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Washington State
Court of Appeals
Division Two

August 8, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: CLIFFORD A. PORTER, Petitioner, v. PEGGY A. PORTER, Respondent.	No. 57168-4-II PART-PUBLISHED OPINION

CHE, J. — Clifford Porter appeals the trial court order that (1) clarified the dissolution decree by basing Peggy's[1] share of the military retirement on salary increases Clifford earned during the recall to military service after the dissolution, and (2) denied Clifford's request for prejudgment interest and for reimbursement for overpayments made to Peggy between 2012 and 2020. Clifford and Peggy were married from 1977-1994. Clifford served in the military during the entire marriage. The dissolution decree awarded Peggy a fractional share of Clifford's military retirement. After his 2003 retirement as a Lieutenant Colonel, the trial court entered a Military Qualifying Court Order (MQCO), which assigned Peggy a 30.25 percent interest in the

[1] Peggy Porter is now known as Peggy Huckstadt. For clarity, this opinion will use the parties' first names. No disrespect is intended.

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disposable military retired pay—equaling half of the community portion of the military retirement.

In 2009, the military recalled Clifford to active duty, and he received a promotion to the rank of Colonel and salary increases. He retired again in 2012. Clifford's additional years of service lowered the fractional share of the military retirement that Peggy was entitled to under the decree. But the MQCO was not amended, resulting in ongoing overpayments to Peggy.

We hold (1) the trial court properly clarified the decree by ruling that Peggy's share of the military retired pay included Clifford's salary increases from the recall to military service, (2) Clifford impliedly waived his rights to reimbursement prior to June 2020 under the doctrine of laches, and (3) the trial court did not abuse its discretion by declining to award prejudgment interest. We affirm the trial court, deny Peggy's request for attorney fees on appeal, and deny Clifford's request for sanctions.

FACTS

Clifford joined the Army in 1976. Clifford and Peggy married the following year. During the marriage, Clifford attended medical school. In 1994, Clifford and Peggy divorced. The dissolution decree provided that Peggy was entitled to a fractional share of Clifford's military retirement. The trial court provided two alternative formulas to determine that share.

Under alternative one, Peggy's share equaled 0.5 x (11/the number of years of creditable military time toward retirement). Alternative one applied if Clifford did not receive credit toward his military retirement for his time in medical school. Under alternative two, Peggy's share equaled 0.5 x (15/the number of years of creditable military time toward retirement). Alternative two applied if Clifford did receive such credit.

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In 2002, Clifford retired from the military. The next year, the trial court entered a MQCO, which assigned Peggy a 30.25 percent interest in Clifford's disposable military retired pay, appearing to utilize the second alternative formula in the decree. That assignment was 50 percent of the community property fraction set out in the decree.

The MQCO defined "military retired pay" as "retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code." Clerk's Papers (CP) at 33. The MQCO stated that Peggy agreed that future overpayments were recoverable from her. The MQCO also contained an acknowledgment provision that provided, "Clifford A. Porter[] is currently receiving military retired pay, based on his prior service in the United States Army. The parties further acknowledge that his former spouse Respondent, Peggy A. Huckstadt (formerly known as Peggy A. Porter), has an interest in such military retirement benefits." CP at 32.

In a 2003 letter from Defense Finance and Accounting Service (DFAS) to Clifford, DFAS stated if Peggy's entitlement to payments terminated, it was Clifford's responsibility to notify DFAS. DFAS allowed retired service members to see their monthly statements as they became available.

The military recalled Clifford to active duty service during the Afghanistan conflict from 2009 to 2012. During Clifford's recall to military service, the military stopped issuing retirement payments to Clifford and Peggy. After Clifford retired a second time in 2012, the military resumed paying retirement benefits to Clifford and Peggy. In 2012 letter from DFAS to Clifford,

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DFAS again informed him that if Peggy's entitlement to payments terminated, it was Clifford's responsibility to notify DFAS.

In May 2019, approximately seven years after DFAS resumed payments to Peggy and Clifford, Clifford informed Peggy that she was erroneously receiving more than her fair share of the military retirement due to his years of recall service not being counted. In May 2020, Clifford sent Peggy a proposed clarifying order, which would have assigned Peggy a 27.273 percent interest in the military retired pay and based that interest on his salary as of his initial retirement as a Lieutenant Colonel.

In 2022, Clifford moved to clarify the dissolution decree and MQCO, and for reimbursement of overpayments and prejudgment interest. In the alternative, Clifford asked the trial court to vacate or modify the MQCO, and issue a military retired pay division order directing correct payments equaling one-half of the community portion of the military retired pay to Peggy.

Peggy claimed laches barred the request for overpayments. Peggy emphasized that she would suffer significant financial damages for having to reimburse Clifford for tens of thousands of dollars in overpayments. To that end, Peggy maintained that she and her current husband retired early to assist their aging parents, and their monthly cashflow did not meet their monthly expenses.

After a hearing on Clifford's motion, the trial court entered findings of fact. The trial court ruled that Clifford's pay and rank as of his second retirement should be used to determine Peggy's share of the military retirement because (1) the intent of the dissolution decree supported such a conclusion, (2) it was Clifford's previous military service that allowed him to be

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promoted in rank, and (3) Peggy did not receive retired pay during Clifford's recall to military service. The trial court added Clifford's three additional years of service to the formula determining Peggy's fractional share, which reduced Peggy's share from 30.25 to 27.273 percent of the military retirement.

The trial court also ruled that Clifford was entitled to reimbursement for the overpayments from June 2020 until the amended MQCO was entered, but he waived his right to reimbursement for overpayments before June 2020. The trial court did not explicitly rule on whether laches applied. Lastly, the trial court denied Clifford's request for prejudgment interest reasoning that granting such an award would not be equitable.

Clifford appeals.[2]

ANALYSIS

I. Salary Increases During the Recall to Military Service

Clifford argues that the trial court erred in ruling Peggy's military retirement share should be based on Clifford's rank at the time of Clifford's second retirement. Clifford emphasizes that he agrees with the trial court's decision to add his three additional years of service to the formula determining Peggy's fractional share, which reduced Peggy's share from 30.25 to 27.273 percent

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[2] Clifford assigns error to Findings of Fact 3 and 7, but he fails to provide any argument or citations to the record relating to those assignments of error. *See* RAP 10.3(a)(6); RAP 10.3(g) (outlining the requirements for developing assignments of error). Consequently, we decline to address these alleged errors.

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of the military retirement pay.[3] Peggy argues that basing the community portion of the military retired pay on Clifford's rank and pay as of his original retirement is prohibited by federal law because she is grandfathered into the former way of calculating military retired pay under federal law.[4] We disagree with Clifford and Peggy.

A. *Ambiguity*

Clifford argues that the dissolution decree was ambiguous, and therefore, the trial court could properly clarify the decree. We agree.

We review the interpretation of dissolution decrees de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999). Where the decree is ambiguous, we seek to ascertain the intention of issuing court by using the general rules of construction applicable to statutes and contracts. *Id.* at 878. But "[i]f a decree is clear and unambiguous, there is nothing for the court to interpret." *In re Marriage of Bocanegra*, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990).

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[3] Clifford would like Peggy to receive 27.273 percent of the military retirement based on his salary as of his initial retirement. This result would cause Peggy to receive less than she did under the original 2003 MQCO while Clifford gained an increase in military retirement pay based on both percentage and salary.

[4] "In 2017, the so-called 'Frozen Benefit Rule' was enacted as part of the National Defense Authorization Act; this Rule limits disposable marital retired pay to the hypothetical retired pay of the military spouse as of the date of the divorce." Anne M. Payne, 172 AM. JUR. TRIALS § 9 (2021). But this so-called rule applies only to spouses divorced after December 23, 2016 and not yet receiving retired pay at the time of the divorce. *See* National Defense Authorization Act of 2018, Pub. L. No. 115-91, § 624, 131 Stat 1283 (2017) (modifying 10 USC § 1408 as of December 23, 2016). Peggy does not point us to any federal law before the enactment of the Frozen Benefit Rule that would bar using Clifford's salary as of his initial retirement to determine the community share of his military retirement pay. As such, we are not persuaded by her argument.

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If the decree is ambiguous, the trial court may clarify it. *Thompson*, 97 Wn. App. at 878. A clarification defines rights the parties already have. *Id*. In contrast, "[a] decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced." *Id*. And trial courts do not have authority to modify decrees in the absence of conditions justifying reopening the judgment. RCW 26.09.170(1).

Where the decree provided that the spouse was entitled to "50 [percent] of Respondent's military retirement pension," the decree was ambiguous because it failed to specify how and at what point in time the pension was to be divided in half. *In re Marriage of Chavez*, 80 Wn. App. 432, 434-35, 909 P.2d 314 (1996). Where the decree awarded a securities account to a spouse but failed to specify the date of the transfer, Division One noted that such an award of securities is inherently ambiguous because the value of securities accounts fluctuates in value daily. *Thompson,* 97 Wn. App. at 879.

Here, the decree assigned Peggy a fractional interest of "the military retirement" to be determined at a later date. CP at 24. The MQCO clarified the decree by determining Peggy's had a 30.25 percent interest in the disposable military retired pay. And the MQCO defined military retired pay as "retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service." CP at 33.

The military retirement language in the decree and the subsequent definition of military retired pay in the MQCO are ambiguous. Neither specifies whether the military retired pay, including salary increases, should be determined at the service member's initial date of retirement or a subsequent retirement date. The decree also fails to specify whether salary

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increases from a mandatory recall to active duty service should be used in determining military retired pay.

Peggy argues that Clifford is requesting an impermissible modification of the decree, not a clarification, because any ambiguity in the decree was clarified by the MQCO. We disagree.

The decree grants Peggy a fractional share of Clifford's military retired pay, but the decree is not clear whether salary increases from an involuntary recall after the marriage should be used when determining that pay. The MQCO does not clarify that ambiguity. Determining if the salary increases from the recall should be used to determine the military retired pay merely determines the scope of the decree.

Since the decree is ambiguous, we seek to ascertain the intention of the issuing court.

B. *Intention of the Issuing Court*

Clifford argues that the court intended to grant Peggy half of the community portion of his military retirement in the dissolution decree. Clifford then argues that his salary increases from the recall to military service are not part of the community portion of the military retirement.

1. *Provisions in the Decree*

In reviewing an ambiguous decree, we seek to ascertain "the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts." *Thompson*, 97 Wn. App. at 878. When interpreting a statute, we look to the statute's plain meaning. *Echo Glob. Logistics, Inc. v. Dep't of Revenue*, 22 Wn. App. 2d 942, 947, 514 P.3d 704, *review denied*, 200 Wn.2d 1020 (2022). In reviewing an ambiguous decree, the court is generally limited to examining the provisions in the decree. *Chavez*, 80 Wn. App. at 435-36.

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Here, the decree assigned Peggy a fractional share of the military retirement. This military retirement language is broad and unqualified. Thus, the decree could include any military retirement pay, including future salary increases. And the formulas used under the two alternatives are similar to those used to grant a spouse a one-half interest in the community portion of a pension or military retired pay. *See Chavez*, 80 Wn. App. at 436.

Clifford argues that the MQCO shows that the court did not intend to include future salary increases from the recall to military service in the military retirement because the acknowledgment provision in that order provides,

> Clifford A. Porter[] is currently receiving military retired pay, *based on his prior service in the United States Army*. The parties further acknowledge that his former spouse Respondent, Peggy A. Huckstadt . . . has an interest in such military retirement benefits.

Br. of Appellant at 46 (emphasis added) (quoting CP at 32). But the "based on his prior service" language merely shows that the military retired pay he was receiving in 2003 was based on his prior service. That language does not indicate whether the trial court intended for Peggy's share of the military retirement to be based on future salary increases due to a recall to active duty service.

We hold that the trial court intended for Peggy to receive one-half of the community portion of the military retired pay. The question is then whether the salary increases from Clifford's rank promotion during the recall to military service are included in calculating the community portion of the military retirement.

2. *Salary Increases from the Recall and Community Efforts*

Pensions are community property "to the extent the marital community contributes the labor of the spouse." *In re Marriage of Bishop*, 46 Wn. App. 198, 200, 729 P.2d 647 (1986). In

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Chavez, we held that the salary increases—but not the benefits—from additional years of service following a couple's divorce are included in the community share of a military pension. 80 Wn. App. at 437.

In *In Re Marriage of Bulicek*, the parties were married for 22 years, and the husband worked for the same company during their marriage. 59 Wn. App. 630, 638, 800 P.2d 394 (1990). In the dissolution, the trial court granted the wife a percentage, as-received, amount of the husband's pension. *Id.* at 639. Under this method, the wife's monthly payout could increase after dissolution due to the husband's prospective pay increases. *Id.* at 638-39. Division One held that the husband's future advancements and pay increases at that company were founded on the 22 years of community effort. *Id.*

We find *Bulicek* instructive. Clifford and Peggy were married for about 17 years, several years less than the parties in *Bulicek*. Like in *Bulicek*, Clifford worked for the same employer, the military, for the entirety of their marriage. Without the prior years of service and prior rank of Lieutenant Colonel, Clifford likely would not have reached the rank of full Colonel solely during the three years he served during the mandatory recall to service period. Under these narrow circumstances, Clifford's salary increases during the recall to service period were based on the community's efforts.

Moreover, had Clifford not initially retired in 2002 but continued working until 2012, all the salary increases from his hypothetical 2002 to 2012 service would be included in the community portion of the military retired pay. Clifford's salary increases from the recall to military service from 2009 to 2012 are not stripped of their foundation on community efforts merely because he had an earlier voluntary retirement and was subject to a mandatory recall to

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military service. We do not find that distinction meaningful. We hold that Clifford's salary increases received during the recall to military service were based on about 17 years of community efforts, and the salary increases should be used in calculating Peggy's share of the military retirement.

Therefore, the trial court properly clarified the decree. Nevertheless, we briefly address Clifford's other arguments to the contrary below.

a. *Control of the Period in Which Military Retired Pay Would be Deferred*

Clifford appears to argue that the community portion of his retired military pay should not include his salary increases during the recall to military service because he no longer had control over the period in which his military retired pay would be deferred. We disagree.

Clifford draws a distinction between military retirement and other retirements. He maintains that military retirement subjects service members to mandatory recall to active duty, and the military controls that decision entirely, which gives the military control over the timeline of deferred payments. In contrast, Clifford maintains that in standard retirement plans, the employee has control over the deferred payments, and the employer cannot recall the employee to service. Clifford argues this distinction should take this case outside of the line of cases that included post-divorce salary increases in the community portion of the pension, and therefore, Clifford's salary increases during the recall, which occurred years after the divorce, should be excluded.

We do not find Clifford's distinction persuasive in this context. Clifford does not cite to any case that suggests that salary increases from a mandatory recall to military service after

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divorce cannot be founded upon community efforts. We decline to adopt Clifford's argument for such a distinction in this context.

b. *Valuation Problems*

Clifford also argues that the community portion of his military retired pay should not include his salary increases from the recall to service as there were no longer concerns about valuation and risk sharing. We disagree.

In support of his argument, Clifford emphasizes that awards of pension rights on a percentage, as-received, basis are to be encouraged because it avoids difficult valuation problems. Concerns about valuation are relevant to the trial court's disposition of pension benefits. *Bulicek*, 59 Wn. App. at 636-37.

But we are not asked to reconsider the trial court's initial disposition of pension benefits. Rather, we are asked to interpret the dissolution decree. Clifford's argument about valuation problems is not relevant to the question before us.

c. *Indemnification*

Clifford argues that the trial court improperly indemnified Peggy for the pay she did not receive during the recall. We disagree.

In *Howell v. Howell*, a family court awarded the spouse upon divorce a portion of her husband's military retirement. 581 U.S. 214, 216, 137 S. Ct. 1400, 1402, 197 L. Ed. 2d 781 (2017). Thirteen years later, the husband waived a portion of his military retirement to receive disability benefits, which reduced the wife's portion of the military retirement. *Id.* at 219. The family court subsequently ordered the husband to reimburse or indemnify the spouse for what she would have received but for the disability waiver. *Id.*

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Pertinently, federal law allowed state courts to treat "disposable retired pay" as community property, but excluded from the definition of "disposable retired pay" amounts deducted as a result of a military member's waiver to receive disability benefits. *Id.* at 217. The United States Supreme Court held that the family court's indemnification order and all such orders were preempted under federal law. *Id.* at 222.

The Court noted that state courts cannot vest that which they lack the authority to give under federal law. *Id.* at 221. And the Court emphasized the "dollar for dollar" nature of the indemnification, and that the family court's decision rested solely on the need to reimburse the portion lost due to the election of disability benefits, which was improper under federal law. *Id.* at 222-23.

Here, the trial court entered an order concluding that Peggy's military retirement share should be based on Clifford's final rank and salary as of his second retirement because (1) the dissolution decree supported such a conclusion, (2) it was Clifford's previous service that allowed him to increase in rank, and (3) Peggy did not receive retired pay during Clifford's recall. This is distinguishable from *Howell*.

Most importantly, the trial court did not award Peggy anything. The trial court did not enter an order requiring reimbursement to Peggy—much less an order requiring "dollar for dollar" reimbursement for the three years of suspended retirement benefits. The trial court did not modify the decree. Rather, the trial court clarified the decree by determining whether the salary increases from the recall to military service should be used in calculating Peggy's share of the military retirement. Although the trial court should not have considered Peggy's failure to

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receive military retirement that she was not entitled to, the trial court had proper grounds for clarifying the decree based on the issuing court's intent.

d. *Equity Determination*

Clifford argues that the trial court erred by basing its clarification on an impermissible equity determination. We decline to reach this argument.

Our review is de novo. As such, we stand in the same position as the trial court, and therefore, we do not address the trial court's rationale. *Thun v. City of Bonney Lake*, 3 Wn. App. 2d 453, 466, 416 P.3d 743 (2018).

Consequently, we decline to reach this argument.

The panel has determined that the remainder of this opinion has no precedential value and should not be published in accordance with RCW 2.06.040.

UNPUBLISHED TEXT FOLLOWS

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

II. REIMBURSEMENT

Clifford argues that the trial court erred by concluding that Clifford waived his rights to reimbursement for overpayments before June 2020. Relatedly, Clifford argues that the trial court

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erred by concluding that he was in the best position to correct errors created by his return to service.[5] We disagree.

We review the application of equitable doctrines, like waiver or laches, de novo. *In re Marriage of Tupper*, 15 Wn. App. 2d 796, 810, 478 P.3d 1132 (2020). But whether the facts that support the application of an equitable doctrine have been proven is a question of fact. *See Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Consequently, we review the trial court's findings on this issue for substantial evidence. *Green v. Normandy Park*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *Id.*

"A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). To impliedly waive a right, the party must act in such a manner "as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it." *Id.* at 670 (quoting *Kessinger v. Anderson*, 31 Wn.2d 157, 168, 196 P.2d 289 (1948)).

"Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." *Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). "Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay." *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 241, 88 P.3d 375

[5] Where findings of fact are mischaracterized as conclusions of law, we review them for substantial evidence. *Real Carriage Door Co., ex rel. Rees v. Rees*, 17 Wn. App. 2d 449, 457, 486 P.3d 955, *review denied*, 198 Wn.2d 1025 (2021). This "conclusion of law" is, in fact, a "finding of fact," which we review for substantial evidence.

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(2004). "Mere delay, lapse of time, and acquiescence do not defeat the remedy unless so long continued that in a particular case its changed condition would make it inequitable to allow recovery." *McKnight v. Basilides*, 19 Wn.2d 391, 401, 143 P.2d 307 (1943). Indeed, "the main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others." *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000). The defendant bears the burden to show that laches applies. *Id.*

At the trial court, Clifford argued that he was entitled to improperly paid funds from 2012 onward under the theory of unjust enrichment. Peggy argued that Clifford was not entitled to those funds due to laches. The trial court ruled that Clifford waived his entitlement to overpayments from the beginning of his second retirement in 2012 to June 2020. But for whatever reason, the trial court did not specifically address the issue of laches, although the court appeared to rule as if Peggy proved laches applied.

We affirm based on laches. First, the delay was inexcusable. Clifford did nothing for seven years. Even when Clifford texted Peggy in 2019, Clifford merely stated that Peggy's share appears to be incorrect due to the additional years of service, and that they could work it all out. Clifford made an explicit and clear request by sending a proposed clarifying order one year after the text message in June 2020. And it wasn't until February 2022—10 years after the overpayments began—that Clifford moved for reimbursements.

Moreover, Clifford knew that he served three additional years in the military and was promoted during that time. Clifford had access to the monthly statements from DFAS showing the overpayments to Peggy as they became available. Further, DFAS maintained that it was

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Clifford's responsibility to notify it to stop payments if Peggy's entitlement to payments ever terminated and, presumably, if any other circumstance arose that affected Peggy's entitlement to payments. Additionally, Clifford's argument that the overpayments were obvious—or at least that such payments should have been obvious to Peggy—tends to also show that such overpayments should have been obvious to Clifford as well. Based on the aforementioned facts, we hold that substantial evidence supports the trial court's finding that Clifford was in a better position than Peggy to correct the MQCO, and that the delay was inexcusable.

Also, Peggy would be prejudiced by allowing recovery after the inexcusable delay. The seven-year delay was so long that it would make it inequitable for Clifford to recover from Peggy. Peggy is a 67-year-old living on a fixed income. Peggy is currently accruing a monthly shortfall and was caring for her and her husband's aging parents through 2020. Consequently, based on laches, we hold that the trial court did not err in denying Clifford's request for reimbursement for overpayments made before June 2020.

III. Prejudgment Interest

Clifford argues that the trial court abused its discretion by denying him prejudgment interest on his reimbursement because the overpayments can be calculated with exactitude, and prejudgment interest is not a penalty. We disagree.

We review prejudgment interest awards for an abuse of discretion. *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 595, 355 P.3d 286 (2015). "A prevailing party is generally entitled to prejudgment interest, provided the damages are liquidated." *In re Marriage of Rockwell*, 157 Wn. App. 449, 454, 238 P.3d 1184 (2010). Damages are liquidated where the "data in the evidence makes it possible to compute the amount with exactness, without reliance

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on opinion or discretion." *Lakes v. von der Mehden*, 117 Wn. App. 212, 217, 70 P.3d 154 (2003). Although parties are generally entitled to such interest, courts have discretion to deny such interest where the claimant engaged in a period of unreasonable delay in completing the litigation. *Seattle-First Nat. Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn. App. 744, 761, 972 P.2d 1282 (1999).

Here, the overpayment and the prejudgment interest claim arose in 2012. Seven years later, Clifford sent a text to Peggy about the overpayment issue. And he did not submit a proposed amendment to the MQCO until the following year. Clifford maintains that he discovered the overpayment issue when he hired new legal counsel for his second divorce. Clifford also emphasizes that the overpayments were obvious, at least with respect to Peggy, because her garnishment increased $700 a month after he resumed retirement, and she should have noticed this increase as a certified public accountant.

But the overpayments were not hidden from Clifford. Seven years is an unreasonably long time to not assert one's rights regarding, by Clifford's own characterization, a significant overpayment. Clifford's only explanation for such a delay is that he failed to discover it until he obtained new counsel. Such circumstances constitute unreasonable delay. Therefore, we hold the trial court did not abuse its discretion by denying Clifford prejudgment interest in this matter.

ATTORNEY FEES

Peggy requests attorney fees under RAP 18.9 because Clifford's appeal is frivolous. We deny her request.

RAP 18.9(a) authorizes us to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appeal. "An appeal is frivolous

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if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). In determining whether an appeal meets the aforementioned criteria, we resolve doubts in the appellant's favor. *Id.*

Although we did not find Clifford's arguments to have merit, they are not so devoid of merit as to be frivolous. Consequently, we deny Peggy's request for attorney fees.

SANCTIONS

On February 1, 2023, Clifford moved for sanctions against Peggy under CR 11, RAP 18.7, and RAP 18.9(a) for violating RAP 2.2, RAP 2.5(d), RAP 5.1(d), RAP 5.1(f), RAP 10.1(b), and RAP 10.3(5). Clifford asks us to grant him reasonable attorney fees for responding to frivolous portions of the respondent's brief, and having to bring his request for sanctions.

CR 11 addresses when pleadings and other legal memoranda are either not well grounded in fact or in law, or whether such filings are filed for an improper purpose. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). "While CR 11 sanctions were formerly available on appeal under RAP 18.7, a 1994 amendment to RAP 18.7 and 18.9 eliminated the reference to CR 11 in RAP 18.7 and provided for sanctions on appeal only under RAP 18.9." *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009).

We have discretion to order a party to pay sanctions for using the RAPs for the purpose of delay, filing a frivolous appeal, or failing to comply with the RAPs. RAP 18.9(a). We exercise our discretion to deny Clifford's request under RAP 18.9(a).

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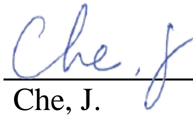
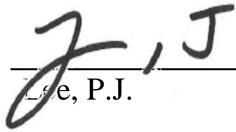
CONCLUSION

We affirm the trial court, deny Peggy's request for attorney fees on appeal, and deny Clifford's request for sanctions.



Che, J.

We concur:



Lee, P.J.

Price, J.