Supreme Court No. 96096-8
Court of Appeals No. 76653-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD THOMPSON,

Plaintiff-Respondent,

vs.

STEVEN T. LYNCH,

Defendant-Appellant

and DOES 1 through 30, Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT

CASE NO. 16-2-04736-0 KNT

The Honorable Veronica Alicea Galvan, Trial Judge

PLAINTIFF/RESPONDENT'S ANSWERING BRIEF

DOUGLAS GILL JR., ESQ.
WSBA NO. 41208
SWIGART & GILL LAW OFFICES, P.S.
329 E. Main Street
Auburn, Washington 98002
(253) 939-4556
Doug@swigartlaw.com
Attorneys for Richard Thompson, Plaintiff/Respondent

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I. INTRODUCTION

This lawsuit involves a dispute among the parties related to the operations of two separate legal entities, and agreements entered into by and among their respective shareholders and members. The agreements involved a restructuring of a corporation, payments to be made pursuant to an outstanding promissory note, and for the buy-out of a shareholder's shares. Appellant Steven Lynch ("Lynch") was in charge of the bank account for the company that was issuing the payments from 2003 until approximately 2009.

Lynch was required to be paid $420,000.00 under the agreements between the parties. Lynch, in his motion for summary judgment filed with the trial Court, has conceded that he had been paid $347,000.00 toward the agreements. He disputed that five additional checks were applied toward the agreements, and instead contends that they are somehow "guaranteed payments to partner" or a "return of owner's capital."

Based on the testimony and evidence at trial, the trial court found that three of the five checks were "withdrawals of capital" by Lynch, thereby meeting the monetary terms of the agreements between the parties which also resulted in an overpayment to Lynch. Additionally, the trial court found that Lynch had breached the buy-sell agreement between the

parties, and ordered him to repay the overpaid sums and to transfer his ownership in the corporation to the respondent, Richard Thompson ("Thompson").

The trial court's decision, based on the evidence presented and the testimony given should be affirmed in full.

II. COUNTERSTATEMENT OF ISSUES ON REVIEW

Appellant's petition for review asserts that after the trial court made 33 errors in its 51 findings of facts and erred in 12 of its 20 conclusions of law and 4 of its 6 judgment findings were in error, then the Court of Appeals erred in its decision that findings of fact are subject to review for substantial evidence, rather than de novo. Lynch also argues that the Court of Appeals erred in upholding the trial court's conclusions of law because he failed to make legal arguments in support of the challenges under RAP 10.3(a)(6) and failed to cite authority and reasoned legal argument, which made the claims insufficient to merit judicial consideration. Joy v. Dep't of Labor & Inds., 170 Wn App. 614, 629, 285 P.3d 187 (2012). Lynch is again trying to argue every part of the trial court and appellate court decisions.

The court did not err in its Findings of Facts Nos. 33, 26, 27, 28, 29, 30, 31, 32, 39, 34, 36, 37, 38, 42, 40, 41, 1, 2, 5, 12, 14, 20, 21, 22, 23, 24,

46, 47, 48, 49, 50, 51, Conclusions of Law Nos. 2-11, 14, 15, 18 or in its Findings of Judgment Nos. 1, 2, 3, 4, 5, 6.

III. STATEMENT OF THE CASE

This case involves the parties to the lawsuit, Lynch and Thompson and two individual companies, CRS Enterprises, LLC ("CRS"), and STL Enterprises, Inc. ("STL"). STL was formed by Lynch in 1997 (Plaintiff's Complaint (hereinafter "Complaint"), CP 19, ¶ 2). CRS was formed in 1999 with Thompson and STL being listed as the only members (Complaint, CP 20, ¶ 3, 141).

A. The Action Agreement

In 2003, the parties executed a document entitled "Action by Unanimous Consent of Shareholders of STL, Inc., a Washington Corporation and CRS, L.L.C., a Washington Limited Liability Company" (the "Action Agreement", CP 19, 141). This document was prepared by Lynch's personal attorney, David Moe. In that document, signed by Lynch and Thompson, it is stated that CRS is owned 51% by STL and 49% by Thompson (Action Agreement, CP 20, ¶ 3, 142). The agreement also states that STL which had previously been owned in its entirety by Lynch was to be now owned 51% by Lynch and 49% by Thompson (*Id.*, ¶

1, CP 142). The agreement established the following ownership of the two entities, which remains the same until the ruling by the trial court:

CRS 51% STL Enterprises, Inc.

49% Richard Thompson

STL 51% Steven Lynch

49% Richard Thompson (*Id.*, ¶ 1, 3).

As part of the Action Agreement, STL was to issue a promissory note in the favor of Lynch in the amount "equal to the excess amount of equipment and cash heretofore paid, loaned, or contributed by Lynch to STL" (*Id.*, ¶ 1, CP 142). It was further agreed that "Since this plan of capital withdrawals from STL was commenced in the year 2002, and is ongoing, the original note balance is calculated to show the amount remaining to be paid" (*Ibid.*). The Action Agreement further stated that "The original note amount, while subject to calculation and verification as state [sic] in Paragraph 1, above, is estimated to be $170,000.00 less any capital withdrawals by Lynch from either STL or CRS since December 31, 2002" (*Id.*, ¶ 6).

In addition, the Action Agreement set forth the manner in which Lynch was to conduct his actions regarding CRS and STL. Specifically, it was agreed that Lynch would "act in good faith in exercise[ing] of voting rights (a) in setting amounts of compensation or payment of any benefits

shareholders and members of STL and CRS, such compensation shall be reasonable in amount, considering comparable rates paid in the industry for comparable services . . . " (*Id.*, ¶ 8).

The Action Agreement also, effective immediately upon its signing, made Lynch and Thompson the two and only two members of the Board of Directors of STL, and making Lynch the President and Treasurer, with Thompson serving as Vice President and Secretary, to be continued until further agreement between Lynch and Thompson (*Id.*, ¶ 10).

Lynch and Thompson also agreed to execute a Shareholder (Buy-Sell Agreement) at the time of the execution of the Action Agreement (*Id.*, ¶ 11).

B. Shareholder Agreement (Buy-Sell Agreement)

On the same date the Action Agreement was executed, Lynch, Thompson, and STL Executed a Shareholder Agreement (the "Buy-Sell", CP 10, 142-143). This document was also prepared on the behalf of Lynch by his attorney David Moe. Under the Buy-Sell Agreement, it was agreed that the document would not be enforceable until such time as Lynch had been paid in full by STL under the promissory note (Buy-Sell, CP 10, ¶ 1, 140).

The Buy-Sell Agreement noted that Lynch and Thompson own 100% of the outstanding capital shares of capital stock of STL (*Id.*, ¶ 1 Witnesseth). The Buy-Sell Agreement also states that it will allow a departing shareholder to transfer his interest in STL to the remaining shareholder upon either the termination of the shareholder's employment or upon the death of the shareholder (*Id.* ¶ 1(F), 2).

The Buy-Sell Agreement sets forth an agreed upon price for the capital stock to be purchased from the departing shareholder at $250,000.00 (*Id.*, ¶ 3(1)).

Under the Buy-Sell Agreement, it was agreed that "so long as any part of the purchase price of shares of capital stock sold in accordance with this Agreement remains unpaid, the Corporation shall not: (A) declare or pay dividends on its capital stock; . . . (D) allow any of its obligations to become in default; . . ." (*Id.*, ¶ 5).

C. Addendum A

Subsequent to the execution of the Action Agreement and the Buy-Sell Agreement, Lynch and Thompson executed a document entitled "Addendum A" on December 6, 2006 ("Addendum", CP 23, 143). Under that agreement, the parties consented to changes to the "Sales Agreement of CRS Enterprises, LLC. [sic] from Stephen Thomas Lynch to Richard Lee Thompson. . " (*Id.*) Since there is no agreement wherein Lynch

agreed to sell CRS to Thompson, given the fact that CRS was and is owned by STL (51%) and Thompson (49%), the parties were referring to the Buy-Sell Agreement, with that assumption being agreed to by Lynch during his deposition. This fact was confirmed by the trial court (Findings of Fact, CP 141, ¶ 20). The terms of the sale were reduced from $5,000.00 to $2,500.00 per month, and CRS agreed to maintain Lynch's health insurance, vehicle payment, maintenance, fuel, and auto insurance through June 2015 (Addendum, CP 23, 143).

Lynch acted as the bookkeeper for CRS until sometime in 2008 or 2009, and was solely responsible for all checks that were issued during that time. Not a single check was made payable to STL during that time, but rather, every single check issued by Lynch on the behalf of CRS, including those at issue in the trial, was issued to him personally (CP 141-145, ¶¶ 26, 32, 34, 39, 40. 42).

During his tenure, Lynch was the person who provided the company accountant with all information as it related to the taxes of both STL and CRS.

Thompson filed this case on February 29, 2016, after months of unsuccessfully negotiating with Lynch. As the case progressed, Lynch filed a Motion for Summary Judgment. Included in that motion were the declarations of Mr. Muenster (CP 41-112) and the accountant, Mr.

Fawthrop (CP 36-40). That Motion was heard by a different trial judge and was denied.

Subsequently, a three-day bench trial was held before the Hon. Veronica Alicea Galvan. During that trial, testimony was provided by Lynch (CP 116, 117), Thompson (CP 114, 115) and Lynch's accountant Paul Fawthrop (114, 115). Mr. Fawthrop's testimony occurred over two days (Id.). Evidence was also introduced during the three-day trial (CP 119-124). Not included in the evidence that was accepted and reviewed by the court were the declarations of Mr. Muenster or Mr. Fawthrop (*Id.*). In fact, the declaration of Mr. Fawthrop was rejected by the court (CP 126).

At issue in the trial was the status of five (5) checks issued by Lynch to himself and how they were to be treated: #'s 2832, 3213, 3737, 2376 and 2533 (CP 144-145, RP 3, 6). In the court's ruling, three of those checks were found by the court to be withdrawals of capital by Lynch (CP 144-145), and payable towards the promissory note (RP 3). Upon further reconciliation by the court, the court found that Lynch had been paid $478,000.00 towards the agreements and had in fact been overpaid by $53,000.00 under the terms of the agreements between the parties (CP 170) and ordered that he repay that sum to Thompson (CP 146) and transfer his 51% ownership in STL to Thompson (*Id.*).

Subsequently an appeal was filed with the appellate court in which the court found for the Respondent on all issues and awarded attorneys fees.

IV. STANDARDS OF REVIEW IS CORRECT

(A) Factual Issues

Factual issues are decided by the finder of fact, in this case the judge. Appellate courts generally apply a "substantial evidence" standard of review to findings of fact, and they will not overturn findings of fact if supported by substantial evidence (*See, e.g.* Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959)). "Substantial evidence" is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. [An appellate court] will not "disturb findings of fact supported by substantial evidence even if there was conflicting evidence" (McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 277 (2012) (citations omitted)).

A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion of its desired effect (State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981).

An appeals court will refuse to reweigh the evidence or second-guess the trier of fact's determinations (*See, e.g.* Thorndike v. Hesperian Orchards, Inc., 54 Wn.25 570, 343 P.2d 183).

The Court of Appeals correctly ruled that the findings of fact are subject to review for substantial evidence (Sunnyside Valley Irr. Dist. V. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)), rather than de novo.

A party urging that a verdict or finding of fact is not supported under the evidence must include in the record all evidence relevant to the disputed verdict or finding (RAP 9.2(B); *See,* State v. McKague 172 Wn.2d 802, 807, 262 P.3d 1225 (2011). The burden is on the appellant to provide an adequate record on appeal; a trial court's decision must stand if this burden is not met (*See*, Story v. Shelter Bay Co., 52 Wash.App. 334, 345, 760 P.2d 368 (1986)).

Here, Lynch has presented no record of evidence that demonstrate any of the trial court's findings of fact are not supported by substantial evidence in the record before the court. Instead, Lynch has improperly attempted to introduce into the record evidence that was not before the trial court. Specifically, Lynch has improperly attempted to introduce the evidence related to Mr. Muenster that was used only in his motion for summary judgment, and which was not even brought to the trial court's attention. The second improper attempt is Lynch's reliance on the declaration of Mr. Fawthrop, also brought under the purposes of the summary judgment motion, and which was refused by the trial court when it was attempted to be introduced during trial (CP 123 (entry 126)).

(B) Rulings of Law

The mandate of the appellate courts is to decide law, and appellate courts review rulings on pure questions of law "*de novo*" (*See, e.g.* Town of Woodway v. Snohomish County, 180 Wn.2d 165, 172, 322 P.3d 1219 (2014). Questions subject to conclusions of law in a bench trial are reviewed *de novo*. Construction of a contract when there is no disputed evidence concerning evidence concerning the parties' intent is also subject to *de novo* review (Noble v. Ogborn, 43 Wn.App. 387, 390, 717 P.2d 285, *review denied*, 106 Wn.2d 1004 (1986)). However, if the interpretation of the contract depends on resolving the credibility of extrinsic evidence or inferences to be drawn from extrinsic evidence, the meaning of a contract has been held to be a question of fact (Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

Lynch has attempted to manipulate the ruling by the trial court to make it appear as if the findings of fact include conclusions of law. Based on the evidence presented and the testimony provided at trial, the trial court and appellate correctly applied the relevant standard of review to the appropriate classification.

V. LYNCH'S ATTEMPT TO INTRODUCE NEW EVIDENCE WAS CORRECTLY DENIED

Lynch has attempted to introduce new evidence, not considered by the trial court, into his appeal. Specifically, he has attempted to introduce the declaration of his attorney, Mr. Muenster, and his accountant, Mr. Fawthrop. In fact he relies heavily on those declarations in support of his appeal. Both of those declarations were utilized in his failed summary judgment motion before another trial court. Mr. Muenster's declaration was never even attempted to be introduced into evidence, and Mr. Fawthrop's was refused by the trial court (CP 119-124).

In order to introduce new evidence, Lynch should have petitioned the court pursuant to RAP 9.11. RAP 9.11 specifies when a party may be allowed to submit new evidence, with six (6) specific and rare circumstances that must be met. Those requirements must be met in order to be considered for review (State v. Fuentes, 179 Wn.2d 808, 826-827, 318 P.3d 257 (2014). None of those requirements have been met here.

The appellate court correctly ruled that "the party presenting an issue for review has the burden of providing adequate record to establish such error." State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

VI. THE APPELLATE COURT CORRECTLY ACCEPTED THE FINDINGS OF FACT AS VERITIES

This appeal was brought on a short record without a complete verbatim report of the proceedings.

Accordingly, the trial court's findings of fact are accepted as verities (Rekhi v. Olason, 28 Wash.App. 752, 753, 626 P.2d 513 (1981), *citing* Gaulpholm v. Aurora Office Buildings, Inc., 2 Wash.App. 256, 257, 467 P.2d 628 (1970)). The rule is that the appellate court may only examine the record which was before the trial court, no more, no less (Gaulpholm v. Aurora Office Buildings, Inc., 2 Wash.App. 256, 257, 467 P.2d 628 (1970)).

Accordingly, the appellate court ruled correctly when stating that when an appellant fails to designate a complete record for review, the trial courts are treated as verities on appeal. See A.F.J., 161 Wn. App. 803, 806 n.2; Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 90, 173 P.3d 959 (2007).

VII. THE COURT'S FINDINGS OF FACTS AND ITS CONCLUSIONS OF LAW WERE SUPPORTED BY THE EVIDENCE PRESENTED TO IT.

Appellant took a convoluted approach to his appeal in his brief. The issue before the trial court essentially boiled down to how five (5) checks issued by Lynch to himself were to be applied to the agreements among

the parties (CP 144, lines 8-9). The trial court made its determinations regarding all of those checks at three parts of its findings of fact (CP 144-145). In making those findings of fact, the trial court took a measured approach, setting forth findings of fact that ultimately led to its findings of fact regarding three (3) of those checks to the detriment of Lynch (*Id.*) Lynch has provided no evidence in his brief that are contrary to those findings.

The appellate court then upheld those findings. We again reiterate here:

"As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. *See,* RAP 10.3 (*See,* Matter of Estate of Lint, 135 Wash.2nd 518, 531, 957 P.2d 755)".

"Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases [. . .] there is more than one version of the facts. If [the court] were to ignore the rule requiring counsel to direct argument to specific findings of fact which are

assailed and to cite to relevant parts of the record as support for that argument, [the court] would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This [a court] will not and should not do (Ibid.)".

The appellant would have you believe this is a question of contractual interpretation. This is a question of fact that was decided by the finder of fact after hearing testimony of the witnesses and a review the evidence, subject to the appropriate review by this court. Again, as the record on appeal is incomplete, the trial court's decision of fact is to be treated as verities (Rekhi v. Olason, *supra* 28 Wash.App. at 753).

Additionally, in general, if an oral opinion of a court is later superseded by a written opinion, the oral decision should only be relied upon where it is consistent with the findings and judgment of the written opinion (Pearson v. Dept. of Labor and Ind., 164 Wash.App. 426, 440-441, 262P.3d 837 (2011) (internal citation omitted)). "[A] trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It ... may be altered, modified or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment (*Ibid.*)). Consequently, the fact that the trial court's oral opinion did not mention the specifics related to this finding of

fact in its oral findings has no bearing, it subsequently did so in its written findings of fact.

Again, Lynch has provided no evidence in the record that the finding of the trial court was in error or that the appellate court was in error affirming the decision.

VIII. ATTORNEY'S FEES

In regards to the attorney's fees awarded to Thompson as the prevailing party, the trial court awarded those fees as Lynch was the defaulting shareholder. The language cited by Lynch is his brief, paragraph 3B(iii) of the Buy-Sell Agreement is ambiguous, and should be construed against the drafter Lynch. The language states "In the event that suit shall be required to collect on the promissory notes above referred to, then in such event, the defaulting Stockholder or the Corporation shall pay for attorney fees, and court costs incurred in such action." The language references promissory "notes" of which there is only one. In light of the testimony presented and the evidence admitted, the trial court inferred the parties' intent to award attorney's fees to the prevailing party.

This is supported by paragraph 19 of the Buy-Sell Agreement. Although the paragraph references alternative dispute resolution, the trial court's award of attorney's fees is also established here. Lynch clearly waived his right to arbitrate the dispute by his participation in the litigation

(*See,* Otis Housing Association, Inc. v. Ha, 165 Wash.2d 582, 589 201 P.3d 309). In upholding the award of attorney's fees, the Otis Housing court found that the prevailing parties and were entitled to their attorney fees (Id. at fn 2). As such Thompson was properly awarded his attorney's fees at both the trial and appellate court.

IX CONCLUSION

For the reasons stated, this Court should not grant review and affirm the 3-page decision on the panel and affirm the award of Thompson's attorney fees and costs.

Dated this 29th day of August, 2018.

Swigart & Gill Law Offices, P.S.

/s/Douglas Gill Jr
Douglas Gill Jr, Esq.
WSBA #41208
Attorney for Plaintiff/Respondent,
Richard Thompson

CERTIFICATE OF SERVICE

I, Shannon L. McCullough, certify under the penalty of perjury of the laws of the State of Washington that on August 29, 2018 I sent a copy of this document to the following person(s) and in the following manner:

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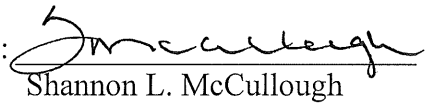
By: 
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