**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| MARI CARROLL, | ) | No. 59891-1-I |
| | ) | |
| Respondent, | ) | DIVISION ONE |
| | ) | |
| v. | ) | |
| | ) | |
| THOMAS ELZEY, | ) | UNPUBLISHED |
| | ) | |
| Appellant. | ) | FILED: August 25, 2008 |
| | ) | |
| | ) | |

Cox, J.—This is an action for partition of property that Mari Carroll claims was neither disclosed nor distributed at the dissolution of her marriage to Thomas Elzey in January 1996. She claims an interest in that undistributed property as a tenant in common as well as attorney fees.

We hold that the trial court properly determined that the property at issue in this case was subject to partition to Carroll and Elzey as tenants in common. Laches does not bar her claim. Moreover, the court did not abuse its discretion in either valuing the property at the times chosen or awarding attorney fees to Carroll. We affirm.[1]

In the early 1990s, the marital community of Carroll and Elzey, then husband and wife, owned a one-third interest in Alexander Hutton, Inc. (AHI), an investment banking corporation. Michael Sherry, David Fitterer, and their

[1] We deny Carroll's June 12, 2008 motion to strike the additional authorities that Elzey filed and served.

respective marital communities owned the remaining two thirds of AHI.

Between March and July of 1994, Elzey met with Kent Johnson to discuss the formation of a broker-dealer firm to be owned by Johnson and AHI. Soon thereafter, Johnson and the male AHI owners began developing that business. The owners selected Alexander Hutton Capital (AHC) as the name for the new business. AHC would not have been formed without AHI and its name and reputation.

AHC conducted business in a variety of legal forms, starting as a partnership. It later became a corporation, then a partnership again, and finally a limited liability company (LLC).

Carroll petitioned for dissolution of her marriage with Elzey on July 1, 1994. At that time, she and Elzey still owned a one-third interest in AHI. They held that community interest until entry of the decree of dissolution in January 1996.

During the dissolution proceeding, Carroll sought discovery from Elzey and AHI that was designed to discover any interests Elzey or the community might have in stock, partnerships, corporations, subsidiaries, and other business entities or assets. It is undisputed that Elzey did not disclose any information about AHC when responding under oath to the written requests. He stated in his responses that he had no separate property. He neither supplemented his responses nor provided any documents relating to AHC or its business.

Throughout the period of the dissolution proceeding and thereafter,

Johnson and the male AHI owners continued to meet and develop AHC business. After November 1994, they decided that AHC would become a limited liability company and that they would take ownership of it in their individual names. They also decided that Elzey would not initially be listed as an owner because of his then-pending dissolution proceeding. They agreed to delay listing Elzey as an owner and to allow him to buy an interest in AHC, at the founders' price, after his dissolution was final.

On March 7, 1995, AHC became a limited liability company, AHC LLC. Johnson, Fitterer, and Sherry took ownership in their individual names, as planned. Sometime prior to the January 1996 dissolution of the marriage of Carroll and Elzey, AHC LLC obtained the business opportunities of Yellow Pages on the Internet (YPI) and F5 Labs (F5). These opportunities were brought to AHI by Sherry and Johnson and transferred to AHC LLC.

AHC LLC worked to infuse capital to YPI. The AHC members were given the opportunity to purchase YPI stock, proportional to the members' interest in AHC. The YPI shares later became stock in InfoSpace, giving the AHC members an interest in later highly successful litigation against InfoSpace.

AHC LLC also helped F5 with rounds of financing in exchange for warrants to purchase stock. AHC exercised the warrants and divided them among the AHC members. The AHC members, including Elzey, acquired interests in YPI and F5 based on their ownership in AHC LLC.

In October 1995, Elzey and Carroll negotiated a CR 2A property

settlement agreement. A decree dissolving their marriage and approving their settlement agreement was entered on January 9, 1996. The dissolution decree awarded the community interest in AHI to Elzey. It did not address any interests in AHC, YPI, or F5.

On June 1, 1996, Elzey's name appeared of record in AHC LLC files, evidencing fulfillment of the earlier agreement for Elzey to acquire an interest in AHC LLC at the founders' price. Specifically, Elzey acquired a two-ninths interest in AHC LLC by payment to Sherry and Fitterer for their respective one-ninth interests at the previously agreed founders' price.

In 1996 or 1997, prompted by comments about AHC from Elzey, Carroll inquired of Elzey, Johnson, and Fitterer whether she had any interest in AHC LLC. She was told that she had none.

In 2004, Sherry called her and told her she might have an interest in AHC, prompting her further investigation. As a result of this investigation, Carroll commenced this action.

After a bench trial, the trial court concluded that Elzey's interest in AHC LLC was community property up to the time of the dissolution and thereafter became a tenancy in common with Carroll. Based on this conclusion, the court partitioned the property. The court granted further relief with respect to the two other entities at issue in this case as well as attorney fees in favor of Carroll.

Elzey appeals.

## CHARACTERIZATION OF PROPERTY

Elzey argues that the trial court erred in concluding that the interests in AHC, F5, and YPI were community property rather than mere expectancies at the time of the January 1996 dissolution decree. Specifically, he claims that those interests were property acquired after that decree. We disagree.

Upon a dissolution of marriage, all property of the spouses, community and separate, is before the court for disposition.[2] The trial court must make a "just and equitable" distribution of property based upon all the circumstances, including the character of the property as community or separate.[3]

The character of property is determined based on the time of its acquisition and the nature of the funds or credit used to obtain it.[4] All property acquired during a marriage is presumed to be community property.[5] A spouse may overcome this heavy presumption with clear and convincing evidence of the property's separate character.[6] All property acquired after the spouses are living separate and apart is presumed to be the separate property of the acquiring spouse.[7]

---

[2] RCW 26.09.080; Morris v. Morris, 69 Wn.2d 506, 509, 419 P.2d 129 (1966).

[3] RCW 26.09.080; In re Marriage of Pearson-Maines, 70 Wn. App. 860, 864 n.3, 855 P.2d 1210 (1993).

[4] In re Marriage of Sedlock, 69 Wn. App. 484, 506-07, 849 P.2d 1243 (1993).

[5] RCW 26.16.030; Hamlin v. Merlino, 44 Wn.2d 851, 862, 272 P.2d 125 (1954).

[6] Kolmorgan v. Schaller, 51 Wn.2d 94, 98, 316 P.2d 111 (1957).

Property acquired during the marriage has the same character as the funds used to purchase it.[8] Property acquired with community funds or credit is community property.[9] Once the character of property is fixed, it continues until changed by agreement or operation of law.[10]

"Property" that the trial court should allocate upon dissolution includes everything of "exchangeable value" and "every interest or estate" recognized by law.[11] Property can be intangible, such as a business' goodwill,[12] and it may be a future interest, such as unvested stock.[13] But a mere expectancy is not property.[14]

Property not disposed of by a dissolution action becomes property held by the former spouses as tenants in common.[15]

---

[7] RCW 26.16.140.

[8] In re Marriage of Chumbley, 150 Wn.2d 1, 6, 74 P.3d 129 (2003).

[9] Mumm v. Mumm, 63 Wn.2d 349, 352, 387 P.2d 547 (1963); In re Douglas' Estate, 65 Wn.2d 495, 503-04, 398 P.2d 7 (1965).

[10] In re Madsen's Estate, 48 Wn.2d 675, 676-77, 296 P.2d 518 (1956).

[11] In re Marriage of Langham and Kolde, 153 Wn.2d 553, 564, 106 P.3d 212 (2005); In re Marriage of Harrington, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997).

[12] In re Marriage of Luckey, 73 Wn. App. 201, 205, 868 P.2d 189 (1994).

[13] In re Marriage of Short, 125 Wn.2d 865, 871, 890 P.2d 12 (1995).

[14] Harrington, 85 Wn. App. at 624.

[15] Yeats v. Estate of Yeats, 90 Wn.2d 201, 203, 580 P.2d 617 (1978); Olsen v. Roberts, 42 Wn.2d 862, 864, 259 P.2d 418 (1953).

Parties prior to and during marriage have a fiduciary duty to one another in agreements which have been reached between them.[16] A fiduciary duty does not cease upon contemplation of the dissolution of a marriage.[17]

Where a party to a dissolution action clearly and unambiguously asserts in response to interrogatories the nonexistence of a fact of which that party has or should have knowledge, the other party may rely on such statements.[18] The exercise of reasonable diligence does not require a party to look behind the answers.[19]

Unchallenged findings are verities on appeal.[20] We uphold the trial court's findings of fact after a bench trial if they are supported by substantial evidence in the record.[21] We do not review credibility determinations on appeal.[22] We also review findings to determine whether they support the conclusions of law, which we review de novo.[23]

---

[16] In re Marriage of Hadley, 88 Wn.2d 649, 665, 565 P.2d 790 (1977); Friedlander v. Friedlander, 80 Wn.2d 293, 301, 494 P.2d 208 (1972); Hamlin, 44 Wn.2d at 865.

[17] Seals v. Seals, 22 Wn. App. 652, 655-56, 590 P.2d 1301 (1979).

[18] Id.

[19] Id. (citing Kurtz v. Fels, 63 Wn.2d 871, 875, 389 P.2d 659 (1964)).

[20] Miles v. Miles, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

[21] Id.

[22] In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

[23] Ives v. Ramsden, 142 Wn. App. 369, 382, 174 P.3d 1231 (2008).

Elzey assigns error to 65 matters in his brief on appeal. We address only those that are necessary for our decision.

*AHC*

It is undisputed that Carroll conducted formal discovery during the pendency of the parties' dissolution proceeding. Unchallenged Findings of Fact 96 through 102, 104, and 107 through 109 show that Elzey provided written responses, under oath, to those discovery requests and that the responses made no mention of AHC. Elzey neither supplemented his responses to that discovery nor produced any documents relating to AHC in response to the discovery requests. The unchallenged findings also state that he gave sworn testimony at trial that he never disclosed his interest in AHC to Carroll. In fact, he told her during the dissolution proceeding that neither AHI nor their marital community had any interest in AHC.

It is likewise undisputed that the parties negotiated a CR 2A property settlement agreement in the dissolution proceeding based, in part, on the information provided by Elzey in response to Carroll's discovery requests. Both Carroll and the dissolution court relied on the accuracy of Elzey's representations in his responses to the discovery requests in considering the property settlement agreement.

We have no difficulty in concluding that the trial court correctly concluded in this partition action that one third of AHI was the community property of Elzey and Carroll until the decree on January 9, 1996. Likewise, we have no difficulty

in concluding that the trial court correctly determined that AHI owned two thirds of AHC LLC, a separate entity, at the time of the dissolution decree. That finding is supported by substantial evidence.

AHC existed in various forms from its inception in 1994 through the time of the dissolution decree. Initially it was a partnership or joint venture beginning near the time Carroll filed the petition for dissolution in July 1994. AHI acquired a two-thirds interest in AHC at AHC's inception. Thus, the marital community had an interest in AHC from AHC's inception because it was acquired during the marriage with AHI, a community asset. As the unchallenged finding of the trial court indicates, "AHC would not have existed or been formed without AHI and its name and reputation." Accordingly, AHC LLC was an asset that was subject to distribution during the dissolution proceedings.

Our conclusion is bolstered by Elzey's acquisition of an oral option to purchase an interest in AHC LLC at the founders' price following his dissolution. During the dissolution proceeding, Elzey and his partners agreed to change the form of AHC to an LLC and to take ownership of AHC LLC in their individual names. They also agreed that Elzey would not participate as an owner of AHC LLC until the dissolution was final. Once the dissolution became final, he exercised his option, as the prior agreement permitted. The trial court characterized this transaction as Elzey's contractual right to participate in the ownership of AHC LLC after his dissolution was final by paying the founders' price for his "AHI-derived percentage interest" in AHC. This conclusion was

correct.

Elzey argues that this option was not an enforceable contract because it was not supported by consideration. We reject this unpersuasive argument.

Contracts must be supported by consideration, which is a bargained-for exchange of promises.[24] Consideration may consist of an act; a forbearance; the creation, modification, or destruction of a legal relationship; or a return promise.[25] Courts generally do not inquire into the adequacy of consideration, asking instead only whether it is legally sufficient.[26] Consideration is unenforceable under this rule only if it is so inadequate as to be constructively fraudulent.[27]

Elzey had an existing right as an owner of a community interest in AHI to participate in the formation of AHC, an asset of the former entity. Elzey was a general partner in AHC before it became a limited liability company. The agreement to take an option to purchase an interest in AHC LLC following the dissolution proceeding in lieu of the right to immediately purchase an interest is consideration for the other owners' promise to later sell to Elzey at the founders' price. Partnership law requires remaining members of a partnership to

---

[24] Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004).

[25] Huberdeau v. Desmarais, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971).

[26] Labriola, 152 Wn.2d at 834.

[27] Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 314 (1967).

compensate a dissociated partner for the value of his partnership interest.[28] Here, the partners compensated Elzey by giving him the option. Thus, the option was supported by consideration and enforceable.

Unchallenged finding 132 states that the parties fulfilled the prior oral agreement in June 1996. There was consideration to support the promise to sell Elzey an interest in AHC LLC after the dissolution became final.

It is noteworthy that unchallenged finding 45 states that the Cairncross & Hempelmann law firm prepared a conflict letter prior to the dissolution decree seeking permission from Elzey, AHI, and others to represent them when giving "advice to Johnson, Sherry, Fitterer or ***Elzey*** regarding AHC."[29] There would have been no reason for counsel to reference advice to Elzey regarding AHC if he then had no interest in AHC. This observation further supports the conclusion that the marital community had an interest in AHC prior to the dissolution decree.

Elzey argues that AHC LLC did not exist until after the marriage was defunct and that his interest in AHC was therefore his individual property. To the contrary, the trial court's unchallenged findings of fact establish that AHC existed by August 1994 as a partnership or joint venture and that AHI owned two thirds of AHC at that time. A person's interest in a partnership, LLC, or other similar business entity is property for purposes of community property law

[28] RCW 25.05.250.

[29] (Emphasis added.)

because it has exchangeable value and is recognized as an interest by law.[30] Elzey has not argued how AHC's eventual transformation from a general partnership to an LLC alters the legal analysis that Carroll and Elzey had a community interest in AHC from its inception as a partnership and throughout its various forms.

The cases on which Elzey relies do not require a different result. For example, in In re Marriage of Bishop[31] and In re Marriage of Hurd,[32] the courts held that an employee's severance pay earned entirely after the marriage and an anticipated inheritance that might be paid after the marriage, respectively, were mere expectancies and not current property interests to be distributed upon dissolution.[33] Elzey's interest in AHC, however, was not a mere expectancy. It was a current property interest the Elzey and Carroll marital community acquired by virtue of their interest in AHI, making it community property at the time Carroll filed for dissolution and at the time of the dissolution decree.

For these reasons, we conclude that the trial court correctly determined that the marital community of Elzey and Carroll had an interest in AHC LLC at

---

[30] E.g., In re Marriage of Brooks, 51 Wn. App. 882, 889, 756 P.2d 161 (1988).

[31] 46 Wn. App. 198, 201-02, 729 P.2d 647 (1986).

[32] 69 Wn. App. 38, 49, 848 P.2d 185 (1993).

[33] See also Sahin v. Sahin, 435 Mass. 396, 758 N.E. 2d 132 (2001) (discussing valuation of a business that was indisputably community property at the time of dissolution).

the time of the dissolution decree. That asset was not distributed at that time. Therefore, Carroll and Elzey remained tenants in common of that asset after the dissolution decree.

*F5 and YPI*

Elzey next characterizes any interests in F5 and YPI as mere expectancies, not property interests at the time of the distribution of property in the dissolution. We again disagree.

"Property" that the trial court should allocate upon dissolution includes everything of "exchangeable value" and "every interest or estate" recognized by law.[34] Property can be intangible, such as a business' goodwill,[35] and it may be a future interest, such as unvested stock.[36] But a mere expectancy is not property.[37]

F5 and YPI were "works in progress" during the marriage. Although the first stock offering for each did not occur until early 1996, just after the dissolution was final, Johnson testified that it takes an average of three months

[34] Langham, 153 Wn.2d at 564; Harrington, 85 Wn. App. at 624.

[35] Luckey, 73 Wn. App. at 205.

[36] Short, 125 Wn.2d at 871.

[37] Harrington, 85 Wn. App. at 624.

to put together a stock offering. This supports a reasonable inference that the ventures were works in progress during the marriage.

The trial court found that F5 and YPI were business ventures of AHC, and these findings were supported by substantial evidence in the record. Sherry testified that Elzey's and the other members' interests in F5 and YPI directly resulted from their respective interests in AHC. Elzey obtained his interest in F5 and YPI from community property. Thus, the community had an interest in those ventures as community property.

Elzey claims the court erred in not valuing his option to buy in to AHC LLC and the F5 and YPI stock as options that vested after the marriage. The trial court found the purchase option to be similar to a fully vested stock option. In contrast, Elzey feels he continued to earn the right to participate in AHC LLC after the marriage because the option was contingent upon the parties' dissolution actually occurring. The fact that the purchase option was contingent upon the dissolution might have made it unmatured because it could not be exercised until some future date.[38] But it was a fully vested option because it was fully earned and Elzey had an absolute right to exercise the option on that date.[39] It was fully earned because Elzey received it, not in exchange for his labor, but in exchange for his community interest in the AHC partnership.

---

[38] See id. at 625-26 ("If the option cannot be exercised until some future date, but the option-holder has an absolute right to exercise the option on that date, the option is vested and unmatured.").

[39] See id.

Elzey also argues that AHC, F5, and YPI were not property but were mere expectancies during the dissolution. As discussed above, the trial court's unchallenged findings of fact establish that AHC existed by August 1994 as a partnership or joint venture and that AHI owned two thirds of AHC at that time. Later during the marriage, AHC was an LLC, and Elzey had an interest in it for the reasons stated above. A person's interest in a partnership, LLC, or other similar business entity is property for purposes of community property law because it has exchangeable value and is recognized as an interest by law.[40] Thus, the trial court's findings support the conclusion that AHC existed as community property during the marriage and should have been disclosed.

Elzey's stock in F5 and YPI was community property for the same reason, in addition to those discussed above. He has not proven that he received those shares in exchange for his separate labor. Rather, the record supports that he received them based on his community interest in AHC.

Elzey argues that any interest in AHC and its ventures was allocated to him in the dissolution decree "as an aspect of his interest in AHI." This is simply wrong.

The trial court's unchallenged factual findings are that AHC LLC was a separate business entity by the time of the dissolution decree, not a mere "aspect" of AHI. Moreover, the plain language of the dissolution decree does not refer to AHC in any way. It simply was not distributed at that time. The parties

[40] E.g., Brooks, 51 Wn. App. at 889.

remained tenants in common of that property and its ventures as a result.

**DATES OF VALUATION**

Elzey contends the trial court erred in valuing the assets at the time of partition rather than the time of dissolution. We disagree.

Community property that is not distributed upon dissolution is thereafter owned by the former spouses as tenants in common.[41] Tenants in common are

[41] Yeats, 90 Wn.2d at 203, 206.

presumed to own equal shares in the property unless they prove otherwise.[42]

Partition is an action in equity.[43] The trial court has "great flexibility" in fashioning equitable relief for the parties.[44] Washington appellate courts have upheld the trial court's discretion to value the property at the time of the partition action.[45] Regardless of when valued, if one co-tenant improves the property, the trial court has discretion to reimburse him or her for the value of those improvements.[46] The party seeking reimbursement must prove that his or her actions actually increased the market value of the property.[47]

We review a trial court's equitable remedy in a partition action for an abuse of discretion.[48]

Here, the trial court valued the assets at various times subsequent to the date of dissolution and did not credit Elzey with any improvements. This was not

---

[42] Cummings v. Anderson, 94 Wn.2d 135, 140, 614 P.2d 1283 (1980).

[43] Leinweber v. Leinweber, 63 Wn.2d 54, 56, 385 P.2d 556 (1963).

[44] Cummings, 94 Wn.2d at 143.

[45] See Yeats, 90 Wn.2d at 206 ("The nature of the assets at the time of partition is controlling."); Carson v. Willstadter, 65 Wn. App. 880, 884, 830 P.2d 676 (1992) ("common sense and Washington authority" suggest that property in partition actions should be valued at the time of partition).

[46] Leinweber, 63 Wn.2d at 58 (co-tenant could recover "the benefits created by the sweat of his brow (the enhanced valuation realized upon the partition sale)," preventing a windfall to the other co-tenants).

[47] Cummings, 94 Wn.2d at 144-45.

[48] Friend v. Friend, 92 Wn. App. 799, 803, 805, 964 P.2d 1219 (1998).

an abuse of discretion. This is a case in which Elzey made materially false statements in breach of his fiduciary duty to his spouse and abused the discovery process. There is nothing inequitable about the trial court concluding that Carroll should receive 50 percent of the assets of which she has unknowingly been a tenant in common since 1996.

Elzey cites In re Marriage of Monaghan[49] to assert that a business should be valued at the date of dissolution, not partition. Monaghan is distinguishable from this case because it involved the court dividing accounts receivable in the husband's solo dental practice.[50] Thus, any money gained after the dissolution in that case would have been due only to the husband's separate efforts, unlike an investment or business that increased in value due to the efforts of others. Further, Monaghan does not disapprove of supreme court and other cases in which trial courts have exercised discretion in valuing property at another date, such as the date of partition.[51]

The trial court also correctly refused to credit Elzey with improvements to the value of the assets, despite his claim that he has made efforts to increase their value. Without such evidence, he has no basis to object to the distribution of the property held as tenants in common.

---

[49] 78 Wn. App. 918, 929, 899 P.2d 841 (1995).

[50] Id. at 929. The case contains little analysis on this issue and cites no authority for the conclusion that the property must be valued at the time of dissolution.

[51] See, e.g., Yeats, 90 Wn.2d at 206; Carson, 65 Wn. App. at 884.

There is no admitted evidence in this record regarding any efforts Elzey *personally* made to increase the value of AHC, F5, or YPI. During his trial testimony, he testified about his work for AHC very briefly, and only in general terms.

Elzey argues that the trial court misunderstood the nature of a venture capital firm and that he should be credited with AHC's capital raising efforts. He contends that given the work of a venture capitalist and the fact that Elzey worked for AHC, it must be the case that he contributed to the value of AHC, F5, and YPI. To the contrary, there is nothing in the record to suggest that he did.

The only evidence Elzey cites in the record that even arguably supports his argument is attachments to depositions, documents that were not admitted as exhibits at trial. The trial court did not err in refusing to consider this additional evidence. The court requested briefing on the issue but did not request additional evidence. Moreover, those documents only support that Elzey did some general work for AHC, not that he worked on F5 or YPI, and not that his efforts specifically contributed to an increase in the value of AHC. As Carroll notes in her brief, the trial court seems not to have given AHC an independent value, but only awarded damages based on the success of F5 and YPI, as well as proceeds from a judgment in favor of AHC LLC.

Elzey also cites trial court exhibits relating to meetings regarding the InfoSpace litigation. It is difficult to tell how these documents establish that Elzey's efforts led to the litigation's success when they do not cite any work

Elzey personally undertook on the matter. In fact, one of the exhibits he cites represents one member's opinion that Elzey's only contribution to the InfoSpace litigation would be his necessary vote to approve a possible settlement offer. Finally, he cites exhibits that do not refer to him specifically or are completely irrelevant.

Based on this record, it appears that Sherry and Johnson, not Elzey, were primarily responsible for the success of F5 and YPI. The trial court's finding that Elzey did not prove that he increased AHC's value is not, as he argues, inconsistent with its oral finding that Elzey was a rainmaker at the *initial* stages of AHC's formation. In any event, his rainmaking did not bring F5 and YPI to AHC. The efforts of Sherry and Johnson did.

Elzey also argues that he contributed his separate funds to these business ventures. The trial court awarded him the opportunity to brief the issue of reimbursement for funds he may have contributed to the co-tenancy. The trial court found he had not made an appropriate showing and that he was compensated for his efforts through salary.

**LACHES**

Elzey argues that the doctrine of laches should bar Carroll's claims. We disagree.

Laches is an equitable doctrine consisting of two elements: (1) inexcusable delay and (2) resulting prejudice to the other party.[52] Because it is

[52] Clark County Pub. Utility Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000).

an equitable doctrine, a party with unclean hands may not assert it.[53]

A party is entitled to rely upon statements made by the adverse party in a civil action:

> [W]here a party to an action, in clear and unambiguous terms under oath, asserts the existence or nonexistence of a fact whereof such party has knowledge, or in the ordinary course of affairs would be expected to have knowledge, the adverse party may rely on such statements and, in the exercise of reasonable diligence, is not required to look behind the statements.[54]

Moreover, spouses owe one another a fiduciary duty to disclose all separate and community assets prior to dissolution.[55]

In Seals v. Seals, the court held that the husband breached his fiduciary duty to the wife when he failed to disclose the existence of certain assets during the dissolution proceedings.[56] Further, the wife was entitled to rely upon the husband's disclosures. Reasonable diligence did not require her to look beyond the husband's dishonest responses.[57]

Here, Carroll's delay was excusable and not unreasonable. The trial court's unchallenged rulings state that Elzey did not disclose his interest in AHC LLC to Carroll and that Carroll had a right to rely on his representations. Elzey

---

[53] Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 949, 640 P.2d 1051 (1982).

[54] Kurtz, 63 Wn.2d at 875, cited in Seals, 22 Wn. App. at 656.

[55] Seals, 22 Wn. App. at 655-56.

[56] 22 Wn. App. 652, 655-56, 590 P.2d 1301 (1979).

[57] Id.

argues that Carroll either knew or should have known about these assets despite Elzey's representations. Knowing about the property and knowing about having an interest in the property are distinct. Carroll testified she knew AHC existed but did not know either she or AHI had an interest in it until Sherry called her in 2004. The trial court explicitly found her testimony credible, a determination not subject to our review.

Sherry also testified that he suspected fraud may have been committed, so he first informed Carroll about her potential interest in AHC LLC in 2004. Before that time, she did not know because Elzey and the other partners had falsely told her she had no interest in AHC.

As in Seals, given the high fiduciary duty between spouses, Carroll was allowed to rely on Elzey's discovery responses and was not required to conduct an independent investigation of each response, especially when Johnson and Fitterer had also told her she had no interest in AHC. It was therefore not unreasonable of her to wait until 2004, when Sherry called her, to initiate further investigation leading to this lawsuit.

Laches does not apply to bar Carroll's claims in this action.

**ATTORNEY FEES**

Elzey argues that the trial court abused its discretion in awarding attorney fees to Carroll under RCW 26.09.140 and CR 26(g). We hold that the trial court properly exercised its discretion in deciding to award fees and in determining the amount to be awarded.

Civil rule 26(g) requires an attorney to certify discovery responses after a reasonable inquiry, indicating that the responses are consistent with the discovery rules and the law, not used for improper purpose or delay, and not unreasonable or unduly burdensome.[58] The discovery rules are clear that a party must fully answer all interrogatories and requests for production unless an objection is made.[59] Sanctions are appropriate if an attorney violates these rules by filing a misleading response after certifying otherwise, even if the violation is not intentional.[60]

Trial courts have broad discretion in the choice of sanctions for violation of a discovery order.[61] We review a trial court's ruling for a clear abuse of that discretion.[62]

The trial court was within its discretion to award fees for Elzey's discovery violation. The bulk of Elzey's argument rests on his analysis that AHC LLC was not property that should have been disclosed in response to Carroll's interrogatories and requests for production. Once again, the trial court's unchallenged findings establish that AHC was "property." Even if AHC and its

---

[58] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 343, 858 P.2d 1054 (1993).

[59] Id. at 354; CR 33(a); CR 34(b).

[60] Fisons, 122 Wn.2d at 344-45.

[61] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

[62] Id.

ventures were Elzey's separate property, they should have been before the dissolution court for distribution, and Carroll's discovery requests fairly covered those assets.

Elzey argues that the trial court did not conduct the proper analysis under Washington State Physicians Insurance Exchange and Ass'n v. Fisons Corp.[63] by ensuring that it imposed the least restrictive sanction and did not use CR 26(g) as a fee-shifting device. He claims the trial court should have considered a less severe sanction. We conclude that the trial court properly exercised its discretion in awarding sanctions. The trial court correctly concluded that attorney fees here were proper under Fisons to punish and deter Elzey for his deceptive conduct and to compensate Carroll for having to litigate these claims as a result of his breach of discovery rules and fiduciary duties.[64]

Finally, Elzey contends that the trial court abused its discretion with respect to the amount of fee awarded, contending the court allowed recovery for duplicate work. To the contrary, the trial court applied the lodestar method from Mahler v. Szucs,[65] made extensive findings of fact regarding factors such as the reasonableness of the work done and rates charged, found that the attorneys "made considerable effort" to avoid duplication of work, and reduced the fee

[63] 122 Wn.2d 299, 343, 858 P.2d 1054 (1993).

[64] See id. at 356 (goals are to deter, punish, compensate, and educate); CR 26(g) (court may impose attorney fees as a sanction for violation of the rule).

[65] 135 Wn.2d 398, 957 P.2d 632 (1998).

award by $10,000 to cover any possible duplication. There was no abuse of discretion in awarding the amount the trial court did.

Carroll also seeks fees on appeal under the same authorities. As the prevailing party, we award her fees under Fisons and CR 26(g) subject to her compliance with RAP 18.1(d).[66]

We affirm the judgment.

Cox, J.

WE CONCUR:

Schindler, C.J.

Ellington, J.

[66] See CR 26(g) (sanctions appropriate for "reasonable expenses incurred because of the violation, including a reasonable attorney fee"); Rideout, 150 Wn.2d at 359 (basing attorney fees on appeal on the same rationale supporting fees before the trial court, despite the fact that the applicable statutes did not mention attorney fees on appeal).