

No. 71714-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

GABRIEL LEE,

Appellant,

v.

CAROL KENNARD,

Respondent.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE REGINA S. CAHAN

REPLY BRIEF OF APPELLANT LEE/
CROSS-RESPONDENT'S BRIEF

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I. INTRODUCTION

RCW 26.09.070(6) expressly provides, and the parties in this case agreed (CP 64), that their separation agreement retained its status as a contract, and that they could rely on contract law in enforcing their rights after a decree of dissolution was entered incorporating the agreement. The trial court properly considered appellant/cross-respondent Gabriel Lee's defenses of unconscionability and laches against specific performance of the decree's maintenance escalator when cross-appellant/respondent Carol Kennard sought a six-figure judgment for allegedly past due support after waiting 8 years to enforce the escalator while Lee timely paid more than his full support obligations under the separation agreement and decree.

The trial court properly ruled that laches barred Kennard's demand for retroactive enforcement of the escalator because Lee was damaged by her unreasonable delay in seeking its enforcement, and erred only in giving Kennard the benefit of the cumulative percentage increase in the CPI since 2000. The trial court should not have enforced the maintenance escalator after finding the separation agreement to be "completely one-sided" and substantively unfair, due in part to the "astronomical" maintenance

obligation it imposed on Lee. (CP 380-81) The trial court's decision is contrary to both RCW 26.09.070(3), which provides that an unfair agreement is not binding on the court, and to Supreme Court precedent that "either substantive or procedural unconscionability is enough to void a contract." *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55, ¶ 14, 308 P.3d 635 (2013), *cert. denied*, 134 S. Ct. 2821 (2014).

This Court should reverse the trial court's decision enforcing the maintenance escalator and vacate the judgment against Lee. This Court at a minimum should affirm the trial court's determination that laches barred retroactive enforcement of the maintenance escalator on Kennard's cross-appeal, and remand on Lee's appeal for recalculation of Lee's prospective maintenance obligation based only on the increase in the CPI between 2008 and 2011. This Court should vacate the trial court's fee award to Kennard and award attorney fees to Lee on appeal.

II. REPLY ARGUMENT

A. The trial court properly considered Lee’s defenses of unconscionability and laches in deciding whether to enforce the maintenance escalator.

1. On remand, the trial court was expected to “exercise its discretion to decide any issue necessary to resolve the case.” (Reply to Kennard Br. 15, 16-18)

In both her response to Lee’s appeal and in her cross-appeal, Kennard argues that the trial court on remand only had power to enforce the maintenance escalator and award attorney fees to her. (Kennard Br. 15, 16-18) But the trial court’s discretion was not so limited. This Court directed the trial court to enforce the maintenance escalator “*unless* [the agreement] is found unfair at the time of execution.” *Lee v. Kennard*, 176 Wn. App. 678, 687, ¶ 16, 310 P.3d 845 (2013) (emphasis added). Accordingly, the trial court properly “interpreted the plain meaning of the Court of Appeals decision as mandating the trial court to make a determination whether the settlement agreement was unfair at the time of execution.” (CP 375)

The trial court also had discretion to consider Lee’s defense that laches barred enforcement of the maintenance escalator. By remanding the “issue of the maintenance escalator to the trial

court,” this Court expected the trial court to “exercise its discretion to decide any issue necessary to resolve the case.” *Marriage of Rockwell*, 157 Wn. App. 449, 453, ¶ 6, 238 P.3d 1184 (2010).

In *Rockwell*, this Court had, in an earlier appeal, directed the trial court on remand to use the time rule method to characterize the wife’s pension, which would effectively increase the wife’s separate property interest in the pension. On remand, the trial court strictly complied with the Court of Appeals mandate, re-characterized the wife’s pension, awarded the wife her increased separate property interest, and divided the community interest 60/40 as it had done previously. It otherwise left its earlier property distribution, which had been affirmed by this Court, intact.

In the husband’s second appeal, this Court held that while the trial court was required to re-characterize the pension as directed, it still had discretion in dividing the pension on remand and was not bound to divide it as it had previously done. This Court stated that its “opinion did not mandate that the trial court preserve the 60/40 overall division initially ordered. We did not intend to bind the trial court on remand to only the two alternatives argued by counsel. We intended that the trial court exercise its

discretion on remand. We cannot ascertain from this record that it did so, and for this reason, we vacate the judgment and remand for further proceedings.” *Rockwell*, 157 Wn. App. at 454, ¶ 6.

Here, the trial court on remand properly exercised its discretion in considering both Lee’s arguments that the maintenance escalator could not be enforced because the separation agreement was unfair at the time it was executed and that laches barred its enforcement. Nothing in this Court’s earlier decision reversing the trial court’s determination that the maintenance escalator was void as a matter of law prohibited the trial court from considering Lee’s equitable defenses on remand. Because the trial court had concluded that the maintenance escalator was void as a matter of law, Lee had not previously had the opportunity to defend against its enforcement on these equitable grounds. His only opportunity to do so was on remand.

In determining the trial court’s authority on remand, a distinction is made “between what the superior court was obligated to do without the exercise of any discretion and the area within which it could exercise its discretion.” *Harp v. Am. Sur. Co. of N.Y.*, 50 Wn.2d 365, 369, 311 P.2d 988 (1957). Here, there is no dispute that on remand the trial court could not once again conclude that

the maintenance escalator was void as a matter of law. However, this Court's decision did not prevent the trial court from exercising its discretion to consider equitable defenses to the enforcement of this provision of the separation agreement and decree.

This case is therefore different than *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 311 P.3d 594 (2013), *rev. denied*, 179 Wn.2d 1027 (2014), in which the "law of the case" precluded the trial court on remand from considering the Bank's alternative argument to claim priority over Treiger's lien, which the Supreme Court had previously determined had priority because it was entered and recorded prior to the Bank's prejudgment writ of attachment. 177 Wn. App. at 191, ¶ 24 (*citing Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 50, ¶ 19, 266 P.3d 211 (2011)). This Court held that the trial court had no discretion on remand because the Supreme Court's holding that Treiger's equitable lien had priority became the law of the case and the "trial court on remand had no authority to ignore this holding on remand." *Bank of America, N.A.*, 177 Wn. App. at 191, ¶ 24.

Here, in contrast, the only "law of the case" is that the maintenance escalator was not void as a matter of law. But this Court's previous decision did not require the trial court on remand

to enforce the escalator. To the contrary, this Court's decision contemplated that Lee could defend against enforcement on equitable grounds, including a claim that the agreement was unfair at the time it was executed, since the only premise of his earlier CR 60 motion was the maintenance escalator was void as a matter law:

Unless it is found unfair at the time of execution, the court must enforce that agreement according to its terms. Below, Lee did not allege that the agreement was unfair at the time it was entered into, and the trial court made no such finding. The argument instead focused on whether the escalator was unenforceable as a matter of law.

Lee, 176 Wn. App. at 687-88, ¶ 16.

Had this Court intended the trial court to simply enter a judgment in favor of Kennard, it could have issued this specific direction in its opinion. Instead, it “remand[ed] the issue of the maintenance escalator to the trial court” to enforce, unless the trial court found that there were defenses to its enforcement. *See Lee*, 176 Wn. App. at 687-88, 693, ¶¶ 16, 29. Therefore, on remand, the trial court properly considered Lee's defenses of unfairness and laches.

2. **The doctrine of merger does not preclude the trial court from declining to enforce the maintenance escalator if there are defenses to its enforcement.** (Reply to Kennard Br. 34-35)
 - a. **As a matter of law, and a matter of fact, the separation agreement retained its status as a contract and the doctrine of merger does not apply.**

The doctrine of merger did not preclude the trial court from declining to enforce the maintenance escalator if it decided that the contract was unconscionable when executed. Under the merger doctrine, “where a property settlement agreement [was] approved by a divorce decree, the rights of the parties rest[ed] upon the decree rather than the property settlement.” *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963) (Kennard Br. 34-35). However, RCW 26.09.070(6) was enacted 10 years after the *Mickens* decision. RCW 26.09.070; Laws 1973 1st Ex. Sess., c. 157, § 7. That statute now provides not only that the “terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt,” but that they are also “are enforceable as contract terms.” RCW 26.09.070(6). Under the statute, merger is no longer an impediment to consideration of defenses to enforcement of a separation contract’s terms.

The parties in this case also expressly agreed that the separation agreement “retains its status independently as a contract between the parties,” and that “each spouse [can] enforce their rights as they arise from this Agreement by contract law, as well as those remedies available for the enforcement of judgments and dissolution law specifically including the use of the contempt power of the court.” (CP 64) The parties therefore could enforce or defend against the enforcement of the separation agreement as a contract as both a matter of law and a matter of fact, regardless of the agreement’s incorporation into the decree. Under contract law, the trial court could decline to enforce specific terms of the separation agreement if it found the contract unconscionable. See *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, ¶ 6, 211 P.3d 454 (2009), *rev. denied*, 167 Wn.2d 1019 (2010) (among the “ordinary” defenses to enforcement of a contract is unconscionability); *Marriage of Olsen*, 24 Wn. App. 292, 299, 600 P.2d 690 (1979) (“It is a well settled rule that courts of equity will not enforce contracts that are illegal, against public policy, or unconscionable”).

Once Kennard sought to enforce the maintenance escalator, the trial court had authority to consider Lee’s defense against

specific performance of this provision based on his argument that the separation agreement was substantively unconscionable. Lee did not ask that the entire agreement be found unenforceable even though the agreement as a whole was substantively unfair. Instead, he asked that the specific provision which Kennard was seeking to be enforced – the maintenance escalator – be severed from the decree and not enforced. (CP 263; *see* CP 67: “in the event that any portion of this Agreement shall be declared invalid by any court of competent jurisdiction, those parts not at issue shall be still be of full force and effect”)

In each of the cases relied on by Kennard for her claim that a separation contract cannot be challenged as unfair once merged or incorporated into a decree of dissolution, the party claiming its unfairness sought to *vacate* the separation contract. *See Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999) (Kennard Br. 35) (husband filed a CR 60 motion seeking to “re-open the property settlement and maintenance agreements”); *Bullock v. Bullock*, 131 Wash. 339, 230 P. 130 (1924) (Kennard Br. 34) (wife sought to set aside the property settlement agreement claiming that she received less than half of the community property). Here, however, Lee did not ask the trial court on remand to vacate the parties’ separation

agreement. Instead, as RCW 26.09.070(6) allows, and this Court's earlier decision contemplated, Lee asked the trial court to decline to enforce the maintenance escalator because the agreement was unfair when it was entered. (CP 1-26) *See Olsen*, 24 Wn. App. at 295-96 (affirming trial court's decision refusing to enforce the provision of a separation agreement prohibiting modification when it resulted in "unreasonable or disproportionate hardship or loss for the encumbered spouse") (App. Br. 22); *Partnership of Rhone/Butcher*, 140 Wn. App. 600, 166 P.3d 1230 (2007), *rev. denied*, 163 Wn.2d 1057 (2008) (modifying a single provision in a separation contract because otherwise the contract would not be just and equitable) (App. Br. 23). The doctrine of merger does not foreclose this defense.

b. The doctrine of merger does not limit a trial court's discretion not to enforce the decree for laches.

The doctrine of merger could have no effect at all on the trial court's discretionary decision declining to enforce the terms of a decree under the doctrine of laches based on the parties' conduct *after* the agreement was executed and the decree entered. Regardless whether a decree is entered by agreement or after a trial, laches may be a defense to its enforcement if the party seeking

enforcement knew the facts constituting her claim, unreasonably delayed in commencing the action, and the other party was damaged by the delay. *See e.g. Marriage of Watkins*, 42 Wn. App. 371, 374, 710 P.2d 819 (1985), *rev. denied*, 105 Wn.2d 1010 (1986) (trial court did not abuse its discretion in rejecting the mother's demand for back child support under an order of child support based on laches). *See also Marriage of Ayyad*, 110 Wn. App. 462, 38 P.3d 1033, *rev. denied*, 147 Wn.2d 1016 (2002) (acknowledging that a court can decline to order retroactive adjustment of a child support order providing for "automatic adjustment" on the basis of laches or other recognized equitable grounds). The doctrine of merger could never preclude the trial court's decision not to enforce an agreement based on laches, which necessarily depends upon a party's delay in pursuing her rights after the decree was entered.

B. Consistent with recent Supreme Court authority, the courts should not enforce a substantively unconscionable agreement on the grounds it is procedurally “fair.”

1. The terms of a substantively unconscionable agreement are unenforceable. (Reply to Kennard Br. 36-37, 41, 43-44)

As confirmed in many recent Supreme Court decisions, substantive unconscionability¹ alone is sufficient to make *any* agreement unenforceable,² regardless of its claimed procedural fairness. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, ¶ 18, 103 P.3d 773 (2004); *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317-19, 322, ¶¶ 36, 41, 103 P.3d 753 (2004); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 402, ¶ 46, 191 P.3d 845 (2008); *Hill V. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55, ¶ 14, 308 P.3d 635 (2013); *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603, ¶ 5, 293 P.3d 1197 (2013) (*all discussed* App. Br. 26-27) In

¹ The trial court used the term “unfair” instead of “unconscionable,” but a contract that is “completely one-sided,” as found by the trial court here (CP 380-81), is by definition unconscionable. *See Zuver v. Airtouch Communications*, 153 Wn.2d 293, 303, ¶ 10, 103 P.3d 753 (2004) (“Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.”)

² Lee did not “invite” the trial court’s error in enforcing the agreement based solely on its purported procedural fairness. (Kennard Br. 41) Lee specifically asked the trial court not to enforce the maintenance escalator because it was substantively unfair, regardless of any procedural fairness. (*See* CP 20-22) The trial court declined to do so because this issue was best addressed by the appellate courts. (*See* CP 381)

answer to the weight of this authority, Kennard argues that “none of the cases cited involved contract provisions as part of a final court order.” (Kennard Br. 43) But this claim is no different than her “merger” argument, refuted above. See Reply § II.A.2.a, *supra*. As a matter of law (RCW 26.09.070(6)), and as the parties here agreed (CP 64), the separation agreement retained its status as a contract, subject to all remedies and defenses available for enforcement of a contract.

It would not “overrule” the Supreme Court’s decision in *Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) for this Court to conclude that a substantively unconscionable separation agreement cannot be enforced. (Kennard Br. 36) In *Hadley*, the Court held that in deciding whether to enforce certain property status agreements executed during the marriage, the court must look to whether the agreements were procedurally fair. 88 Wn.2d at 654. But the agreements in *Hadley* did not purport to distribute the property in any particular manner, or to require a party to undertake any onerous obligations. Instead, the agreements were solely intended to characterize assets as either community or separate property.

It was therefore not necessary for the Court to determine whether the agreements were substantively fair in *Hadley*. See *DewBerry v. George*, 115 Wn. App. 351, 364-65, 62 P.3d 525 (marital agreements that do not purport to direct the trial court to dispose of the parties' property in any particular manner falls outside the two-prong test), *rev. denied*, 150 Wn.2d 1006 (2003). A decision relying on more recent case law to conclude that the courts should not enforce a substantively unconscionable separation agreement purporting to control property division and spousal maintenance will have no impact at all on the Supreme Court's decision in *Hadley*.

Kennard also misplaces her reliance on *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009) (Kennard Br. 36), which in affirming the trial court's decision not to enforce an unfair prenuptial agreement recited the "two-prong" test that (in theory) allows enforcement of a substantively unfair agreement entered with sufficient procedural safeguards. In *Bernard*, the Supreme Court's first decision addressing marital agreements after it held that "substantive unconscionability alone" can make an agreement unenforceable, *Adler*, 153 Wn.2d at 347, ¶ 18, the Court declined to "entertain" the argument that substantive unfairness alone could

invalidate an agreement between spouses as “unnecessary [] because the prenuptial agreement at issue is both substantively and procedurally unfair, and the application of a different analysis would not alter the outcome here.” 165 Wn.2d at 903, ¶ 17. Again, a decision by this Court in keeping with the more recent Supreme Court decisions holding that a substantively unconscionable agreement is not enforceable would not “overturn *Bernard*.” (Kennard Br. 36)

Because the trial court found that the agreement here was “completely one-sided” and “no doubt substantively unfair” due to its “astronomical” child support and maintenance provisions, this Court should vacate the judgments against Lee and hold that the maintenance escalator cannot be enforced because the separation agreement was substantively unfair.

2. Neither *Hulscher* nor *Glass* bars Lee from defending against specific performance of the maintenance escalator. (Reply to Kennard Br. 15, 18, 34, 38-39, 41, 45)

Kennard relies heavily on dicta in *Marriage of Huslcher*, 143 Wn. App. 708, 180 P.3d 199 (2008) and *Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992) to claim that any challenge to the fairness of the separation agreement was “time-barred” because not

brought before entry of the dissolution decree incorporating the contract. (Kennard Br. 15, 18, 34, 38-39, 41, 45) But RCW 26.09.070(6) gives the parties a right to defend against *enforcement* of a separation agreement incorporated in a decree by all remedies available, including under contract law. See Reply § II.A.2.a, *supra*. This Court's decision in *Glass* and Division Two's decision in *Hulscher* did not address this provision of the statute, and instead cite only RCW 26.09.070(3) and (7). Nothing in either RCW 26.09.070(3) or RCW 26.09.070(7) deprives the trial court of its authority to refuse to enforce a provision of a separation contract that was unfair when executed.

“[S]tatutory language is [] interpreted in context, considering related provisions, and the statutory scheme as a whole.” *Marriage of Chandola*, 180 Wn.2d 632, 648, ¶ 30, 327 P.3d 644, 652 (2014). RCW 26.09.070(3) provides that if parties to a separation contract petition for dissolution of marriage, the contract is not binding on the trial court if it finds that the contract was unfair at the time of execution:

If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage [], the contract, except for those terms providing for a parenting plan for their children, shall

be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution.

RCW 26.09.070(3).

RCW 26.09.070(7) provides that “when the separation contract so provides, the decree may expressly preclude modification of any provision for maintenance set forth in the decree.” But as contemplated in RCW 26.09.070(3) and RCW 26.09.070(6), a non-modifiable maintenance provision is not binding on the court, and need not be enforced, if the contract was unfair when it was executed. Because Lee was defending against enforcement of the maintenance escalator, the trial court properly considered whether the separation agreement was unfair when it was executed under RCW 26.09.070(3) and (6).

In any event, the parties’ separation agreement did not completely prohibit modification of the maintenance provision. The parties had agreed that maintenance could be modified under certain circumstances not relevant here. (CP 70-72)

Any language in *Hulscher* or *Glass* suggesting that any challenge to the fairness of a separation contract must be made

before the trial court's approval and entry of a decree is dicta, as it was "not necessary to the decision in that case." *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). Language in an opinion is dictum if it has no bearing on the decision. *State ex rel. Evergreen Freedom Found. v. Nat'l Educ. Ass'n*, 119 Wn. App. 445, 452, 81 P.3d 911, 915 (2003). Dictum is "unnecessary surplusage" that need not be followed; the court "may clarify any ambiguity it creates" in subsequent cases. *State ex re. Evergreen Freedom Found.*, 119 Wn. App. at 451-52.

In *Hulscher*, the trial court refused to enforce a provision in an agreed decree of dissolution that made maintenance non-modifiable, as the parties had not executed a separate contract making maintenance non-modifiable, and did not reach the husband's argument that the agreement should not be enforced because it was unfair at the time it was entered. Division Two reversed, holding "that the parties need not enter a separate written instrument constituting their separation contract, so long as the decree of dissolution embodies the agreed-to separation contract provisions. Accordingly, we hold that the trial court erred when it modified the Hulschers' nonmodifiable spousal maintenance

provision embodied in their decree of dissolution.” *Hulscher*, 143 Wn. App. at 710, ¶ 1.

Division Two acknowledged that the “lower court expressly refused to determine whether the spousal maintenance provision was unfair [and] [o]n this record, we cannot determine whether the nonmodifiable maintenance agreement was unfair at execution.” 143 Wn App. at 717, ¶ 18. Nevertheless, Division Two concluded that even if the trial court had reached that issue, the husband’s argument would fail, because a party “must make such a challenge before the trial court’s approval and entry of the decree.” *Hulscher*, 143 Wn. App. at 717, ¶ 17. In reaching that conclusion (which was not necessary to resolve the case, as it had already determined that the maintenance provision was nonmodifiable), Division Two cited RCW 26.09.070(3) and this Court’s dicta in *Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d 1054 (1992).

In *Glass*, this Court noted that while the appellant had not “argued in this appeal that these parties’ separation contract was unfair at the time it was executed, the time for such a challenge has expired in any event. Any such challenge must be made prior to the entry of the decree by which the separation contract is approved by the court. RCW 26.09.070(3), (7). If such a challenge were to be

allowed years later, *at the time of a modification proceeding*, the provisions of RCW 26.09.070(3) and (7) would be rendered meaningless.” *Glass*, 67 Wn. App. at 390 (emphasis added).

Here, Lee was not seeking to modify maintenance when he asked the trial court on remand to not enforce the maintenance escalator. Instead, he raised his defenses to enforcement in response to Kennard’s attempt to enter a judgment for “back maintenance.” And contrary to this Court’s dicta in *Glass*, RCW 26.09.070(3) does not require the trial court to determine whether the separation contract was fair when executed *before* the decree is entered.

In any event, the court commissioner who entered the parties’ decree never determined whether the separation agreement was fair before entering it. Instead, in the *pro forma* findings of fact and conclusions of law prepared by Kennard’s counsel, the only finding of fact regarding the fairness of the agreement is that “the distribution of property and liabilities as set forth in the decree is fair and equitable.” (CP 991) This finding does not address the contract as a whole, and whether the specific provision that Kennard now belatedly seeks to enforce – the maintenance

escalator – was fair at the time it was executed, particularly in light of the already grossly disproportionate property award to Kennard.

C. The trial court erred in calculating cumulative percentage increases in the CPI from the time the agreement was first executed to the maintenance adjustment in 2011 and thereafter. (Reply to Kennard Br. 43, 45-46)

The trial court properly ruled that the maintenance escalator only applies to “current maintenance from the time [Kennard] filed this action on October 18, 2011” (CP 382), but erred in giving Kennard the benefit of the cumulative percentage increase in the CPI since 2000, when the separation agreement was first executed.³ The trial court should have only imposed the percentage increases between 2008 and 2011 to adjust maintenance. Because the trial court accepted Lee’s laches defense, there is no basis for Kennard’s claim that she was still owed the “accumulated effect of the escalated amount” prior to her filing her motion in 2011. (Kennard Br. 46)

Laches is intended to prevent “injustice and hardship.” *Marriage of Barber*, 106 Wn. App. 390, 397, 23 P.3d 1106 (2001).

³ Lee did not invite the trial court’s error, contrary to Kennard’s claim (Kennard Br. 43). Lee made his position clear that the percentage increases for maintenance should begin at the time of adjustment in 2011 and not from when the separation contract was entered. (See CP 911-19)

Giving Kennard the benefit of the percentage increase in the CPI during the 8 years she “unfairly” and “strategically” “sat on her rights” unjustly granted her a windfall, and thus failed to prevent the injustice and hardship that laches is intended to avoid.

D. Kennard did not substantially prevail in seeking to enforce the maintenance escalator and the trial court erred in awarding her attorney fees. Instead, Lee was entitled to his fees under RCW 26.18.160 below and in this Court. (Reply to Kennard Br. 32, 46-49)

The mandate did not require the trial court to award attorney fees to Kennard on remand. Instead, in remanding the “issue of the maintenance escalator to the trial court,” the trial court was expected to “exercise its discretion to decide any issue necessary to resolve the case.” *Marriage of Rockwell*, 157 Wn. App. 449, 453, ¶ 6, 238 P.3d 1184 (2010); *See* Reply § II.A.1, *supra*. Among the issues to be decided was whether to award attorney fees if Kennard successfully enforced the maintenance escalator.

On remand, Kennard only partially prevailed in “enforcing” the maintenance escalator. While the trial court granted Kennard’s motion to enforce the escalator *prospectively*, it rejected her demand for retroactive enforcement. In other words, the trial court denied Kennard’s original motion in the trial court for “past due”

maintenance. (*See* CP 173); *See also* *Lee v. Kennard*, 176 Wn. App. at 684, ¶ 7.

RCW 26.18.160 allows an award of costs to the “prevailing party” in an action to enforce a maintenance order. Because the trial court rejected Kennard’s demand to retroactively enforce the maintenance escalator, Lee did not “owe” her any past due maintenance when she filed her motion in 2011. This case is therefore different from *Marriage of Nelson*, 62 Wn. App. 515, 519, 814 P.2d 1208 (1991) on which Kennard relies for her claim that she is the prevailing party. (Kennard Br. 47-48)

In *Nelson*, the mother was the prevailing party because she received a judgment in her pursuit of “child support arrearages” as part of a motion for contempt. 62 Wn. App. at 519-20. Here, because Lee was never in contempt and the trial court denied Kennard’s request for “past due” spousal maintenance, awarding her only a judgment for maintenance owed after she filed her original motion, Kennard was not a prevailing party for purposes of attorney fees under RCW 26.18.160.

If any attorney fees were warranted, it was to Lee, not Kennard, as he was the prevailing party in Kennard’s enforcement action. Lee successfully defended against her claim that he owed

past due maintenance based on Kennard's claim for retroactive adjustment of the escalator clause because her delay in pursuing it was "unreasonable" and "strategic" and financially prejudiced Lee. (CP 382) Accordingly, Lee should have been awarded attorney fees by the trial court, and he should be awarded fees in this Court, because Kennard's delay in seeking to enforce the maintenance escalator was bad faith under RCW 26.18.160.

III. CROSS-RESPONSE

A. The trial court properly concluded that the separation agreement was substantively unconscionable when executed. (Response to Kennard Br. 15)

Kennard claims that the maintenance escalator was fair because the parties anticipated that Lee's income would increase. (Kennard Br. 15) But in concluding that the separation agreement was substantively unfair when executed, the trial court properly considered the separation agreement as a *whole*, and *all* of the contract's provisions, not just the maintenance escalator.

In deciding that the separation agreement was substantively unfair when it was executed, the trial court considered 1) the property division, which left Lee with only 14% of the marital estate; 2) the combined maintenance and child support award, which left

Lee's household with only 43% of the parties' combined income; 3) the escalator provision which would increase Lee's obligation regardless of his ability to pay and Kennard's need; and 4) that Lee would have to pay maintenance to Kennard for longer than the parties were married. (See CP 375-76, 380-81) After taking all those facts into account, the trial court properly concluded that the separation agreement was "completely one-sided" (CP 381) and that "the division of property was not a fair and equitable distribution of community property and the astronomical maintenance and child support awards only aggravated the inequities of the situation." (CP 380)

An "unequal distribution of property obviate[s] the need for spousal maintenance as it substantially improve[s] [the wife]'s financial position." *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995). A property distribution as grossly disproportionate as this one makes it questionable whether maintenance was even appropriate, never mind a maintenance award for a period longer than the parties' marriage itself and with an escalator.

"[I]t is not a policy of the law to give a wife a perpetual lien upon her divorced husband's future earnings, which arise from his

personal efforts.” *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962). “The purpose of spousal maintenance is to support a spouse until she is able to earn her own living or otherwise become self-supporting.” *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). Regardless whether the parties anticipated that Lee’s income would increase after their divorce, Kennard was not entitled to an award that allowed her to “keep up” with Lee’s earned income, when she was not even “entitled to maintain her former standard of living as a matter of right.” *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

Here, after a mid-term marriage of less than 20 years, the trial court properly concluded that a separation agreement that left Lee with few assets and saddled with “astronomical maintenance and child support” obligations was “completely one-sided and no doubt [] substantively unfair.” (CP 380, 381) The trial court’s only error was in nevertheless enforcing the agreement after concluding that it was substantively unfair.

B. The trial court properly declined to enforce the escalator on maintenance paid by Lee before Kennard filed her motion.

- 1. The trial court has authority to waive any local rule requiring financial disclosure, and it properly treated Kennard's motion as one for summary judgment.** (Response to Kennard Br. 14, 21-22)

Kennard's procedural complaints are without merit. The trial court did not err in considering Lee's laches defense under King County Local Family Law Rule (KCLFLR) 10. Nor did it err in considering Kennard's motion for entry of a money judgment as one for summary judgment.

The issues before the trial court on remand did not necessitate a balancing of the parties' current financial circumstances. Instead, the issues were whether the separation agreement was fair when it was executed in 2000, and whether the maintenance escalator should be enforced when Lee was damaged by Kennard's 8-year delay in seeking enforcement. Requiring the parties to provide the last two years of tax returns and their paystubs for the last six months under KCLFLR 10 would not have assisted the trial court in making its decision on the issues before it.

In any event, Lee had already provided his financial information under KCLFLR 10 in October 2011, shortly after

Kennard filed her motion for past due spousal maintenance. (*See* CP 616-843; CP 996-1000) *See* KCLFLR 10(a)(2) (“a party may use a previously-prepared financial declaration if all information in that declaration remains accurate”). Kennard claims that Lee’s current financial information was necessary because it “goes to the heart of his claim of damages.” (Kennard Br. 22) But the “damage” that Lee claimed was for the financial obligations that he incurred between when the maintenance escalator could have first been enforced in 2003 and 2011, when Kennard for the first time sought a judgment based on the maintenance escalator. (*See* CP 42-45) Kennard does not explain how she was prejudiced by Lee not providing financial information for the period between the trial court’s decision in 2011 and remand from this Court in 2013. Nor can she, as this information would have been irrelevant to the trial court’s decision.

Regardless, the trial court has “inherent authority to waive its rules.” *Raymond v. Ingram*, 47 Wn. App. 781, 784, 737 P.2d 314, *rev. denied*, 108 Wn.2d 1031 (1987). “Unless the record shows that an injustice has been done, this court will presume” that the trial court disregarded the local rules for a good reason. *Raymond*, 47 Wn. App. at 784. In this case, in light of the fact that Lee

previously provided his financial information for the 2011 hearing, it was within the trial court's discretion to waive any requirement for him to provide updated information in 2013 to decide whether to enforce the maintenance escalator retroactive to the period before Kennard filed her motion in 2011.

This Court must also reject Kennard's challenge to the trial court treating her motion for entry of a judgment for purported past due maintenance and interest as a motion for summary judgment. (Kennard Br. 14) Kennard alleges no harm from the trial court describing her "motion for judgment" as a "motion for summary judgment." Kennard's motion treated Lee's liability for past due maintenance and the amount owed under the parties' settlement agreement as *fait accompli*. Like a motion for summary judgment, Kennard essentially argued that "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." CR 56(c); *see e.g. Marriage of Ferree*, 71 Wn. App. 35, 42, 856 P.2d 706 (1993) (applying the rules of summary judgment on motion seeking to enforce a settlement agreement when the party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed). Kennard's six-figure demand for retroactive maintenance was in all aspects a

motion for summary judgment, and the trial court properly treated it as one.

2. **The trial court properly concluded that Kennard was aware of her right to pursue enforcement of the maintenance escalator, and unreasonably delayed 8 years before pursuing that right.** (Response to Kennard Br. 18-21)

A court can decline to order retroactive adjustment “on the basis of laches, or other recognized equitable grounds, and *a long delay in seeking to enforce an automatic periodic adjustment might, in some cases, justify prospective adjustment only.*” *Marriage of Ayyad*, 110 Wn. App. 462, 471, fn. 3, 38 P.3d 1033 (2002) (emphasis added). The trial court properly rejected Kennard’s demand for retroactive enforcement of the maintenance escalator because 1) Kennard had knowledge of the facts constituting the cause of action or a reasonable opportunity to discover such facts; 2) Kennard unreasonably delayed commencing the action; and 3) Lee was damaged by the delay. *See Marriage of Dicus*, 110 Wn. App. 347, 357, 40 P.3d 1185 (2002).

Kennard’s argument that this decision should not have been made on summary judgment because there were purportedly “genuine issues of material fact” is baseless. The issue of laches was

determined by motion – not after a trial – in each of the cases cited by the parties. *See e.g. Dicus*, 110 Wn. App. 347 (father denied an offset for child support based on laches by motion); *Marriage of Barber*, 106 Wn. App. 390, 23 P.3d 1106 (2001) (reversing trial court’s decision made on motion for reimbursement of daycare expenses when it failed to consider the mother’s laches argument); *Hunter v. Hunter*, 52 Wn. App. 265, 758 P.2d 1019 (1988) (court considered father’s laches defense on mother’s motion to enforce child support order), *rev. denied*, 112 Wn.2d 1006 (1989) (Kennard Br. 19); *Marriage of Capetillo*, 85 Wn. App. 311, 932 P.2d 691 (1997) (court considered father’s laches defense on mother’s motion for back child support) (Kennard Br. 18).

Further, Kennard never asked for a trial to resolve disputed facts. Under KCLFLR 6(g)(2), Kennard could have asked the trial court to consider live testimony if she believed it was warranted, but she did not make that request. *See Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003) (rejecting any complaint that the trial court should have tested the parties’ credibility by hearing live testimony rather than by affidavits when the mother did not seek an evidentiary hearing).

In any event, the only fact issue Kennard alleges on appeal is that she had sought to impose the maintenance escalator earlier but Lee claimed he was “too broke” to pay more. (Kennard Br. 20) But even if it were true that Lee claimed he was “too broke” to pay the adjusted maintenance (viewing the evidence most favorably to Kennard, the non-moving party), the other evidence presented showed that this comment was made in context with the fact that Lee was already paying more support for the children than was required of him, relieving Kennard of any further burden.

For instance, in an email to Lee in 2004 (the first year Kennard could have sought a cost of living adjustment), Kennard complained that the child support order requiring her to pay half of post-secondary support for their older child was not “realistic,” and that she could instead pursue the “COLA increase.” (CP 127: “Paying half of everything after taking such a big cut isn’t realistic. You also know I have never asked for a cola increase for which I was eligible, and half of the GET was paid while we were married.”) But Kennard ended up not pursuing the cost of living adjustment in 2004, because the parties had agreed that Lee would instead continue to pay a transfer payment to Kennard for the older son, who was no longer residing with her. (See CP 134: “When we first

discussed sharing college expenses for Chris, we agreed that I would continue to pay you the full child support (\$875 per month) in lieu of paying the COLA.”)

The issue of the cost of living adjustment was once again raised in 2007, when Lee wrote to Kennard explaining he would require her to pay her share of the post-secondary support if she pursued the escalator. (CP 134: “I looked at the record of the GET payment history, it turned out that I had actually paid the entire amount (short of the original application fee), which means I paid for his entire tuition. [] If you insist on me paying you the COLA, then you need to pay Chris the proportional amount for living/educational expenses based on the formula of sharing evenly”; *see also* CP 435-41 (GET payment history)) Once again, Kennard declined to pursue the cost of living adjustment in 2007, and as a consequence was relieved of paying any more of the older son’s post-secondary support.

Instead, Kennard waited until 2011, once the parties’ post-secondary child support obligation for the older son had been (more than) fully shouldered by Lee, to seek to retroactively “adjust” maintenance. Kennard’s apparent motivation in 2011 for finally seeking enforcement of the maintenance escalator after 8 years was

because Lee (properly) refused to sign a QDRO prepared by Kennard's counsel that would have given Kennard an interest in Lee's post-separation contributions.⁴

Based on the evidence presented by both parties, the trial court properly determined that Kennard was "clearly well aware of the COLA escalation clause of the maintenance provision and her avenues to pursue it. There was no evidence presented as to any reasonable grounds for [Kennard] to have delayed 8 years before filing for enforcement of the COLA adjustment and a request for retroactive payments." (CP 378-79) *See Dicus*, 110 Wn. App. at 357.

In *Dicus*, the father filed an action in 2000 seeking an offset against back child support that he claimed was overpaid between 1984 to 1990 due to social security payments paid directly to the mother. The court noted that the father had clearly known of these overpayments as early as 1986, when he originally sought and then abandoned a claim for an offset. The father "then remained silent

⁴ Kennard's current attorney represented her in "negotiating" the separation agreement with Lee, who was then pro se. He was sanctioned for preparing this QDRO because it was "clearly contrary to the original decree and was therefore neither well grounded in fact nor warranted by existing law." *Lee v. Kennard*, 176 Wn. App. 678, 690-91, ¶ 24, 310 P.3d 845 (2013) (affirming the CR 11 sanctions imposed against Kennard's counsel).

for 13 years” before once again demanding an offset in 2000 – a circumstance “unusual” enough to warrant applying laches to deny the requested offset. *Dicus*, 110 Wn. App. at 357.

Like the father in *Dicus*, Kennard knew that she could ask the court to enforce the maintenance escalator, but abandoned her claim. This case is unlike *Hunter*, 52 Wn. App. at 271 (Kennard Br. 20-21), where this Court held that the mother’s failure to enforce a child support order for nearly 7 years was reasonable when the father had claimed he could not pay child support. In *Hunter*, it was undisputed that the father could not pay child support during those years and the mother was advised by her attorney that any legal action during that period would not have been fruitful. *Hunter*, 52 Wn. App. at 271.

Here, unlike in *Hunter*, Lee continued to timely pay his support obligations. Further, unlike in *Hunter*, there was no evidence that had Kennard sought to adjust maintenance earlier it would have not been “fruitful.” Instead, the evidence was that while Lee likely could have paid the adjusted maintenance, he could not (and would not) while taking on greater support obligations for the children – obligations which he did shoulder, and from which Kennard indisputably benefited.

In other words, Kennard could have sought to enforce the maintenance escalator, but declined to do so, recognizing the consequence might be that she would have to pay more support for the parties' children. Based on the evidence before the trial court, even viewed in the light most favorable to Kennard, she knew her rights to pursue a cost of living adjustment between 2003 and 2011, and her delay in bringing her action was unreasonable.

3. The trial court properly concluded on summary judgment that Lee was damaged by Kennard's delay in seeking to adjust child support. (Response to Kennard Br. 22-32)

The trial court also properly concluded that Kennard's unreasonable delay in seeking to enforce the maintenance escalator damaged Lee. The trial court noted that Kennard "strategically s[a]t on her rights while accruing 12% interest while [Lee] has abided by the terms of the agreement and would be financially prejudiced by the retroactive application of the COLA escalation clause." (CP 382) The trial court also recognized, as evidenced by the parties' email exchanges in 2004 and 2007, that Lee would have sought to reduce his child support obligation and to enforce Kennard's obligation to pay half the children's post-secondary

support had Kennard sought to enforce the cost of living adjustment earlier. (CP 379; *See* CP 127, 134-36)

The trial court understood that Kennard's decision to wait until the children were no longer dependent to pursue adjustment prevented Lee from pursuing that relief. (CP 379: "[Lee] cannot retroactively seek adjustment of child support. [Lee] had the right to prospectively seek modification of child support while the children were dependent but no longer has the right because child support may not be retroactively modified.") The trial court also acknowledged that in any event, Lee could not "retroactively alter the amounts [he] already paid" for the children's support beyond his court-ordered obligations, including transfer payments Lee made to Kennard when the older son was no longer living with her. (CP 379) Finally, the trial court noted that Lee had "made prospective retirement investment decisions during the years 2003-2011. Uncontroverted evidence established that a COLA enforcement judgment would result in a substantial loss of Petitioner's retirement (401k) savings." (CP 379)

Kennard claims that it was only "speculative" that Lee would have obtained any relief had he sought to reduce his child support obligation. (Kennard Br. 23) But there is nothing "speculative"

about the fact that Lee would not have been required to pay child support directly to Kennard for the older son while the son was in college, living on campus, and Lee was paying for the majority of his post-secondary expenses. (See CP 117: “Support shall be paid in the amount of \$875 per month per child, until each child reaches age 18 or, if either child goes to college and continues to live a home, as long as the particular child remains at home after age 18.”) Further, there was undisputed evidence that the daughter primarily resided with Lee during her senior year of high school, and Lee could have, but did not, pursue child support from Kennard for that period. *Marriage of Holmes*, 128 Wn. App. 727, 738, ¶ 25, 117 P.3d 370 (2005) (regardless of the parents’ incomes, the parent with whom the child does not live primarily is liable for child support).

In any event, Kennard is wrong when she claims that Lee was required to prove an action taken or not taken in “detrimental reliance” on her unreasonable delay in pursuing enforcement of the maintenance escalator. (Kennard Br. 30-32) Whether the party asserting an equitable defense to enforcement “change[d] his position or refrain[ed] from performing a necessary act to such person’s detriment” is an element of equitable estoppels, not laches. *Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176 (1984).

Instead, under the doctrine of laches, Lee only had to prove that he was damaged as a result of Kennard's delay. *See Dicus*, 110 Wn. App. at 357-58 (setting forth the elements of a laches defense).

In concluding that laches barred retroactive enforcement of the maintenance escalator, the trial court properly recognized that a party cannot "strategically sit" on the right to adjust maintenance in order to obtain a large retroactive judgment years later. This case is not like those where courts have held that a party is not damaged "simply by having to do now what he was legally obligated to do years ago." *See Marriage of Sanborn*, 55 Wn. App. 124, 128, 777 P.2d 4 (1989) (Kennard Br. 28); *Marriage of Hunter*, 52 Wn. App. at 27 (Kennard Br. 28), *rev. denied*, 112 Wn.2d 1006 (1989); *Marriage of Capetillo*, 85 Wn. App. 311, 932 P.2ds 691, *rev. denied*, 132 Wn.2d 1011 (1997) (Kennard Br. 27). In each of those cases, the obligor failed to pay a court-ordered obligation for a specific amount. In this instance, it is undisputed that Lee paid his court-ordered obligations regularly, and paid more than he was obligated in child support.

The maintenance escalator was not self-executing, as Lee's maintenance obligation could not have been adjusted absent court action. *See Marriage of Kahle*, 134 Wn. App. 155, ¶¶ 14, 15, 160,

138 P.3d 1129 (2006) (holding that an automatic periodic adjustment of child support is not self-executing and is not enforceable without court order). Thus, between 2000 and 2011, Lee paid all that he was required to pay absent a court order changing his maintenance obligation. Kennard knew that she could have sought to enforce the escalator during that entire period, but declined, accepting the payments in the amounts set forth in the separation agreement, and benefitting from Lee's agreement to pay more support for the children. (See CP 127: "You also know I have never asked for the cola increase for which I was eligible" (2/25/2004); CP 135, 136: "I don't recall that the cola was predicated on anything. However, I have never asked for an increase anyway, despite the fact that I thought it possible. [] Anyway, I didn't ask for a COLA." (7/20/2007)) The trial court properly acknowledged that Lee would in fact be damaged by entry of an unjustifiable judgment for over \$375,000 that Kennard seeks in claiming she was entitled to pursue retroactive enforcement of the maintenance escalator.

IV. CONCLUSION

This Court should reverse and remand to the trial court to vacate the judgments awarded against Lee for maintenance and

attorney fees because the separation agreement was unfair and should not be enforced. If this Court holds that the agreement is enforceable, it should affirm the trial court's decision that retroactive enforcement of the escalator is barred by laches, vacate the attorney fee award because Kennard was not the prevailing party, and remand for recalculation of maintenance applying the change in the CPI for only the three years prior to Kennard's 2011 motion. Finally, this Court should award attorney fees to Lee on appeal.

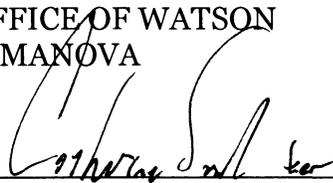
Dated this 20th day of February, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 20, 2015, I arranged for service of the foregoing Reply Brief of Appellant Lee/Cross-Respondent's Brief, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 20th day of February, 2015.



Victoria K. Vigoren