

No. 71714-6-I.

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

---

GABRIEL Y. LEE, Appellant

v.

CAROL ANN KENNARD, Cross Appellant

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BRIEF OF CROSS APPELLANT/RESPONSE BRIEF OF CROSS  
APPELLANT

---

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION ONE  


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## **I. Statement of the Case**

This appeal arises from a remand hearing directed by the mandate that issued in *Lee v. Kennard*, 176 Wa.App 678, 310 P.3d 845 (2013). The case involves the degree to which the non-modifiable spousal maintenance escalator clause contained in the decree of dissolution entered February of 2000 will be enforced as well as attorney fees incurred to enforce it.

The decree incorporated by reference a property settlement agreement of the parties reached in 1999 which contained the maintenance escalator provision. See *Lee v Kennard* supra at 682 (2013). The mandate of this court directed enforcement of that provision and an award of attorney fees to include those incurred on appeal by Ms. Kennard in seeking enforcement, unless the provision were to be “set aside” on remand. (*Lee v. Kennard* supra at 690).

The remand hearing occurred before King County Superior Court Judge Regina Cahan on December 13, 2013. Dr. Lee filed a motion for summary judgment. He construed the mandate as allowing him the opportunity to argue, on remand, the agreement is substantively unconscionable, or unfair (CP 6-7 and 21). He also challenged the enforcement of the provision based upon theories that the court lacks

the subject matter jurisdiction to enforce the agreement (CP 17), that Dr. Lee would be deprived of property without procedural and substantive due process. He also advanced the defense of laches (CP 21-24).

Carol Kennard filed a motion for judgment of \$375,959.03, past due since February 2003 and attorney fees pursuant to the mandate (CP 137 through 138). She did not file a motion for summary judgment.

The court entered an order on January 30, 2014, which rejected all of Dr. Lee's theories designed to result in the maintenance escalator provision being set aside. (CP 373 through 383). The court did grant his motion for summary judgment as to the laches defense, entered findings of fact and conclusions of law and directed an order of judgment be entered as to past due amounts owing, including interest, from and after the month Ms. Kennard filed the pleadings seeking enforcement, in October 2011. It also awarded all attorney fees directed by the court of appeals mandate. (CP 951-952).

Thus, on April 21, 2014, the trial judge entered a judgment of \$106,608 for past due maintenance, a determination that all amounts due under the escalator clause are prospectively enforceable, and awarded her a judgment of \$20,538 in attorney fees and costs (CP 951-952).

## **II. Assignments of Error:**

- 1. There Was No Substantial Evidence To Support The Finding That Carol Kennard Moved For Summary Judgment.**
- 2. The Court Erred By Finding The Separation Agreement Unfair In Substance**
- 3. The Trial Court Erred By Granting Dr. Lee's Summary Judgment Motion As To The Laches Defense And By Failing To Enter A Judgment For The Full Amount Of Maintenance Past Due Since February 2003**

Issues Pertaining To Assignments Of Error

- A. Whether The Laches Defense Was Beyond The Scope Of This Court's Mandate**
- B. Whether There Existed Genuine Issues of Material Facts**
- C. Whether The Court Erred In Granting Dr. Lee's Motion, A Form Of Financial Relief, In The Absence of Financial Information Required By King County Family Law Rule 10.**
- D. Whether The Damages Element Of The Laches Defense Was Not Satisfied As A Matter Of Law Since**
  - 1. There Was No Evidence Dr. Lee Would Have Succeeded Had He Sought Modification Of His Child Support Obligation**
  - 2. There Was No Evidence That Dr. Lee Would Have Succeeded In Modifying Hi Post-Secondary Education Obligation**
  - 3. There Was No Evidence That He Would Have Sought Modifications Of Either His Child Support Or His Post-Secondary Education Obligations**

**4. Having To Pay Past Due Judgment Interest Owing Is Not Damage For Purposes Of A Laches Defense**

**5. The Findings of Fact As To The Damages Incurred By Dr. Lee Do Not Constitute Damages For Purposes Of The Defense Of Laches As A Matter Of Law.**

**E. Whether The Reliance Element Of the Laches Defense Was Not Satisfied.**

**III. Argument:**

**A. There Was No Substantial Evidence To Support The Finding That Carol Kennard Moved For Summary Judgment.**

The trial court found that both parties moved for summary judgment (CP 373). Findings of fact must be supported by substantial evidence. (*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d 873, 73 P.3d 369 (2003)). The mandate required entry of a judgment for all past due maintenance and all attorney fees incurred, limited to the maintenance provision only. Thus, Carol Kennard filed a motion entitled “Motion for Judgment Re: Past Due Maintenance and for Attorney Fees” (CP 137-138). Ms. Kennard did not file a motion for summary judgment. The court erred by finding that she did so.

**B. The Court Erred By Finding The Separation Agreement Unfair In Substance**

The trial court should not have reached the issue of the substantive fairness of the agreement. To do so was beyond the scope of the mandate given the doctrine of merger and as clarified in its post mandate order that its decision does not overrule the holding in *In re Marriage of Hulscher*, 143 Wa.App. 708, 180 P.3d 199 (2008). *Hulscher*, supra at 717, holds that post decree attacks on the fairness of spousal maintenance provisions are precluded as being time barred. Any language suggesting otherwise in its written decision is pure dicta. (Order Denying Motion To Recall Mandate, May 20, 2014 case #68226-1-I, appendix 1).

Even if that were not the case, at the time of execution, it was contemplated by the parties that Dr. Lee's income would increase more than the all urban consumers cost of living index (RP 14). The agreement also made provision for a reduction in his maintenance obligation if Dr. Lee's income should reduce through no fault of his own. (CP 994). The maintenance provision, along with the cost of living factored in, increased by about 30% as of when she sought enforcement in 2011 to \$11,700 per month, while his earned income increased over 90% or \$36,500 per month. (RP 59) The maintenance escalator provision was not unfair in substance.

**C. The Trial Court Erred By Granting Dr. Lee's Summary Judgment Motion As To The Laches Defense And By Failing To Enter A Judgment For The Full Amount Of Maintenance Past Due Since February 2003**

**1. The Laches Defense Was Beyond The Scope Of This Court's Mandate**

The directive of this court in its published opinion was that the maintenance escalator clause and all attorney fees incurred by Ms. Kennard, in trying to enforce it, including attorney fees incurred on appeal, were to be awarded by the remand court. It permitted only one exception: "Unless the separation agreement is set aside..." *Lee v. Kennard* supra. It was the duty of the remand court to strictly follow that directive. *Harp v. American Surety Co. of N.Y.*, 50 Wa2d 365 at 368, 311 P.2d 988 (1957).

For over half a century our State Supreme Court has held that the doctrine of merger applies to decrees that adopt marital separation agreements. (*Mickens v. Mickens*, 62 Wa.2d 876, at 880 385 P.2d 14 (1963). Counsel for Dr. Lee in fact admitted in oral argument that laches is an equitable defense that does not have the legal effect of setting aside the agreement because, if cognizable, it only precludes enforcement of escalated maintenance amounts past due up to the time Ms. Kennard filed her motion to enforce. It does not set aside those amounts prospectively

from that point in time. (RP 10 and 71-72). Dr. Lee cannot have the court set aside the agreement, unless he can successfully set aside the order in the decree that incorporated the maintenance escalator clause by reference. The only basis for setting aside the provision of a final order is to fulfill the standards of CR 60(b), entitled “Relief From Judgment;” in other words, a motion to vacate the order containing the escalator clause.

Dr. Lee was aware of that burden because, originally, prior to this court's published decision in this case he sought to prevent enforcement through a motion to vacate the pertinent provisions of the decree of dissolution pursuant to CR 60 (RP 14-15 RP 22).

There is no case in Washington that defines what “set aside” means. Black's Law Dictionary provides a legal definition of the phrase: “SET ASIDE (Of a court) to annul or vacate (a judgment, order etc.)” See Black's Law Dictionary, Eighth Revised Ed. at 1404 (1990).

There is no provision of CR 60(b) that provides authority to “set aside” an agreement already adopted and incorporated into a final order of the decree of dissolution. The doctrine of merger precluded the laches defense from being raised since it is not included as a basis to set aside a judgment under CR 60.

As emphasized in *Hulscher* supra, “Nevertheless, even if the record permitted us to determine whether the non-modifiable spousal maintenance provision was unfair at execution, the argument fails. Martin did not claim that the spousal maintenance provision was unfair until nearly a year after the trial court approved and entered the decree. But a party must make such a challenge before the trial court’s approval and entry of the decree. RCW 26.09.070(3) ... (7); ... and (7) ... **Consequently, Martin’s claim that the spousal maintenance provision was unfair at the time of execution is time barred.**” (emphasis supplied) *In re Marriage of Hulscher*, supra at 717 (2008).

**2. There Existed Genuine Issues of Material Facts.**

The remand court erred in granting Dr. Lee’s motion for summary judgment as to his laches defense (CP 27-28). Appellate review of orders granting a motion for summary judgment is de novo. *Briggs v. Nova Servs.*, 166 Wash.2d 794, 801, 213 P.3d 910 (2009).

A party raising the defense of laches has the burden of proving each of the elements that comprise it. *In re Marriage of Capetillo*, 85 Wash. App 311 at 317, 932 P.2d 691 (1997). Those elements are: “(1) the plaintiff had knowledge or a reasonable opportunity to know of the facts constituting a cause of action; (2) commencement of the action was

unreasonably delayed; (3) the defendant was damaged by the delay. *Hunter v. Hunter*, 52 Wash.App. at 270, 758 P.2d 1019 (1988); *In re Marriage of Watkins*, 42 Wash.App. 371, 374, 710 P.2d 819 (1985), review denied, 105 Wash.2d 1010 (1986)”; (4): that the damages incurred were in reliance on Carol Kennard’s delay in enforcement (*In re Marriage of Capetillo supra* at 318 (1997)).

“Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Briggs v. Nova Servs.*, supra (2009); CR 56(c). “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008).” *Realm, Inc. v. City of Olympia*, 168 Wash. App 1 at 1, 277 P.3d 679 (2012).

Summary judgment is not appropriate where the existence of a legal duty depends on disputed material facts. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wash.App. 144, 148, 75 P.3d 592 (2003). Since the gravamen of the laches defense pertains to Dr. Lee’s duty to pay the ordered, escalated amounts of spousal maintenance the following issues of

material fact were created by the evidence which should have precluded the granting of his motion for summary judgment.

Dr. Lee asserted that Ms. Kennard did not ever communicate any desire for him to pay the amounts of spousal maintenance due under the maintenance escalator clause until she moved for enforcement in October 2011. (CP 241). However, Ms. Kennard stated in her declaration:

“I also incorporate pages 4 through 7 of my December 5, 2011 declaration that explains all the efforts I made to communicate to him my desire to have him pay the escalator amounts...” (CP 196). In her declaration of December 5, 2011, Ms. Kennard explained: “In 2003, I notified him in an email that we needed to adjust the amount of maintenance. I also contacted him several times over the succeeding years via telephone. Each and every time I attempted to address this issue with him, he would claim he was always “too broke” to abide by the terms of the agreement. He refused to provide me with financial information or even discuss the issue.” (CP 888).

In *Hunter v. Hunter*, supra, the mother delayed bringing the issue to court for seven years because Mr. Hunter said he could not afford to pay the support payment. The appeals court held: “Under these

circumstances we do not consider Jeri Hunter's delay to have been unreasonable." *Hunter* supra at 271.

Thus looked at most favorably to Carol Kennard as the nonmoving party, there exist genuine issues of material facts as to the reasonableness of her delay to seek enforcement of the maintenance obligation. Furthermore, since resolution of the issues may involve credibility determinations, summary judgment should not have been granted. (*Laguna v. Washington State Dept. of Transp*, 146 Wash.App 260, 190 P.3d 374 (2008)). The motion for summary judgment as to the laches defense should have been denied.

**3. The Court Erred In Granting Dr. Lee's Motion, Which Is A Form Of Financial Relief In The Absence of Financial Information Required By King County Family Law Rule 10.**

This Court ordered on remand that a judgment for the entire past due maintenance be awarded Ms. Kennard and attorney fees. Dr. Lee's motion for summary judgment based upon the laches defense constituted a request for financial relief, since he sought a determination that he owes nothing; and that he should owe no attorney fees. King County Family Law Local Rule 10 mandates by use of the word "shall" that any issue involving spousal maintenance or attorney fees requires the party to

submit a financial declaration, pay stubs for the last six months, complete personal tax returns for the prior two years, including all schedules and all W-2's, and all statements related to accounts in financial institutions...during the last six (6) months. Dr. Lee failed to submit any of those records.

The court was made aware of the rule and its requirements as a basis for denying the financial relief that he sought. (CP 165-166). In fact, his failure to do so goes to the heart of his claim of damages more fully discussed here after. The court should have denied his motion.

#### **4. The Damages Element Was Not Satisfied As A Matter Of Law.**

Conclusions of law are reviewed de novo by an appellate court. (*Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002)). The trial court rendered “conclusions of law” (CP 379-383) related to damages as follows: that Dr. Lee irrevocably and detrimentally changed his financial position because he cannot retroactively modify or terminate his child support obligations or modify or recoup the educational costs he already paid (CP 381). It also concluded as a matter of law that having to pay past due judgment interest resulting from her delay would be unfair (CP 382). Those conclusions of law do not fulfill the legal standard of

damages for purposes of a laches defense. These failures should have resulted in the outright denial of his motion, and the granting of her motion for all amounts past due since the escalator initially went in to effect as of February 2003.

**a. There Was No Evidence Dr. Lee Would Have Succeeded Had He Sought Modification Of His Child Support Obligation.**

To be cognizable as damages under the laches defense Dr. Lee's burden is to show detriment in fact, not in theory. The mere speculative possibility that he might have been relieved of his child support/post-secondary educational obligations is legally insufficient to satisfy the damages element. For example, proof that the defendant in fact, gave up legally enforceable visitation rights and that he in fact incurred debt that he would not otherwise have incurred did constitute damages under the laches defense. See *In re Marriage of Watkins*, 42 Wa.App. 371 at 375, 710 P.2d 819 (1985). Here, Dr. Lee provided no evidence had he attempted a modification of his child support obligation, the result would in fact have been better than what he actually contributed.

A child support obligation can be in excess of the standard calculation, where the actual and reasonable needs of the children justify it and the combined net monthly incomes of the parties exceed the amount

the maximum advisory level on the economic table. The court is to consider the incomes and total financial resources of both households including the income of spouses. (See, *In re Marriage of Scanlon and Witrak*, 109 Wa.App 167 at 175, 34 P.3d 877 (2001) and *In re Marriage of McCausland*, 159 Wa.2d 607, 152 P.3d 1013 (2007). The same financial information is to be considered in determining the relative contributions to post-secondary education each parent will be required to make under RCW 26.19.090.

As to modifying his child support obligation, the older child, Chris, began his undergraduate work at the University of Washington immediately after graduating high school in 2004 and Stacia graduated high school in 2008. (CP 43-45). The first maintenance escalation went into effect in February 2003 and recalibrated again in 2006 and 2009. Dr. Lee could have sought modifications of his child support obligation as to both children in 2003, Stacia in 2008 and as to his post-secondary obligations as well by then. RCW 26.09.170 allows for adjustments of child support every two years. Dr. Lee supplied no evidence of his income or other financial resources in 2003 or 2006. To demonstrate that he would have prevailed in a child support modification proceeding or as to his contributions towards post-secondary education, he would have had to

disclose what his income and other financial resources were, including the income of his wife, as of when he would have petitioned to modify his support obligations.

In the absence of that evidence, the remand court had no basis to determine whether he would have succeeded or failed as to any of those obligations, relative to what he actually paid had he attempted to do so. Thus the court erred by concluding that he was damaged by not being able to retroactively seek those modifications.

**b. There Was No Evidence That Dr. Lee Would Have Succeeded In Modifying Hi Post-Secondary Education Obligation.**

As of 2009 his percentage obligation to contribute to their post-secondary education would have been considerably more than 50/50, based upon the parties relative incomes. In 2009, his maintenance obligation was \$11,700 per month including the escalated amount. (CP 143). Dr. Lee's annual income was \$442,125 or \$36,844 per month (CP 781).

The child support order obligated both parents to contribute to each child's college education until age 25. Both parents in fact did fulfill that obligation because both in fact contributed (CP 196). The order is non-specific as to the degree to which each was to be responsible. (CP 376-

378). However, there is no evidence as to the total amounts spent each year by each parent.

Dr. Lee paid \$5,496 per year for GET credits to cover all undergraduate tuition for both children \$288 per month for Chris and \$170 per month for Stacia. (CP 87). He paid \$1,750 per month or \$21,000 annually for both children (\$875 per month for Chris and \$875 per month directly to Stacia). (CP 44). When Chris went back east to pursue a master's degree in 2007, Dr. Lee contributed \$500 per month until he reached age 25 when the parents' legal obligation terminated (CP 43).

Carol Kennard paid for Chris's dorm fees, car insurance, food and shelter each weekend, each school vacation and each summer, his gas and his spending money. The total amounts were not in evidence. (CP 196) When Chris went on to graduate study, Carol Kennard contributed \$58,000 to those costs, (CP 196). There was no evidence from which the court could have concluded that had he moved to adjust the post-secondary obligation, he would have ended up paying less than he actually paid. Thus, the court's conclusion of law that he suffered by not being able to retroactively modifying his post-secondary obligation is not supported by any evidence.

**c. There Was No Evidence That Dr. Lee Would Have Sought Modifications Of Either His Child Support Or His Post-Secondary Education Obligations**

Whether or not he would have succeeded had he sought modifications of either child support or his post-secondary education obligations, he provided no evidence that he would have actually sought any modifications had Carol Kennard sooner sought enforcement of the spousal escalation obligation. In *In re Marriage of Capetillo*, 85 Wash.App. 311, 932 P.2d 691 (1997) the father made the same argument as Dr. Lee: foregoing pursuit of a support modification as damages. The court stated, "...nothing in the record supports this finding. His testimony does not indicate that he considered modification in the early years..." *Capetillo* supra at 318.

Thus evidence that Dr. Lee would have sought modification is necessary to prove this aspect of the element of damages. Dr. Lee failed to do so. His attorney merely argued that he could have terminated outright his statutory duty to contribute child support (RP 69) without the requisite evidence in the record to support that contention. Dr. Lee's motion should have been denied, and a judgment for the full amount of spousal maintenance past due should have been entered.

**d. Having To Pay Past Due Judgment Interest Owing Is Not Damage For Purposes Of A Laches Defense**

The court also concluded that it would be unfair for Dr. Lee to have to pay the accumulation of judgment interest on the past due amounts resulting from her delay (CP 381-382). However, interest past due on an unpaid judgment does not constitute damages for purposes of a laches defense. Interest on past due judgments are part of his legal obligation. It becomes due with each month that he failed to pay the escalated amounts (*Stablein v. Stablein* 59 Wash.2d 465, 368 P.2d 174 (1962)).

In *In re Marriage of Sanborn*, 55 Wash. App 124 at 128-129, 777 P.2d 4 (1989) the court held: “A defendant cannot be said to be ‘damaged’ simply by having to do now what he was legally obligated to do years ago.” Following *In re Marriage of Hunter*, 52 Wash.App at 271, 758 P.2d 1019 (1988); see also *Rutter*, 59 Wash.2d at 785–86, 370 P.2d 862.

**e. The Findings of Fact As To The Damages Incurred By Dr. Lee Do Not Constitute Damages For Purposes Of The Defense Of Laches As A Matter Of Law.**

The trial court found that Dr. Lee made prospective investments in his retirement during the intervening years and that enforcement of the past due obligation “would result in substantial loss of Petitioner’s 401 (k)

savings” (CP 379). This is a finding with no legal force. The paying of any substantial past due legal obligation necessarily results in substantial loss of any asset used as a source to pay it. However, as established in *In re Marriage of Sanborn* supra, at 128-29 (1989), the loss that results from paying what one owes is not damage for purposes of a laches defense.

In March 1999 the value of his retirement account was \$217,000 (CP 445). As of 2013 it was worth over \$1,000,000 (CP 445 and sub number 72 of sealed source document tab G). The amount of past due maintenance is \$253,285.20 without interest over 10 years (CP 143) or an average of \$2,110 per month. If there was evidence that he relied on her failure to enforce the maintenance escalation obligation to make his retirement account contributions, those unpaid monthly obligations would, in effect, be loans to him, plus interest at 12% per annum through which for every dollar he contributed to his retirement account, his employer Group Health contributed two dollars.

For example, during the first six months of 2013, he contributed \$13,076.81 (\$2,179 per month) while Group Health contributed \$26,079.33 or \$4,346 per month! (CP 445-446). Thus, instead of being damaged, he gained monumentally by not paying his maintenance escalation payments, even with the interest accumulation. He, in effect,

borrowed against what he owed Ms. Kennard to gain more in his retirement account. Instead of being damaged, he profited.

#### **5. The Reliance Element Was Not Satisfied.**

There was no evidence that Dr. Lee relied on Carol Kennard's delay to make those retirement account contributions. For the defense of laches to succeed, it is not enough to show that the delay in enforcement was unreasonable, and that damages were incurred. The defendant must also prove the detriment suffered was in reliance on the delay in enforcement. In *Watkins*, supra, there was an actual quid pro quo: that if the father would forego his right to visit the children, and approve an adoption, he would not owe the mother payment of his child support obligation, *Watkins* supra at 375. Even if that were not the case, the evidence was undisputed that "...Donald detrimentally relied on Colleen's delay in bringing suit. The evidence reflects that he did not seek visitation rights during the 5 1/2 year period, and he incurred financial obligations he would otherwise have forsaken..." *In re Marriage of Watkins* supra at 375, 710 P.2d 819 (1985). In *Watkins*, supra, the father's laches defense was made out because he proved both reliance on the delay, in fact, and that he would not have incurred that damage absent that reliance.

In *Capetillo* supra, the father had a physical injury which caused him to reduce his work hours. He used up all his settlement funds, entered into a blended family, and didn't seek a modification of his child support obligation: "While the record shows that each of these circumstances occurred, it is not at all clear that they occurred **in reliance** on Ms. Capetillo's failure to pursue child support..." *Capetillo* supra at 318 (emphasis supplied). Thus, the father's laches defense failed because he could not prove that the detriment he suffered was in reliance on the delay in enforcement.

In *In re Marriage of Hunter* supra, the father's laches defense failed, not only because his past due maintenance was not damage for purposes of a laches defense, but also because he admitted "...that he did not undertake major financial obligations that he would otherwise have forsaken had he anticipated paying the outstanding maintenance," *Hunter* supra at 128 (1988). In other words, he failed to prove that his financial debts and obligations were in fact a result of his reliance on the delay.

Dr. Lee presented no evidence that his contributions to build his substantial 401 (k) savings or that his failure to bring a petition to modify his child support or post-secondary obligations sooner were in reliance on her delay. His failure to provide any evidence of the reliance element

precluded an award of summary judgment in his favor as to his laches defense. Since it is his burden to prove reliance, the absence of a finding as to reliance, entitles this court to conclude that he did not rely on her delay, *Capetillo* supra at 318. The trial court should have denied the motion and entered a judgment for the full amount owing pursuant to the directive of this court's mandate.

#### **IV. Conclusion**

The laches defense was beyond the scope of the mandate since it does not serve to set aside the spousal maintenance escalator provision of the decree. Even if it had that legal effect, it was not made out since neither the damages nor reliance elements were proven and he failed to produce any of the required financial information required by King County Family Law Rule 10 as a prerequisite to obtaining the financial relief that he sought. Thus the remand court erred in failing to deny Dr. Lee's motion for summary judgment and in failing to enter a judgment for the full amount of spousal maintenance past due since February 2003.

#### **Attorney Fees:**

An award of attorney fees is requested consistent with the mandate in this matter, and pursuant to RCW 26.18.160.

#### **V. Response To Dr. Lee's Appellate Brief.**

**A. The Following Arguments Were Not Raised Below And Therefore Should Not Be Considered On This Appeal**

As a general rule, arguments raised for the first time on appeal are not to be considered (*Bennett v. Hardy*, 113 Wa.2d 912 at 918, 784 P.2d 1258 (1990)). There are specific exceptions under RAP 2.5 (a): jurisdiction, failure to establish facts upon which relief can be granted or manifest error affecting a constitutional right. Case law has extended exceptions to include, reference to a statute not addressed below pertinent to substantive issues that were raised below, or where the appeal affects the right to maintain an action. See *Bennett v. Hardy* supra at 918 (1990). The following issues are being raised by Dr. Lee for the first time on this appeal.

1. Whether this court should refuse to follow the holding of *In re Marriage of Shaffer*, 47 Wa.App. 189, 733 P.2d 1013 (1987) that the reviewing court can substitute its own concept of fairness under RCW 26.09.080, instead of being limited to examining the circumstances that existed when the martial agreement was executed.

2. Whether a successful laches defense precludes prospective enforcement of the maintenance escalation clause after the date Ms. Kennard filed her motion to enforce the obligation.

3. Whether waiting to enforce prior to the expiration of the statute of limitations constitutes bad faith precluding the attorney fee award.

None of those issues fall within the exceptions to the general rule. Therefore none of them should be considered by this court.

**B. The Remand Court Complied With This Court's Mandate By Refusing To Preclude Enforcement Of The Final Decree Containing The Maintenance Escalator Clause Based Upon The Fairness or Unconscionability Of The Separation Agreement**

**1.To Do So Would Have Been To Overrule Five State Supreme Court Decisions.**

For nearly a century our State Supreme Court has precluded attacks on agreements already merged into final court orders. *Bullock v. Bullock*, 131 Wa 339, 230 P.130 (1924), cited in *In re Marriage of Olsen*, 24 Wa.App 292 at 297, 600 P.2d 690 (1979). For over half a century our State Supreme Court has expressly extended the doctrine of merger to marital separation agreements adopted in a final decree from which no appeal was taken. "Where a property settlement agreement is approved by a divorce decree, the rights of the parties rest upon the decree rather than the property settlement." (*Mickens v. Mickens*, 62 Wa.2d 876, at 880 385 P.2d 14 (1963)). This principle was followed in *In re Marriage of Hulscher*, 143 Wa. App 708, 180 P.3d 199 (2008) at 717, in holding that a

post decree attack on a non-modifiable maintenance provision of a divorce decree is “time barred”. Thus, to consider whether the maintenance escalator provision is substantively unconscionable or unfair would effectively overrule *Mickens v. Mickens* supra.

It would also overrule the holding of *In re Marriage of Moody*, 137 Wa.2d 979, 979 P.2d 1240 (1999) which held that a post decree attack on the spousal maintenance provision of a separation agreement merged into a final decree from which no appeal had been taken cannot be based upon its fairness. *In re Marriage Moody* supra at 982 (1999). A year and a half after the decree which adopted the agreement was entered; later Mr. Moody filed a motion to vacate under CR 60(b) upon the theory that the agreement as to spousal maintenance was unfair. The court held:

“Whether the terms of a separation agreement are unfair is a legal issue which must be raised on appeal-not in a motion to vacate the decree. Citation omitted. The issues of whether the provision of the decree were unfair when entered is not properly before the court and we decline to consider it.”  
*Moody* supra at 991(1999).

Thus, to reverse based upon the argument that the agreement (or the decree) is unfair or unconscionable would overrule the Supreme Court’s decision in *In re Marriage of Moody* supra.

In still another case, our State Supreme Court also observed that to fail to validate a separation agreement that fulfills the test of procedural fairness that is substantively unfair is inappropriate because to do so would reject the "...two pronged analysis which was set out in *Matson* and has characterized our analysis for over 50 years," *In re Marriage of Bernard*, 166 Wa.2d 895 at 903, 204 P.3d 307 (2009). To do so here, as Dr. Lee urges, would be to overturn *Bernard* supra, as well.

Assuming arguendo, that the court was permitted to reach either the substantive unconscionability issue or the fairness issue, for it to have refused to review whether the provision meets the test of procedural fairness, would overrule our State Supreme Court's holding in *In re the Marriage of Hadley*, 88 Wa.2d 649, 565 P.2d 790 (1977), regarding the validity of agreements between spouses. There the doctrine of merger did not apply because an appeal was taken from the decision of a trial court incident to entry of the decree of dissolution. Our State Supreme Court held that the two prong test governs the validity of agreements reached between spouses during the marriage. (See, *Hadley* supra at 654 (1977).

Neither a superior court, nor this court can overturn a decision of the State Supreme Court. To do so is to err. See *1000 Virginia LTD Partnership v. Vertecs Corp*, 158 Wa.2d 566, 578 146 P.3d 423 (2006)

See also *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wa.App 702, 308 P.3d 644 (2013). Here, the remand court correctly refused to do so, observing that its duty to follow the law in its footnote 4 of its order at page 9, leaving that for a policy determination by the higher court. (CP 380). The higher court that may do so, it must be our State Supreme Court.

**2.The Doctrine of Merger Precluded The Remand Court From Setting Aside the Separation Agreement Based Upon Considerations Fairness or Substantive Unconscionability**

The doctrine of merger, with its emphasis on finality, necessitates that the only issues this court could entertain, would be those cognizable under CR 60, entitled “Relief From Judgment”. The fairness of a maintenance provision cannot be attacked in a post decree motion under CR 60. (See, *In re Marriage of Moody* supra). Dr. Lee has not argued any provision of Court Rule 60 on the basis of which a court order can be vacated based upon unconscionability. In fact there is none.<sup>1</sup>

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<sup>1</sup> The only provision of CR 60 that could be used would be CR(60)(b)(5) (that the judgment is void). The judgment would be substantively unconscionable if it violated public policy. (See, *Scott v. Cingular Wireless*, 160 Wa 2d 843 at 847, 161 P.3d 1000 (2007), followed by *McKee v. A T & T Corp.*, 164 Wa 2d 372 at 396, 191 P.3d 845 (2008). However, Dr. Lee already raised that issue but this court rejected it. “Therefore we hold that the trial court erred as a matter of law in holding that the spousal maintenance escalation clause was void and unenforceable.” *Lee v. Kennard*, supra at 688.

The only theories available to Dr. Lee to render that portion of the decree void were constitutional arguments. He pursued the following constitutional arguments below: that in approving the separation contract in its decree, the trial court in 2000 lacked subject matter jurisdiction, (CP 17), and that Dr. Lee was deprived of lack substantive and procedural due process of law (CP 16 through 20 ). All of those arguments were rejected by the remand court and none of them are raised by Dr. Lee on this appeal.

This court, in its order denying a recall of the mandate made clear that the language in its decision regarding a showing of the agreement being unfair, was superfluous dicta that would have been eliminated had a timely motion for reconsideration been filed before the mandate issued. (See appendix 1). This is because, this court expressly acknowledged, its order denying recall of the mandate, that its decision does not overrule the holding in *In re Marriage of Hulscher*, 143 Wa. App 708, 180 P.3d 199 (2008) that held such attacks to be “time barred”.

“As the Glass court astutely observed, “[i]f such a challenge were to be allowed years later, at the time of a modification proceeding, the provisions of RCW 26.09.070(3) and (7) would be rendered

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maintenance escalation clause was void and unenforceable.” *Lee v. Kennard*, supra at 688.

meaningless.” Glass, 67 Wash.App. at 390, 835 P.2d 1054.”  
*Hulscher supra* at 717.

**3. Case Law Cited By Dr. Lee Does Not Support  
His Contention That The Court Could Review  
The Fairness Of The Agreement Pursuant To  
RCW 26.09.070.**

The cases upon which Dr. Lee relies to support his contention that RCW 26.09.070 provides authority to the remand court to review the fairness of the provision of a decree of dissolution that adopts a separation agreement the agreement are all inapposite.

*In re Marriage of Olsen*, 24 Wa.App. 292, 600 p.2d 690 (1979) involved a non-modifiable maintenance provision of an agreement executed before the parties filed their Mexican divorce decree. The doctrine of merger was expressly discussed in the opinion. The court reviewed the fairness of the agreement only because a merger had not occurred.

“It is apparent from the language of the 1966 agreement that the parties did not intend to merge the agreement with the subsequent decree; and more importantly, it is clear from the language of the Mexican decree that the Mexican court avoided merging the two.” *In re Marriage of Olsen supra* at 298 (1979). Here, however as in *Hulscher supra*, and *Moody*,

supra, the decree expressly incorporated and adopted the 1999 separation contract of the parties (CP 992-995) and included the terms of the maintenance escalator clause. (CP 993).

*In re Marriage of Hansen*, 24 Wa.App 578, 602 P.2d 369 (1979) and *Partnership of Rhone/Butcher*, 140 Wa.App 600, 166 P.3d 1230 (2007), rev denied, 163 Wa.2d 1057 (2008), both involved whether an agreement would be enforced at a trial **before** the final order determining their rights occurred. Thus, the doctrine of merger did not apply as it does here.

The unconscionability defense is a hybrid of the unfairness defense. It is tantamount to arguing that the order incorporating the agreement is not merely unfair in substance; it is so unfair that it shocks the conscience, is “monstrously harsh” or “exceedingly calloused” (See, *Zuber v. Airtouch Communications Inc.*, 183 Wa2d 293 at 303, 103 P.3d 753 (2004). Dr. Lee’s remedy was to appeal the decree.

Contracts that contain a provision that violates public policy have been held to be substantively unconscionable. (*Alder v. Fred Lind Manor* 153 Wash.2d 331, 103 P.3d 773 (2004)). However this court in this case squarely held that a maintenance escalator provision is not void stating “We have previously recognized a distinction between what courts may do

and what parties may do by agreement with respect to the modifiability of maintenance. *In re Marriage of Hulscher*, 143 Wash.App. 708, 714-715, 180 P.3 199 (2008). The court may not impose non modifiability, but the parties may agree to do so. *Lee v. Kennard*, supra at 687. By arguing substantive unconscionability Dr. Lee attempts to circumvent the very holding in this case.

**C. If The Following Decisions of The Remand Court  
Constitute Errors, They Were Invited By Dr. Lee.**

“A party may not set up an error at trial and then complain of it on appeal.” *In re Per Restraint of Thompson*, 141 Wa.2d 712, 723, 10 p.3e 380 (2000). Dr. Lee has done precisely that as to the following arguments.

**1. That The Court Should Not Have Reached The  
Procedural Fairness Second Prong Under In re  
Marriage of *Bernard* supra.**

Dr. Lee’s counsel acknowledged to the court that she must look at both substantive and procedural fairness issues. The following colloquy took place between the court and counsel for Dr. Lee:

“The Court: So you are essentially saying not only do I need to do a substantive and procedural fairness analysis of the time of execution—

“Ms. Watson: Yes, ma’am.”

(RP 10-11).

During the remand hearing counsel for Dr. Lee conceded that if the laches defense were successful, it would not preclude enforcement of the maintenance escalator obligation prospectively from when Ms. Kennard filed her motion to enforce in September 2011. The following colloquy took place between the court and counsel for Dr. Lee:

“Ms. Watson : Laches – I think the questions is – if the Court enforces the agreement, or deems that it should because it is not unfair –

“The Court: Um-hum?

“Ms. Watson: --but then accepts the argument of laches, I think the question is will that work prospectively?

The Court: Right, even though you might find that there is no retroactive implementation of the escalation clause, and no interest, is there still – could she prospectively have –

“Ms. Watson: I think in the nature of a laches defense, I would have to say that is correct. It can only protect against the past...” (RP 71 – 72)

**3. That The Percentage Increase In the Consumer Price Index From Inception in 2003 Is In Effect Prospectively As of When Ms. Kennard Filed Her Motion To Enforce In 2011**

This was also admitted by counsel for Dr. Lee in the same colloquy with the trial judge:

“Watson...

...Going forward, her spousal maintenance would increase by 35%, as well as increasing inflation between now and the next seven years that he has to pay.” (RP 71-72).

**D. None Of The Unconscionability Cases Cited Are Apposite**

All of the cases cited involve enforcement of a provision of a commercial contract. None of the cases cited involved contract provisions adopted as part of a final court order from which no appeal had been taken. Since they do not involve the doctrine of merger, none are apposite.

Even if that were not so, the remand court did not conclude the maintenance escalator provision to be unconscionable in substance although asked to do so (CP 380-381). The court was made aware of the following:

The parties were married for twenty years. The wife was 52 years of age when they divorced, gave up a teaching career to raise the children and had physical disabilities that adversely affected her ability to teach. (CP 375). The husband was freed to establish a career as a heart surgeon. He grossed \$19,000 per month at the time of the divorce, and ordered to pay \$9,000 per month as base maintenance.

As to the provision to adjust the maintenance every three years based limited to the consumer price index, it was anticipated that he would earn more than the annual increase in the consumer price index because he

As to the provision to adjust the maintenance every three years based limited to the consumer price index, it was anticipated that he would earn more than the annual increase in the consumer price index because he had done so historically. (CP 194-195) (RP 14). By the time he would have been paying \$11,700 per month, in 2010, a 30% increase in spousal maintenance, his income was over \$36,000 per month, an increase of more than 90%. (RP 14).

His maintenance obligation is non-modifiable except his obligation reduces \$1 for every \$2 she would earn. If his income should reduce through no fault of his own, his maintenance obligation reduces accordingly (CP 994).

That spousal maintenance scheme is neither “monstrously harsh” or “exceedingly calloused”. It does not shock the conscience. The remand court appropriately exercised its discretion by rejecting the argument that the maintenance escalator clause is unconscionable in substance.

**E. If Unfairness Is An Available Defense, The Issue Is Not Whether The Agreement Met The Test of Procedural Fairness, But Whether Execution And Entry Of The Decree Of Dissolution Occurred In A Procedurally Unfair Manner.**

Dr. Lee does not challenge the remand court’s determination that the procedure requirements to validate the agreement under *Matson* supra

and *Bernard* supra were satisfied by Kennard. (CP 380). That determination stands as a verity on the appeal (*Robel v. Roundup Corp*, 148 Wash.2d 35, 59 P.3d 611 (2002)).

The doctrine of merger necessitates that Dr. Lee's burden was to prove procedural unfairness as to the execution and entry of the decree of dissolution which adopted the agreement, not the agreement itself. That is his only means of setting aside the agreement. As *Hulscher*, supra makes clear, contrary to Dr. Lee's argument, the court's authority under RCW 26.09.070 is limited to a fairness determination before entry of a decree of dissolution, not eleven years after its entry. His counsel admitted that he waived that right. (RP 40).

**F. If The Laches Defense Was Valid.**

**1.It Was Not Error For The Court To Enforce The Maintenance Escalator Clause As Of When Ms. Kennard Filed Her Motion To Enforce**

A successful laches defense does not vacate the provision of the decree that orders the spousal maintenance escalation obligation. If the laches defense was cognizable under the mandate and properly proven (which Ms. Kennard challenges on both counts in her appeal infra at section C(1) at pages 11-13, the remand court properly ruled that the escalator obligation continues in force as of when the motion to enforce

was filed by Ms. Kennard. Since laches is merely an equitable defense to enforcement during the period Ms. Kennard did not seek its enforcement it only pertains to what was owed prior to the filing of her motion to enforce it. This is presumably why Dr. Lee's counsel conceded the issue in oral argument.

**2.It Was Not Error To Use The Accumulated Cost  
Of Living From Inception Of The Decree Should  
Not Be Prospectively.**

Even if the laches defense were valid, as of the date of filing of the enforcement action, the accumulated effect of the escalated amount was owed because by the terms of the decree, spousal maintenance is non-modifiable. (CP 993). The escalated obligation as of that filing is part of the maintenance obligation that is non-modifiable. Thus the accumulated amount was owed as of that time. The court did not err in that sense.

**VI. The Attorney Fee Award**

**A. The Mandate Requires An Award Fees To Ms. Kennard**

Since the mandate compels an award of fees including on appeal unless the agreement is set aside, and the agreement, properly, was not set aside, the award of fees was compelled.

**B. Ms. Kennard Did Not Engage In Bad Faith**

The mandate required that Dr. Lee pay for fees all incurred by Ms. Kennard to enforce the maintenance obligation. That necessarily included fees incurred pursuant to that remand hearing, unless the obligation were set aside, and this appeal as well.

The mandate did not reserve to Dr. Lee the right to seek fees. Nor did he seek fees in the original appeal. He did not argue bad faith below.

Bad faith occurs “when a party intentionally brings a frivolous claim with improper motive for purpose of harassment.” (*In re Pearsall-Stipek*, 136 Wa.2d 255 at 266-267, 961 P.2d 343 (1998)). Her claim was not frivolous, nor brought to harass Dr. Lee. Absent an express finding of bad faith an appellate court must not assume it, even the record supports it (*State v. SH*, 102 Wa.App. 468, 479, 8 P.3d 1058 (2000)). Here the court did not find bad faith in Ms. Kennard’s decision to wait until 2011 to seek enforcement. The record supports her decision to wait because he claimed he could not afford to pay (CP 197). He did not claim that she did, and there is no evidence that she did.

**C. Ms. Kennard Is The Prevailing Party Under RCW  
26.18.160**

In the only reported decision construing the reference in RCW 26.18.160, a mother sought a judgment of \$315 per month for child

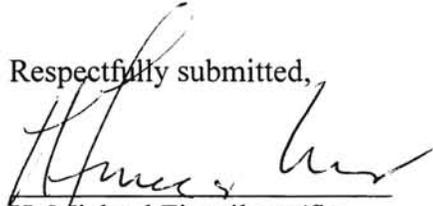
support past due for 15 months or \$4,725. The father alleged an agreement and urged that he owed at the rate of \$68.64 per month or \$1,029.00. The trial court determined he owed \$161.36 per month or \$2,420 and considered both parties the prevailing party (or neither as against the other in effect. The Court of Appeals held that a prevailing party, for purposes of the statute has been defined to be a party who seeks enforcement and receives a money judgment. See *In re Marriage of Nelson*, 62 Wa.App 515 at 519, 814 P.2d 1208 (1991). Even though the father had received an equitable offset which resulted in the judgment being closer to his position than her position, the trial court's failure to award her attorney fees under the statute was held an abuse of discretion and the court of appeals reversed.

Ms. Kennard sought a judgment of \$305,000 for all amounts past due since February 2003 and for perpetuation of the escalator amounts in future. Dr. Lee sought a judgment for her of \$0.00 and an elimination of the obligation for the five years that it could continue. She was awarded a judgment of \$114,000 and a determination that the amounts due prospectively remain in full force and effect. She was the prevailing party thus entitled to the award of fees.

She requests fees for having to defend this appeal as well.

DATED this 30 day of December, 2014.

Respectfully submitted,

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

H. Michael Finesilver (fka  
Fields)

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

## **Appendix 1**

3-20-14

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In the Matter of the Marriage of	)	
	)	No. 68266-1-I
GABRIEL Y. LEE,	)	
	)	ORDER DENYING MOTION
Respondent,	)	TO RECALL MANDATE
	)	AND DENYING THE
v.	)	MOTION TO STRIKE
	)	RESPONDENT'S ANSWER
CAROL ANN KENNARD,	)	TO THE MOTION TO
	)	RECALL MANDATE
Appellant.	)	

The appellant, Carol Kennard, has filed a motion to recall the mandate issued by this court on October 18, 2013. Respondent, Gabriel Lee, has filed a response. Kennard filed a motion to strike Lee's response and a reply. Lee filed a response to the motion to strike, and Kennard filed a reply. Both Kennard and Lee request fees.

The motion to recall the mandate suggests that the opinion in Lee, by virtue of the phrase "unless the separation agreement is set aside," impliedly overturns In re Marriage of Hulscher, 143 Wn. App. 708, 108 P.3d 199 (2008), and it should be clarified to guide the trial court on remand. In re Marriage of Lee, 176 Wn. App. 678, 693, 310 P.3d 845 (2013). The phrase is merely a reference to the discussion in section II of the opinion, which relied on Hulscher. It was not intended to imply any disagreement with Hulscher. Under a timely motion for reconsideration, the panel would have removed this language as unnecessary. However, the case was mandated and the trial court has already acted on remand. Appeal is a more appropriate procedure than recall of the mandate under the facts here.

We have considered the motions and have determined that both motions should be denied. Now, therefore, it is hereby

ORDERED that the motion to recall the mandate is denied; it is further

ORDERED that the motion to strike the answer to the motion to recall the mandate is denied; it is further

ORDERED that Kennard's request for attorney fees is denied; it is further

ORDERED that Lee's request for attorney fees is denied.

Done this 20<sup>th</sup> day of March, 2014.

Schindler, J.

Appelwick, J.

Becker, J.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 MAR 20 AM 11:29

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

*The Court of Appeals*  
of the  
*State of Washington*

DIVISION I  
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600 University Street  
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98101-4170  
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March 20, 2014

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CASE #: 68266-1-I

In re the Marriage of: Gabriel Y. Lee, Respondent v. Carol Ann Kennard, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion To Recall Mandate And Denying The Motion To Strike Respondent's Answer To The Motion To Recall Mandate entered by this court in the above case today.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

LAM

enclosure

## Les Feistel

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**From:** Moore, Lori <lori.moore@courts.wa.gov>  
**Sent:** Thursday, March 20, 2014 3:47 PM  
**To:** Les Feistel; 'info@seattlefamilylaw.net'  
**Subject:** COURT OF APPEALS 68266-1-I In re the Marriage of: Gabriel Y. Lee, Respondent v. Carol Ann Kennard, Appellant  
**Attachments:** 68266-1-I.Order Letter.pdf; 68266-1-I.Order.pdf  
**Importance:** High

RICHARD D. JOHNSON  
*Court Administrator/Clerk*

*The Court of Appeals  
of the  
State of Washington*

DIVISION I  
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600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD (206) 587-5505

**The attached order is being transmitted to counsel electronically. No hard copy will follow.**

Thank You!!

**Lori Moore**  
**Case Manager**  
**Court of Appeals Division One**  
**e-mail: [lori.moore@courts.wa.gov](mailto:lori.moore@courts.wa.gov)**  
**tel: 206-464-5892**



COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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

I, Amy Fields, state and declare as follows:

I am a Law Clerk in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 31th day of December, 2014, I placed true and correct copies of the Brief of Cross-Appellant/Response Brief of Cross-Appellant to the Court of Appeals with Seattle Legal Messengers for delivery on December 31, 2014 to:

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

And

Catherine W. Smith  
1619 8th Avenue North

2014 DEC 31 11:11:02  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA

Seattle, WA 98109-3007  
(206) 624-0974

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

DATED at Seattle, Washington, on this 31th day of December,  
2014.



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Amy Fields

Anderson, Fields, Dermody & Pressnall  
207 E. Edgar Street  
Seattle, Washington 98102  
(206) 322-2060