

No. 71714-6-I.

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GABRIEL Y. LEE, Appellant

v.

CAROL ANN KENNARD, Cross Appellant

REPLY BRIEF OF CROSS APPELLANT

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STATE OF WASHINGTON
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H. Michael Finesilver (f/k/a
Fields)
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

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I. Reply To Cross Response Argument Regarding Dr. Lee's Appeal

A. The Scope of the Mandate Precludes The Laches Defense.

Dr. Lee misstates Ms. Kennard's position on this matter at pages 3 and 7.¹ She did not argue that the mandate unconditionally requires enforcement and an award of attorney fees. She argues that the mandate limits Dr. Lee's defenses to those that "set aside" the maintenance escalator provision of the decree of dissolution. Thus, the directive to the remand court contained in *In re Marriage of Rockwell*, 157 Wa App 449, 238 P.3d 1184 (2010) is fundamentally different from the one here.

In *Rockwell, supra* this court clarified the mandate of *In re Marriage of Rockwell*, 141 Wa App at 255, 170 P.2 572 (2007); to wit, that once the remand court properly characterized the pension, it was not bound by its original 60/40 split of property, given its broad discretion under RCW 26.09.080. *In re Marriage of Rockwell supra* at 453 (2010).

That is quite different from the mandate here which limits Dr. Lee's defenses on remand only to those which "set aside" the maintenance

¹ All references in the text of this brief to page numbers refer to those contained in the response brief filed on behalf of Dr. Lee to which this brief replies.

escalator provision. The remedies available that justify setting aside a judgment entered over 14 years ago are governed by CR 60(b).

Dr. Lee argues at page 5 that the judgment being void is not within the scope of the mandate and that he had no opportunity to raise either the laches or unconscionability defenses pursuant to the original proceeding that led to the first appeal in this case. The mandate does not preclude an attack based upon voidness, which as pointed out in Ms. Kennard's response brief, he attempted to do so by urging a theory as to lack of subject matter jurisdiction and due process, all rejected by the remand court and abandoned by him on this appeal.

Nothing precluded him from raising the laches or unconscionability defense in the original proceeding. He chose not to do so, although he raised the laches defense for the first time on that appeal over objection.

The argument made on behalf of Ms. Kennard at page 16 of her response brief that the scope of the mandate precludes the laches defense is accurate, notwithstanding what may have been said at page 10, since a successful laches defense does not set aside the escalator provision. The aim of a CR 60(b) motion, to vacate or reopen a judgment, is tantamount to setting it aside, as observed by our State Supreme Court in *In re*

Marriage of Jennings, 138 Wa 2d 612 at 618, 980 P.2d 1248 (1999) in which it quoted the language of the trial court's order granting a CR 60(b)(11) motion which was affirmed. See *Jennings* supra at 628 (1999).

B. RCW 26.09.070 Does Not Repudiate The Common Law Doctrine of Merger Nor Did The Decision In This Case

Dewberry v. George 115 Wa App 351, rev. denied, 150 Wa 2d 1006 (2003) is inapposite because it did not involve a post decree attack as here. The court explained that the two pronged test of fairness did not apply to the parties' oral agreement because it did not govern how property was to be distributed, upon demise of the relationship. The agreement merely characterized property. The court observed that it did meet the standards of both substantive and procedural fairness. *Dewberry* supra at 364-365 (2003).

Dr. Lee argues RCW 26.09.070 (6), by implication, repudiates the common law doctrine of merger announced in prior cases cited in Ms. Kennard's response brief handed down prior to its enactment in 1973. However case law and the statute itself dictate otherwise. The doctrine of merger has been held to apply post decree in cases handed down since enactment of the statute.

In 2008, the Court of Appeals adhered to the doctrine of merger as it construed the effect of RCW 26.09.070 (3) and (7) holding that a post decree attack as to the fairness of an agreement merged into a decree is time barred. *In re Marriage of Hulscher*, 143 Wa App 708 at 717, 180 P.3d 199 (2008). This court observed that it did not overrule *Hulscher* supra. (**Appendix 1**).

The response brief infers at p.16 that the language precluding the attack as being time barred is dicta. The time barred language is clearly the holding of the case. The court noted that Mr. Hulscher raised the issue of fairness before the trial court, post decree, as he attempted to avoid a non-modifiable maintenance provision. *Hulscher* supra at 716 (2008). That the trial court did not resolve the fairness issue and no record was made on appeal are of no moment since Mr. Hulscher raised it on appeal and the court of appeals decided the issue: “Nevertheless, even if the record permitted us to determine whether the non-modifiable spousal maintenance provision was unfair at execution, the argument still fails.” *Hulscher* supra at 717 (2008).

The court’s reasoning and holding are particularly instructive, given Lee’s argument that sub-section 6 provides an independent basis for

circumventing the doctrine of merger, allowing a post decree attack based upon unfairness and unconscionability:

“...[i]f such a challenge were to be allowed years later ... the provisions of RCW 26.09.070 (3) and (7) would be rendered meaningless. (citation omitted). Consequently, Martin’s claim that the spousal maintenance provision was unfair at the time of execution **is thus time barred** (emphasis supplied). *Hulscher* supra at 717 (2008).

Consistent with that rationale, our State Supreme court, nine years earlier squarely faced whether the issue of fairness could be raised from a decree provision from which no appeal had been taken. “In this court, Homer argues that ... the provisions of the agreements ... are unfair.” *In re Marriage of Moody*, 137 Wa 2d 979 at 987, 976 P.2d 1240 (1999). The court held that the issue of the unfairness of an agreement merged into a decree of dissolution cannot be raised in a post decree motion. It can only be raised on appeal of the decree. See, *In re Marriage of Moody*, supra at 991 (1999).

Division II of the Court of Appeals relied upon the doctrine of merger in *In re Marriage of Yearout*, 41 Wa App 897, 900-901, 707 P.2d 1367 (1985) relying upon *Mickens v. Mickens* 62 Wa 2d 876, 385 P.2d 14 (1963) and *Millheisler v. Millheisler*, 43 Wa 2d 282, 261 P.2d 69 (1953), wherein the State Supreme court observed: “From an examination of the

record we can readily understand why appellant might now feel that he had been unduly generous, but it is his contract and the court should not make another one for him.” *Millheisler* supra at 288 (1953) citing the doctrine of merger as the reason. That is precisely what Dr. Lee is attempting to do here.

None of the cases handed down after the enactment of RCW 26.09.070, construe RCW 26.09.070 (6) because that subsection is limited to judgment and contract enforcement remedies. It makes no reference to contract defenses whatsoever. The only subsections of RCW 26.09.070 related to contract defenses to enforcement is the reference to unfairness being raised before entry of the final decree under RCW 26.09.070 (3).

A legislative intent to change or repudiate the common law will not be found unless it appears with clarity from the language of the statute. *McNeal v. Allen*, 95 Wa 2d 265 at 269, 621 P 2d 1285 (1980). The court is to give effect to all statutory language, considering each provision in relation to the other. *King County v. C.P.S.G. Mgmt Hearings Bd.* 142 Wa 2d 553, 560, 14 P.3d 133 (2000). Unlikely, absurd or strained consequences are to be avoided when construing a statute. *Glaubach v. Regence Blueshield*, 149 Wa 2d 827, 833, 74 P.3d 115 (2003).

Where the legislature has not expressed an intention to change existing common law, and where language of a new act is consistent with past policy, appellate courts will presume that the Legislature intended to continue that policy. *In re Marriage of Little*, 96 Wa 2d at 194, 634 P.2d 498 (1981). See also, *In re Marriage of Possinger*, 105 Wa App 326 at 334, 353 P.2d 417 (1960).

A prime example in the family arena was the adoption of the child relocation act in 2000 RCW 26.09.420 through 540. There the legislature expressly repealed the common law standard for determining whether a parent could relocate with a child, pre decree (*In re the Marriage of Littlefield*, 133 Wa.2d 39, 940 P.2d 1362 (1997) and post decree, (*In re the marriage of Pape* 139 Wa 2d 694, 989 P.2d 1120 (1999). See historical and statutory note under RCW 26.09.405.

Interpretation of the intended scope of RCW 26.09.070 (6) is also governed by the following rule of statutory construction: “Expressio unius est exclusio alterius”: “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969). *State v. Swanson*, 116 Wash. App.

67, 75, 65 P.3d 343, 347 (2003). Since sub-section 6 makes no reference to contract defenses, it should be assumed that the legislature did not intend sub-section 6 to be a vehicle to subvert the doctrine of merger, especially reading RCW 26.09.070 as a whole.

This conclusion is consistent with Sub-section (3). The provision states: "...the contract, except for those terms providing for a parenting plan for their children, **shall be binding upon the court** (emphasis supplied) unless it finds ... that the separation contract was unfair at the time of its execution." Contrary to what Dr. Lee argues, it was not the obligation of the dissolution court to find the agreement fair prior to adopting it in a decree of dissolution. The duty of the trial court, incident to entry of the decree of dissolution, is exactly the opposite: to incorporate the separation contract into the decree of dissolution unless it finds it unfair at the time of entry. See RCW 26.09.070 (3). Thus, subsection 3 contemplates that the party believing it to be unfair when entered into must bring the issue to the attention of the trial court before the court entered its final decree.

There are contract defenses that have the effect of setting aside a provision of a decree of dissolution, unfairness, unconscionability, and laches are not among them. They are fraud under CR 60(b)(4) and mistake

under CR 60 (b) (1). Dr. Lee relies upon *In re Partnership of Rhone/Butcher*, 140 Wa App 600, 166 p.3d 1230 (2007) which involved a mistake as to whether unmarried partners in a committed intimate relationship could divide a pension through a Qualified Domestic Relations Order. The response brief filed on behalf of Kennard inaccurately described the case as involving reformation of an agreement incident to entry of the final decree of equitable distribution. That misreading is of no significance since the court of appeals affirmed reformation of the award in a post decree proceeding contained based upon mutual mistake of the law. Neither party raised the issue of whether a CR 60 motion should have been brought, but the issue clearly fell within the scope of CR 60 b (1) had the aggrieved party done so. Any reference to RCW 26.09.070 (6) was dicta, since that statute only applies to married persons seeking a decree of legal separation or marital dissolution.

C. The Spousal Maintenance Provision Is Not Unconscionable Since One-Sided Provisions of Contracts Are Not Per Se Unconscionable

To make out a case for substantive unconscionability a showing that an agreement is one-sided is insufficient. For example, “A unilateral provision in an arbitration agreement is substantively unconscionable only if it is shown that the disputed provision is so ‘one-sided’ and ‘overly

harsh' as to render it unconscionable. *Zuver*, 153 Wa 2d at 319 n.18, 318, 103 P.3d 753....” *Satomi Owners Assoc. v. Satomi LLC*, 167 Wa 2d 781 at 815, 225 P.3d 213 (2009). Thus, to be substantively unconscionable the provision must first be unilateral, and if so, both one sided and overly harsh.

In *Satomi*, the obligation to arbitrate was unilateral since only one party to of the contract was bound by it: the consumer. Dr. Lee argues the contract here contains a provision if one “portion” of the contract is deemed invalid by a court the other “parts” remain in full force in effect, (CP 67). Neither a “portion” nor a “part” of a contract equate to a contract “provision”. The escalator clause is only one provision among several, in the portion of the contract specifying explicit exceptions to the non-modifiable spousal maintenance provision. Several of them inhere to the benefit of Dr. Lee.

“If Carol should find employment, maintenance shall be reduced one dollar for every two dollars...

“...If the husband’s salary is reduced due to involuntary reduction of salary or full-time equivalent, spousal maintenance shall reduce proportionately...

“If husband becomes disabled temporarily or permanently, partially or completely, then spousal maintenance will be reduced proportionate to the reduced disability income.

“If the husband changes employment involuntarily due to termination by Group Health for any reason, then

spousal maintenance shall be the lesser of one-half of husband's new income pre-tax or \$9,000, plus accumulations for CPI adjustments." (CP 39-41)."

These adjustment provisions as specific exceptions to the non modifiability provision are to Dr. Lee's benefit. Therefore, the portion of the agreement related to maintenance adjustments is not unilateral and not harsh. Therefore, the escalator provision is not unconscionable.

Finally, unlike the statute which limits the fairness question to the circumstances of the parties when the contract was executed, determination of whether a contract is substantively unconscionable depends upon the effect on the affected party when the contract is to be enforced. Whether a requirement to arbitrate under a debt adjustment contract was unconscionable in substance depended upon whether the customer could prove the arbitration process would impose "prohibitive costs". *Adler v. Fred Lind Manor*, 153 Wa2d 331 at 353, 103 P.3d 773 (2004). Where the customer proved that she "...struggles financially ... and the costs of arbitrating in California would exceed her claim, sufficient evidence was presented to make a prima facie case for a prohibitive-cost defense." *Gandee v. LDL Freedom Enterprise Inc.* 176 Wa 2d 598 at 604, 293 P.3d 1187 (2013).

Here Dr. Lee failed to present any evidence that he could not afford to pay what he owes, because he failed to produce his last six months bank statements, brokerage statements, 401 k statements, income statement or his 2012 or 2013 tax returns as required by King County Local Rule 10. Since he failed to provide evidence as to whether the escalator provision was overly harsh or shocking to the conscience at the time of enforcement, at the remand hearing, he failed to prove unconscionability. Since he had control of that information and failed to produce it, the court should determine that he has the ability. See *In re Marriage of Bucklin*, 70 Wash.App. 837, 855 P.2d 1197 (1993) where ex-husband's petition to modify child support was denied because he failed to provide evidence of his income tax returns and business records.

D. Dr. Lee Is Not Entitled To Modify His Obligation As Of October 2011 By A Recalibrated C.P.I. Escalation Obligation Effective As Of 2008 Since His Maintenance Obligation Is Non-Modifiable.

The laches defense did not change what was due as of October 2011 when Kennard moved to enforce or in December 2013 when he raised the defense in December 2013. Dr. Lee's counsel conceded as much in oral argument. Dr. Lee does not deny that what was due was 30% of the original \$9,000 maintenance obligation as of October 2011 and

34.88% as of the December 2013 remand hearing. To impose only the most recent increase as of 2008, as urged by Dr. Lee, would modify the obligation. Maintenance is non-modifiable by the terms of the decree into which the provision of the agreement is merged.

Modification of a right under a court order is defined as an increase or decrease from what constituted that entitlement. For example: “A modification of visitation rights occurs where the visitation rights given to one of the parties is either extended beyond the scope originally intended or where those rights are reduced, giving the party less rights than those he originally received.” *In re Marriage of Christel and Blanchard*, 101 Wash.App. 131 P.3d 600 (2000). The remand court properly rejected his contention because it would be a modification of his non-modifiable maintenance obligation as to what was due when the remand hearing occurred.

E. The Attorney Fees Award Was Necessitated By The Mandate And Justified Under RCW 26.18.160.

Dr. Lee argues at page 24 that Kennard was not a prevailing party under RCW 26.18.160 because he was not found in contempt and was not ordered to pay the majority of what ostensibly was past due maintenance prior to her filing her motion to enforce. RCW 26.18.160 does not require

a finding of contempt for fees to be awarded. There was no finding of bad faith on her part that was a necessary prerequisite under the statute for Dr. Lee to recover.

His argument is that the judgment for what was due from October 2011 to December 2013 when the remand hearing occurred, and for what will be owing in the future that he hoped he would not have to pay does not justify her being considered the prevailing party. The obligation will go on for several more years until he retires an amount in the aggregate that cannot be presently quantified. She clearly was the prevailing party for purposes of RCW 26.18.160.

However, even if she had not been, she is nevertheless entitled to her costs and fees because Dr. Lee did not succeed in accomplishing what was required of him by the mandate to avoid paying attorney fees and costs. A successful laches defense does not set aside the provision. It merely prevents partial enforcement. Thus, the remand court properly awarded her all of her fees because the mandate from this court required it to do unless Dr. Lee could succeed in setting the entire agreement aside, which he failed to do.

II. Reply Argument to Cross Response re: Ms. Kennard's Appeal

A. The trial court did not find the agreement to be unconscionable in substance.

The remand court did not determine the agreement to be unconscionable. His analysis of case law as to the justifications for spousal maintenance ignore numerous cases in which maintenance is awarded on a virtually permanent basis or even where the spouse awarded maintenance is self supporting. See, *In re Marriage of Wilson* 117 Wa App 40, 68 P.3d 1121 (2003), *In re Marriage of Morrow* 53 Wa App 579, 770 P.2d 197 (1989), and *In re Marriage of Washburn* 101 Wa 2d 168, 677 P.2d 152 (1984). The brief at page 27 cites *Cleaver v. Cleaver* 10 Wa App 14, 20, 516 P.2d 508 (1973), but rendered in 1972, a year before RCW 26.09.090 was enacted for the proposition that a spouse is not entitled to an award commensurate with the lifestyle established during the marriage. RCW 26.09.090(1)(c) requires a trial court to consider “The standard of living established during the marriage.”

Nor was there any evidence that Ms. Kennard could live off her property division without any spousal maintenance as argued at page 26. Her health prevented meaningful employment. (CP 195). Dr. Lee’s initial brief emphasized that Kennard received 86% of an estate worth less than

\$300,000 including the family home. She obviously could not survive without spousal maintenance.

Nor did the evidence show that the escalator clause enabled her to keep up with his increases in income as argued at page 27. Were that the case, her increases would have been based upon his increases in his income (over 90%) as of September 2010 rather than the CPI (about 30%) as of 2011.

B. The Trial Court Abused Its Discretion In Granting To Dr. Lee Financial Relief Where He Failed To Supply Current Financial Records Required By KCFLR 10.

Compliance with KCFLR10 did not relate to balancing the parties' financial circumstances as argued at page 28. Kennard never argued that it did. There is nothing in the record to indicate that the remand court "waived" KCFLR 10. The response brief relies upon *Raymond v. Ingram*, 47 Wa App 781, 737 P.2d 314 (1987) for the proposition that there is a presumption that if the court waived a local rule it did so for good reason and injustice must be shown. If the remand court waived the rule, the question is whether doing so constituted an abuse of discretion.

Raymond supra, involved a local procedural rule that required a party who seek the same relief as before to reapply to the same judge. KCFLR 10 is not a procedural rule. It mandates the documentary evidence

required before a party can obtain financial relief pertaining to spousal maintenance. (CP 165-166).

The response brief argues that the damages question is what he owed as of when Ms. Kennard filed in 2011 (page 28). Kennard argues that what he owes is not damages cognizable by a laches defense as a matter of law. If it is, the issue is whether he was damaged as of when he raised the laches defense, which was at the December 2013 remand hearing. Absent compliance with KCFLR 10, the court could not determine what portion, if any, of his 401(k) would be necessary to pay what he owes. An injustice was done to Kennard, since Dr. Lee's damages claim that he could only pay by liquidation of his 401 k could not be known unless the comprehensive concurrent financial disclosures required by the rule had been met. Thus it was an abuse of discretion to grant the motion for summary judgment as to laches.

C. Kennard Did Not Treat Her Motion As One For Summary Judgment; She Was Following The Directive Of This Court's Mandate.

The response brief argues at page 30 that Ms. Kennard's position was that there are no material issues of fact and that she is entitled to a judgment as a matter of law. That is only accurate as to amount of the past due judgment that she sought. It is inaccurate as to his motion for

summary judgment. Kennard's response brief submitted numerous specific material factual disputes with what Dr. Lee presented.

D. Case Law Does Not Compel The Conclusion That Ms. Kennard's Delay Was Unreasonable.

At page 31 the response brief cites two cases. *In re the Marriage of Ayyad*, 110 Wa App 462 at 471 f.n.3, 38 P.3d 1033 (2002) involved whether a child support modification under RCW 26.09.170 would be imposed retroactively. There was no laches defense pled, so the language at footnote 3 is pure dicta. A trial court can do so as of when the petition for modification is filed under RCW 26.09.170(1).

The other case, *In re Marriage of Dicus*, 110 Wa App 347, 40 P.3d 1185 (2002) is instructive because it supports Ms. Kennard's position in two respects. It required a showing of actual, not speculative damage, which Ms. Dicus proved: "Thus, Ms. Dicus expended money she should have received from Mr. Dicus and spent time and money defending an enforcing the child support obligation." *Dicus supra* at 358 (2002).

The case followed *In re Marriage of Capetillo*, 85 Wa App 311, 932 P.2d 691 (1997) as to the elements of a laches defense. *Dicus supra* at 357 (2002). Whether Ms. Dicus relied on his delay was not an issue raised

on the appeal. However that there is a reliance element was established in *Capetillo* supra at 318 (1997).

E. Failure To Set An Evidentiary Hearing Where Genuine Material Issues of Fact Existed Is Required By CR 56(d)

At page 32 the response brief cites KCLFR 6 (g) (2) and *In re Marriage of Rideout*, 150 Wa 2d 337 at 352, 77 P.3d 1174 (2003), for the proposition that the remand court acted within its discretion not to set a hearing on oral testimony since Ms. Kennard did not request one. The distinguishing factors are that *Rideout* supra did not involve a motion for summary judgment. KCLFR 6 (g) (2) requires a request by a party that does not bind the court to allow oral testimony even if the parties stipulate that it occur. However that rule does not pertain to motions for summary judgment.

CR 56 has a specific requirement as to what a trial court must do if it denies a motion for summary judgment in whole or in part. CR 56(d) imposes the following obligation on the court: "... the court...shall if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order ...Upon the trial of the action, the facts so specified shall be deemed established, and the trial

shall be conducted accordingly.” The rule does not qualify this duty of the court by some pre-condition that a special request for a trial on oral testimony to occur. Ms. Rideout had the obligation to do so because she opposed a motion for contempt. Ms. Kennard had no obligation to do so because Dr. Lee filed a motion for summary judgment.

As to whether there were genuine issues of material fact, Dr. Lee argues as if the 2004 and 2007 emails are the beginning and the end of the story. Kennard’s requests for Dr. Lee to pay and his protests that he could not afford it were by oral communications after 2004 “...for several years.” (CP 197).

Nor do the emails of 2004 and 2007 confirm, as Dr. Lee argues, at page 37, that he would have sought modification of child support had Kennard pursued enforcement of the maintenance escalation clause. In the 2004, exchange Dr. Lee’s email did not say that if she insisted on the COLA he would seek a modification. He made no mention of any court action. (CP 135)

In 2007, he wrote her exactly the same thing he wrote in 2004 which is in bold face. (CP 136). She explains all things she’s done for the children financially including the costs of extensive repair of the roof she provided them. (CP 135) The entire balance of the email describes her

adverse financial circumstances, the poor state of her health at age 60. (CP 136). None of the emails reflect an intention by Dr. Lee to pursue a child support modification action if she were to seek enforcement.

Finally the argument at page 40 of the response brief that under *In re Marriage of Kahle*, 134 Wa App 155 at 160 138 P.3d 1129 (2006) the child support obligation could not be “adjusted” absent a court order.

That is true since child support is always modifiable even if parties agree to never modify it. Such agreements are void for public policy reasons. See *Pippins v. Jenkelson* 110 Wa 2d 475, 754 P.2d 105 (1988). *Kahle* supra involved the propriety of retroactively modifying a child support obligation which is authorized under RCW 26.09.170 (1). Here, the maintenance escalator clause is self-executing in the sense that it cannot be modified because maintenance is non-modifiable by the terms of the decree of dissolution. Thus, the maintenance escalator CPI tri-annual adjustments are non-modifiable. To recalibrate the interest due as of October 2011, as Dr. Lee argues constitutes a modification; relief to which he is not entitled by the terms of the decree.

III. Conclusion:

This court, in a published opinion, relied upon *In re Marriage of Hulscher*, supra, which upholds the common law doctrine of merger.

Thus, its mandate requires the remand court to award a judgment for all past due spousal maintenance owed and attorney fees, including on this appeal, unless Dr. Lee could “set aside” the provision of the decree into which the provision of the separation agreement was merged in 2000. This court clarified that it did both relied upon and did not overrule *Hulscher supra*.

Dr. Lee did not file a CR 60(b) motion to set aside the escalator provision upon remand. Instead he filed a motion for summary judgment. He sought to void the provision based upon theories of lack of subject matter jurisdiction and other constitutional due process arguments, rejected by the remand court and abandoned on this appeal. His other arguments should have been rejected by the remand court as well because they are either precluded by the doctrine of merger and RCW 26.09.070 or do not set aside the provision.

Case law squarely precludes a challenge to the fairness of the agreement since that issue had to have been raised prior to entry of the decree in 2000. He concedes that all aspects of procedural fairness were met, as found by the remand court. He was fully advised by his current lawyer, before he signed. He does not challenge that finding on this appeal. Therefore, since he was represented and fully advised, his only

avenue as a contract defense, would have been to raise the issue of substantive unconscionability prior to entry of the final decree in 2000. He failed to do that as well.

The doctrine of merger precludes it being raised now 15 years after the fact. Even if it were cognizable, the portion of the decree carving out specific exceptions to spousal maintenance being non-modifiable, are one that require adjustments tri-annually based upon the CPI, and numerous others, which reduce the entire monthly maintenance obligation in various circumstances if there were to be reductions of his income through no fault of his own. Thus, the portions of the decree that order these upward and downward adjustments are therefore neither unilateral nor harsh. The “agreement” is not unconscionable.

The laches defense should have been rejected because it does not have the effect of setting aside the provision as required by this court’s mandate. From the time of the first of the four intervening tri-annual adjustments, in 2003, the first of which increased the maintenance obligation by only \$872.10 per month (CP 141), Kennard asked Lee to pay and he told her he could not afford the increase. She asked for proof and he refused to provide it. This occurred for several years.

It was not until 2011, when Dr. Lee had to supply financial information in the enforcement proceeding below that Kennard first discovered that Dr. Lee was earning \$42,000 per month as of September 2011. He purposely failed to pay the increased obligation not because he could not afford to, but rather because he did not like the obligation to which he agreed as part of the decree of dissolution. Kennard depended upon that maintenance because her health and eventually her age prevented her from being self supporting. Case law expressly does not permit a reformation of his own deal eleven years after the decree was merged and entered when she first sought enforcement.

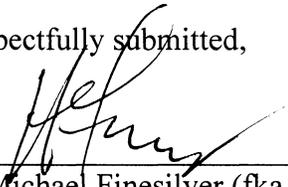
If a laches defense were cognizable on remand, it should have been denied since Kennard's reliance was reasonable given his years of saying I can't afford it. His damages claim does not fulfill the legal definition of damages nor did he prove reliance on her delay. A judgment for the full amount should have been entered.

As to what was owed as of December 2013, when the hearing occurred, the remand court properly calculated the amount as to what cumulatively was owing, rather than use a recalibrated amount, effective 2008 as urged by Dr. Lee, since the obligation going forward is non-modifiable maintenance. The award of fees was proper, not merely

because Kennard prevailed under RCW 26.18.160, but because Lee did not succeed in setting aside the escalator provision, the only basis, under this court's mandate, that attorney fees were to be denied including on this appeal.

DATED this ____ day of March, 2015.

Respectfully submitted,

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

H. Michael Finesilver (fka Fields)
Attorney for Appellant
W.S.B.A. #5495

Appendix 1

3-20-14

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

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

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

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

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

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

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

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

Done this 20th day of March, 2014.

Schindler, J.

Appelwick, J.

Becker, J.

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

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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

March 20, 2014

H. Michael Finesilver
Attorney at Law
207 E Edgar St
Seattle, WA, 98102-3108
les@a-f-m-law.com

Janet M. Watson
Law office of Watson & Toumanova
108 S Washington St Ste 304
Seattle, WA, 98104-3406
info@seattlefamilylaw.net

CASE #: 68266-1-1

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

Counsel:

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

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

enclosure

Les Feistel

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

RICHARD D. JOHNSON
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

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

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

Thank You!!

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

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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

DECLARATION OF
SERVICE

FILED
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 STATE OF WASHINGTON
 2015 MAR 25 PM 4:33

I, Amy Fields, state and declare as follows:

I am a Law Clerk in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 5th day of January, 2015, I placed true and correct copies of the corrected Table of Authorities and pages 37, 42 and 43 of Reply Brief of Cross-Appellant to the Court of Appeals with Seattle Legal Messengers for delivery on March 25, 2015 to:

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

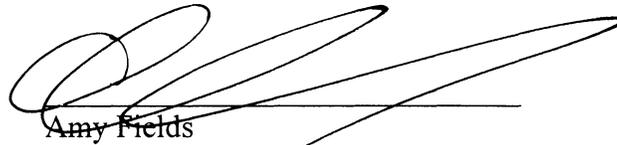
And

Catherine W. Smith
 1619 8th Avenue North

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

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

DATED at Seattle, Washington, on this 25th day of March, 2015.



Amy Fields

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