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~~No. 36443-3-II~~

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BENJAMIN A. COSGROVE, III, an individual,

APPELLANT,

v.

TONI YOUNG, an individual

RESPONDENT

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR.

Assignments of Error

Young assigns no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Young believes that Cosgrove has misstated the facts and misapplied the law on appeal, which are stated more accurately as follows:

1. The trial court correctly denied Cosgrove's Motion for Summary judgment when:
 - a. Application of the doctrine of judicial estoppel is improper in this matter.
 1. There was no inconsistency in Young's position before the bankruptcy court.
 2. Young did not mislead the bankruptcy court.
 3. Cosgrove suffered no prejudice by the preclusion of the affirmative defense of judicial estoppel.
 4. Cosgrove did not come before the court with "clean hands" as required when requesting an equitable remedy.

2. The trial court properly considered Young's motion as one for Clarification and not Reconsideration.
3. The trial court properly compelled arbitration for the entire matter.
 - a. The trial court is authorized to refer the matter for arbitration pursuant to the broad language of the CR 2A.
 - b. The trial court properly denied Cosgrove's motion to stay arbitration when there is no error in applying the law or rule.
 - c. The issues before the arbitration were raised by Cosgrove and well known to Cosgrove.
4. The trial court properly confirmed the arbitration amount
 - a. There was a valid arbitration award by the arbitrator.
 - b. The CR 2A specifically allows the authority to resolve any "unresolved issues".
 - c. The arbitrator has both statutory and inherent authority to award attorney fees.
5. The trial court properly entered multiple orders.
 - a. No rule or case requires providing Cosgrove with

28 days' notice of the motion to enforce.

- i. Cosgrove failed to comply with RAP 7.2 and 8.1.
- b. CR 54(b) is a mechanism for giving finality to an order prior to the entry of *the* final order in the case and the court is not required to make these findings.
- c. The trial court does have the statutory and inherent authority to enter judgment against Cosgrove.

B. STATEMENT OF THE CASE.

The parties started dating in June 2000. They began cohabitation in 2004. (CP 2 ¶3.1; CP 125). From October 2004 to January 2010, the parties maintained a meretricious relationship. During this time, Young and Cosgrove were also business partners jointly owned and operated a catering business by the name of TRY Ventures in Washington State. (CP 2 ¶3.3 - 3.4). This was their only source of income.

Cosgrove who had previously operated a catering business told Young he was prohibited by the state from owning a catering business and therefore the business named TRY Ventures was opened and operated solely in Young's name. (CP 3 ¶3.6). Cosgrove convinced Young to take an early retirement and cash out some of her retirement funds to put more time and money into their catering operation. (CP 96 Line 9-12). Around

2009 the petitioner, who kept the books for the company told Young that she needed to file for bankruptcy. He wanted her to do this so that they could get rid of the business debt and start over under a new business name. (CP 96 Line 14-18). Young was reluctant to do this because of the impact on her credit, but finally agreed to do this to help the company. (CP 125 line 25; CP 126 Line 1-6). Cosgrove explained that since all the debt was in her name he would not need to file. In April 2009 Young filed for Bankruptcy. Because all the debt was in her name alone, Cosgrove was not a joint party in the Bankruptcy and his credit was spared. (CP 3 ¶3.8). The business BAC was then opened and it was operated jointly although only Cosgrove's name was on it. (CP 3 ¶3.9 - 3.10). BAC was the successor in interest to TryVentures. Both companies used the same equipment, same employees, offered the same services and had the same clients. No formal transfer of assets or equipment was ever made from TryVentures to BAC. Young listed TryVentures and some of the specific assets held by TryVentures in her bankruptcy petition, but not BAC. (CP 126 Line 6-10; CP 115-121).

Young received her Bankruptcy discharge in September 2009. Prior to this date the parties signed a partnership agreement with respect to BAC, LLC. (CP 3 ¶3.7). Cosgrove handled all the finances in the relationship, while Young was responsible for the shopping, crew

scheduling, cleaning, unloading & loading vehicle for events and at events, groceries, dealing with artists, artists' dressing rooms, hotel accommodations, car rental, travel arrangements and off course work at the venues for the catering company. (CP 3 ¶3.7). Young repeatedly asked Cosgrove to add her name as an owner of BAC. Cosgrove kept delaying and insisting that an attorney had informed him that he could not add her name to the business until six months after her discharge.

Young and Cosgrove continued to own and operate BAC per their agreement until January 15, 2010, when Cosgrove obtained a domestic violence protection order against Young using false allegations on January 15, 2010 under cause number 101-0012 in King County District Court. (CP 3 ¶3.11). The apparent reason for the protection order was the fact that Young was broke and was no longer a financial benefit. DEPOSITION OF COSGROVE. At the hearing, the Court dissolved Cosgrove's protection order as meritless. (CP3 ¶3.11, ¶3.13). However, while Young was restrained for two weeks, Cosgrove used that time to loot and destroy the possessions of Young. (CP 3 ¶3.12).

Young returned to the family home on Tuesday, February 2, 2010, to find that all her possessions had been removed from the home including but not limited to the fixtures of the condominium, a safe containing cash, appliances, the shower head, the water heater and other personal

belongings, and photographs including those of a personal nature. Only a small portion of her clothes were left in a pile on the floor. The storage unit downstairs from their unit was also emptied. (CP 3-4 ¶3.13). Because the thermostat had been disabled she could not reside in the unit as she was unable to heat it.

Cosgrove changed the locks on the storage units used for the business, disparaged Young with her clients and employees and shut her out of the business. Young was left with no assets or income to support herself. (CP 4 ¶3.14 – 3.15).

A Complaint in this matter was filed on February 9, 2010. (CP 1-19). Cosgrove's acceptance of service was filed on March 3, 2010. SEE DOCKET. Young repeatedly asked Cosgrove to answer the complaint. For four months Cosgrove assured Young that his answer would be filed any day. Young finally drafted a motion for default and indicated they would not proceed to a deposition scheduled by Cosgrove without receiving an answer from Cosgrove. Young received a copy of Cosgrove's answer on July 16, 2010. (CP 145-154). Cosgrove's answer was attached to the e-mail. (CP 841 line 7; CP 858-859). When Young pulled the docket to prepare this motion she realized that, in fact Cosgrove did not file their answer on that date. Instead they waited for more than two months to file their answer on September 23, 2010. (CP 145-154).

Cosgrove filed their answer two and a half months before trial and introduced a third party complaint, against Young's parents.

The amended answer included a third party complaint alleging the tort of conversion against Young's parents, the Youngs. (CP 151-154). The Cosgrove lived with Young and her parents for over a year rent free before moving into a condo with Young. Cosgrove had left some of his personal possessions at the Youngs' house when he moved out. He and Young were also using the Youngs' garage as a storage and staging area for catering equipment and supplies. (CP 234 Line 21 – 235 Line 2; CP 267 Line 8-16).

Cosgrove made demand for return of the small portion of the catering equipment and supplies and personal property that he had left in Young's parents' home. Young had already demanded the return of her personal property and compensation for her share of the catering company. Cosgrove refused to return any property and provide compensation and the parties were stalemated.

No attempt was made to serve the third party until October 25, 2010. Two subsequent attempts were made with the last attempt on November 1, 2010. Cosgrove never brought a motion requesting the service by alternate means on third party defendants. (CP 841 Line10-15; CP 918-920).

Cosgrove brought a summary judgment motion on March 24, 2010 to preclude Young's claims on the basis of judicial estoppel. (CP 20-90). Young defended on the basis that Cosgrove who had asked her to file only to turn around and then try to take her share of the company based on the filing did not have clean hands. She also asserted that his actions in filing a temporary restraining order on a false basis and stealing all the property in their dwelling were such that he should be denied an equitable remedy. She also asserted that she had identified the assets sufficiently when she identified TRY Ventures and some of the assets on her schedule. She further asserted that she had an interest in the property whether it belonged to her or Cosgrove by virtue of their meretricious relationship. (CP 97). The Court denied Cosgrove's motion and ruled that the doctrine of judicial estoppel would not be applied. (CP 143-44).

The parties signed a CR2A agreement on December 9, 2011. (CP 176-181). The CR 2A Agreement authorized the arbitrator to broadly resolve any "unsolved issues", but expressly reserved enforcement of the agreement to the court. Young agreed to return to Cosgrove certain personal property that she retained and to give him the catering equipment that was used as part of their catering company. (CP 177 ¶1.3; CP 180-181). Cosgrove in compliance with the CR2A agreement was given the opportunity to conduct a walk-through of both Young's condo and her

parents' house and claim any personal property of his that he found. (CP 232-234). In return, Cosgrove agreed to pay Young for her interest in their joint personal and business assets. (CP 176 ¶1.1).

During the walkthrough a dispute arose regarding the ownership of certain items, a TV, vases and wine belonging to Young's parents. (CP 234-234; CP 267-268; CP 572 Line 11-13). Subsequently, Cosgrove demanded those items and some that he had not identified during the walkthrough and items that had not been located. (CP 188-190; CP 572 Line 13-15).

Although the court had been informed that the parties had reached a settlement, (CP 834 Line 17-18; CP 839 Line1-2) Cosgrove on the eve of trial sought a continuance to serve the third party defendants. (CP 833-837). The last day to seek a continuance in the underlying matter was October 11, 2010. (CP 872-877). Cosgrove's action against third party defendants the Youngs was dismissed on January 28, 2011. (CP 270-272).

The CR2A Agreement required Cosgrove to pay Young \$5,000.00, by December 31, 2010. (CP 176 ¶1.1). He failed to do so. (CP 232 line 14-15). Subsequently, Cosgrove also failed to pay the \$10,000.00 that was due on September 11, 2011. (CP 573 Line 10-11; CP 612 Line 2-3).

Young brought a motion to enforce the CR 2A on January 28, 2011. Cosgrove used his demands for items that were nonexistent or

owned by others to justify his nonperformance. (CP 294-306). Cosgrove defended stating that issues of fact and law precluded entry of an order enforcing the CR2A. (CP 294-306). On February 11, 2011, the Court denied Young's motion and found that "[i]ssues of fact exist regarding the interpretation of CR 2A agreement." (CP 349). During the hearing the court had specifically asked why the matter had not been arbitrated.

Young, pursuant to the Court's comment, brought the issue to the arbitrator in this matter. (CP 367-368; CP 406). The arbitrator agreed with Cosgrove's objection regarding enforcement, and held that his authority did not extend to enforcement of the CR2A. (CP 386-387). The arbitrator suggested in his letter that additional guidance from the court would be helpful. (CP 387 ¶2).

Young brought a motion to clarify the Court's February 11, 2011, ruling on March 1, 2011. (CP 350-353). However, the motion was not solely for clarification, Young also requested that the court provide direction to the parties by either ordering the matter to arbitration, setting an evidentiary hearing or resetting the matter for trial. Cosgrove opposed Young's motion arguing that the motion to clarify constituted a motion to reconsider and was not timely filed with the Court. (CP 393-395). Cosgrove ignored at that time as he does in this appeal Young's request for the court to provide guidance regarding the appropriate next step. The

Court ordered, “[t]he entire matter is referred to Mr. Jolly for Arbitration.” (CP 417).

Cosgrove was aware of the issues that were before the arbitrator and needed no guidance from Young. The issues were the issues of fact and legal interpretation raised by Cosgrove in opposition to the motion to enforce the CR2A. Cosgrove filed a request for discretionary review with the appellate court on April 22, 2011. SEE DOCKET. After Cosgrove failed to appear for the motion the order was summarily denied on June 14, 2011. (CP 464-470). The appellate court did opine that they did not believe that matters of enforcement would be properly before the arbitrator. (CP 469).

Following the June 14th decision, the parties spent several weeks communicating back and forth attempting to coordinate an arbitration date before settling on September 13, 2011. After agreeing to this date, Cosgrove filed a motion with Judge Doyle on September 2, 2011, seeking to stay the arbitration hearing and sought specific clarification and definition on the scope of the arbitrator’s authority. (CP 419-430). While awaiting this decision, the parties conferred with the arbitrator and agreed to continue the arbitration to September 26, 2011. The court denied both of Cosgrove’s motions without further comment on September 13, 2011. (CP 568-569).

On September 23, 2011, Cosgrove filed a Notice for Discretionary Review and Emergency Motion to Stay the Arbitration Proceedings with the Appeals court (SEE DOCKET) and asked if the arbitrator would continue the hearing until the matter was resolved. The arbitrator declined to do this a second time. The Appeal request was denied on September 23, 2011, in part due to the untimely filing of the motion. (CP 607-68). The Arbitration was held on September 26, 2011.

During this time Young became concerned about the wine in the parties' jointly owned storage unit and scheduled a walkthrough of the wine valued at approximately \$30,000, held in a wine storage unit that only Cosgrove had access to. At the time of the restraining order Cosgrove had changed the locks and Young had not had access to the unit since December of 2010. (CP 127 line 4-9). Young arrived at the unit to find both Cosgrove and his counsel absent and the storage unit empty. Cosgrove was the only person who had access to the unit. (CP 127 line 4-9). When asked directly about the whereabouts of the wine during the arbitration Cosgrove raised his 5th Amendment rights against self-incrimination. (CP 712 ¶3.19).

The arbitration was held on September 26, 2011. Cosgrove requested permission to participate telephonically as he stated he was out of town on business. He declined to identify his location. Cosgrove,

Young, Young's parents and David Mullen provided testimony at the hearing. Photos and other documentary evidence were presented to the arbitrator as well.

During the arbitration, Cosgrove objected to the admission of documents obtained by Young and the testimony of David Mullen. (CP 781 ¶4). David Mullen is the owner of the wine storage facility. Cosgrove's objections stemmed from Young's failure to provide either a copy of the subpoena duces tecum to Cosgrove's counsel or the documents obtained from the subpoena duces tecum. (CP 780 ¶2; CP 781 ¶3). The identity of Mr. Mullen as well as a declaration summarizing his testimony had been timely provided to Cosgrove. Due to a clerical oversight the subpoena had not been provided to Cosgrove. The arbitrator excluded the documents which had not been received by either of the parties until the Friday prior to the arbitration and instead considered only the testimony of Mr. Mullen. (CP 706 ¶2.7; CP 703 ¶1.3). His arbitration decision specifically states that he did not consider any of the documents provided by Mr. Mullen. (CP 589 ¶12.7).

The arbitrator after reviewing the documents and testimony made findings of fact and clarified the issues of interpretation that had been raised by Cosgrove. (CP 702-719). Specifically, the arbitrator noted:

2.4 ...Resolution of issues of fact necessarily requires the arbitrator to make findings of fact and thus the arbitrator has the authority to do so in that context. The arbitrator is further permitted to resolve any disputes about the material terms of the CR 2A Agreement. (CP 705)

....

2.7 Cosgrove has also claimed insufficient notice of the arbitration proceeding, citing RCW 7-0.04A.090(1). The arbitrator finds that this objection is without merit. In fact, the scheduling of the arbitration hearing took place over a period of months with extensive notice to all parties including notices of the issues involved. However, the arbitrator does find that Cosgrove was given insufficient notice of the written report from the wine storage facility regarding access to the facility and declines to admit that written report into evidence or consider it as part of this decision. (CP 706)

Id. In his conclusion, the arbitrator stated:

4.1 The CR 2A Agreement required Young to permit Cosgrove a walkthrough of her condominium and parent's home within 2 days of the date of the agreement. Young permitted a thorough and complete walkthrough of both locations on December 10, 2010, within the 2 day time allotted. Cosgrove was further permitted to retrieve a large quantity (multiple van loads) of business and personal property items and to complete a thorough search of the home for his property. Young therefore met her obligations to provide Cosgrove with a walk through under the Agreement. The agreement does not require Young to provide any further walk through to Cosgrove. (CP 713).

4.2 The fact that there were items that were not located during the walk through was expected as Young asserted she did not have possession of the items that Cosgrove sought. Defendant was entitled to those of his items he located during the walkthrough and, in fact, he successfully located several van loads of his property as well as property belonging to the catering business. For items not located during the walkthrough but listed in Attachment A, Young is obligated to return those items to Cosgrove she

subsequently located them as provided in Section 1.3 of the Agreement. For items that he was prevented from retrieving due to Young's objection, I am addressing them as part of this decision. (CP 713-714).

...

4.14 Section 1.5 of the Agreement provides for the wine in the wine storage facility to be divided equally by an alternate pick method. When Young arrived at the facility to inspect and divide the wine, the wine had been removed and Cosgrove was not present. The testimony from the wine storage owner and from Young **leads the arbitrator to conclude that Cosgrove unilaterally removed and secreted the wine without notice to Young and knowing that she was intending to inspect the storage unit. In doing so, he was violating the requirements of Section 1.5 of the Agreement.** He has made no effort to cure or otherwise resolve his obligation to divide the wine collection equally with Young. There is insufficient evidence for the arbitrator to make a finding of the value of the wine and the arbitrator is prohibited from addressing the means of enforcing Section 1.5 of the Agreement. **However, the arbitrator does conclude that Section 1.5 of the Agreement required Cosgrove to cooperate with the walkthrough and division of the wine collection and that he has failed to do so. The arbitrator further finds that his actions constitute bad faith.** (CP 717-718)

Id. (emphasis added).

On October 25, 2011, the arbitrator denied Cosgrove's first motion for reconsideration and declined to issue any further decision when Cosgrove again urged reconsideration. (CP 766).

On October 31, 2011, Young, based upon the arbitrator's findings and conclusions, moved to enforce the CR 2A Agreement. (CP 571-576).

On November 18, 2011, the Court entered an Order to Enforce CR 2A

Agreement. (CP 783-785). The Court further Ordered that Cosgrove pay Young's attorney's fees per the arbitration award and that he execute all the documents he is required to sign per the agreement. (CP 784).

On November 14, 2011, Young moved for confirmation of the award of attorney fees. (CP 691-693). The Court ordered confirmation of the arbitration award and Young was granted judgment against Cosgrove in the amount of \$4,000.00. (CP 801-802).

Cosgrove repeatedly insisted that he intended to comply with the judge's order and asked for an extension of time to do so. (CP 921-923). On January 5, 2012, Cosgrove filed his notice of appeal. In his notice of appeal, Cosgrove only listed an intent to appeal the Amended Order to Enforce the CR 2A Agreement. *Id.* On January 20, 2012, fifteen days after the appeal deadline, Cosgrove filed an Amended Notice of Appeal where he bootstrapped eight other issues to the original appeal. Specifically, Cosgrove was appealing: 1. Order Denying Defendant's Motion for Partial Summary Judgment entered May 7, 2010; 2. Order Denying Plaintiff's Motion to Enforce Settlement Agreement entered February 11, 2011; 3. Order on Motion for Clarification entered March 28, 2011; 4. Order Denying Defendant's Motion to Stay Arbitration entered September 13, 2011; 5. Arbitration Decision dated October 6, 2011; 6. Arbitrator's Ruling denying reconsideration dated October 12, 2011; 7.

Order to Enforce CR2A Agreement entered November 17, 2011; 8. Order Confirming Arbitration Award and Order [for] Entry of Judgment; 9. Amended Order to Enforce CR2A Agreement, entered on December 6, 2011.

C. SUMMARY OF THE ARGUMENT

Cosgrove alleges multiple errors on the part of the trial court. The only orders timely appealed were the decisions to enforce the settlement agreement, the denial of the motion to stay the arbitration and the order granting a judgment for attorney fees based on the order confirming the arbitrator's decision. The other orders appealed by Cosgrove were appealed by a late notice of appeal amending the appeal of the motion to enforce the CR2A.

The first error asserted is the trial court's refusal to grant Cosgrove an equitable remedy barring Young from claiming ownership in their jointly held assets. Cosgrove's subsequent signing of a settlement agreement with Young makes this untimely appealed issue ripe for denial. In addition, Young presented multiple arguments in opposition to this motion. The court's denial of this motion was not an abuse of discretion.

The remaining issues raised by Cosgrove all stem from Cosgrove's basic contention that the court erred in referring the issues of fact and interpretation which Cosgrove raised as a bar to enforcement of the

settlement agreement to arbitration. In fact, the settlement agreement gives the arbitrator authority to deal with any “unresolved issues”. It is a broad phrase intended to give the arbitrator broad powers in resolving issues between parties with a contentious history and expectation of a contentious future. Both the arbitrator and the court acted within their authority to resolve the issues of the party as expeditiously as possible given Cosgrove’s multiple attempts to delay the proceedings and evade his responsibilities under the settlement agreement.

D. ARGUMENT

1. Cosgrove’s amended January 20, 2012, appeal is procedurally flawed.

RAP 2.4(b) states:

Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, **if (1) the order or ruling prejudicially affects the decision designated in the notice**, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

(emphasis added). Here, Cosgrove amended notice of appeal seeks review on the following issues 1) Order Denying Defendant’s Motion for Partial Summary Judgment entered May 7, 2010; 2) Order Denying Plaintiff’s Motion to Enforce Settlement Agreement entered February 11, 2011; 3) Order on Motion for Clarification entered March 28, 2011; 4)

Order Denying Defendant's Motion to Stay Arbitration entered September 13, 2011; 5) Arbitration Decision dated October 6, 2011; 6) Arbitrator's Ruling denying reconsideration dated October 12, 2011. 7) Order to Enforce CR2A Agreement entered November 17, 2011; 8) Order confirming Arbitration Award and Order [for] Entry of Judgment; 9) Amended Order to Enforce CR2A Agreement, entered on December 6, 2011. The only decision that was timely appealed was the Amended Order to Enforce CR2A Agreement, entered on December 6, 2011.

a. Cosgrove fails to identify any prejudicial effect from the trial court's ruling.

More importantly however, Cosgrove has identified no prejudicial effect from the trial court's ruling in this matter on the order to enforce the settlement agreement. Cosgrove's failure to state any prejudicial effect in his appeal is fatal and the appellate court should therefore deny Cosgrove's appeal.

b. No substantial right was affected by the trial court's finding that the doctrine of judicial estoppel did not apply

Here, the court issued its ruling on the issue of judicial estoppel months prior to the CR 2A. The trial court's ruling had no impact at all on the parties abilities to restrict the claims of the parties or the settlement terms. Because the trial court's decision in regards to judicial estoppel did

not affect a substantial right of Cosgrove. Because it did not affect Cosgrove's rights appeal on this issue is improper.

c. RAP 2.4 does not permit the designation of an arbitration decision for review by the appellate court.

Here, the arbitrator made his final decision on October 6, 2011. Cosgrove made no attempt to dispute or appeal the arbitrator's findings and conclusions. Because Cosgrove did not dispute or appeal the arbitrator's findings and conclusions, the trial court had no discretion, but to confirm the arbitration decision. Cosgrove simply failed to raise any issues of fact to dispute under the CR 2A. Thus, because Cosgrove was untimely in appealing the arbitrator's decision, the argument's regarding the trial court's ruling are therefore waived. Because they were waived Cosgrove's appeal as to the arbitrator's decisions should now therefore be denied.

d. Cosgrove failed to comply with RAP 2.4(c).

(c) Final Judgment Not Designated in Notice. Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely post-trial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

An order confirming an arbitration is a final order. See RCW § 7.04A.280. Cosgrove fails to timely base his appeal on CR 50(b), CR 52(b), or CR59. Cosgrove's failure to provide the proper basis for his appeal is fatal and the appellate court should deny his appeal in toto.

2. The Court correctly denied Cosgrove's Motion for Partial Summary Judgment.

Review of an order granting summary judgment de novo. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Oltman v. Holland Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). The Court must view all facts, and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

a. Preclusion of the Doctrine of Judicial Estoppel is proper in this matter.

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Johnson v. Si-Cor, Inc.*, 107 Wn.App. 902, 906, 28 P.3d 832 (2001);

Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778, 782 (9th Cir.2001). “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.” *Johnson*, 107 Wn.App. at 906, 28 P.3d 832 (quoting *Seattle–First Nat’l Bank v. Marshall*, 31 Wn.App. 339, 343, 641 P.2d 1194 (1982)). An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi Constr. Co. v. Global Northwest, Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). Review of the trial court’s application of the doctrine of judicial estoppel is based on an abuse of discretion. *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th Cir.2001). Under the abuse of discretion standard, the trial court will not be reversed unless its decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Schumacher*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000)(citing *In re Marriage of Peterson*, 80 Wn.App. 148, 152, 906 P.2d 1009 (1995)).

- i. **Young’s position before the bankruptcy court and the trial court were not inconsistent.**

Cosgrove mischaracterizes the Bankruptcy proceedings and fails to disclose specific relevant facts in this matter. Here, Young filed bankruptcy for in June 2009. (CP 3 ¶3.8). Young identified TRY Ventures and particular assets of the catering company in her bankruptcy pleadings. (CP 126 line 6-10). As she stated in her motion there was no difference between BACC, LLC and TRY Ventures. The assets of the companies were identical and BACC, LLC was simply a new name for the same enterprise which the partners had previously operated as TRY Ventures. (CP 96-97).

Young adequately identified the assets in which she held an interest at the time of her filing. (CP 126 Line 6-9) To the extent, that she may have had some type of future or contingent interest in BACC her failure to omit it from her schedules was clearly not an attempt to conceal assets, since **at the time BACC was an empty corporation and she had identified the only entity holding assets as well as identifying with particularity**, the computer, office equipment, and catering equipment. (CP 126 line 6-9). (emphasis added). Thus, the position held by Young in the bankruptcy proceeding is not inconsistent with the position she currently asserts before the court. At most, she held only a future interest in the BACC, LLC which was an empty shell corporation with no monetary value at the time she filed for bankruptcy. She identified the

entity that was holding the assets and identified the assets Cosgrove currently asserts to be BACC assets. She should be entitled to make a claim against an interest she acquired after filing bankruptcy particularly when that entity currently holds assets that were identified in her bankruptcy filing. Because Young's position is not inconsistent the first prong of the test is met.

ii. Young did not mislead the bankruptcy court.

Washington's courts have held that where the litigant did disclose the asset, but failed to value it correctly or list it on the appropriate asset schedule a partial disclosure is sufficient. In these cases, the court has found that the debtor was not attempting to conceal the asset, and because they had disclosed the assets, albeit imperfectly, the debtor would not be barred from making a subsequent claim. In *Baldwin v. Silver*, 147 Wn.App.531, 196 P.3d 170, (2008), the Court refused to grant an insurance company judicial estoppel because, while the debtors had not listed their claims in the asset section of the bankruptcy schedules they had listed it in the statement of affairs section of the bankruptcy schedules. *See* 11 U.S.C. § 521(a); RCW 19.86.010 *et seq.*

Here, Young identified the entity that was holding the assets and identified the assets Cosgrove currently asserts to be BACC assets. The information was provided to the Court, although portions were only

identified in the Statement of Affairs. Because Young did not attempt to conceal her assets and did in fact disclose them, albeit imperfectly, Young did not therefore mislead the bankruptcy court.

iii. Cosgrove suffered no unfair detriment in the preclusion of the affirmative defense of judicial estoppel

The first maxim in equity is: ‘He who seeks equity must do equity.’ *People’s Sav. Bank v. Bufford*, 90 Wn. 204, 208, 155 P. 1068 (1916).

It is our view that a court of equity will deny relief to a party who, to the injury of another, has misrepresented facts connected with the relief sought, whether the misrepresentations were made with intent to defraud or were made in the honest belief that they were true, so long as the person making them retains the benefits flowing therefrom.

Walsh v. Wescott, 131 Wn. 314, 319, 230 P. 160 (1924). The rule is that findings upon conflicting evidence in an equity case will not be disturbed on appeal unless it can be said, that the evidence preponderates against them. *Peterson v. Ogle*, 110 Wn. 610, 188 P. 768 (1920); *Yarnall v. Knickerbocker Co.*, 120 Wn. 205, 206 P. 936 (1929). Here, Cosgrove seeks redress to the “unfairness” of the preclusion of his defense. However, a quick review of this case would indicate that Cosgrove came before the trial court with unclean hands. He actively encouraged Young to file bankruptcy and then filed a false restraining order as his first salvo

in a battle to strip her of all her assets and leave her with nothing. At every turn he has knowingly, willingly, and consciously attempted to take advantage of Young through manipulating the legal system.

3. The Court properly considered Young’s Motion for Clarification or Evidentiary Relief.

Cosgrove’s arguments regarding the content and the timing of the motion are premised on the supposition that the motion for clarification and evidentiary relief needs to conform to the requirements of a motion for reconsideration. There is no authority to support this position. The trial court has continuing jurisdiction to clarify an ambiguous judgment, and such clarification is not barred by principles of res judicata. 14 *Wash. Prac., Civil Procedure* § 2:2

Unlike a modification, amendment, or alteration to a judgment, which must be accomplished under the court rules or some other exception to preclusion, **a clarification of a judgment can be accomplished at any time.**

Kemmer v. Keiski, 116 Wn. App. 924, 68 P.3d 1138 (2003). A “clarification,” on the other hand, is “‘merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.’ *In re Marriage of Christel and Blanchard*, 101 Wn.App. 13, 22, 1 P.3d 600 (2000), (quoting *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)). A court may clarify a decree by defining the parties’ respective rights and obligations, if the parties cannot agree on the

meaning of a particular provision. *Rivard*, 75 Wn.2d at 419, 451 P.2d 677. The court had denied the motion to enforce the CR2A, but the parties were unable to reach agreement regarding whether the court had intended for them to resolve it through arbitration. The motion was not one for rehearing. Young did not ask the court to reconsider the decision nor to grant enforcement of the CR2A, but instead sought clarification and/or guidance as to what the parties' next step should be. The court had the authority to order the parties to arbitration either as a clarification or pursuant to Young's motion that the court either set the matter for an evidentiary hearing, order the matter to arbitration or reset the matter for trial.

4. The trial court correctly compelled arbitration of the entire matter, denied Cosgrove's motion for stay of arbitration, and did not require Young to identify the issues that were to be arbitrated.

a. The trial court had authority to refer the entire matter for arbitration.

Cosgrave's whole argument rests on his characterization that everything sent to the arbitrator in this matter was enforcement of the properly executed CR 2A. This statement is specious.

"The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). The disagreements among the parties is not in regards to

enforcement, but in the interpretation of the obligations and duties of the parties as memorialized in the CR 2A. As Cosgrove correctly states “[w]hether a dispute should be submitted to arbitration depends solely on the parties’ agreement to arbitrate.” *Satomi Owner’s Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 810 , 225 P.3d 213 (2009). The question of arbitrability is “an issue of judicial determination [u]nless the parties clearly and unmistakably provide otherwise.” *Howsam*, 537 US. at 83. Specifically in this matter the parties agreed to this language:

3.3 Any disputes regarding the drafting of final documents or any unresolved issues shall be submitted to the binding arbitration of Matthew Jolly...

“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.” RCW 7.04A.060(3). Before the drafting of papers had even begun issues arose between the parties that they were unable to resolve. Cosgrove’s contention is that the phrase “unresolved issues” refers only to issues that were not resolved at the time of the drafting of the settlement agreement. However, the fact that issues were likely to arise during the walkthrough was in the contemplation of both the parties. The proceedings had been extremely contentious and Young at least certainly contemplated that the arbitrator would have the authority to resolve issues that arose during the walkthrough. The arbitrator was also

aware that resolution of issues arising during the walkthrough had been contemplated by the parties and his findings that these issues were within the scope of the agreement reflects this. Because the parties clearly and unmistakably agreed to arbitrate this, the court had the absolute authority to send this matter to arbitration. *See* RCW 7.04A.070(1) (providing that a court shall order parties to arbitrate upon a “showing [of] an agreement to arbitrate”).

Further, if the order of the trial court had the potential to be improperly broad this potential was never realized. The arbitrator declined to issue any order enforcing the agreement and issues of enforcement were reserved to the trial court when Young brought the motion to enforce the agreement before the trial court after the arbitrator resolved the issues of fact and interpretation which arose regarding the walkthrough and the division of the wine. A motion which Young brought only after giving Cosgrove the opportunity to comply with the settlement agreement based on the clarifications of the arbitrator and his resolution of the factual issues between the parties.

b. The trial court properly denied Cosgrove’s motion to stay arbitration.

Questions of arbitrability are reviewed de novo. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn.App. 703, 713, 959 P.2d 1140 (1998),

review denied, 137 Wn.2d 1012 (1999). Unless an arbitrator's award on **its face shows adoption of erroneous rule or mistake in applying the law**, award will not be vacated or modified. *Harris v. Grange Ins. Ass'n*, 73 Wn.App. 195, 868 P.2d 201(1994)(emphasis added). An Arbitration award can only be vacated upon one of the grounds specified in statute governing vacation of arbitration award. *Id.* The grounds to vacate or modify an arbitration award is found at RCW 7.04A.230 and RCW 7.04A.240.

Here, it appears that the only ground cited by Cosgrove is that there was no agreement to arbitrate issues of enforcement. *See* RCW 7.04A.230(1)(e). However, this statement is contrary to the actual words and the broad nature of an executed CR 2A. “[i]f the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator.” *Munsey v. Walla Walla College*, 80 Wn.App. 90, 96 906 P.2d 988 (2006) (quoting, *Meat Cutters Local 494 v. Rosauer's Super Markets, Inc.*, 29 Wn.App. 150, 154, 627 P.2d 1330 (1981)). Here, The CR 2A is facially and emphatically clear that “any disputes regarding the drafting of final documents or any unresolved issues shall be submitted to the binding arbitration of Matthew Jolly.” (CP 178 ¶3.3). The following paragraph 3.4 states that if it becomes necessary to bring an enforcement action in the court the party

who brings the action will be entitled to fees. (CP 179 ¶3.4). Section 3.4 does not reserve any issues to the trial court. To the extent it reserves anything it reserves enforcement “action”. No enforcement action was taken by the arbitrator. The motion to enforce the agreement was brought to the trial court. Because the arbitration clause in the parties’ agreement is broad in scope and the CR 2A specifically allowed for arbitration the trial court’s ruling to deny Cosgrove’s motion for stay was proper.

c. Cosgrove was well aware of the issues that were to be arbitrated.

Cosgrove’s objection is surprising in that Cosgrove himself appeared, argued, and was integral in framing the issues that were brought before the Arbitrator. It is therefore unsurprising that the arbitrator in this matter stated:

2.7 Cosgrove has also claimed insufficient notice of the arbitration proceedings, citing RCW 70.04A.090(1). **The arbitrator finds that this objection is without merit. In fact, the scheduling of the arbitration hearing took place over a period of months with extensive notice to all parties including notice of the issues involved.**

(CP 589 ¶2.7). Cosgrove was granted a continuance during the pendency of his first motion for discretionary review which he requested based on his position that the issues before the arbitrator were not properly before the arbitrator. The arbitrator delayed scheduling the hearing for over a

month to accommodate his schedule when the motion for discretionary review was denied. Cosgrove received an additional continuance when he moved the court for a stay based on his position that the issues Young had placed before the arbitrator were improper. It is disingenuous after having filed two appeals and a motion to stay the arbitration based on his position that the issues before the arbitrator were not properly before the arbitrator to assert that he was not aware of the issues. Given the extensive notice given to Cosgrove, his argument is without merit and was properly disposed of by the trial court.

5. The trial court did not err in confirming the arbitration award.

Washington courts have given substantial finality to arbitrator decisions rendered in accordance with the parties' contract and RCW 7.04. The shorthand description for this policy of finality is that judicial review of an arbitration award is limited to the face of the award. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified. *Id.*; see also *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn.App. 813, 816, 790 P.2d 228 (1990) (applying the above cited rule and reversing the trial court confirmation of an arbitration award, and remanding the matter for a new arbitration hearing, where an error of law

appeared on the face of the award). The trial court confirms an arbitration award as the judgment unless there exists a statutory ground for vacation, modification, or correction. *Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn.App. 884, 888, 939 P.2d 1258 (1997). Similarly, appellate review is limited in that it can only confirm, vacate, modify, or correct the arbitration award. RCW 7.04.150-.170; *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992).

Judicial review of an arbitration award does not include a review of the merits of the case. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 402, 766 P.2d 1146 (1989) “Judicial review of such awards is confined to the narrow grounds set forth in RCW 7.04.” *Davidson v. Hensen*, 135 Wn.2d 112, 133, 954 P.2d 1327 (1998).

a. Arbitrator did issue an arbitration award in this matter.

Private arbitration is governed by chapter 7.04A RCW, Washington's uniform arbitration act. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525, 79 P.3d 1154 (2003). “Under this statute, the parties may seek court confirmation of the award, but unlike mandatory arbitration, there is no provision for court review of the award. Accordingly, disappointed parties may not request a trial de novo.” *Sales*

Creators, Inc. v. Little Loan Shoppe, LLC, 150 Wn.App. 527, 531, 208 P.3d 1133(2009).

An arbitration “award consists of a statement of the outcome, much as a judgment states the outcome.” *Westmark Properties, Inc. v. McGuire* 53 Wn.App. 400, 403, 766 P.2d 1146 (1989). Here, the October 6, 2011, Arbitration Decision, contains a statement of the outcome. Because there was a statement of the outcome there was a proper and valid arbitration award. Because there was a proper arbitration award the trial court could thus confirm said award.

b. The CR 2A is broad on its face giving the arbitrator the authority to resolve any “unresolved issues.”

The arbitration clause in the parties’ agreement is broad in scope.

In §3.3 it states:

Any disputes regarding the drafting of final documents or any unresolved issues shall be submitted to binding arbitration with Matthew Jolly. (CP 178 ¶3.3).

Generally, any contractual dispute will be arbitrable, unless it can be said with confidence that the arbitration clause in the contract cannot be interpreted to cover the dispute. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn.App. 703, 714, 959 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1012 (1999). ‘Absent an express provision excluding a particular type of dispute, ‘only the most forceful evidence of a purpose to exclude a

claim from arbitration can prevail.” *ML Park Place Corp. v. Hedreen*, 71 Wn.App. 727, 739, 862 P.2d 602 (1993) (quoting *Local Union No. 77, Int’l Bhd. of Elec. Workers v. Pub. Util. Dist. No. 1*, 40 Wn.App. 61, 65, 696 P.2d 1264 (1985)). The issues are not beyond the scope of the arbitration agreement in the CR 2A agreement. The Court in *Truitt v. Truitt*, 151 Wn.App. 1034, Not Reported in P.3d, 2009 WL 2365600, Wn.App. Div. 1, 2009, held that an agreement to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract. RCW 7.04A.060(1). Here, again Cosgrove mischaracterizes and repeatedly attempts to limit the arbitrator’s findings into an enforcement issue.

c. The arbitrator has authority to award attorney fees.

Cosgrove forgets that this matter was not before the trial court, but before an Arbitrator. While an arbitration agreement may control what issues are to be arbitrated, once the issues are submitted to arbitration, **the proceeding itself is governed by statute.** *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 894, 16 P.3d 617 (2001)(emphasis added). The arbitrator is the final judge of both the facts and the law, and no review will lie for a mistake in either. *Yakima County v. Yakima County Law*

Enforcement Officers Guild, 157 Wn. App. 304, 335, 237 P.3d 316 (2010).

An arbitrator is not limited in his power and any agreement of arbitration has certain nonwaivable provisions. *See* RCW 7.04A.040. One of the provisions that is nonwaivable is RCW 7.04A.080(2). RCW 7.04A.080(2) provides that:

...the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy...

RCW 7.04A.080(2)(*emphasis added*). Just like a trial court, the arbitrator “is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation.” *In re Firestorm*, 129 Wn.2d 130, 139 P.2d 411 (1996).

Here, after reviewing the evidence presented and the testimony provided, the arbitrator found that Cosgrove exercised bad faith. Cosgrove does not even dispute the fact that he emptied out the storage unit of the wine. He instead asks that this court second guess the arbitrator and excuse his actions because he was not provided with a subpoena duces tecum for Mr. Mullan’s testimony. It should be further noted, that Cosgrove does not raise any means to quash or issue a protective order to prevent the subpoena duces tecum of Mr. Mullan and Cosgrove fails to

disclose that the material provided by Mr. Mullan was forwarded immediately once it was received by Young's counsel.

Cosgrove fails to demonstrate any prejudice by this discovery, except that it puts to light that he is the only person who reasonably could have cleared out the storage unit. The arbitrator as the ultimate judge of the facts and law in this matter was well within his authority to find Cosgrove in bad faith and assess attorney fees accordingly. Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless the award on its face shows their adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified. *Carey v. Herrick*, 146 Wash. 283, 263 P. 190. N. State Const. Co. v. Banchemo, 63 Wash. 2d 245, 249-50, 386 P.2d 625, 628 (1963) Among the recognized equitable grounds sufficient to support an award of attorney fees as costs or damages, are the bad faith or misconduct of a party, actions by a third person subjecting a party to litigation, and the dissolution of wrongfully issued temporary injunctions. *Gander v. Yeager*, 167 Wash. App. 638, 274 P.3d 393 (2012). The arbitrator in his role as the adjudicator in this hearing had the authority to make an award of attorney fees for Cosgrove's "bad faith" both in his conduct during the

arbitration and in the claims he asserted in bad faith which made the proceeding necessary.

6. The trial court did not err when it entered multiple orders.

a. Young did not have to provide Cosgrove with 28 days' notice.

Review of a trial court's decision to enforce a settlement agreement pursuant to CR 2A and RCW 2.44.010 is conducted under the abuse of discretion standard. *Callie v. Near*, 829 F.2d 888, 890 (9th Cir.1987). An abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992). Here, Cosgrove's reliance on *Binkerhoff v. Campell*, 99 Wn.App 692, 994 P.2d 911 (2000), for authority of a 28 day notice requirement is misplaced. Use of the 28-day summary judgment calendar is not mandatory in a motion to enforce. While the Court did find that a motion to enforce a settlement agreement is to be **reviewed** under the same standard as a motion for summary judgment, it did not state that the parties had to provide 28 days' notice. Because the *Binkerhoff* court only stated the standard of review and not a requirement to meet the notice provisions of CR 56 and as Cosgrove provides no other relevant case law to support his position, the appellate court should find that there was no abuse of discretion by the

trial court. The notice required for specific types of hearings is in fact not dictated by caselaw, but by court rule. The claim made by Cosgrove is similar to the rule for 12(b)(6) motions which require that when a motion to dismiss relies on extrinsic evidence it must be treated as a summary judgment motion and must comply with CR 56. However, there is no corresponding requirement in the rules when noting a motion to enforce a settlement agreement. Young complied with the rules in noting her motion and if Cosgrove required additional time to respond then Cosgrove should timely have sought a continuance of the hearing to obtain the time he required.

b. Cosgrove's reading of RAP 7.2 is in error

Cosgrove cites and quotes selectively from RAP 7.2. However, even the section cited does not appear to support Cosgrove's position. Specifically, Cosgrove cites RAP 7.2 for the proposition that:

...if the trial court's 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's decision. ...

Arguably **all** the orders referred to in Cosgrove's brief are prior to January 23, 2012, acceptance date by the appellate court. **After** review is accepted, the trial court has authority to act in a case only to the extent provided by RAP 7.2. RAP 7.2(a). *State v. J-R Distribs.*, 111 Wn.2d 764,

769, 765 P.2d 281 (1988). Here, Cosgrove cites trial orders entered on November 9, 2011, November 28, 2011, and March 23, 2012. It should be noted that the March 23, 2012, order is based on two previous orders dated November 7, 2011, and November 28, 2011. Cosgrove effectively is making a complaint about orders that were entered two months prior to the appellate court's acceptance of this appeal. Cosgrove is effectively arguing that the trial court is powerless to issue **any** order until a party decides whether or not to bring an appeal before this court. This is contrary to the RAP 7.1(The trial court retains full authority to act in a case before review is accepted by the appellate court, unless the appellate court directs otherwise as provided in rule 8.3.). Acceptance of Cosgrove's reasoning would place the speed of justice solely in the hands of the appealing party.

i. Cosgrove failed to comply with RAP 7.2 and RAP 8.1

RAP 7.2(c) provides:

Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.

RAP 8.1 requires that a party may obtain a stay by filing with a trial court a supersedeas bond or with the court's approval or by stipulation post security other than a bond or cash. Here, Cosgrove brought his appeal to

stay a money judgment. Cosgrove failed to post any supersedeas bond or any security for the stay in this matter. Cosgrove further failed to file a notice that the trial court's decision does not require a superseded bond. RAP 8.1(f). Because Cosgrove failed to provide any security, the trial court's judgments in these matters should not be stayed.

c. Cosgrove misapplies the requirements of CR 54(b) as a bar against the trial court's order.

RAP 2.2(d) provides in part:

In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment which does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay.... **In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.**

RAP 2.2(d)(*emphasis added*). “The superior court civil rule counterpart to this appellate rule, CR 54(b), is to the same effect.” *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498798 P.2d 808 (1990). “Civil Rule 54(b) governs entry of judgments on multiple claims and provides that ‘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.” *Fluor Enterprises, Inc. v. Walter Const., Ltd.*, 141 Wn.App. 761, 766, 172 P.3d 368 (2007). The purpose of CR 54(b), is to achieve a balance between having only one appeal in a single action and permitting timely review to avoid unnecessary retrials in multiple party or multiple claim actions. *Doerflinger v. New York Life Ins. Co.* 88 Wash.2d 878, 567 P.2d 230 (1977).

Here, contrary to Cosgrove’s contention the trial court is not obligated to conduct CR 54 findings when it enters a judgment. It is required to do so only if it wishes to give the judgment finality prior to ruling on any remaining claims. A finding of finality was not requested by either party and the court was not required to make one absent a request or some perceived necessity for immediate appeal of that judgment.

d. The trial court did have authority to enter judgment against Cosgrove without an evidentiary hearing.

As a preliminary matter, Cosgrove again fails to cite any law or case that supports his his argument. Cosgrove has repeatedly cited *Brinkerhoff v. Campbell*, 99 Wash. App. 692, 697, 994 P.2d 911, 914-15 (2000) for the standard of review and for the proposition that the court may not enforce a settlement agreement when the parties have raised an

issue of material fact. Brinkerhoff does not state that the court must hold an additional evidentiary hearing after the issues of fact have been resolved in an arbitration per the settlement agreement. Cosgrove did not assert any issues of fact. In the absence of an issue of fact the court acted properly in enforcing the settlement agreement.

7. Respondent is entitled to attorney fees.

Pursuant to RAP 18.1, Young seeks attorney fees under RAP 2.4(g) and as the prevailing party under the validly executed CR 2A in this matter.

E. CONCLUSION

Cosgrove's arguments are without merit. This appeal is just another in a long line of tactics to delay and to increase the cost to Young. For the aforementioned reasons, Young respectfully asks that the appeal court deny all of Cosgrove's arguments.

Respectfully submitted this 3rd day of July,
2012.

Wong Fleming

By: 

Dianna Caley, WSB# No. 23413
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing BRIEF OF RESPONDENT upon the following persons:

Jones Law Group, PLLC
Marianne K. Jones
Mona K. McPhee
11819 NE 34th Street
Bellevue, WA 98005

- Via Mail
- Via Fax
- Via Legal Messenger Delivery

DATED this 3rd day of July, 2012, in Bellevue, WA.



Cara Hazzard
Paralegal

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STATE OF WASHINGTON
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