No. 96771-7
[Court of Appeals No. 77393-3-I]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

ROBERT P. MCCLESKEY,

Respondent,

v.

KATHY A. MCCLESKEY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Kathy McCleskey purports to seek review of an appellate decision "affirming the denial of her motion to enforce the parties' Separation Contract because it was styled as a motion for contempt and brought in the parties' dissolution action." Pet. at 1. That is not what happened. Kathy brought a contempt motion to enforce the parties' separation contract as she interpreted it. The trial court rejected Kathy's proffered interpretation, ruling that the contract does not include any strict sequence for Bob's transfer payments to Kathy. As such, Bob had satisfied his contractual obligations, so was not in contempt.

The appellate court correctly affirmed, ruling that there is no strict payment sequence in the separation contract and that the contract permits prepayment without penalty in any event. Consistent with numerous precedents, the court correctly declined to use parol evidence to contradict or modify the contract.

The appellate court also correctly rejected Kathy's alternative argument for breach of fiduciary duty, holding that it is outside the court's contempt powers to punish (alleged) prior bad acts. This holding too is consistent with controlling precedent.

This Court should deny review and award Bob fees.

RESTATEMENT OF THE ISSUES

1. Where the parties' separation contract: (a) does state a strict sequence for Bob's transfer payments to Kathy; and (b) allows Bob to prepay any transfer payments without penalty, did the appellate court correctly affirm the trial court's contract interpretation refusing to read a strict payment sequence into the contract?[1]

2. Is the appellate decision declining to use parol evidence to add a strict payment sequence to the separation contract consistent with numerous cases from this Court and the appellate courts holding that parol evidence may not be used to show intent independent of the writing, or to contradict, vary, or modify the writing?

3. Did the appellate court correctly hold that the trial court may not use its civil contempt powers to punish Bob for prior bad acts (alleged breach of fiduciary duty), where the court's contempt powers are solely to compel future performance of some act yet in the would-be contemnor's ability to perform?

4. Should this Court award Bob fees available under the parties' separation contract?

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[1] This Answer uses first names to avoid confusion. No disrespect is intended.

FACTS RELEVANT TO ANSWER

Kathy and Bob McCleskey married in 1982 and divorced in November 2016. Op. at 2. They entered a CR 2A agreement after a mediation in April 2016. *Id*. After disputing the CR 2A agreement, they engaged in binding arbitration and entered a separation contract incorporated by reference in the dissolution decree. *Id*.

Bob, the Chairman of the Board and CEO of Sellen Construction Inc. ("Sellen"), held 10,000 shares of the company's stock, and has the right to future stock redemptions and "profit distributions." *Id*. at 2. The separation contract divides the Sellen stock, provides that Bob would pay Kathy half of any Sellen profit distributions paid before Bob first redeemed Sellen stock, and requires Bob to pay Kathy an "equalizing" transfer payment of $3,335,159 "in six installments as follows" (Op. at 3-4; CP 203-04):

a. $500,000 on or before April 29, 2016 (wife acknowledges receipt of this installment);

b. $500,000 on the closing of the sale of the Rancho Mirage house awarded to the husband or June 1, 2017, whichever is earlier;

c. $1,000,000 paid to the Trust (see below) within three business days of the husband's receipt of the first payment for the redemption (or other disposition) of his Sellen Construction Company Inc. ("Sellen") stock;

d. $500,000 paid to the Trust (see below) within three business days of the husband's receipt of the second payment for the redemption (or other disposition) of his SeIlen stock;

e. $500,000 paid to the Trust (see below) within three business days of the husband's receipt of the third payment for the redemption (or other disposition) of his Sellen stock; and

f. $335,159 paid to the Trust plus accrued interest (see below) within three business days of the husband's receipt of the fourth payment for the redemption (or other disposition) of his Sellen stock.

g. In the event that husband's SeIlen stock is redeemed or otherwise disposed of in fewer than four payments, the balance of the $3,335,159 cash payment owed to wife plus accrued interest shall be due and paid to the Trust within three business days of the husband's receipt of the final redemption (or other disposition) payment for his SeIlen stock.

Immediately following this "schedule," the separation contract allows Bob to "pre-pay" any installment without penalty. CP 204.

SeIlen's Board of Directors redeemed 500 shares of Bob's stock, effective December 1, 2016. Op. at 4. Bob then transferred $1 million to Kathy satisfying installment c. *Id*. at 5. Bob explained as much to Kathy:

> Below is confirmation for a wire transfer to your US Bank account in the amount of $1,000,000. That is the amount I owe you upon the first payment from Sellen for the redemption of my Sellen stock, which took place yesterday.

CP 79. Bob also reminded Kathy that the $1 million payment started interest running on the balance due under the separation contract except for the $500,000 he owed her in June, or when the house sold, whichever occurred first. CP 79.

Bob received a Sellen profit distribution on December 22, 2016. Op. at 5. He did not owe Kathy any of that distribution, where Sellen had already redeemed some of his stock, and where the separation contract provides that Bob would pay Kathy "50% of any Profit Distribution paid to him *prior to* the date he receives the first payment from Sellen for the redemption (or other disposition) of his Sellen stock." CP 209 (emphasis added); Op. at 5.

Bob had not sold the Rancho Mirage house by June 1, 2017, and did not pay Kathy the $500,000 due under installment b. upon sale or June 1, whichever occurs first. Op. at 5; CP 203. As such, interest began accruing. Op. at 5; CP 204.

Kathy moved for contempt on June 14, 2017, asking the trial court to "enforce" the separation contract and to order Bob to pay her 50% of the December 22 profit distribution. Op. at 5; CP 2. Kathy argued that the separation contract required Bob to make each payment in order, such that when he paid her $1 million after his first Sellen redemption, he could not pay her installment c. (tied

to the redemption), but had to first pay her installment b. (tied to the house sale or a date certain). Op. at 5; CP 15-16. Kathy thus claimed that Bob's $1 million payment was not installment c., but installment b. and half of installment c. *Id*. The commissioner denied Kathy's contempt motion, awarding Bob fees under the contract. Op. at 5; CP 203.

Kathy moved for revision, arguing again that Bob was required to pay the installments in a strict sequence, also adding that he breached his fiduciary duty by failing to follow the separation contract (as she interpreted it). Op. at 6; CP 172-73, 179. The trial court denied Kathy's motion, ruling that "the separation contract is clear and unambiguous on its face" and that the "profit share is clear that once first distribution happens, there's no profit sharing." RP 41, 44. The court rejected Kathy's argument that the contract required Bob to pay her in a specific order:

> It is clear to me that the provision of paragraph 20, sub C is an independent, standalone provision that is triggered upon first payment of redemption stock. If parties had intended that only sales of – or excuse me, only redemption of stocks after 2016 would be included, then that provision should be in there, but it's not. There is no schedule.
>
> There is nothing that says that A, then B, then C, then D. And in fact, had – I strongly suspect had Mr. McCleskey received a distribution of stock earlier than Ms. McCleskey had anticipated and had not sent within three business days

> . . . the receipt of that money, we'd be here on that contempt. And so it can't work both ways.

RP 42-43. The court also ruled that the provision allowing Bob to "prepay" any installment dictated that no specific order was required (RP 44-45):

> There is also, of course, the prepayment which just says the husband may prepay any or all of the foregoing installments without penalty. And so if you're prepaying any and all, then they can't be serial. One cannot then be required in advance of the other or else there's no way to prepay any and all.

The court awarded Bob fees under the separation contract. CP 23.

Kathy appealed. The appellate court affirmed, awarding Bob fees. Bob addresses that correct decision in the arguments below.

REASONS THIS COURT SHOULD DENY REVIEW

A. The appellate court correctly interpreted the parties' separation contract.

The parties' separation contract is straightforward, particularly regarding Bob's obligation to pay Kathy any portion of Sellen profit distributions, the payment Kathy sought in her contempt motion. Op. at 2-3; CP 1-3, 203-04. Bob was required to pay Kathy "50% of any Profit Distribution paid to him *prior* to the date he receives the first payment from Sellen for the redemption (or other disposition) of his Sellen stock." CP 209 (emphasis added). Thus, the Sellen redemption in December 2016 ended

Bob's obligation to pay Kathy upon receiving any future profit distribution. *Id*.

It is undisputed that Sellen first redeemed stock in December 2016, before Bob received a Sellen distribution. Op. at 4-5; CP 79. It is equally undisputed that Bob timely paid Kathy the $1 million she was entitled to for that redemption. *Id*. Thus, the appellate court correctly held that after Sellen's first redemption, Bob had no obligation to share profit distributions with Kathy (Op. at 10):

> When Bob redeemed the stock and paid the $1 million to satisfy installment c., he terminated Kathy's entitlement to a share of the profit distribution. Bob's actions did not contravene the separation contract.

The appellate court also correctly rejected Kathy's arguments that "the contract's use of the words 'installment' and 'schedule' connotes a series of events in succession and demonstrates the parties intended the payments to occur in a specific order." Op at 9. The separation contract required Bob to pay Kathy $500,000 when he sold the house, or by June 1, 2017, whichever occurred first, and to pay interest if he failed to do so. CP 203. Installment c. required Bob to pay Kathy $1 million when Sellen first redeemed his stock, without reference to "a date, deadline, or condition precedent other than Bob's first redemption

of stock." Op. at 9. Thus, the appellate court correctly held that requiring Bob to pay the installments in "strict sequence would add terms to the agreement inconsistent with the existing language." *Id*. (citing ***Condon v. Condon***, 177 Wn.2d 150, 163, 298 P.3d 86 (2013)).

The court further correctly held that importing a strict payment sequence into the contract "would also improperly contradict the prepayment clause allowing Bob to prepay 'any or all' installments" without penalty. Op. at 9 (citing ***Hollis v. Garwall, Inc.***, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)). Thus, "regardless of" Kathy's arguments on the meaning of "installment" and "schedule," the court held that the prepayment clause allowed Bob to pay installment c. whenever he chose to. Op. at 9.

In short, the trial and appellate courts correctly interpreted the separation contract to provide that Bob did not owe Kathy any profit distributions received after the first Sellen redemption.[2]

[2] Kathy's Petition does not argue that this interpretation is incorrect. As below, her contract argument is solely that the court erred affirming the trial court's decision not to take extrinsic evidence.

B. The appellate court properly handled parol evidence consistent with numerous cases from this Court and the appellate court.

Parol evidence cannot be used to add terms to a contract or to show intentions independent of the contract. Yet that is exactly what Kathy seeks: a contract that requires a strict payment sequence where none exists (and would contradict the contract's plain language). The appellate court's decision rejecting Kathy's attempt to use parol evidence to rewrite the contract is consistent with numerous precedents. This Court should deny review.

This Court has made abundantly clear that ***Berg v. Hudesman*** does not allow "unrestricted use of extrinsic evidence":

> Initially ***Berg*** was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in ***Berg*** has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis, 137 Wn.2d at 693 (citations omitted) (addressing ***Berg v. Hudesman***, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)); *see also* ***Hearst Commc'ns, Inc. v. Seattle Times Co.***, 154 Wn.2d 493, 502-03, 115 P.3d 262 (2005) ("Unfortunately, there has been much confusion over the implications of ***Berg***"). Courts must "declare the meaning of what is written, and not what was intended to be

written." ***Marriage of Schweitzer***, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997) (quoting ***Berg***, 115 Wn.2d at 669); ***Hearst***, 154 Wn.2d at 502-03.

Courts may use surrounding circumstances and other extrinsic evidence only "to determine the meaning of specific words and terms used," not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word." ***Hollis***, 137 Wn.2d at 695-96. In short, "'[a]dmissible extrinsic evidence does *not* include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.'" ***Go2net, Inc. v. C I Host, Inc.***, 115 Wn. App. 73, 84, 60 P.3d 1245 (2013) (quoting ***Bort v. Parker***, 110 Wn. App. 561, 574, 42 P.3d 980, *rev. denied*, 147 Wn.2d 1013 (2002)).

Thus, the appellate court correctly stated the law:

> The court attempts to determine the parties' intent "by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." ***Hearst Commc'ns, Inc. v. Seattle Times Co.***, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Subjective intent lacks relevance if intent can be determined from the actual words used. ***Hearst***, 154 Wn.2d at 503-04. The court must examine the reasonable meaning of the words used, giving effect to their ordinary, usual, and popular meaning unless

> the entirety of the agreement demonstrates a contrary intent. ***Hearst***, 154 Wn.2d at 504. "Courts will not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves." ***Condon v. Condon***, 177 Wn.2d 150, 163, 298 P.3d 86 (2013).
>
> A trial court may examine extrinsic evidence "for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties." ***Go2Net, Inc. v. C I Host, Inc.***, 115 Wn. App. 73, 84, 60 P.3d 1245 (2003). Extrinsic evidence relating to the context of the agreement may be examined to determine the meaning of specific words and terms used, but cannot show "intention independent of the instrument" or "vary, contradict or modify the written word." ***Hollis v. Garwall, Inc.,*** 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). "[E]xtrinsic evidence of a party's subjective, unilateral, or undisclosed intent regarding the meaning of a contract's terms is inadmissible." ***RSD AAP, LLC v. Alveska Ocean, Inc.***, 190 Wn. App. 305, 315, 358 P.3d 483 (2015).

Op. at 7-8. The appellate court's holding on parol evidence comports with these precedents.

Since (as addressed above) a strict payment sequence would contradict the contract's plain language, the appellate court correctly held that Kathy's "subjective intent is irrelevant." Op. at 9 (citing ***Hearst***, 154 Wn.2d at 503-04). Kathy plainly sought to use parol evidence for the impermissible purpose of adding a strict sequence to the contract. Op. at 9-10. The appellate court correctly held: this "is an impermissible use of parol evidence." Op. at 10 (citing ***Hollis***, 137 Wn.2d at 695-96).

Kathy argues that the appellate court erroneously declined to use parol evidence to define "installment" and "schedule," but since these words do not require further elucidation, the resort to parol evidence is improper. *Compare* Pet. at 10-11 *with* ***Hollis***, 137 Wn.2d at 695-96. Kathy's reliance on ***Brogan & Anensen LLC v. Lamphiear***, is misplaced. Pet. at 10-11 (citing 165 Wn.2d 773, 775, 202 P.3d 960 (2009)). There, the parties' Purchase and Sale Agreement allowed the buyer to take possession "on the possession date," but neglected to check any of the three boxes defining date of possession. ***Brogan***, 165 Wn.2d at 776. Where the Agreement completely failed to express any intent as to when the buyer would take possession, the court properly used extrinsic evidence to fill that gap. 165 Wn.2d at 776.

Similarly, in ***Baumen v. Turpen***, it was appropriate to use neighborhood topography to determine the meaning of "one story" in a 1947 restrictive covenant. 139 Wn. App. 78, 89-90, 160 P.3d 1050 (2007). But this case bears no resemblance to ***Brogan*** or ***Baumen***. There are no gaps in the parties' contract, nor any terms whose meaning is not plain on the face of the writing.

Further, Kathy's Petition makes abundantly clear that she does not seek to define "installment" and "schedule" as they are

used in the contract, but to add a strict payment sequence to the contract where none exists. Pet at 10-12. Doing so would impermissibly rewrite the contract to conform to Kathy's professed, but unexpressed intentions, and would directly contradict the provision allowing Bob to prepay any installment without penalty. The appellate court correctly rejected this impermissible use of parol evidence. This Court should deny review.

C. The appellate court correctly held that it could not dissolve the separation contract in a contempt proceeding.

Kathy next takes issue with the appellate court's holding that the trial court could not consider Kathy's argument that Bob breached his fiduciary duty during the course of negotiations "because she had styled her motion as one for contempt." Pet. at 14-15 (no citation). The appellate court actually held that a "contempt motion cannot provide Kathy with the relief she seeks." Op. at 10. That is correct.

Civil contempt is a remedial sanction used not to punish a prior bad act, but to compel performance of some act yet in the would-be contemnor's power to perform. ***Interest of M.B.***, 101 Wn. App. 425, 439-40, 3 P.3d 780 (2000). The underlying principle is

that a court has the power to induce any act it has the right to coerce. ***M.B.***, 101 Wn. App. at 439-40.

Since Kathy brought a contempt motion to enforce the separation contract, the appellate court correctly held that "the only question before the court was whether Bob disobeyed the court's order" adopting the parties' separation contract. *Compare* CP 172 *with* Op. at 12. To answer that question, the court had to determine the contract's meaning and Bob's compliance with it. Op. at 12.

Whether Bob breached his fiduciary duty to Kathy is, as the appellate court held, "outside of the contempt motion." Op. at 13. Here, as on appeal, Kathy argues that Bob breached his fiduciary duty in the course of negotiations by misrepresenting his ability to redeem Sellen stock. Pet. at 14-15; Op. at 10. Simply put, Kathy claims Bob acted badly when they were negotiating to contract. *Id*. But the court's contempt powers cannot be used to punish a prior bad act. ***M.B.***, 101 Wn. App. at 439-40.

Kathy created confusion on appeal by arguing in the alternative that even if the appellate court affirmed the trial court's contract interpretation, then it should reverse on the basis that Bob breached his fiduciary duties. BA 18-19. This too misunderstands the court's contempt powers. If, as Kathy's alternative argument

assumes, the appellate court affirmed a contract interpretation allowing Bob to pay the installments in whatever order he chose, then Kathy would not want the contract enforced. Rather, she would want recession or restitution, remedies that are not available in the contempt process. ***M.B.***, 101 Wn. App. at 439-40; RP 42-43.

Kathy's petition illustrates the same confusion. Kathy accuses the appellate court of ignoring that she moved for contempt *and* to enforce the separation contract. Pet. at 17. That is exactly the point – Kathy sought to *enforce* the separation contract, the only remedy available in the contempt process. This is why her fiduciary-duty claim falls outside the contempt process – it seeks to punish a prior bad act, not to compel future performance.

Kathy mistakenly argues that the appellate court's decision conflicts with ***Marriage of Langham***, stating that "'the authority to use any suitable process or mode of proceeding to settle disputes over which it has jurisdiction.'" Pet. at 15 (quoting 153 Wn.2d 553, 560, 106 P.3d 212 (2005)). ***Langham*** is easily distinguishable. It is not a contempt case, so says nothing about the court's contempt powers.

There, the wife moved for entry of a judgment, alleging that her former husband converted stock options awarded to her in the

parties' dissolution. Op. at 11; ***Langham***, 153 Wn.2d at 556. The wife did not allege that the husband was in contempt, but brought a motion on the family law motions calendar to enforce the parties' dissolution decree. Op. at 11; 153 Wn.2d at 560. She sought and obtained damages based on the stock's fair market value. 153 Wn.2d at 558.

The husband argued on appeal that the motions calendar did not afford him the usual protections due to a tort defendant. *Id*. at 560. Rejecting that argument, the Supreme Court held: (1) that the superior court has the authority to enforce a decree, so properly entered judgment against the husband; and (2) that the husband admitted to converting the stock, so "[a]dditional safeguards would have done him little good." *Id*.

The appellate court correctly distinguished ***Langham*** on its procedural posture. Op. at 12. In ***Langham***, the question controlling enforcement of the decree was whether the husband converted stock. 153 Wn.2d at 556-60. But in Kathy's contempt action, "the only question before the court was whether Bob disobeyed the court's order." Op. at 12. While the wife in ***Langham*** sought damages for a prior bad act, Kathy sought to coerce Bob to follow the separation contract (as she interpreted it) in the future.

While acknowledging that the wife in ***Langham*** "specifically requested adjudication of the husband's tortious conduct," Kathy argues she requested "exactly" the same thing. Op. at 12. Kathy did not allege a tort, but a breach of contract. And she did not seek to punish a prior bad act, but to coerce future performance. Kathy's motion was nothing like Langham's.

Kathy next argues that the appellate decision "confuses a critical area of law," by creating "a requirement that post-decree enforcement actions be pursued in a separate action." Pet. at 17. That is false. Nothing in the appellate court's decision suggests that a party seeking to enforce a dissolution decree must pursue an action other than contempt. *Id*. Rather, the appellate court plainly and correctly accepted that a contempt motion is an appropriate vehicle for enforcing a separation contract/dissolution decree. Op. at 6-13. This point was never contested.

The issue is not the type of motion that must be used to enforce a separation contract, but the relief available given the motion used. Because Kathy elected to use the contempt process, her remedies were limited to coercing Bob's future performance. ***M.B.***, 101 Wn. App. at 439-40. Because her breach-of-fiduciary

duty claim seeks to punish prior bad acts, it has no place in the contempt process. 101 Wn. App. at 439-40.

Finally, Kathy argues that the appellate court erroneously refused to consider her argument "that Bob breached his fiduciary duty to her because of a supposed deficiency in motions practice." Pet. at 19. That too is false. The appellate court did not find any "deficiency" in Kathy's motion, but correctly held that a "contempt motion cannot provide Kathy with the relief she seeks." Op. at 10.

In sum, the appellate court's decision on this point is consistent with controlling precedent on the court's contempt powers. ***Langham*** is inapposite, so cannot create a conflict. This Court should deny review.

D. This Court should award Bob fees.

This Court should deny Kathy's Petition and award Bob fees. The appellate court awarded Bob fees under the separation contract, providing for an attorney fee award to the party who prevails in any action to enforce the contract. Op. at 13; CP 216; RAP 18.1(a). Thus, Bob is entitled to fees for answering Kathy's petition. RAP 18.1(j).

CONCLUSION

The appellate court's decision is correct, and is consistent with controlling precedent. This Court should deny review and award Bob fees.

RESPECTFULLY SUBMITTED this 15th day of February 2019.

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