

Case No. 67720-9-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

BENJAMIN A. COSGROVE, III, an individual,

PETITIONER,

v.

TONI YOUNG, an individual,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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I. INTRODUCTION

This appeal is the result of motions and rulings in the underlying trial court action between Plaintiff/Respondent, Toni Young (“Young”) against the Defendant/Appellant Benjamin Cosgrove (“Cosgrove”), including (1) a CR2A agreement under which “issues regarding the drafting of the document or any unresolved issues” were to be arbitrated and issues of enforcement of the agreement were to be brought before the trial court; (2) a determination by the Court that the doctrine of judicial estoppel was not applicable to preclude Young from bringing any contingent, liquidated, or unliquidated claim for money or assets not disclosed in bankruptcy; (3) an untimely motion for reconsideration (presented to the court as a motion for clarification), which resulted in an order referring the entire matter for arbitration before Matthew Jolly, when issues of enforcement were to be brought before the trial court; (4) the issuance of multiple orders/judgments based upon findings and conclusions issued by arbitrator Matthew Jolly that were based in part upon excluded evidence. The errors by the trial court have resulted in multiple final judgments being entered:

A May 10, 2010 Order Denying Defendant’s Motion for Partial Summary Judgment wherein the court determined that even if Young failed to disclose assets in BACC to the bankruptcy court, judicial estoppel

did not apply under the three-prong test of *New Hampshire v. Maine*, 532 U.S. 742 (9th Cir. 2001);

A November 17, 2011 Order to Enforce CR2A Agreement (constituting a final judgment because it did not comply with CR 52 or CR 54 and which was later amended on December 6, 2011), which was entered without evidentiary hearing and was premised upon findings and conclusions issued by arbitrator Jolly, including findings and conclusions based upon excluded evidence, directing Cosgrove to (1) pay Young \$15,000 (an enforcement issue); (2) pay Young \$2,070; (3) sign documents (that were not provided to Cosgrove) (an enforcement issue); (4) allow inspection of his storage areas (an enforcement issue); (5) produce wine for division (an enforcement issue); and (6) otherwise bring himself “into compliance” (an enforcement issue);

A November 28, 2011, Order Confirming Arbitration Award (constituting another final judgment because it did not comply with CR 52 or CR 54), which is based upon findings and conclusions on issues of enforcement issued by arbitrator Jolly, including findings and conclusions based upon excluded evidence, granting Young a final judgment against Cosgrove for attorney’s fees in the amount of \$4,000.

A March 23, 2012, Order for Judgment (constituting another final judgment because it did not comply with CR 52 or CR 54), which is based upon findings and conclusions on issues of enforcement issued by

arbitrator Jolly, including findings and conclusions based upon excluded evidence, granting Young a final principal judgment against Cosgrove in the principal amount of \$6,070.00.

Cosgrove seeks the following relief from the appellate court:

(1) Reversal of the Court's order that judicial estoppel did not apply to preclude any contingent, liquidated, or unliquidated claims brought by Young for money or assets not disclosed in bankruptcy;

(2) Reversal of the Order on Motion for Clarification wherein the trial court referred the "entire matter" for arbitration;

(3) Reversal of the Order Denying Defendant's Motion to Stay Arbitration;

(4) Reversal of the Order to Enforce CR 2A dated November 17, 2011 (later amended on December 6, 2011), which is based upon the findings and conclusions issued by arbitrator Matthew Jolly, which are based in part upon testimony given in reliance of excluded evidence, and under which Young was awarded attorney's fees in the amount of \$2,070;

(5) Reversal of the Order Confirming Arbitration Award and Ordering Entry of Judgment dated November 28, 2011 dated November 17, 2011, which is based upon the findings and conclusions issued by arbitrator Matthew Jolly, which are based in part upon testimony given in reliance of excluded evidence, and under which Young was awarded attorney's fees in the amount of \$4,000 based upon findings and

conclusions of bad faith, which is based upon testimony given in reliance of excluded evidence;

(6) Reversal of the Order for Judgment under which Young was granted judgment in the principal amount of \$6,070, which is based upon the findings and conclusions issued by arbitrator Matthew Jolly, which are based upon testimony given in reliance of excluded evidence, or, in the alternative a determination that the Order for Judgment under which Young was granted judgment in the principal amount of \$6,070 constitutes the final judgment in this matter.]

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it determined that judicial estoppel did not apply to preclude any contingent, liquidated, or unliquidated claims brought by Young for money or assets not disclosed in bankruptcy, thereby effectively dismissing Cosgrove's affirmative defense of judicial estoppel. In asserting this assignment of error, Appellant asks the court to consider the following issues: (1) whether Young position before the trial court, claiming a partnership interest in BACC, LLC, was consistent with her earlier position before the bankruptcy court, claiming that she had no potential or contingent assets; (2) whether Young misled either the trial court or the bankruptcy court; and (3) whether Young derived an unfair advantage over or imposed and

unfair detriment on Cosgrove if not estopped from asserting her claim for partnership interest in BACC, LLC.

Assignment of Error No. 2: The trial court erred when it considered Young's Motion for Clarification, which constituted a Motion for Reconsideration that was not timely filed. In asserting this assignment of error, Appellant asks the court to consider the following issues: (1) whether Young's motion for clarification of the Order to Enforce CR2A constituted a motion for reconsideration under CR 59; and (2) if so, whether the trial court had discretion to enlarge the time for Young's to file her motion, and, in the absence of such discretion, whether the trial court should denied Young's motion.

Assignment of Error No. 3: The trial court erred when it referred the entire matter, including issues of enforcement, to arbitration, failed to stay arbitration, and failed to require Young to identify the issues she was seeking to have arbitrated. In asserting this assignment of error, Cosgrove asks the court to consider the following issues: (1) whether the trial court had authority to refer the entire matter for arbitration when it entered the Order on Motion for Clarification; and (2) whether the court the trial court had authority to stay the arbitration or determine the issues that were subject to arbitration, or otherwise require Young to identify the issues for arbitration

Assignment of Error No. 4: The trial court erred when it confirmed the arbitration award resulting from Findings of Fact and Conclusions of Law that were based upon excluded evidence. In asserting this assignment of error, Cosgrove asks the court to consider the following issues: (1) Whether trial court had authority to confirm the arbitration award, when no award had been issued; (2) whether the CR 2A limited the arbitrator's authority and the arbitrator did not have authority under the CR2A to hear the entire matter including issues of enforcement/compliance; (3) whether the arbitrator had authority to enter findings of fact and conclusions of law, including awarding attorney's fees, that were based upon excluded evidence.

Assignment of Error No. 5: The trial court erred when it entered multiple orders/judgments without requiring Young to provide sufficient notice, conducting an evidentiary hearing to determine issues of enforcement/compliance under the CR2A Agreement, and including the requisite language under CR 54(b) that the order disposed of only part of the case, and the trial court did not enter findings of fact and conclusions of law required by CR 52(a). In asserting this assignment of error, Appellant asks the court to consider: (1) whether Young provided Plaintiff with sufficient notice of the second motion to enforce the CR 2A Agreement; (2) whether the trial court had authority to issue partially dispositive orders without the inclusion of requisite language under CR

54(b) or entry of findings and conclusions under CR 52; (3) whether the trial court had authority to enter a judgment awarding Young amounts without conducting an evidentiary hearing and in reliance upon findings and conclusions based upon excluded evidence.

III. STATEMENT OF THE CASE

This action is premised upon a meretricious relationship alleged by the Plaintiff/Respondent Young against the Defendant/Appellant Cosgrove, which Cosgrove denies. (CP 2-5) Cosgrove denies that a meretricious relationship was established. (CP 146-148)

In bringing her action against Cosgrove, Young asserted, among other causes of action, a cause of action for termination of a joint venture or implied partnership (BACC, LLC), under which she sought the equitable division of property acquired and debts incurred by the joint venture or implied partnership. CP 33, ¶ 4.5-4.6) In support of her claim, Young asserted facts of the existence of a joint venture or partnership until the time she filed for bankruptcy in 2009. (CP 30, ¶ 3.4; CP 31, ¶¶ 3.6, 3.9 and 3.10; CP 32, ¶ 3.1). Cosgrove denied these assertions and the cause of action and asserted an affirmative defense of judicial estoppel because Young had failed to disclose the existence of a contingent claim to the bankruptcy court. (CP 147-150). Cosgrove sought summary judgment determination that Young's partnership claims were precluded under the doctrine of judicial estoppel. (CP 20-90) The trial court denied Cosgrove's

motion, but further qualified the ruling by stating that the doctrine of judicial estoppel was not applicable to Young's claims, thereby precluding Cosgrove's defense if the case were to later proceed to trial. (CP 143-44)¹

Later in 2010, the parties entered into a CR 2A Agreement on December 9, 2010, related to the division of assets of the parties. (CP 276-281) The CR 2A was specific as to those issues that were to be subject to arbitration. (CP 359) The CR 2A contains three provisions that are of specific importance in this appeal:

- 3.1 Each party agrees and stipulates that this is a full and complete agreement between the parties and is enforceable in court. Each party understand that even though final documents yet need to be prepared stipulation is binding upon execution and is enforceable in court. . . .
- 3.3 Any disputes regarding the drafting of final documents or any unresolved issues shall be submitted to binding arbitration with Matthew Jolly. . . .
- 3.4 In the event it becomes necessary to enforce this agreement in court, the party who successfully brings and [sic] enforcement action shall be entitled to an award of 100% of the attorney's fees an costs incurred in said enforcement action.

Multiple disputes regarding the interpretation of and performance under the agreement arose. (CP 283-285)

¹The Order states that it was signed on May 7, 2007; this was a scrivener's error. The case was filed in 2010, the motion was not brought until March 2010, and the order was signed and entered in May 2010.

On January 4, 2011, Young's counsel represented to Cosgrove's counsel, "No any dispute regarding sufficiency of poster production, production of someone else's tv, etc will go to the arbitrator." (CP 287)

On January 21, 2011, Young brought a motion to enforce the agreement before this court in January 2011. (CP 163-201) Cosgrove objected to the motion to enforce the agreement, because Young had breached the CR 2A, and Cosgrove's performance was excused. (CP 294-306) Specifically, Cosgrove asserted that Young failed to return personal property to Cosgrove and that he was not granted an opportunity for a complete walkthrough of Young's condo, storage room, storage unit, and Young's parent's home, for the purpose of locating personal property. (CP 301-304) On February 11, 2011, the court denied Young's motion in an order that states, "Issues of fact exist regarding interpretation of CR 2A agreement." (CP 349) Young immediately attempted to bring the same issues to the arbitrator. (CP 367-68, 406) As the arbitrator was without authority to determine issues of enforcement of the CR 2A, Cosgrove objected to the demand for arbitration, insofar as any issues of enforcement were involved. (CP 383) Mr. Jolly agreed that his authority did not extend to enforcement of the CR 2A. (CP 386-87) When Young was further denied the relief she sought, she brought a motion for "clarification" to the trial court. (CP 367-68, 406)

On March 1, 2011, more than 10 days after the Order Denying Motion to Enforce CR2A had been entered, Young moved the court to reconsider its order, titling her motion a “Motion to Clarify Order”, and seeking alternate forms of relief, including setting an evidentiary hearing and placing the matter into arbitration. (CP 350-353) Cosgrove opposed Young’s motion to the extent it constituted a motion for reconsideration and was not timely filed with the Court. (CP 393-394) In opposing Young’s motion, Cosgrove argued that the CR2A limited an arbitrator’s jurisdiction. (CP 399-401) Young agreed with Cosgrove that if issues of enforcement of the CR2A were sought, the trial court should conduct an evidentiary hearing. (CP 409) Despite the lateness of Young’s motion and despite the parties being in agreement that the court should set an evidentiary hearing on issues of enforcement of the CR2A, the Court ordered, “[t]he entire matter is referred to Mr. Jolly for Arbitration.” (CP 417) Because the arbitration provision in the CR 2A Agreement clearly limited the scope of arbitrator’s role, and for other reasons not relevant to this motion, Cosgrove sought discretionary review of the order referring the “entire matter” to arbitration. (CP 442-461) The appellate court denied Cosgrove’s motion, but qualified its ruling:

It is beyond the scope of the arbitration clause to send the question of enforcement of the settlement agreement to arbitration....Although a more precise identification of the “unresolved issues” being referred to arbitration would be helpful, it is not probable error just because the trial court

checked a box that “the entire matter” is referred to arbitration. Presumably, Young will not contradict her contention before me that the trial court order does not refer issues of the enforcement of the CR2A settlement to arbitration. (CP 469, *Emphasis added*)

Young also represented to the Court of Appeals that in seeking clarification as to the trial court’s order that “she did not ask the court to refer questions of enforcement to arbitration but that reading the trial court’s orders together reveals that the court referred *‘the entire matter’ consisting of the unresolved questions of interpretation of the CR 2A agreement.*” (The Court may take judicial notice of Young’s Response to Motion for Discretionary Review dated May 23, 2011, pages 7-8)

Between June 27, 2011 and July 11, 2011, Cosgrove’s counsel repeatedly requested that Young identify the issues for arbitration; Young refused to identify the issues for arbitration. (CP 472-477) Young repeatedly failed to provide this basic information to Cosgrove until she submitted her brief to the arbitrator on August 30, 2011, two weeks before the date originally set for arbitration on September 13, 2011. (CP 481-491) Young’s arbitration brief requested relief in the form of, *inter alia*: (i) factual determinations relating to performance and breach of the agreement, (ii) determination of bad faith in performance, (iii) supplementation of the agreement; and (iv) factual determination whether a condition precedent has been satisfied. (Id.) Young’s brief also included

some issues and relief requested in the form of interpretation of the contract. (Id.)

In light of the ruling from the Court of Appeals, and Young's continued refusal to identify the issues she was seeking to have arbitrated, and because Cosgrove did not have an opportunity to conduct discovery, depose witnesses or otherwise prepare witnesses to present testimony, as authorized by RCW 7.04.170, Cosgrove moved the Court to stay the arbitration proceedings and determine the issues to be arbitrated. (CP 419-430) The Court denied Cosgrove's motion to stay arbitration and also denied his request to define the issues to be arbitrated. (CP 568-570) The arbitration took place on September 26, 2011. (CP 702)

Prior to arbitration, Young's counsel issued a subpoena duces tecum ("SDT") to Eastside Wine Storage ("EWS") prior to arbitration. (CP 742-746) However, Young's counsel failed to provide a copy of the SDT to opposing counsel at anytime prior to the arbitration. (CP 780) Young acknowledged the failure to provide the EWS subpoena to Cosgrove. (CP 787) In addition, prior to arbitration, Young failed to provide the documents obtained by way of the EWS subpoena to Cosgrove. (CP 781)

David Mullan of EWS testified at the arbitration and the arbitrator, while declining to admit the written report by EWS, relied on the testimony of Mr. Mullan in making his findings of fact and conclusions of

law. (CP 702, 706, 712, 717-18) Mr. Mullan's testimony was based upon documents of EWS he reviewed, which were obtained in response to the subpoena, but he testified the records were actually records from a third party company that handles only the card key entry system for EWS. (CP 712) These documents were not business records of EWS. (CP 781) At arbitration, Cosgrove's counsel objected to the admission of documents obtained by Young or the testimony of Mr. Mullan, which was based upon his review of the third party records. (Id.) In reliance of Mr. Mullan's testimony, the arbitrator made specific findings of fact regarding Mr. Mullen's review of the facility records and conclusions of law that Cosgrove had violated the CR 2A Agreement. (CP 712, 717)

In addition, over the objection of Cosgrove prior to and during arbitrator that issues of enforcement were not before the arbitrator under the terms of the CR 2A Agreement, the arbitrator made conclusions of law, in equity, that Young is entitled to recover \$4,000 in attorneys' fees based upon on bad faith by Cosgrove. (CP 717-18) The arbitrator attributed the amount of \$4,000 solely to bad faith by Cosgrove, which the arbitrator based solely upon Cosgrove's actions related to the storage and division of the wine, which was based upon the testimony of David Mullan regarding Cosgrove's access to the facility, which was based upon third party records obtained from EWS, which were obtained by way of

SDT without notice to Cosgrove prior to the arbitration. (CP 702, 706, 712, 717-18)

Since the arbitrator denied admission of the documents upon which Mr. Mullan's testimony was based, and because issues of equity were not before the arbitrator for determination, Cosgrove sought reconsideration of the arbitrator's findings and conclusions based upon the testimony of Mr. Mullan. (CP 724) On October 12, 2011, arbitrator confirmed that none of the materials produced in response to the SDT to EWS were admitted into evidence or considered as part of the arbitration decision, but declined reconsideration of the decision. (CP 771) Following the arbitrator's clarification that none of the materials produced in response to the SDT to EWS were admitted into evidence or considered as part of the arbitration decision, Cosgrove sought revision of the decision after the alteration to paragraph 2.7 of the decision. (CP 773) On October 25, 2011, arbitrator Jolly summarily denied Cosgrove's motion for reconsideration and declined to issue any further decision. (CP 775) Thereafter, no arbitration was has been issued by the arbitrator, and Cosgrove did received any notice of an arbitration award. (CP 724)

On October 31, 2012, prior to confirmation of the arbitration decision, Young moved to enforce the CR2A Agreement based upon the arbitrator's findings and conclusions. (CP 571-576) Rather than conducting an evidentiary hearing, as required, the Court relied upon Mr.

Jolly's findings and conclusions and entered an Order to Enforce CR2A Agreement on November 17, 2011 (CP 783-785); the Order was later clarified on December 6, 2011. (Exhibit I to Amended Notice of Appeal) Over Cosgrove's objection, the court ordered Cosgrove to pay attorney's fees awarded to Young in the arbitration, when the attorney's fees were based upon bad faith as determined by Mr. Jolly without authority to make such a determination under the CR2A. (CP 702, 706, 712, 717-18; Exhibit I to Amended Notice of Appeal) The trial court further ordered Cosgrove to sign all documents he is required to sign, but otherwise failed to identify those documents, and Young failed to present the documents to Cosgrove for signature. (Exhibit I to Amended Notice of Appeal; CP 652) The trial court made no findings of fact or conclusions of law that Cosgrove's request for attorney's fees, in excess of the amount of attorney's fees awarded in arbitration, were reasonable under the *Lodestar* method. (Exhibit I to Amended Notice of Appeal.)

On November 14, 2011, Young moved for confirmation of a nonexistent award. (CP 691-693)

On November 28, 2011, the Court ordered confirmation of the arbitration award and ordered that Young was granted a judgment against Cosgrove in the amount of \$4,000. (CP 801-802) The order did not contain any language required under CR 54 that the judgment was a final judgment or that it was a partial judgment under CR 54(b). (Id.)

IV. ARGUMENT

A. Standards of review.

Review of summary judgment is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate “where the pleadings, depositions, affidavits and admissions on file show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 622, 112 P.3d 544 (2005) (internal quotation marks and citation omitted). The facts and all reasonable inferences are viewed in a light most favorable to the non-moving party, here the Appellant. *Id.*

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion. *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 239, 122, P.3d 729 (2005), citing *Perry v Hamilton*, 51 Wn.App. 936, 938, 756 P.2d 150 (1988). A trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wilcox*, 130 Wn.App. at 239, citing *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn.App. 896, 906, 977 P.2d 639 (1999).

The standard of review of an order compelling arbitration or whether or not arbitration should proceed is also de novo. *Satomi Owners*

Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213, 223 (2009). The appellate court examines the arbitration agreement to determine the arbitrability of the dispute. *Davis v. General Dynamics Land Systems*, 152 Wn. App. 715, 217 P.3d 1191, 1192 (2009) citing *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscaping Group, Inc.*, 148 Wn. App. 400, 403-04, 200 P.3d 254 (2009); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001). Cosgrove bears the burden of showing arbitration should not to be compelled. *Satomi*, 167 Wn.2d at 797.

A motion to enforce a settlement agreement is considered under the same standard as a motion for summary judgment. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000). When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a motion for summary judgment. *Id.*, at 914 citing *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993).

B. The trial court erred when it denied Cosgrove's Motion for Partial Summary Judgment and ordered that the doctrine of judicial estoppel did not apply.

Judicial estoppel arises in equity and serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 224-5, 108 P.3d 147, 150 (2005). A court may invoke judicial estoppel either

to prevent a party from gaining an advantage by taking inconsistent positions or to maintain the dignity of judicial proceedings. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

In deciding whether to apply judicial estoppel, a court considers three factors: (1) whether the party's later position clearly conflicts with its earlier one, (2) whether the party persuaded a court to accept its early position such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court, and (3) whether the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

The Bankruptcy Code and court rules impose on the debtor an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. *Cunningham*, 126 Wn.App. 229-30. A debtor must list potential causes of action, even when lacking knowledge about the likelihood of success. *Id.* In the bankruptcy context, judicial estoppel can preclude a debtor from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. *Hamilton*, 270 F.3d at 783.

In *Hamilton*, the Ninth Circuit Court of Appeals affirmed the application of judicial estoppel to bar Hamilton's undisclosed pre-petition

claim against his insurer even after the bankruptcy court vacated the discharge. 270 F.3d at 784. The Court determined that Hamilton asserted inconsistent positions when he failed to list his insurance claim and then later sued the insurer on the same claims. *Hamilton*, 270 F.3d at 784. The Court noted:

We now hold that Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated.

Hamilton, 270 F.3d at 784. Similarly, Division Three noted:

A Chapter 7 debtor . . . could well be precluded from pursuing an undisclosed pre-petition, personal injury lawsuit, if the debtor's case was closed as a "no asset" case. By not disclosing the asset, the debtor keeps an asset that may have created a dividend for the debtor's unsecured creditors. By closing the case as a "no asset" case, the court implicitly accepts the debtor's position, as stated in the debtor's bankruptcy schedules, that the liquidation of the debtor's nonexempt assets would not create a dividend for unsecured creditors.

Johnson v. Si-Cor Inc., 107 Wn.App. 902, 909, 28 P.3d 832 (2001).

i. Young's positions before the bankruptcy court and the trial court were inconsistent.

Here, within five months of a "no asset" discharge in bankruptcy plaintiff Young filed this action against Defendant claiming assets that were not disclosed in the bankruptcy, including ownership in BACC LLC

and stating that the ownership of assets has not been determined. (CP 1-19 ¶¶ 3.6; 3.15; and 3.16.

In reviewing the bankruptcy schedules and Statement of Financial Affairs there is no doubt that plaintiff failed to disclose a contingent claim (either liquidated or unliquidated) for determination of assets and more importantly, she failed to disclose the alleged partnership interest in BACC LLC. On Schedule B, Personal Property Item 14, plaintiff listed “none” under the disclosure of “interests in partnerships or joint ventures. Itemize.” (CP 65). Item 18 lists “none” for disclosure of “other liquidated debts owed to debtor including tax refunds. Give particulars.” (CP 66). Item 21 lists “none” for disclosure of “other contingent or unliquidated claims of every nature including tax refunds, counterclaims of debtor, right of set off. Give estimate of each.” (Id.)

Yet within 5 months of receiving a no asset discharge in bankruptcy, plaintiff came before the superior court seeking ownership in a business (BACC LLC), and making a claim for a determination of assets which she reported to the bankruptcy court were non-existent. (CP 29-37).

A debtor seeking shelter under the bankruptcy laws has a statutory duty to disclose all assets, or potential assets to the bankruptcy court. 11 U.S.C. §§ 521(1), 541(a)(7). "The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend [her] financial statements if circumstances

change." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).

Young claimed to the bankruptcy court she had no potential or contingent assets at the time she filed for bankruptcy, and only five months later claimed she had potential or contingent assets in BACC, LLC. Young's respective positions were clearly inconsistent. However, Young had a duty to disclose the potential or contingent obligation to the bankruptcy court such that the estate would have the option to recover the assets, and there is no authority under which Young could disclaim the potential or contingent claim and then later assert a cause of action for the claim that could have been brought in the bankruptcy court.

ii. Young misled the bankruptcy court by failing to disclose the potential or contingent asset.

Young either misled the bankruptcy court or misled the trial court. Young asserted the existence of a partnership and therefore had knowledge of any potential claim related to the partnership. By failing to disclose the potential or contingent claim, she misled the court to determine the bankruptcy to be a "no asset" bankruptcy. In failing to disclose the potential or contingent claim, Young did not merely create a perception that she misled the bankruptcy court, she did mislead the bankruptcy court.

iii. The court imposed an unfair detriment to Cosgrove by precluding an affirmative defense.

Judicial estoppel should be applied if the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). The Court failed to follow the law when it entered an order stating that judicial estoppel was not applicable to Young's claims. By including this language within the order, the Court imposed an unfair detriment on Cosgrove. If the case were to proceed to trial, Cosgrove was precluded from asserting a significant affirmative defense at trial.

C. The trial court erred when it considered Young's Motion for Clarification, which constituted a Motion for Reconsideration that was not timely filed.

i. Young's motion for clarification of the Order to Enforce CR2A constituted a motion for reconsideration under CR 59.

On February 11, 2011, the trial court denied Young's motion to enforce the settlement agreement because she did not meet the required legal standard. (CP 348-49.) The court's order further explained that there are, "Issues of fact exist regarding interpretation of CR2A." (CP 349) Young's motion for "clarification" included requests for varied results. However, the only relief that could be granted by the trial court at that point was the request for an evidentiary hearing to determine whether

Young initially breached the agreement, thereby excusing Cosgrove's performance under the CR 2A.

RAP 2.2(a) governs decisions that may be appealed. Under RAP 2.2(a)(3), "any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action" constitutes a final appealable decision. RAP 2.2(a)(3). In this matter, Young filed a Motion to Enforce the CR2A, seeking:

- (1) An order requiring Cosgrove to provide \$5,000;
- (2) Sign a confession of judgment;
- (3) Sign a security agreement;
- (4) Bring himself in compliance with the CR 2A within two weeks;
- (5) Judgment against Cosgrove in the amount of \$65,000 upon failure of compliance;
- (6) Preliminary injunction restraining Cosgrove from using assets of the catering business;
- (7) Preliminary injunction restraining Cosgrove from working in the catering field;
- (8) Attorney's fees and costs;
- (9) CR 11 sanctions

(CP 163-174) Cosgrove objected to Young's motion on grounds that Cosgrove was excused from performance due to Young's own prior breach of the CR 2A. (CP 294-306) The trial court denied Young's motion. (CP 348-49)

Young subsequently brought a motion for reconsideration, identified by Young as a motion for clarification, wherein Young sought to

have the issues in her Motion to Enforce CR 2A referred to an arbitrator or to have an evidentiary hearing on those issues. (CP 350-53). In doing so, Young did not raise any new facts or legal theories that would entitle her to the relief she sought, and the relief she sought was relief that she could have originally sought in her Motion to Enforce CR 2A. The denial of Young's Motion to Enforce CR 2A determined the action, prevented a final judgment, or discontinued the action, and therefore constituted an appealable order under RAP 2.2(a)(3). Since The Order Denying Motion to Enforce CR 2A was appealable, it constituted a "judgment" for purposes of CR 59. *Zimny v Lovric*, 59 Wn.App. 737, 801 P.2d 259 (1990)

ii. Young failed to timely file her motion for reconsideration/clarification.

Under CR 58, judgments are deemed entered for all procedural purposes from the time of delivery to the clerk for filing. *Metz v. Sarandos*, 91 Wn.App. 357, 360, 957 P.2d 795 (1998). CR 59 requires that any motion for reconsideration be filed within 10 days of the date the judgment is entered. *Id.* CR 6(b) does not permit enlargement of the time for filing a motion for reconsideration. *Id.* Thus, the trial court has no discretionary authority to extend the time period for filing a motion for reconsideration. *Id.*

Rather than seeking reconsideration of the Court's ruling within 10 days as required by CR 59, Young instead attempted to have an arbitrator enforce the agreement. (CP 367) When the arbitrator refused to enforce the agreement, Young then filed her motion for "clarification," which at its core constituted a motion for reconsideration. However, Young failed to file the motion within 10 days of the date the Order Denying Motion to Enforce was entered on February 11, 2011. Young did not file her motion for reconsideration until March 1, 2011. (CP 350-353)

Since Young's motion for "clarification" constituted a motion for reconsideration under CR 59, Young was required to bring her motion for reconsideration within 10 days of the date of entry of the order she was seeking to be reconsidered. Young failed to meet this requirement, and the trial court was without authority to consider the motion. The trial court was without discretion to enlarge the time for filing the motion for reconsideration, and it erred in granting Young any of the relief she sought in her untimely motion.

D. The trial court erred when it compelled arbitration of the entire matter, failed stay arbitration of issues of enforcement, and failed to require Young to identify the issues she was seeking to have arbitrated.

i. The trial court did not have authority to refer the entire matter for arbitration when it entered the Order on Motion for Clarification.

Arbitration is a matter of contract. A party cannot be compelled to arbitrate unless he has agreed to submit the dispute to arbitration. *Satomi*, 167 Wn.2d at 810 citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *Weiss v. Lonquist*, 153 Wn. App. 502, 510, 224 P.3d 787, 792 (2009) citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) and RCW 7.04A.070(1) (providing that a court shall order parties to arbitrate upon a “showing [of] an agreement to arbitrate”). Whether a dispute or claim is subject to arbitration is an “issue for judicial determination.” *Satomi*, 167 Wn.2d at 809 citing *Howsam*, 537 U.S. at 83.

The ultimate forum, if any, is significant because the right of review afforded from the decision differs significantly between a court hearing and an arbitration. See RAP 2.2, 6.1 (right of appeal); *Boyd v. Davis*, 127 Wn.2d 256, 261-62, 897 P.2d 1239 (1995) (review of arbitration award is severely limited.)

Young and Cosgrove did not have an agreement to arbitrate issues of enforcement of the CR 2A. The lack of this agreement, and the lack of the authority of the arbitrator in this respect, was recognized by both Cosgrove and the arbitrator. The trial court was without authority to order the entire matter to be arbitrated, because issues identified by Young included issues of enforcement of the CR 2A, and the trial court erred in compelling arbitration.

- ii. **The trial court erred by failing to stay the arbitration proceedings, determining the issues that were subject to arbitration, or otherwise require Young to identify the issues for arbitration.**

In her arbitration brief, Young raised multiple issues of performance and breach that were, as a result, actually issues of enforcement. These were not issues that were subject to the arbitration clause of the parties CR 2A agreement.

Whether a dispute should be submitted to arbitration depends solely on the parties' agreement to arbitrate. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213, 223 (2009) citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). This “‘question of arbitrability’ is ‘an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.’” *Howsam*, 537 U.S. at 83 quoting *AT&T Techs., Inc.*

v. Commc'ns Workers of Am., 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *see also Satomi*, 167 Wn.2d at 809, 816-17 (when the arbitration clause does not clearly and unmistakably provide who is to determine questions of arbitrability, it is a question for the court). Here, the settlement agreement includes the following relevant provisions:

- 3.1 Each party agrees and stipulates that **this is a full and complete agreement** between the parties and is **enforceable in court**. Each party understands that even though the final documents yet need to be prepared **this stipulation and agreement** is binding upon execution and is **enforceable in court**. Each term and provision of this agreement was material to the consideration provided. The parties stipulate and acknowledge that this agreement is fair and equitable.
- 3.3 Any disputes regarding the drafting of final documents or any unresolved issues shall be submitted to the binding arbitration of Matthew Jolly. The costs of such arbitration shall be paid 50% by the plaintiff and 50% by the defendant.
- 3.4 In the event it becomes **necessary to enforce this agreement in court**, the party who successfully brings and [sic] enforcement action shall be entitled to an award of 100% of the attorney's fees and costs incurred in said enforcement action.

(CP 283-285, (*emphasis added*)) The arbitration clause does not “clearly and unmistakably provide who is to determine questions of arbitrability,” therefore, in this case questions of arbitrability are properly decided by this court. *Satomi*, 167 Wn.2d at 809, 816-17.

On August 30, 2011, two weeks prior to the date originally scheduled for arbitration, Young submitted an arbitration brief to

Cosgrove. (CP 481-491) Young's arbitration brief included multiple issues that were not within the arbitrator's authority to decide and to grant relief. First, in section III.A of Young's arbitration brief she sought an evidentiary hearing and, essentially, findings of fact regarding disputed events that directly relate to whether one or the other party performed, or could perform, some of the obligations under the contract. (CP 485-486) Young asked the arbitrator to act as a trier of fact and decide: 1. Whether certain property found in Plaintiff's parents home is in fact the property of her parents. 2. Whether the defendant can establish that he found property during the walk through that was his property that the plaintiff refused to deliver to him. 3. Whether the defendant can show that he made a claim asking for the posters belonging to Ms. Toni Young that he left with her. (Id.) Young also asked for a finding of fact that "the Peter Max picture was not found and was not Plaintiff's possession;" and a finding that "defendant is responsible for the cost of the [wine] storage unit and that under the agreement the defendant owes the plaintiff an amount equal to her share of the wine." (CP 486-87)

However, determination of the facts, and the corresponding determination of whether application of those facts to the contract affords relief, requires the arbitrator to construe the contract. This is part of enforcing the contract and is outside the arbitration provision and agreement of the parties. Therefore, Cosgrove requested that the trial

determine that the relief or controversy Young sought to be resolved in section III.A. of her arbitration brief was not subject to arbitration. *See Satomi*, 167 Wn.2d at 809-810, 816-17.

Second, section III.B of Young's arbitration brief requests, in part, that the arbitrator determine that she did not breach the contract by failing to perform the obligations relating to valuable posters. (CP 487) Whether or not a party is in breach of a contract requires determination of the facts and the corresponding determination of whether application of those facts to the contract afford relief requires the arbitrator to construe the contract. This is part of enforcing the contract and is outside the arbitration provision and agreement of the parties. Therefore, Cosgrove requests that this court determine that the relief Young seeks in section III.B. of her arbitration brief as to whether or not Young breached the agreement is not subject to arbitration. *See Satomi*, 167 Wn.2d at 809-810, 816-17.

Cosgrove acknowledged that Young's first question, in section III.B., of Young's arbitration brief whether or not the contract includes terms that prohibit Cosgrove from making a claim for items not claimed during the walkthrough is a question of contract interpretation and, therefore, a question directed to the arbitrator pursuant to the trial court's previous orders and as clarified in the Court of Appeals decision. (CP 487:8-19) However, if the CR 2A does not include such term, the arbitrator had no authority to "clarify" or alter the terms of the agreement.

Third, section III.C. of Young's arbitration brief presented multiple issues. Young appeared to request a determination of impossibility of performance. (CP 487-88) Whether performance is impossible requires determination of the facts and the corresponding determination of whether application of those facts to the contract affords relief requires the arbitrator to construe the contract. This is part of enforcing the contract and is outside the arbitration provision and agreement of the parties. Young's brief also raised questions of "good faith" and application of a condition precedent in section III.C. (Id.) Although not clear from her brief, if Young was raising the question whether Cosgrove negotiated and performed the agreement in breach of the contract principle of good faith and fair dealing, consideration of that question requires determination of the facts and the corresponding determination of whether application of those facts to the law of good faith and fair dealing afford relief which in turn required the arbitrator to enforce the contract. Similarly, whether a condition precedent had been satisfied required a factual determination and the corresponding determination of whether application of those facts to the contract affords relief requires the arbitrator to construe the contract. Finally, Young requested "clarification" or "a supplement to the agreement," and the arbitrator has no authority to alter or supplement the terms of the agreement. Therefore, Cosgrove requested that the trial determine that the relief Young sought in section III.C. of her arbitration

brief described in this paragraph was not subject to arbitration. *See Satomi*, 167 Wn.2d at 809-810, 816-17.

Fourth, section III.D. of Young's arbitration brief presented a factual determination as to whether Cosgrove had requested certain posters listed in the agreement and not listed in the agreement in a timely manner. (CP 489-490) Young was requesting a factual determination. (Id.) However, to the extent that it was contract interpretation as to whether the contract provides a limitation on the time that a party may object to performance or to lack of performance of the other party, only that issue would be a question of contract interpretation. To the extent Young requested a "clarification" or "a supplement to the agreement," the arbitrator had no authority to alter or supplement the terms of the agreement. Therefore, Cosgrove requested that this court determine that the relief Young sought in section III.D. of her arbitration brief described in this paragraph is not subject to arbitration. *See Satomi*, 167 Wn.2d at 809-810, 816-17.

Finally, section III.E. of Young's arbitration brief requested an attorney's fees award attempting to enforce an attorney's fees clause which exists related only to enforcement of the agreement. (CP 490-491) Since attorney's fees can only be awarded under the CR 2A based upon an enforcement action, and the arbitrator had no authority to enforce the contract, and the matter of attorney's fees was not properly before the

arbitrator. Therefore, Cosgrove requested that the trial court determine that the relief Young seeks in section III.E. of her arbitration brief described in this paragraph is not subject to arbitration. See *Satomi*, 167 Wn.2d at 809-810, 816-17.

The parties did not clearly and unmistakably provide that these issues would be arbitrated, and thus the questions posed to the Court constituted issues for judicial determination. *Howsam*, 537 U.S. at 83 quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); see also *Satomi*, 167 Wn.2d at 809, 816-17. The trial court erred in failing to define the issues for arbitration.

E. The trial court erred when it confirmed the arbitration award.

i. The arbitrator did not issue an arbitration award that could be confirmed in the trial court.

At the time Young sought confirmation of an arbitration award, the arbitrator had not issued one. (CP 724-25)

RCW 7.04A.190 provides: “An arbitrator shall make a record of an award. The record must be authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.” In her motion, Young asserted that an arbitration award was entered on October 6, 2011. (CP 691) However, the arbitrator

has issued only findings of fact and conclusions of law. (CP 752-69) The arbitrator has issued no arbitration award. No award was on file with the Court and no notice of an award had been provided pursuant to RCW 7.04A.190. (CP 724-25) Thus, the trial court was without authority to confirm a non-existent arbitration award.

- ii. **The CR 2A limited the arbitrator's authority and the arbitrator did not have authority under the CR2A to hear the entire matter including issues of enforcement/compliance.**

The arbitration clause in the CR 2A Agreement does not permit the arbitrator to decide issues of enforcement. Arbitration is limited to the scope agreed by the parties. In other words, a party can not be compelled to arbitrate unless he has agreed to submit the dispute to arbitration. *Satomi*, 167 Wn.2d at 810 citing *Howsam*, 537 U.S. at 83; *Weiss v. Lonquist*, 153 Wn. App. 502, 510, 224 P.3d 787, 792 (2009) citing *AT&T Techs.*, 475 U.S. at 648 and RCW 7.04A.070(1) (providing that a court shall order parties to arbitrate upon a “showing [of] an agreement to arbitrate”).

Both the Court of Appeals and Young acknowledged that the arbitrator does not have authority to decide questions of enforcement.

It is beyond the scope of the arbitration clause to send the question of enforcement of the settlement agreement to arbitration....Although a more precise identification of the “unresolved issues” being referred to arbitration would be helpful, it is not probable error just because the trial court

checked a box that “the entire matter” is referred to arbitration. Presumably, Young will not contradict her contention before me that **the trial court order does not refer issues of the enforcement of the CR2A settlement to arbitration.**

(CP 469, *emphasis added*) Furthermore, the trial court’s order for which Young sought clarification specifically addressed questions of **interpretation** of the CR 2A agreement. (CP 348-49) For instance, the parties dispute the meaning of “unresolved issues” in the arbitration clause itself. Its meaning is a question of contract interpretation, *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), and therefore subject to the trial court’s order requiring arbitration.

Given the limited arbitration clause, the language in the agreement requiring enforcement issues be heard by a court, the Court of Appeals decision, and Young’s representations to the Court of Appeals, Cosgrove requests that the court determine that the arbitrator’s authority in this matter is limited to disputes regarding the drafting of final documents or any unresolved issues that is an disputed question of contract interpretation, and the arbitrator’s authority does not include any issue of enforcement.

The law of contracts provides relief when the obligations and rights of a contract are not honored, e.g. awarding damages for breach or an

order requiring specific performance. The process of determining and affording lawful relief is the act of enforcing of a contract. An illustration of this principle is the contract rule that, “a contract is enforceable if there is offer, acceptance, and consideration.” *Yakima County Fire Protection Dist. No. 12 (West Valley) v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). The opposite approach is also illustrative. For example, where an alleged agreement fails to meet the requirements of a contract, it can not be enforced, and therefore, no relief is available. *See e.g. Metro. Park Dist. V. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986) (a promise is considered illusory and insufficient for consideration if it is so indefinite that it cannot be enforced or if its performance is optional or discretionary)).

Courts enforce agreements by *construing* contracts. Contract construction is the process of determining the legal consequences that follow from a contract term. *Berg*, 115 Wn.2d at 663. For example, ‘was the contract provision breached’ is a question of construction. *See generally id.* The court examines the contract terms (whose meaning are determined through contract interpretation, *Berg*, 115 Wn.2d at 663), determines the facts of the case, and applies the facts to the contract terms and law to reach the legal consequence – in other words whether relief can

be afforded and what relief is proper. Thus, contract construction is part and parcel of the enforcement of a contract. And, a decision maker's determination of whether an agreement has been breached or performance must be required, or excused, is a question of enforcement. Thus, pursuant to the CR 2A agreement, trial court was required to decide issues of enforcement between the parties.

iii. The arbitrator did not have authority to enter findings of fact and conclusions of law, including awarding attorney's fees, that were based upon excluded evidence.

Factual findings are reviewed for substantial evidence, i.e. evidence sufficient to convince a rational person of the truth of the finding. *State v Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . . or needless presentation of cumulative evidence" ER 403. The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court's decision must not be "manifestly unreasonable or based upon untenable grounds or reasons." *Neal* at 609, quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The court should admit the evidence if there is sufficient proof to permit a reasonable trier

of fact to find in favor of authentication or identification. *State v Danielson*, 37 Wash.App. 469, 471, 681 P.2d 260 (1984).

Service of a subpoena to an opposing party is a basic requirement of CR 5. Under CR 5(a), every paper relating to discovery must be served on the opposing parties. This is not optional.

The parties have a CR 5 Agreement, and the parties have consistently adhered to this agreement, except in the instance of the SDT to EWS. Prior to arbitration, Young's counsel issued a subpoena duces tecum ("SDT") to Eastside Wine Storage ("EWS") prior to arbitration. (CP 742-46) However, Young's counsel failed to provide a copy of the SDT to opposing counsel at anytime prior to the arbitration, which was required under CR 5. (CP 780) Young's counsel acknowledged the failure to provide the SDT to Cosgrove's counsel. (CP 748) In addition, prior to arbitration, Young's counsel failed to provide the documents obtained by way of the SDT to Cosgrove's counsel. (CP 781) Whether or not failing to provide the SDT to Cosgrove's counsel was an accident, the fact remains that Young failed to provide the SDT, and Cosgrove did not have an opportunity prior to the arbitration to review the documents obtained by way of the subpoena or otherwise prepare for cross examination of David Mullan at arbitration.

Mr. Mullan testified at the arbitration and the arbitrator relied on the testimony of Mr. Mullan in making his findings of fact and

conclusions of law. (CP 752, 756, 762, and 768-69) Mr. Mullan's testimony was based upon documents of EWS he reviewed, which were obtained in response to the SDT but he testified the records were actually records from a third party company that handles only the card key entry system for EWS. (CP 782) These documents were not business records of EWS. (Id.) At arbitration, Cosgrove's counsel objected to the admission of documents obtained by Young or the testimony of Mr. Mullan, which was based upon his review of the third party records. (Id.)

In issuing his arbitration decision, arbitrator Matthew Jolly relied on the testimony of Mr. Mullan in making certain findings of fact and conclusions of law. (CP 752) The arbitrator declined to admit the written report from the EWS regarding access to the facility or consider it as part of his decision. (CP 756) However, in reliance of Mr. Mullan's testimony, which was based upon third party records obtained from EWS via the SDT, including the written report regarding access to the facility, the arbitrator made specific findings of fact regarding Mr. Mullen's review of the facility records and conclusions of law that Cosgrove had violated the CR 2A Agreement. (CP 762; 768)

In addition, over the objection of Cosgrove prior to and during arbitrator that issues of enforcement were not before the arbitrator under the terms of the CR 2A Agreement, the arbitrator made conclusions of

law, in equity, that Young is entitled to recover \$4,000 in attorneys' fees based upon on bad faith by Cosgrove. (CP 768-69)

The arbitrator attributed the amount of \$4,000 solely to bad faith by Cosgrove, which the arbitrator based solely upon Cosgrove's actions related to the storage and division of the wine, which was based upon the testimony of David Mullan regarding Cosgrove's access to the facility, which was based upon third party records obtained from EWS, which were obtained by way of SDT without notice to Cosgrove prior to the arbitration. (CP 768-69)

Since the arbitrator denied admission of the documents upon which Mr. Mullan's testimony was based, and because issues of equity were not before the arbitrator for determination, Cosgrove sought reconsideration of the arbitrator's findings and conclusions based upon the testimony of Mr. Mullan. (CP 781) On October 12, 2011, arbitrator confirmed that none of the materials produced in response to the SDT to EWS were admitted into evidence or considered as part of the arbitration decision, but declined reconsideration of the decision. (CP 771) Following the arbitrator's clarification that none of the materials produced in response to the SDT to EWS were admitted into evidence or considered as part of the arbitration decision, Cosgrove sought revision of the decision after the alteration to paragraph 2.7 of the decision. (CP 773) On October 25, 2011, arbitrator

Jolly summarily denied Cosgrove's motion for reconsideration and declined to issue any further decision. (CP 775)

Cosgrove was prejudiced by Young's failure to provide notice of the SDT to Cosgrove, or otherwise provide copies of the responsive documents prior to the arbitration. As a result of Young failing to provide notice of the SDT to Cosgrove, Cosgrove had no opportunity to question EWS Storage regarding the third party records or prepare cross-examination of Mr. Mullan. Had Cosgrove been provided notice of the SDT, he would have brought evidence to the arbitration to prove that he had been negotiating the price of the storage unit with Mr. Mullen, contemplating for months a less costly storage facility and planning to terminate the storage at the end of July 2011 for months prior to the date that Young unilaterally decided to have request an inspection. Cosgrove would have provided proof of his going in and out of the facility many times previous to the notice of the unilateral inspection and proof that he was the only one maintaining the storage facility and had no other obligation to Young to maintain it in any other manner. However, there was no notice of the SDT and therefore no notice that this issue would arise. Cosgrove was prejudiced by the content of the subpoenaed documents being admitted through the testimony of Mr. Mullan.

The arbitrator properly found in his decision that Cosgrove was given insufficient notice of the written report from the wine storage

facility. (CP 756) The arbitrator further and properly confirmed that none of the documents obtained by way of the subpoena were admitted as evidence at the arbitration; this denial of admission of all documents were proper. (CP 771) However, the arbitrator erred in making findings and conclusions regarding Cosgrove's access to the wine storage facility, when he relied upon the testimony of Mr. Mullan, which even the arbitrator stated was based upon Mr. Mullan's review of the third party records, which were expressly not admitted as evidence at the hearing. The arbitrator's denial of admission of the documents is not consistent with his subsequent reliance upon the testimony of Mr. Mullan which was specifically relying upon the non-admitted documents, and Cosgrove has been prejudiced by the arbitrator's reliance on Mr. Mullan's testimony.

Moreover, the testimony Mr. Mullan, if admitted, was not cumulative and not duplicative of Young's. Young's testimony regarding the storage of the wine at the facility, Cosgrove's access to the facility, or Cosgrove's removal of the wine from the storage facility was speculative. Mr. Mullan's testimony was based upon his review of the third party records obtained by way of the SDT to EWS, without notice to Cosgrove. Absent admission of the documents obtained from EWS with a subpoena that was not served, there is no basis for Mr. Mullan's testimony, upon which the arbitrator relies to reach his conclusion that Cosgrove unilaterally removed and secreted the wine without notice to Young and

knowing that she was intending to inspect the storage unit and thereby acted in bad faith. The arbitrator did not find that based upon Young's testimony alone there is evidence that Cosgrove violated the requirements of Section 1.5 of the Agreement. To the contrary, the only way the arbitrator can reach the findings and conclusions regarding these matters is based upon the non-duplicative testimony of Mr. Mullan. Since the arbitrator declined to admit any of the documents obtained by Young by way of the SDT to EWS, which Mr. Mullan reviewed and upon which he based his testimony, Mr. Mullan's testimony is prejudicial and should not be allowed to be the basis for any equitable award or judgment for attorney's fees.

Attorney's fees were available to the parties by contract only if issues of enforcement were determined by the Court. Thus, the only way for the arbitrator to make a conclusion of law that Young was entitled to an award of attorney's fees and costs totaling \$4,000 was to attribute some amount of attorney's fees to bad faith behavior. (CP 769) The only way for the arbitrator to reach a conclusion that Cosgrove acted in bad faith was to determine that he had failed to cooperate with a walkthrough and division of a wine collection. (CP 768) The way in which the arbitrator reached this conclusion, was to determine, from the testimony of David Mullan, that Cosgrove. (CP 767-68) And the way in which Mr. Mullan had knowledge of any comings and goings to and from the wine storage area was to

review records of EWS, which had been obtained by way of the SDT issued to EWS. (CP 756; 762) Thus, the finding of bad faith and award of \$4,000 is inextricably linked to the arbitrator's reliance on the testimony of David Mullan. The trial court erred in rejecting confirmation of the arbitration decision issued by the arbitrator.

F. The trial court erred when it entered multiple orders/judgments without requiring Young to provide sufficient notice, conducting an evidentiary hearing to determine issues of enforcement/compliance under the CR2A Agreement, and including the requisite language under CR 54(b) that the order disposed of only part of the case, and the trial court did not enter findings of fact and conclusions of law required by CR 52(a).

i. Young did not provide Cosgrove with sufficient notice of the second motion to enforce the CR 2A Agreement.

Since motion to enforce a settlement agreement is considered under the same standard as a motion for summary judgment, Young was required to provide the requisite 28-days notice of her motion to Cosgrove. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000); CR 56. Here, Young served her motion on Cosgrove's counsel on Friday, October 31, 2011, setting the matter for consideration without oral argument on November 9, 2011. (CP 644) Cosgrove was prejudiced not only by not having the 28-days notice but also by being reduced to a 12-page limit rather than a 25-page limit for briefing. The prejudice included not being able to address all of the issues raised in the motion and providing

the full explanatory defense for enforcement of the contract within 12 pages, which simply could not be done.

The trial court erred in allowing Young to continue with her motion to enforce settlement without providing Cosgrove sufficient notice required under *Brinkerhoff* and CR 56..

- ii. **The trial court did not have authority to issue partially dispositive orders without the inclusion of requisite language under CR 54(b) or entry of findings and conclusions under CR 52.**

On November 9, 2011, the trial court entered an order on Young's Motion for Enforce CR 2A (later amended on December 6, 2011), which required Cosgrove to pay \$15,000 and attorney's fees awarded (\$2,070), sign all documents he is required to sign, allow inspection of his storage areas, produce the wine for division and otherwise bring himself into compliance with the CR 2A within two weeks of the date of the order or judgment. (CP 783-785; Exhibit I to Amended Notice of Appeal)

On November 28, 2011, the trial court entered an Order for Confirmation of Award and Entry of Judgment under which Young was awarded a judgment in the principal amount of \$4,000. (CP 801-802)

On March 23, 2012, the trial court entered an Order for Judgment under which Young was awarded a judgment in the principal amount of \$6070.00. (Exhibit A to Notice of Appeal filed 4/9/2012) This final motion was based upon the two orders entered on November 7, 2011

(amended December 6, 2011) and November 28, 2011, both of which were appealed by Cosgrove.

A trial court retains only very limited jurisdiction over a case once the court of appeals has accepted review thereby asserting its jurisdiction. RAP 7.2 limits the trial court's authority and describes the extent of the trial court's authority once the court of appeals has accepted review of a case. RAP 7.2 provides that once the court of appeals has jurisdiction, the trial court may only:

enforce any decision of the trial court and a party may execute on any judgment of the trial court...
award attorney fees and litigation expenses for an appeal ...
in any other action in which applicable law gives the trial court authority to do so...
hear and determine (1) postjudgment motions authorized by the civil rules ... or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. The decision granting or denying a postjudgment motion may be subject to review.

Id. (*Emphasis Added*).

Nothing in 7.2(c) unequivocally states that the court may issue a judgment. Rather, it permits execution on a judgment or enforcement of a

decision. RAP 7.2 explicitly disallows any trial court determination changing the decision then being reviewed by the appellate court.

The plaintiff's motion is not within the jurisdiction of the Court because it is not for execution of a judgment. It is for entry of a judgment, and the motion conflicts with the portion of RAP 7.2 that requires the decision of the trial court to not change. Had the rule allowed entry of a judgment, it would have stated entry of judgment in addition to enforcement of judgment. It did not.

iii. The trial court did not have authority to issue partially dispositive orders without the inclusion of requisite language under CR 54(b).

In seeking the entry of multiple judgments in the underlying trial court matter, the requirements of CR 54(b) were not met in any instance.

CR 54(b) states:

when more than one claim for relief is presented in an action. . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties **only** upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. (*Emphasis Added.*)

None of the orders/judgments entered by the trial court contain the language required by CR 54(b). In addition, there are no supported written findings by the trial court as required by the rule. The use of "only" in the rule requires specific CR 54(b) findings to be mandatory. Since the

previous orders do not have such findings, the mandatory requirements of CR 54(b) were not been met and the orders/judgments are deficient.

- iv. **The trial court did not have authority to enter a judgment awarding Young amounts without conducting an evidentiary hearing and in reliance upon findings and conclusions based upon excluded evidence.**

A portion of the judgment awarded to Young on March 23, 2012, consists of \$4,000 in attorney's fees, which is not based upon any evidentiary hearing conducted by the trial court and which is based upon findings and conclusions by the arbitrator derived from testimony that is based upon excluded evidence. The remainder of the judgment awarded to Young on March 23, 2012, consists of \$2,070 awarded by the trial court related to Young's Motion to Enforce CR 2A, for which AN Order was entered despite a lack of proper notice of the motion and despite the absence of an evidentiary hearing. (CP 641-642; 643-44)

In this matter, a judgment for attorney's fees is not authorized. Attorney's fees were available to the parties by contract only if issues of enforcement were determined by the Court. Thus, the only way for the arbitrator to make a conclusion of law that Young was entitled to an award of attorney's fees and costs totaling \$4,000 was to attribute some amount of attorney's fees to bad faith behavior. (CP 769) The only way for the arbitrator to reach a conclusion that Cosgrove acted in bad faith was to determine that he had failed to cooperate with a walkthrough and division of a wine collection. (CP 768) The way in which the arbitrator reached this

conclusion, was to determine, from the testimony of David Mullan, that Cosgrove. (CP 767-68) And the way in which Mr. Mullan had knowledge of any comings and goings to and from the wine storage area was to review records of EWS, which had been obtained by way of the SDT issued to EWS. (CP 756; 762) Thus, the finding of bad faith and award of \$4,000 is inextricably linked to the arbitrator's reliance on the testimony of David Mullan. The trial court erred in rejecting confirmation of the arbitration decision issued by the arbitrator, and in entering a judgment against Cosgrove for this amount.

In addition, Young is not entitled to a judgment for the remaining amount of \$2,070. The trial court conducted no evidentiary hearing regarding the enforceability of the CR 2A as required by

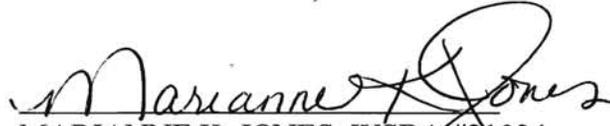
V. CONCLUSION

Young was obligated to disclose potential and contingent claims to the bankruptcy court and she failed to do this. The doctrine of judicial estoppel is clearly applicable to Young's claims for partnership assets. The trial court's order determining that the doctrine of judicial estoppel does not apply should be reversed. Young's Motion for Clarification constituted a motion for reconsideration. The trial court was without authority to extend the time by which Young was to submit her motion for reconsideration, and erred by accepting the motion and ruling on it. In addition, the CR 2A Agreement provided that issues of enforcement were

to be brought before the Court. The Court was without authority to compel arbitration of the “entire matter” when the contract between the parties did not authorize arbitration of issues of enforcement. The Order on Motion for Clarification wherein the trial court referred the “entire matter” for arbitration and the Order Denying Defendant’s Motion to Stay Arbitration should be reversed. Arbitrator Matthew Jolly did not have authority to hear matters of enforcement under the CR 2A, and despite that lack of authority entered findings and conclusions of enforcement of the CR 2A. Moreover, the arbitrator made findings and conclusions that were based upon testimony that was based upon excluded evidence. Finally, the Court entered multiple final judgments that do not comply with CR 54(b). The Order to Enforce CR 2A dated November 17, 2011 (later amended on December 6, 2011), and the Order for Judgment entered on March 23, 2012, which are based upon the findings and conclusions issued by arbitrator Matthew Jolly, which are based in part upon testimony given in reliance of excluded evidence, and under which Young was awarded attorney’s fees in the amount of \$2,070, attorney’s fees in the amount of \$4,000, and a principal judgment amount should be reversed. In the alternative, Cosgrove seeks a determination that the Order for Judgment entered on March 23, 2012, constitutes the final judgment in the case.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

JONES LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Marianne K. Jones". The signature is written in a cursive style with a large, looping initial "M".

MARIANNE K. JONES, WSBA #21034

MONA K. MCPHEE, WSBA #30305

Attorneys for Appellant Cosgrove

CASE NO. 67720-9 I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

BENJAMIN A. COSGROVE, III, an individual,

PETITIONER,

v.

TONI YOUNG, an individual,

RESPONDENT.

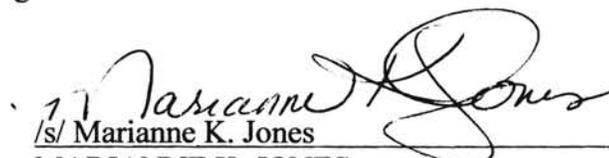
CERTIFICATE OF SERVICE

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I hereby certify that I caused to be served Cosgrove's Opening
Brief by electronic mail as agreed by the parties on June 4, 2012:

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MARIANNE K. JONES