accepted Schneiderman's claim that what he gave Kessler answered Rogers' requests and denied Rogers' motion. CP 524, 532, 534. In fact, this was not true, as discussed below (§IV.C), but the order, entered in reliance on Schneiderman's claims, left Rogers without recourse.

Schneiderman continued to lowball his income at trial, predicting his income was declining and would be no more than $550-600,000 for 2011 and $275-300,000 for 2012. See, e.g., RP 247, 505-506; CP 931. The referee found his income to be $660,000 ($55,000 monthly), based on

[7] Schneiderman claims Judge Forbes erroneously found there was more than one motion. See, Br. Appellant, at 7 and appendix CP 874 (assigning error). He is wrong and the judge is right.

the 2010 draft tax return produced by Schneiderman on the first day of trial, though it appears to have been printed and signed a month earlier. CP 7, 42, 583-584.[8] In fact, post-trial, events unfolded to reveal his gross monthly income at the time of trial was actually twice what the referee found it to be (i.e., nearly $110,000 rather than $55,000), not counting wealth not reported on tax returns (e.g., installment sales payments, equity). CP 31-32. Schneiderman had not supplemented his interrogatory answers with this information. CP 875. See IV.C, below.

Relying heavily on the income figure of $55,000, the referee issued an oral ruling distributing the assets and making an award of maintenance. CP 584-587. Finally, "[i]n the event there are any additional bonus payouts," the referee awarded them to Schneiderman. RP 725. Schneiderman's attorney "did not draft the final papers until [two months later,] October 2011." CP 184. The trial court entered final orders on October 14, 2011 and Rogers appealed. CP 2464.[9]

Six months later (April 2012), Schneiderman's CPA, Forde, sent Province, who then sent to Rogers, via her attorney, a spreadsheet

[8] Rogers' financial expert, Thomas Sadler, testified Schneiderman's income to be $63,688 monthly, based on the same materials CPA Kessler reviewed for purposes of valuing RCNW. CP 569-571, 874. Kessler appears to have requested only records related to RCNW. CP 2617-2636. See, §IV.C, below.

[9] Rogers abandoned the appeal before filing an opening brief, as she pursued CR 60 relief. Yet Schneiderman claims the appeal cost him thousands in fees. CP 48.

describing Schneiderman's 2011 income. CP 4, 35, 654. Schneiderman wanted Rogers to pay taxes on the first seven months of this income. CP 296. This document showed Schneiderman's 2011 income to be twice what the referee found it to be and $700,000 more than Schneiderman had testified he was, at most, going to receive in 2011. Rogers engaged financial experts to analyze this new information. CP 30-38, 39-46.

During this same time, Rogers attempted to obtain accurate information regarding Province's trust account, which the decree awarded to her. CP 86. She had repeatedly sought accountings during pretrial proceedings. CP 1025-34. The balance owed Rogers per the decree, and what should have been in the trust account, should have equaled the community checking account plus Schneiderman's bonus income from 12/09 through 08/11, less approved expenses or withdrawals. At different times, Schneiderman had conceded he did not transfer the funds into the Province trust account until nearly a year after the order and that he had not deposited bonuses into the account as ordered. CP 961-962. He later explained that he wanted to be able to pay for things without having to go through the process of getting funds from the trust. See, e.g., 961-962. Complicating the issue on the receiving end, Province was not forthcoming with an accounting of the trust account; ultimately, what he did provide was an "incomplete and inaccurate" ledger. CP 184.

Though Rogers' efforts to uncover the facts were ongoing, she filed a motion on 10/12/12 for an order to show cause why the decree should not be vacated, which she supported with declarations from herself and the financial analysts assisting her with evaluating the 2011 income spreadsheet from Forde. CP 1, 2-29, 30-38, 39-46.[10] The same day, Schneiderman objected to the motion for a variety for reasons, including personal attacks upon Rogers and a wrong-headed argument that Rogers had violated the CR 60 procedure. CP 47-49, 55.[11] He claimed the court should not issue a show cause order for a merit-based hearing and requested sanctions against Rogers. Id. The rule actually does not provide for an objection to be heard to the motion for an order to show cause. *See* CR 60(e)(2) ("Upon the filing of the motion and affidavit, the court *shall* enter an order …") (emphasis added).

Regardless of the fact Rogers had actually done what the rule requires, and that issuance of a show cause order ordinarily occurs as a matter of course, even without notice to the other side, the commissioner declined to rule on Rogers' motion and set it for a hearing in November

[10]Rogers' signature page includes the incorrect date: 10/12/11, instead of 10/12/12. CP 6.

[11] For example, Schneiderman said of Rogers' financial analysts: "For a CPA with a Masters of Law in Taxation, Ms. Massa doesn't seem too bright or perhaps she is just confused." CP 55. He complained about his ex-wife of 20 years that he was "dealing with someone with a long history of mental illness." CP 293.

before Judge Haberly. CP 56. Among his other objections, Schneiderman insisted Judge Haberly hear the motion for an order to show cause because she was the assigned trial judge. CP 169-171.

Schneiderman's actions substantially delayed entry of a show cause order, though he continued to complain of delay and argued Rogers' motion should be dismissed if not heard by Judge Haberly. CP 169-171. Rogers and her counsel explained the delays, including accommodations extended to Province and to Schneiderman's new counsel. CP 173-175, 177-178.[12] When the issue finally reached her, Judge Haberly noted she had not heard the trial, did not know what issues were addressed there, had only signed agreed final orders, and that "fresh eyes [were] okay" for the motion. CP 180.[13]

Meanwhile, Rogers continued her efforts to untangle the trust account mystery; finally, on 12/18/12, she filed a grievance with the Washington State Bar Association. CP 185. Neither Province nor

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[12] This would be the second of his four attorneys, an observation made only because Schneiderman repeatedly mentions that Rogers had multiple attorneys. See, e.g., Br. Appellant, at 6, etc.; CP 51 ("four attorneys"), CP 294 ("her previous three attorneys … now on her fourth attorney"); CP 400 ("her fifth attorney"); RP (12/02/13) 18, 21 ("another new lawyer"), ("new lawyer… multiple lawyers"), 24 ("three lawyers"). He nowhere explains how this is relevant.

[13] In this appeal, Schneiderman takes a contradictory approach to Judge Forbes, who, like Judge Haberly, did not preside over the trial. Where Schneiderman insisted Judge Haberly should decide the show cause order, even though she did not preside over trial, he now insists Judge Forbes's decision deserves no deference because she did not preside over trial. Br. Appellant, at 16. He cannot have it both ways.

Schneiderman would cooperate with the subsequent investigation. Id. Schneiderman said he refused so as to spare his daughters the ordeal, without explaining how the investigation involved them. CP 428.

Three months later, the WSBA reported its results, finding multiple ethical violations, which "caused serious injury" to both parties. CP 182-190, 201. However, the question most pressing from Rogers' perspective, i.e., "if Ms. Rogers ultimately received all money owed to her," the WSBA could not answer. CP 201.

Nevertheless, in response to Rogers' motion for an order to show cause, Schneiderman declared "every penny has been properly accounted for and distributed to the respondent" and supported this assertion with Province's "trust account records," which he claimed were "included in the trial by referee, approved by Referee Beattie, and approved by Respondent's attorney, Mr. Robinson." CP 284, citing to Exhibit B (CP 305-351). But Rogers filed most of these documents with the court a year earlier to demonstrate the opposite proposition: that the trust account was a mess. CP 2718-2741. Regardless, Schneiderman persists in these assertions to this day. See, e.g., CP 429 ("WSBA never found we suffered a financial loss"); Br. Appellant, at 50 (no finding Rogers did not receive funds owed her).

Moreover, contrary to Schneiderman's assertions, there was confusion at trial about the amount held in the trust account, with different totals being offered throughout the proceeding. See, e.g., RP 395 ($80,000), 399 ($90,000), 431 ($98,000), 654 ($100,000), 704 & 709 ($125,000). Province promised at the end of trial a correct accounting. RP 729; see, also RP 383-384 (Robinson relying on Province assertions re trust). As the WSBA found, that never happened.

While the WSBA investigation was underway, the show cause order was in limbo. Though Judge Haberly decided, on 12/21/12, she did not need to hear the matter, she did not sign the show cause order. In March, when the WSBA issued its report, Rogers' attorney, Steve Olsen, withdrew. CP 225. Rogers described difficulties in finding counsel, presumably because so many local attorneys were friendly with Province and were uncomfortable making a case against him. CP 225; RP (09/17/13) 7-8. New counsel, from Seattle, appeared for Rogers and filed and noted for hearing an amended motion for order to show cause, which included the WSBA investigation results. CP 57-222, 223-227.

As to Rogers's claims in her CR 60 motion about income, Schneiderman initially responded that the court found "early in this case that my salary is $35,000/month … [which] should not be open to debate." CP 54. Later, he repeated "[i]t was just as Judge Haberly set it at 35." RP

(09/17/13) 20. He argued Rogers could have returned to court to ask "that this be recalculated, redetermined, remeasured" if she disagreed with it. RP (09/17/13) 18-20. (Rogers in fact did return to court repeatedly in 2010 and 2011, on this very point, prompting Judge Haberly to remark, "it's been a lot of time getting to the point" reached in her 10/21/10 order, and she declined to disturb it. CP 529. Even Schneiderman observed, in his CR 60 response, that Rogers tried to change the temporary orders. CP 281.) Schneiderman maintained that by persuading Judge Haberly to adhere to the $35,000 figure and then by "relying on and repeating [the court's] decision," he was not misrepresenting his income. CP 288.

He also argued his 2011 income was irrelevant, even though he maintained Rogers should pay taxes on seven months of it. CP 54. He said, "my future income was litigated and accounted for in the Arbitration and Decree." CP 54. He explained that he "worked incredibly hard the last 5 months of the year once the distraction of the divorce was over ..." CP 54. He claimed he made nearly $1 million dollars in those five months and only $350,000 the first seven months. CP 355; see, also CP 288 (monthly income from the first half of 2011 was $50,000 and his earnings after that are "irrelevant."). Yet, according to Forde's spreadsheet, by the end of July in 2011 (covering the seven months of income for which Schneiderman wanted Rogers to pay tax), Scheiderman had earned

approximately $760,000, considerably more than what he had testified at trial in July was the outer limit on his total 2011 income. CP 35.[14]

Schneiderman did not ever argue that Rogers failed to file her motion within a "reasonable time," though he did argue "but for the delays in Ms. Rogers' camp, [the motion] would have been heard and resolved months and months ago." RP (09/17/13) 16 (emphasis added); CP 47-49, 50-55. He did not acknowledge the delays he caused, noted above. Though he did not mention "reasonable time," he did argue the one-year limitation for newly discovered evidence should require the court to ignore "[a]nything filed after the one year mark..." CP 283.

At the September 2013 hearing on the motion for an order to show cause, the court noted the "reasonable time" requirement, but only as incidental to Schneiderman's request to exclude materials developed after the one-year mark. RP (09/17/13) 33. The court viewed the "newly discovered evidence" prong as interrelated with CR 60(b)(4), the latter having no express deadline. Id. As the court "read it, both allegations [income and trust account] involve fraud. So I'm comfortable that the one-year provision does not apply to this particular action." Id.

[14] Despite his pretrial and trial claims of financial distress, post-trial Schneiderman quickly paid Rogers the substantial equalizing payment ordered in the decree (from earned income and "loans") and bought a second waterfront home. CP 629.

The court granted an order to show cause and the matter proceeded to a hearing on the merits, which occurred in December 2013. Again, Schneiderman did not argue Rogers' motion was untimely, as in not filed "within a reasonable time." CP 399-408. At the hearing, the timing issue was not addressed at all. RP (12/02/13) 3-35.

After the hearing, the court issued lengthy findings and an order vacating the property distribution and maintenance provisions of the decree. CP 869-879. The court found Schneiderman had knowingly misrepresented his income, including by failing to update as to current income, so that neither Rogers nor the referee could determine the facts. CP 869-870. The court noted the record contained instances of this beyond those identified by Rogers. CP 870. The court found Schneiderman regularly stated his only reliable or predictable income was $35,000 monthly. CP 870. The court found he testified his 2011 income was declining when he knew or should have known it would be as high or higher than 2010 (and even higher than the more comparable 2008 and 2009), citing to his testimony that the outer limit was likely to be $600,000, when in fact his income for the first half of 2011 already exceeded that amount. CP 870. The court noted Schneiderman failed to prove otherwise. CP 871; see, also, CP 649. His misrepresentations on this material fact justified vacating the decree under CR 60(b)(4).

As to the Province trust account, the court also found that because of Schneiderman's failure to cooperate with the WSBA, and his failure to comply with the orders requiring deposit of funds into the trust and his failure to respond to discovery requests on this subject, it is unknown whether there are additional funds "which should have been deposited to the account..." CP 872. The court criticized Schneiderman for continuing to refer to Province's ledger, revealed false by the WSBA investigation. CP 872. The court noted Schneiderman had "exclusive control" of information which would allow an accounting of what funds should have been placed in trust, but "instead rel[ied] on the bald assertion" that the parties had received all they were entitled to receive. CP 873.

Finally, the court found Schneiderman had also violated his discovery obligations. CP 874. The court noted Schneiderman's false assertions to Judge Haberly that all information Rogers requested had been provided to Kessler and found this to be a willful violation of the rules. CP 874. The court also found Schneiderman had engaged in a "knowing concealment" when he failed to supplement his interrogatory answers with up-to-date income information. CP 875. The court found the information withheld by Schneiderman to be "material and likely to change the result of the property division and maintenance awarded to Respondent at a new trial." CP 875-876.

The court also found newly discovered evidence supported the motion to vacate under CR 60(b)(3). CP 875-876. Such evidence included the WSBA investigation results, not available until Spring 2013; the Forde spreadsheet of RCNW income for 2011, not produced until April 2012; and the Medicare reimbursement summary for 2011, showing significantly higher income than Schneiderman testified, directly contradicting him. CP 875-876. The court again rejected as not "credible" Schneiderman's claims that he earned most his income after trial, noting that he failed to prove the truth of this assertion despite having exclusive control over the information. CP 876. The court also awarded fees to Rogers. CP 2272-2274.

IV. ARGUMENT IN RESPONSE TO APPEAL.

A. THE STANDARD OF REVIEW.

A motion to vacate is addressed to the sound discretion of the trial court. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380, 388 (2013). However, Schneiderman argues this Court should review the trial court's order *de novo.* Br. Appellant, at 16. He argues this Court "owes no deference" to the trial judge's order because the judge did not preside over the trial "in which the alleged fraud was committed." Id.

First, Schneiderman cannot mean to hamstring the superior court by requiring only certain judges hear certain motions. *State v. Caughlan*,

40 Wn.2d 729, 732, 246 P.2d 485 (1952) (the authority of all judges in a county is identical). Indeed, a particular judge cannot retain jurisdiction over a case for that reason. *Id.*

Second, it bears noting that the misconduct here was not confined to trial; it was pervasive and in documents. See, e.g., CP 870 (court's finding misconduct went beyond instances cited by Rogers). Nevertheless, Schneiderman argues that because Judge Forbes reviewed "a documentary record," this Court "is in as good a position" as she to decide whether Schneiderman engaged in prohibited acts. Br. Appellant, at 16-17.[15] In effect, Schneiderman wants this Court to review everything and come to its own conclusions, ignoring the deference this Court accords to the trial court's resolution of this kind of factual dispute. *See In re Marriage of Langham and Kolde,* 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (*de novo* review is appropriate only if the record consists solely of documentary evidence and credibility is not an issue). Indeed, "where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing

[15]Schneiderman argues this Court has the "same 'record'" as Judge Forbes. Br. Appellant, at 18. Yet, he notes the record before her "contained only limited portions" of the trial to the referee and complains that she did not read the entire trial. Br. Appellant, at 15 and 16. But he did not provide it to her! The transcript was at the Court of Appeals, for Rogers' appeal and has now been transferred to this cause per Schneiderman's request. Schneiderman wants this Court to review more of the record than was before Judge Forbes, which seems at odds with his many homages to finality.

court to apply a substantial evidence standard of review." *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174, 1180 (2003); *see, also, Dalton v. State*, 130 Wn. App. 653, 656, 124 P.3d 305, 306 (2005) (appellate tribunal is not permitted to weigh evidence or credibility).

Our Supreme Court has noted this deference is especially appropriate in family law cases. *See Marriage of Rideout,* 150 Wn.2d at 350-353 (contempt proceedings); *In re Parentage of Jannot,* 149 Wn.2d 123, 126-128, 65 P.3d 664 (2003) (parenting plan modification). Our court has recognized "that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference on review." *Jannot*, 149 Wn.2d at 127; *see, also, Rideout,* 150 Wn.2d at 351.

Schneiderman ignores this pertinent authority and cites an old federal case where the plaintiff twitched when she testified about her head injuries. Br. Appellant, at 17, citing *Atchison, T. & S. F. R. Co. v. Barrett,* 246 F.2d 846 (9th Cir. 1957). This may be one good reason to defer to fact-finders, but it is not the only reason. Experience and expertise also justify deference, as our courts and the federal courts have repeatedly held. In any case, Judge Forbes could see if the parties twitched at the hearings.

In short, in Washington, the standard of review of a trial court's decision on a CR 60 motion remains abuse of discretion, including with

deference to the court's factual findings, which are reviewed for substantial evidence. This standard is particularly important here given the centrality of credibility to the trial court's decision.

Nevertheless, Schneiderman asserts this Court should follow federal authority. This does not help him, since the United States Supreme Court has determined "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S.Ct. 2641, 2649, 162 L.Ed.2d 480, 494 (2005). As in Washington, this deference is due not only to the superior position from which a trial judge may determine credibility, but to experience. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518, 529 (1985) ("with experience in fulfilling [fact-finder] role comes expertise.").

Accordingly, the "clearly erroneous" standard applies under federal law, "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson,* 470 U.S. at 574. As the U.S. Supreme Court has noted, there is little to gain and much to be lost by duplication of the trial judge's efforts by the appellate court, including "a huge cost in diversion of judicial resources." *Id.,* at 574-575. Additionally, requiring a party to persuade three more judges of his or her position, having already persuaded a trial judge, is

"requiring too much." *Id.*, at 575. This Court, undertaking the same labor as Judge Forbes, would reach the same conclusions. But the cost of adopting a *de novo* standard, to the court and to Rogers and the law, is plainly too high. In short, it makes no more sense here, than it does in federal court, to essentially moot the entire trial court proceeding.

Nor do the administrative law cases Schneiderman cites help him. Br. Appellant, at 18. One involves the trial court's review of a hearing officer's decision, which is *de novo,* but notes that review of the hearing officer's factual determination is under the "clearly erroneous" standard. *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 670, 266 P.3d 932 (2011). In the other case, the superior court's decision was given no deference by the appellate court, but the hearing board's decision was, including review of facts for "substantial evidence." *Willowbrook Farms v. Dep't. of Ecology*, 116 Wn. App. 392, 397, 66 P.3d 664 (2003). In short, review of the administrative trier-of-fact findings is not *de novo.*

Finally, an important principle bearing on the question in this case, which could only rarely, if ever, arise in the federal context, is the fact of this being a family law case. As noted, our Supreme Court has twice (in *Rideout* and *Jannot)* declared trial level judicial officers to be in a better position, experientially, to address factual issues, in contempt proceedings and in parenting plan modifications. Presumably, this same standard

would apply to child support modifications, which are almost always determined on the basis of documentary evidence, as are many other family law proceedings. *Jannot,* 149 Wn.2d at 128 (noting the application of this standard in such proceedings).

This Court has also suggested deference is due the trial court because it "has the benefit of oral argument to clarify conflicts in the record." *In re Marriage of Stern*, 68 Wn. App. 922, 928, 846 P.2d 1387 (1993). In fact, Judge Forbes made use of this opportunity by inquiring, for example, whether Schneiderman had any evidence, apart from his bald assertion, that he earned the majority of his 2011 income in the latter half of the year. RP (09/17/13) 22. (He conceded he did not. Id., at 23.) See, also, RP (12/02/13) 32 (additional inquiry).

Essentially, Schneiderman asks this Court to assume the position of a superior court judge in relation to a motion to revise a family court commissioner's order. However, longstanding Washington law holds the proper standard of review to be deferential where the trial court must resolve conflicting evidence, whether the evidence is by live testimony or documents. As discussed below, Schneiderman fails to demonstrate Judge Forbes in any way abused her discretion.

B. SCHNEIDERMAN OBJECTS FOR THE FIRST TIME THAT ROGERS' FAILED TO SEEK RELIEF WITHIN A "REASONABLE TIME," AN ARGUMENT WHICH, IN ANY CASE, FAILS.

Schneiderman claims Rogers' motion was not made within a "reasonable time," as CR 60 requires. Br. Appellant, at 19-22. He makes this argument for the first time on appeal. *See* RAP 2.5 (a); *Jones,* 179 Wn.2d at 322 (declining to address arguments not made to the trial court in CR 60 motion). The objection he made below was directed at the one-year deadline for motions based on the newly discovered evidence prong (CR 60(b)(3)) and sought as a remedy the exclusion of evidence produced after Rogers' initial motion to vacate (i.e., after 10/12/12). See, CP 283; see, also, RP (09/17/13) 33 (court addressing the objection). He did not argue, in his responses to Rogers' motions, that the "reasonable time" requirement was violated. CP 47-49, 50-55, 399-408.

This matters because a trial court's discretionary decision on "[w]hat constitutes a reasonable time depends on the facts and circumstances of each case." *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144, 1147 (1999). The trial court did not consider, or make findings, regarding these "facts and circumstances" because Schneiderman did not address to the trial court the argument he makes now. He did not argue then, but argues now, that Rogers had "no explanation" ("inexplicably"; "without any explanation for her delay") for

not having filed sooner. Br. Appellant, at 19-22. The complaint itself is ironic, insofar as the heart of the problem here is Schneiderman's concerted effort to conceal his wealth from his wife and the court, as Rogers in fact explained in her supporting declaration. CP 3-6. Yet, for the first time on appeal, he asks this Court to hold Rogers dilatory for not getting sooner the information he was doing everything to keep from her.

Irony aside, as a practical matter, had Schneiderman made his "reasonable time" argument at the trial level, Rogers could have elaborated upon the "facts and circumstances" surrounding the timing of the motion and the court could have ruled.[16] This Court, then, would have reviewed the trial court's decision for an abuse of discretion. *Luckett,* 98 Wn. App. at 309. Here, again, Schneiderman treats this Court as the trial court. He does not want just a complete second bite at the apple, as he argues in his standard of review section; he wants a first bite.

In any case, it is not a very good argument. Schneiderman played "keep away" with the evidence and now complains that he was good at it. Indeed, perhaps if not for Rogers' persistence in the face of Province's dissembling and the fortuity of CPA Forde sending her the 2011 income information, Schneiderman might have gotten away with it.

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[16] This problem also arose in *In re Marriage of Leslie,* 112 Wn.2d 612, 617, 772 P.2d 1013, 1016 (1989), where the wife first raised laches in her appeal, which left the husband without "an opportunity at trial level to present explanations for the delay[.]"

Even apart from this obvious explanation, Washington law affords many examples of how the "reasonable time" yardstick flexes to suit the "facts and circumstances" of particular cases. *See, e.g., In re Marriage of Leslie,* 112 Wn.2d 612, 772 P.2d 1013, 1016 (1989) (eight years, under CR 60(b)(5)); *In re Marriage of Thurston*, 92 Wn. App. 494, 963 P.2d 947, 950 (1998) (19 months, under CR 60(b)(11)); *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062, 1065 (1985) (20 months). As observed in *Thurston,* the "mere passage of time … is not controlling"; rather, "a triggering event … may arise well after entry of the judgment…." *Id.* What a court must consider is whether the nonmoving party is prejudiced by the delay and whether the moving party has a reason not to have acted sooner. *Id.; see, also, Maddix*, 41 Wn. App. at 252 (using laches analysis); *Thurston,* 92 Wn. App. at 502 (prejudice other than cost and loss of finality). As noted in *Thurston,* the federal rule is also flexible. 92 Wn. App. at 502.

This laches analysis is crucial because the purpose of the time requirements is not to impede but to facilitate justice. Yet Schneiderman never explains the prejudice to him from the "delay" about which he complains, whereas Rogers describes at length her efforts to get at the facts.

Moreover, any argument by Schneiderman about prejudice would have to deal with his contribution to delay, not merely substantively (i.e., the misconduct), but procedurally, meaning the efforts he made to derail Rogers' original motion. CP 47-49, 50-55. As described above, when Rogers gave him courtesy notice, he baselessly impeded her getting a show cause order. CR 60(e)(2); *In re Disciplinary Proceeding Against Ferguson*, 170 Wn.2d 916, 932, 246 P.3d 1236, 1245 (2011) ("CR 60(e) requires the court to schedule a show cause hearing and requires the party seeking relief to provide notice to the opposing party prior to this future hearing"); *Maddix,* 41 Wn. App. at 252 (reversed because trial court did not grant hearing). Schneiderman blames Rogers for delay, yet he did not behave like someone in a hurry to adjudicate the merits.[17]

Once Judge Haberly declined to hear the motion, the issue hardly went dormant. The WSBA was investigating and, when it issued its report, Rogers' counsel withdrew. CP 223-227. Rogers had difficulty retaining new counsel, given the size and collegiality of the Kitsap County family law bar. CP 65. Nevertheless, Rogers succeeded by August in

[17]For some reason, Schneiderman continues to refer to the delay as a "two-year delay." See, e.g., Br. Appellant, at 22. For what it's worth, the original motion was filed within 12 months of trial; from final orders to the amended motion to vacate is 22 months, at least four of which have to be attributed to Schneiderman's delays. Of course, more pertinently, it is his "tangled web-weaving" conduct that necessitated the painstaking investigation in the first place. Schneiderman makes this kind of computational error in a number of places – e.g., seven day trial, instead of four day. CP 282.

getting her CR 60 motion back on track for issuance of a show cause order.

Schneiderman also argues Rogers already knew the basis for her CR 60 motion, so should have filed it immediately after trial. Br. Appellant, at 20. Certainly, Rogers suspected, and argued, Schneiderman was dissembling. She and her attorneys, made every effort to gain an accurate picture of Schneiderman's income. Schneiderman frustrated those efforts, including by persuading judicial officers he was telling all. See, e.g., CP 1025-1195. What Rogers gained after trial was evidence of Schneiderman's deception, which formed the basis of her motion. Rogers may have known Schneiderman was not telling the truth, but she had to prove it. For that, the evidence came later – the Forde spreadsheet (4/12), the WSBA report (03/13), the Medicare information for 2009-2012 (10/29/13) (CP 904-905). Judge Forbes recognized the materiality of this evidence and its unavailability prior to trial. CP 875-877. No doubt, additional evidence will be revealed in the upcoming trial. Having woven the web, Schneiderman should not be heard to complain how difficult it has been to untangle it.

Schneiderman also argues Rogers may not amend her CR 60(b) motion "as a means for raising untimely arguments." Br. Appellant, at 21. For all the reasons discussed above, Schneiderman's "reasonable time"

complaint is meritless. In any case, Schneiderman ignores Judge Forbes' insight into the interplay between the "newly discovered evidence" in this case and the CR 60(b)(4) prong, noting "the rule contemplates that when you discover fraud, you are probably discovering newly discovered evidence." RP (09/17/13) 33. Thus, she rejected Schneiderman's argument to exclude evidence produced subsequent to the original (10/12/12) motion to vacate. Id. She also explained at length how the evidence was not accessible by Rogers before trial. CP 875-877.

Here, Schneiderman slightly recasts his earlier argument as being about "relation-back" (Br. Appellant, at 21), but that does not work because of its faulty premise that only the one-year deadline applied to Rogers' motion.[18] CR 60(b)(4) does not have any time limit, beyond the "reasonable time" limit. If anything, Rogers' original motion was premature. In any case, Schneiderman offers no authority, nor any good reason why the court should ignore the evidence of misconduct.

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[18] This fact (and many others) distinguishes this case from the federal case cited by Schneiderman. Br. Appellant, at 21, *citing Sorbo v. United Parcel Serv.*, 432 F.3d 1169 (10th Cir. 2005). In *Sorbo,* only the one-year time limit applied, and, for that reason, the court held the "amended" motion to be untimely. (The court then denied the initial motion as violating the "reasonable time" requirement.) Here, because the basis for vacating the decree is not only the newly discovered evidence, but CR 60(b)(4), the one-year time limit does not apply in the way Schneiderman argues, as Judge Forbes properly ruled. In other words, Rogers is not trying to "relate back" to the initial motion as a means to salvage the "newly discovered evidence" prong. Rather, she proved the misconduct through evidence discovered after trial. In any case, the Forde spreadsheet supports the CR 60(b)(3) basis in and of itself.

And this is the entire point. Finality is a virtue, but so is deciding cases on their merits, an aspiration defeated by those who would misrepresent facts to the court and the opposing party. Judge Forbes properly set this case for the merit-based trial Schneiderman evaded.

C. THE TRIAL COURT PROPERLY HELD SCHNEIDERMAN TO HIS DISCOVERY OBLIGATIONS.

The judge concluded Schneiderman violated his discovery obligations; Schneiderman disputes two of the court's factual findings. Br. Appellant, at 37-42. The court's finding of a willful violation of discovery rules is reviewed for clear error. *Roberson v. Perez*, 123 Wn. App. 320, 334, 96 P.3d 420, 427 (2004). Moreover, because, here, as in *Roberson,* the extent and materiality of Schneiderman's discovery violations did not come to light until after trial, the diligence of the opposing party is not a consideration, as the trial court properly found (CP 875). *Roberson,* 123 Wn. App. 334. In any case, Rogers can hardly be faulted for lack of effort; indeed, Schneiderman repeatedly complained about her efforts in the trial court. Judge Forbes properly found Schneiderman violated his discovery obligations and that his violations prejudiced Rogers' ability to prepare for trial.

1) Substantial Evidence shows Schneiderman withheld evidence..

The trial court found Schneiderman failed to provide "complete and accurate information regarding his business income" and failed to

provide the trust account records. CP 874. The court also found Schneiderman's failure to supplement his interrogatory answers was a "knowing concealment." CP 875. Substantial evidence supports these findings, from which Rogers supplies several examples.

Documents to Kessler: Judge Forbes found Schneiderman "deliberately misrepresented" to Judge Haberly that he had provided information to Kessler when he had not. CP 874-875. The judge is right.

Rogers propounded interrogatories and requests for production to Schneiderman addressing financial issues, among other things. CP 697-734. Instead of answering in substance, Schneiderman answered more than twenty questions by saying he had "provided to Kessler." Id. He did so even after Judge Haberly told him to first provide the documents to Rogers. CP 1056. In the spring and summer of 2010, Rogers sought twice to compel complete answers to the interrogatories. After a flurry of pleadings and two hearings, and vigorous assertions by Schneiderman that he had disclosed all, Judge Haberly declared Schneiderman "has answered this set [of interrogatories]." CP 524. However, she noted the interrogatories are "continuing in nature and may need to be supplemented by him." CP 524, 532.

In November 2013, responding to Rogers' CR 60 motion, Schneiderman produced a declaration from Kessler stating he was

provided everything he requested. CP 409-410. This did not answer whether Rogers was provided everything she requested. Then, in response to a subpoena, Kessler provided an inventory of what Schneiderman provided him. CP 758-766. Rogers detailed the mismatch between what she had requested and what Schneiderman provided Kessler. CP 748-751. For example, Rogers requested business income tax returns for 2005-2009 and Schneiderman responded that the RCNW returns were "provided to Kessler" and returns for the other entities were attached. CP 705. In fact, he only provided the 2008 RCNW return to Kessler. CP 740. Missing are the other years and the other businesses.

Nevertheless, on appeal, Schneiderman claims the 2009-2010 "tax returns were *jointly* submitted as exhibits at trial, and Rogers' experts acknowledged that they reviewed them." Br. Appellant, at 38. This is misleading in the extreme. First, the record citation fails to denote what tax returns are at issue, citing to CP 750 concerning "US federal personal income tax returns," without saying anything about the missing "business income tax returns" discussed at CP 749. Similarly, Schneiderman's other record citations address only personal tax returns: Voit's declaration (CP 44-46); Sadler's testimony that he had reviewed what documents Kessler had (CP 569); index to trial showing only "Fed. Tax Return" exhibits list (CP 593). None of this supports Schneiderman's claim that he provided

Kessler all the tax returns Rogers requested, and Kessler's submissions make clear Schneiderman did not. They simply do not match.

Failure to amend answers: The court also faulted Schneiderman, who controls when to take his profits, for failing to disclose year-to-date income at trial in July 2011. The trial court found Schneiderman, to be "under a duty seasonably to amend [his] prior response" to interrogatories, as CR 26(e)(2) states. Rogers' interrogatories also admonished:

> **These interrogatories are continuing in nature** and in the event you discover further information that is responsive to the interrogatories, you are to supplement the answers within a reasonable time after you discover the information.

CP 698. Judge Haberly twice reminded him of the same. CP 524, 532. Judge Forbes found Schneiderman failed to do this, which is a "knowing concealment." CP 875. This fact was revealed when Forde supplied Rogers with a 2011 income statement allocating seven months of RCNW income to her for tax purposes – $760,000. CP 4, 35. In lieu of revealing this information, Schneiderman testified his income was going to decline after 2010, a year already unusually low compared to the two preceding years. See, e.g., §III (n.3). For example, when asked by his attorney what his 2011 income was "on track to be," Schneiderman testified:

> You know, my base draw, including the managerial fee, is 420,000. I'm concerned that before the end of the year that managerial fee is going to get cut because of the increased

> responsibilities of the office manager[19] and my partner already telling us – telling me that he doesn't want to sustain that. So if I think that my base fee is going to be 200,000, not knowing what the second quarter numbers are yet, I can guess that there will be another 150 to 200,000 in bonuses over the course of the year, so that would put it at 550 to 600,000.

RP 505; see, also RP 579 (reiterating anticipated salary of 550-600 for 2011). His income exceeded his estimate by more than double. And, as discussed previously, his claims to have made $1 million in the five months post-decree is belied by the record. See § III, above.

On appeal, Schneiderman argues he had no obligation to document his 2011 income because "Rogers did not request it." Br. Appellant, at 39. This is an incredible claim. In her interrogatories, Rogers asked Schneiderman to state his "rate of pay" (CP 713), to provide historical information, and admonished the request was "continuing in nature." CP 698. She asked for information about his bonuses for the "next 12 months," which Schneiderman concedes he did not provide until after Rogers' sought to vacate the decree. Br. Appellant, at 39 n.6.[20] Yet he argued to Judge Forbes the "record is replete with information regarding

[19]Schneiderman was engaged to the officer manager at this point. RP 540. Her salary increased from $65,000 to 80,000 prior to trial. Id.

[20] Schneiderman received a bonus of $61,506 in April 2011, or so he says. CP 355, 424. He goes on to claim his average monthly income for the period was $43,876, a claim he repeats in his appellate brief. CP 424. In fact, even this information (uncorroborated and provided late) shows his monthly income to be $51,000 (i.e., $356,506/7 = $50,929). This includes a "mystery" distribution of $50,000 (no description or date). CP 355. In any case, what he earns and what earnings he takes, are not the same thing. CP 649.

all components of my income up to the date of our arbitration." CP 431. Rightly, Judge Forbes did not believe him.

"A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials." *Johnson v. Mermis*, 91 Wn. App. 127, 132, 955 P.2d 826 (1998). For two years, Rogers contested Schneiderman's claims about his income. She served discovery and sought information by motions to compel. She asked for accountings. In light of these facts, as well as the numerous admonitions regarding the ongoing nature of the interrogatories, Schneiderman's parsing of Rogers' requests underscores why Judge Forbes found a "knowing concealment."[21] His claim that he could not produce 2011 income documentation is plainly false. Br. Appellant, at 40. He acknowledges he knew of his April bonus. His office manager had reviewed a draft report. RP 208. Presumably, by July 31, the business would have to file quarterly returns with the state, as well as federal estimated tax payments. It is simply not credible that Schneiderman had no evidence of his income for the first half of the year. The evidence was clearly available; he simply chose not to provide it to Rogers and the referee.

[21] Schneiderman's citation (Br. Appellant, 40) to *In re Hope 7 Monroe St. Ltd. P'ship*, 743 F.3d 867 (D.C. Cir. 2014) would apply only if Rogers never asked about his income.

Trust Account: Schneiderman also denies he failed to respond to discovery requests regarding funds in trust because he "had no basis for knowing that it was not accurate." Br. Appellant, at 40. He also claims to know "every penny" was accounted for. CP 284. For reasons that will be addressed below, the court properly laid some of the responsibility for the trust fund malfeasance with Schneiderman. See §IV.F. He knew what money was to go into the trust account and his lack of cooperation left the WSBA unable to determine whether Rogers received the money owed her.

2) These violations prejudiced Rogers.

Finally, Schneiderman argues his discovery violations had no impact on Rogers' ability to present her case. Br. Appellant, at 38-40. He claims the withheld information would only have established what Rogers "already knew – Dr. Schneiderman's income varied from year to year …" Br. Appellant, at 41. In fact, what Rogers has discovered post-trial, is that Schneiderman's income did not vary; rather, it has consistently averaged $1,031,758 annually, or $85,980 monthly for the four tax years 2008 through 2011. CP 670. So it hardly helps Schneiderman to cite federal authorities for the proposition that vacating a judgment is not warranted where the undisclosed information was cumulative. Br. Appellant, at 41. That simply is not the case here. Neither Rogers nor the referee had proof in July 2011 that Schneiderman's earnings already exceeded what he

testified was likely to be his maximum for the entire year, or that he would earn more than double the amount he estimated, making up for the unusually low profits in 2010. Forde's spreadsheet, along with the Medicare information, suggest the extent of Schneiderman's misrepresentation. As for the effect of full disclosure on the businesses, time will tell. Judge Forbes rightly granted Rogers a new trial where the complete facts will be revealed.

At the end of the day, Schneiderman's argument regarding discovery can be summarized as an assertion that he provided Rogers with everything he wanted to provide her. He fails completely to rebut the court's finding that he failed to provide what Rogers requested and do what the law required. That is the problem, as Judge Forbes rightly saw.

D. THE TRIAL COURT PROPERLY VACATED THE PROPERTY DISTRIBUTION AND MAINTENANCE AWARD BASED ON THE MISREPRESENTATIONS AND MISCONDUCT.

Complementing his discovery violations, Schneiderman also perpetrated a "systematic misrepresentation regarding his income throughout the dissolution case," and the court found this a sufficient basis to vacate the decree. CP 871.[22]

In challenging these facts, Schneiderman tries to distract from the forest by pointing out a few trees. See, e.g., Br. Appellant, at 38 (citing to

[22] Given the legal and factual sufficiency of this basis, Respondent will not spend pages here describing how Schneiderman's conduct also rises to the level of fraud.

his references to bonus income). But Rogers nowhere claims, and the court nowhere found, that Schneiderman disguised the fact of bonus income, so it is not clear why Schneiderman spends so much time on this issue. Br. Appellant, at 32-37. What Rogers could not discover was what amounts Schneiderman was earning (as well as distributing to himself) or what his other sources of income were producing, all relevant to predicting future earnings. In the pretrial litigation and at trial, Rogers argued Schneiderman's bonus income was substantial, as Schneiderman notes (Br. Appellant, at 28), but she needed to prove it. Schneiderman did not – fair and square – prove otherwise; rather, he did everything he could to portray his bonus income as so incidental and unpredictable as to exclude it from accountings of his total income, leading Rogers on a complex game of hide and seek, which Schneiderman nearly won.

Schneiderman's misrepresentations about his income went beyond mere argument – he misdirected, misled, tactically omitted, and exploited his position of complete control over "the distribution and allocation of income." CP 649 ("when he is paid and how much may not reflect when he earned the income."). For example, as previously noted, he declared under penalty of perjury on child support worksheets in 2010 that his income was only $35,000/month, "[a]s previously declared and adopted by the Court," because his bonus income, being neither "regular nor

reliable," should not be counted. CP 510. He submitted worksheets consistent with his argument, but contrary to Washington law that mandates disclosure of all income for child support purposes. Id.; CP 514 (citing RCW 26.19.071 (all income "shall be disclosed and considered").

In other places where the law specifically imposes a duty on a party to disclose income, such as financial declarations, Schneiderman sent everyone looking for a "CPA Declaration," when he could have at least supplied the figure from his 2009 tax return (i.e., $85,363 monthly average of "total income"; $78,571 monthly AGI). CP 619; 2289-90, 2433-34. Later, when he requested permission to spend money in trust, he declared his "net income is identified in [his] Financial Declaration," which it was not. CP 492. Family law litigants in Washington are expected to be able to say their monthly income, so a court can easily find that important information. With a CPA and a business consultant, Schneiderman should have been able to comply with this simple duty.

Despite what Schneiderman repeatedly said, the record reflects his income was quite consistent. The only quarter since 2008 when he did not receive a bonus was during the pretrial litigation in 2010, when he claimed that a software problem prevented him taking his bonus, though that did not stop his partner from taking his bonuses. See, § III (n.5), above.

This dissembling seems reflexive. Schneiderman did not apparently even think to amend his interrogatory answers to reveal bonuses received in 2011, as he concedes. Br. Appellant, at 39 n.6. Nor did he provide documentation during the CR 60 proceedings to contradict the evidence Rogers presented of his 2011 income, as the trial court found. CP 871. See Br. Appellant, at 30. He claimed he earned most of it in the last part of the year and produced a "report," but without indicating its source or providing any other indicia of reliability or explaining why this "report" was not available at trial. CP 288, 355-356.[23] To the judge's direct inquiry, he finally conceded there was no evidence to support his claim. RP (09/17/13) 23. Despite this failure of rebuttal, he accuses Judge Forbes of a "faulty interpretation" of the Forde spreadsheet, sent to Rogers via her counsel as part of a demand that she pay taxes on the $760,000 earned through July 2011. Br. Appellant, at 32. Judge Forbes acted well within her authority to believe this spreadsheet, corroborated by the Medicare reimbursement information and Schneiderman's own admissions that he failed to disclose bonuses. This credibility call was the trial court's to make. *In re Marriage of Greene,* 97 Wn. App. 708, 714, 986 P.2d 144 (1999) (credibility sole province of the trial court).

[23] There are many reasons to doubt this report, e.g., describing RCNW as operating on the "accrual basis." CP 355. In fact, RCNW operates on a cash basis. See, e.g., CP 1927.

The problem of predicting future income, discussed by Schneiderman (Br. Appellant, at 31 and 37), is one every trial court must confront. The parties may argue their views, but they may not hinder the court's work. When Schneiderman calls this advocacy he belittles the attorneys and litigants who play by the rules. Here, Beattie relied on 2010 income, the lowest of the pertinent years, when Schneiderman was sitting on the knowledge that 2011 was going to be more like what the practice had earned historically and what his partner received. This conduct disserves Rogers and the court. *See Suburban Janitorial Servs. v. Clarke Am.,* 72 Wn. App. 302, 863 P.2d 1377 (1993) (silence can equal misrepresentation). For this reason, CR 60(b)(4) permits the court to vacate a judgment based on "misrepresentation or other misconduct." *Maddix,* 41 Wn. App. at 252.

Such conduct is particularly reprehensible in a marital dissolution, when the relationship between the parties is not an arm's length relationship, but one of trust and confidence, with each spouse bearing the other "the highest fiduciary duties," which continue until the marriage is terminated. *Friedlander v. Friedlander,* 80 Wn.2d 293, 494 P.2d 208 (1972); *Peters v. Skalman,* 27 Wn. App. 247, 251, 617 P.2d 448 (1980). Judge Forbes did not vacate the decree based on an "after-the-fact disparity in the property distribution." Br. Appellant, at 23. In affirming

her, this Court does not "countenance motions to vacate based on the claim, as here, that a prediction of future income was inaccurate when the parties provided full disclosure before trial." Br. Appellant, at 23. Rather, the judge saw Schneiderman's deception for what it was and properly exercised her discretion to vacate the decree tainted by it.

E. THE COURT DID NOT ABUSE ITS DISCRETION BY ACCEPTING EVIDENCE "CREATED" AFTER TRIAL.

Schneiderman's challenge to the CR 60(b)(3) aspects of the court's orders ignores several critical facts. First, of course, this Court may affirm on either of the other two bases addressed above (CR 60(b)(4) and CR 37(g)). Second, the trial court explained how the newly discovered evidence interrelated with the CR 60(b)(4) claim. And, finally, the evidence is "newly discovered," not "newly created," as Schneiderman argues, based on the form the evidence takes. But form is not dispositive.

For example, the misconduct related to the trust account existed (i.e., had occurred) before trial, though the evidence of it could not be discovered sooner. Indeed, it took a WSBA investigation to reveal that, yes, there was something wrong with the account. However, because of Schneiderman's refusal to cooperate, even that investigation could not discover all. Similarly, Schneiderman earned income in the first part of 2011, even if he failed to disclose it and Rogers only learned of it because he later wanted her to pay tax on that income. The same simple logic

applies to the Medicare information: RCNW earned those Medicare payments before trial, even if Rogers had to seek them out by FOIA after trial because Schneiderman failed to provide that information.

The mistake Schneiderman makes is confusing the form for the substance – the income was earned and the trust account misused before trial. It is not that Schneiderman had a struggling practice that became profitable later. Rather, the extraordinary profitability of his practice was shielded from view. The evidence of it was newly discovered.

Schneiderman also again argues that complete information about his income was merely cumulative and would not have changed the referee's decision. Br. Appellant, at 44. He claims Schneiderman's actual income "is not relevant to predicting it." Id. This is silly. The fact that Schneiderman already had earned in the first seven months more than what he testified would be his uppermost earnings for the year surely has some bearing on predictions of future earnings. It defies logic to think the referee would have ignored evidence that 2010 was an abnormally low income year, as compared to 2008 and 2009 and, yes, 2011, even as suggested only by the first seven months' earnings – especially in light of the control Schneiderman exerted over when he would make distributions

to himself.[24] In short, the court did not vacate the decree because "the parties and referee [in]accurately predicted" the 2011 income, as Schneiderman asserts. Br. Appellant, at 44. Rather, by withholding pertinent information, he hindered the referee's ability to predict.

Schneiderman also claims Forde's spreadsheet does not show what it shows, but is a monthly average of income and does not reflect what Schneiderman actually made each month. Id., at 44-45. Apparently, this spreadsheet was sufficient as an accounting to assess Rogers for her "share" of the taxes. In other words, Schneiderman wanted her to pay taxes on about $760,000 of income but also wants the court to believe he did not earn that much during that period. The court did not believe Schneiderman, since no evidence supported his claim.[25]

Schneiderman also attempts, but fails, to undermine the import of the Medicare information. Br. Appellant, at 45. He cites to his own declaration explaining "the majority of Medicare reimbursements are for expensive drugs." CP 422. You would think the practice makes nothing off Medicare when, elsewhere, Schneiderman explains it is the source of

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[24] While Schneiderman repeatedly testified there were quarters when no bonuses were distributed, that was only true of 2010, when the parties were battling over his income. CP 870 (unchallenged finding that Schneiderman "Consistently received quarterly distributions"). See §III.C (n.5) (Spinak took 2010 profits; Schneiderman did not).

[25] Yet Schneiderman asserts on appeal "the evidence is undisputed that Dr. Schneiderman did not receive the bonuses relied upon to establish this average until after trial." Br. Appellant, at 45, citing CP 424. It does not become true just because he keeps saying it.

65-85% of their revenue. CP 877 (unchallenged finding). In any case, what the Medicare information reveals is that they received more in payments for the first half of the year than for the second, not the reverse.

Finally, Schneiderman is also wrong to claim the trust account misuse would not change the result at trial. Br. Appellant, at 46. He ignores that Rogers was awarded the trust account and we still do not know what funds may be missing from it because the person who has that information, Schneiderman, has refused to provide it. Without knowing the account value, the referee could not distribute it. *See Wold v. Wold,* 7 Wn. App. 872, 503 P.2d 118 (1972) (value a material and ultimate fact).

Certainly, too, what may be revealed on this front could easily have a bearing on the fact-finder's view of Schneiderman's credibility, such as it is. Here we see again the dovetailing of all three of Rogers' claims, since the source of the problem remains Schneiderman's failure to disclose all requested and necessary information. As noted in the context of granting a new trial for similar discovery violations, "[a] new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial." *Roberson,* 123 Wn. App. at 336 (internal citations omitted). Simply, "a litigant who has engaged in misconduct is not entitled to 'the benefit of [this] calculation…" *Id.*

F. SCHNEIDERMAN BEARS RESPONSIBILITY JOINTLY AND SEVERALLY FOR THE TRUST ACCOUNT.

Schneiderman argues his attorney's misconduct is not a basis for vacating the decree. Br. Appellant, at 46. Unfortunately, we do not know where Province's misconduct leaves off and Schneiderman's begins. CP 874 (unknown the extent to which Schneiderman involved in misconduct). Schneiderman does not dispute failing to fund the account for nearly a year after being ordered to do so. CP 876 (unchallenged finding). He claimed it was inconvenient. CP 961-962. He dismisses his actions by claiming Rogers knew he had disobeyed the order and did not complain. Br. Appellant, at 48. Indeed, she knew, because it left her without any funds to live on, but it is not true she did not complain. E.g., CP 1025-36.

Here, again, Schneiderman has exclusive control over the necessary information, yet he refuses to provide it. CP 873. He relies on the WSBA ascribing misconduct only to Province (Br. Appellant, at 47), but that ignores that the WSBA concluded its investigation was stymied because neither Province nor Schneiderman cooperated; it also ignores that the WSBA's job is to discipline lawyers, not doctors.

This is the problem. Schneiderman claims (contrary to his claims he did not know what Province did) that "Province returned to our account what was removed," so Rogers cannot "demonstrate that she has been harmed in any material fashion." CP 285. The WSBA concluded

otherwise, partly because it is unknown whether all amounts that should have gone into the account actually made it there. Simply, whether or not Province replaced funds he improperly withdrew, it remains unknown whether funds were withheld entirely by Schneiderman.

Because it is Schneiderman's conduct that is at issue, he is not helped by authorities that declare "[a]bsent fraud, the actions of an attorney … are generally binding on the client." Br. Appellant, at 46, citing *Engstrom v. Goodman,* 166 Wn. App. 905, 271 P.3d 959 (2012). Nor is Schneiderman in a position to claim he is "in no way responsible" for Province's fraud, as in *Alexander v. Robertson,* 882 F.2d 421 (9th Cir. 1989), since he was the only one in a position to know about it sooner than the WSBA did, and remains the only one to know the extent of it. Likewise, he gets no benefit from *Demopolis v. People's National Bank,* 59 Wn. App. 105, 796 P.2d 426 (1990), which held a client is not liable for attorney actions taken outside the scope of representation. Here, we still do not know whether Province acted "without Dr. Schneiderman's knowledge or authorization," as Schneiderman claims. Br. Appellant, at 47, citing Schneiderman's declaration (CP 427). Understandably, the trial court (and the WSBA) wanted proof not more obfuscation.

Yet that conduct continues here. In his brief, Schneiderman disputes Judge Forbes' finding that he and Province provided a false

ledger to the referee (Br. Appellant, at 48), then claims the judge "acknowledges that only 'Mr. Province knew it was false.'" Id. The judge did say Mr. Province knew it was false, but did not say that "only" he knew it was. What bothered the judge, understandably, is that Schneiderman relied on the ledger after the WSBA declared it false. CP 284, 872. Despite his efforts to displace blame onto his attorney and the court, Schneiderman bears responsibility for perpetuating this misinformation.[26]

The fact remains that neither the court nor the WSBA could ascertain what funds Rogers should have received from the trust account, no matter what Schneiderman says. Br. Appellant, at 50. While it may be true that a new trial "will in no way resolve whether Mr. Province stole funds awarded to Rogers" (Id.), a new trial may answer whether Schneiderman did.

G. THE COURT PROPERLY AWARDED FEES TO ROGERS.

Schneiderman makes no challenge to the attorney fees award except as related to his overall challenge to Judge Forbes's order. Br. Appellant, at 50. Because the judge properly exercised her discretion in

[26] It is not at all clear why Schneiderman cites *Alexander v. Robertson,* 882 F.2d 421, 425 (9th Cir. 1989). Br. Appellant, at 47. In that case, an attorney had lost his license but continued to represent a party in a dispute over a boat. Nothing the attorney did actually affected any of the parties, so the court held it was proper to deny a motion to vacate the judgment where the motion was based solely on the lack of credentials. These facts bear no resemblance to this case where there is a finding by the governing body (WSBA) that the attorney's actions "caused serious injury" to both parties. CP 201.

vacating the decree, the judge also properly awarded fees. *Bay v. Jensen,* 147 Wn. App. 641, 659, 196 P.3d 753 (2008).

H. THE WIFE SHOULD RECEIVE HER FEES ON APPEAL.

Rogers asks for an award of attorney fees on the basis of CR 60(b), RAP 18.1(a), intransigence, misconduct, and relative need and ability to pay. *See Housing Authority of Grant County v. Newbigging,* 105 Wn. App. 178, 192, 19 P.3d 1081 (2001); *In re Marriage of Mahalingam,* 21 Wn. App. 228, 584 P.2d 971 (1978); *Seals v. Seals,* 22 Wn. App. 652, 590 P.2d 1301 (1979). Rogers adopts the argument made in her trial brief. CP 1427-1430. Schneiderman's misconduct continues and continues to drive up the costs of these proceedings. *Burrill v. Burrill,* 113 Wn. App. 863, 873, 56 P.3d 993, 998 (2002). For these reasons, this Court should award Rogers her fees.

V. CONCLUSION

For the reasons above, Julie Rogers respectfully asks this Court to affirm the trial court in all respects and to award her fees.

Dated this 31st day of October 2014.

RESPECTFULLY SUBMITTED,
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DECLARATION OF SERVICE

Patricia Novotny certifies as follows:

On October 31, 2014, I served upon the following true and correct copies of the Respondent's Brief, Designation of Clerk's Papers, and this Declaration, by depositing same with the United States Postal Service, postage paid, to:

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

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