

No. 625195

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERRY DEFOOR AND G.W.C. INC.,

Appellants/Cross-Respondents,

v.

STACEY DEFOOR,

Respondent/Cross-Appellant.

REPLY IN SUPPORT OF STACEY DEFOOR'S CROSS-APPEAL

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I. INTRODUCTION

Stacey Defoor prevailed at trial on her claims and on Respondents' counterclaims. Stacey did so by refuting Respondents' contentions on both of the key disputed issues – establishing that she shared an intimate committed partnership with Terry Defoor, and also that she was a shareholder, director, and officer of their company G.W.C. Inc.

After years of obstreperous and even fraudulent opposition, Respondents no longer contest either proposition. Yet Terry and GWC still argue that the courts are powerless to award Stacey any attorneys' fees. To the contrary, this Court can and should award Stacey her attorneys' fees under both the intimate committed relationship doctrine and the Washington statutes protecting corporate shareholders and directors.

II. ARGUMENT

A. **In Making An Equitable Division Of The Couples' Joint Assets, The Trial Court's Judgment Should Have Taken Into Account Stacey's Attorneys' Fees.**

1. **This Case Demonstrates Why, as an Equitable Matter, The Committed Intimate Partner Doctrine Should Permit Attorneys' Fees Awards.**

In his response to Stacey's cross-appeal, Terry argues that under current case law, RCW 26.09.140 "does not authorize a fee award in proceedings dissolving a non-marital relationship." Cross-Appeal Answer. Br., at 27 (citing *Foster v. Thilges*, 61 Wn. App. 880, 887, 812 P.2d 523

(1991)). But while the statutory provision itself does not refer to committed intimate partners or to registered domestic partners, it does not *preclude* an award of fees. Terry's conduct in this case demonstrates why, as an equitable matter, Washington courts in appropriate circumstances may award fees in cases involving the committed intimate partner doctrine.

Chapter 26.09 of the Revised Code of Washington governs dissolution proceedings for married couples. Although the Washington Supreme Court has declined to apply these statutes as a whole to the committed intimate partner doctrine, it has recognized that analogies to Chapter 26.09 are appropriate for particular purposes. *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995) (“[f]or the purpose of dividing property at the end of a meretricious relationship, the definitions of ‘separate’ and ‘community’ property found in RCW 26.16.010-.030 are useful and we apply them by analogy”). As with the dissolution of marriages, attorneys’ fees should also be available, at the court’s discretion, in dissolution proceedings involving committed intimate partners. Contrary to Terry’s suggestion (Cross-Appeal Answer. Br., at 36), allowing fees would no more create common-law marriage than Washington’s adoption of the committed intimate partner doctrine in the first place.

Terry’s misconduct in the trial court demonstrates why fees are appropriate here. The trial court found that Terry created “false

documentation” to refute Stacey’s claim of an ownership interest in the couple’s company GWC Inc, FF 27, and that Terry’s testimony denying that he had an intimate committed relationship with Stacey was “not credible.” FF 17. Respondents do not dispute these findings. Yet because of Terry’s misrepresentations, Stacey was forced to incur substantial attorneys’ fees establishing both the nature of her relationship with Terry and that she was a shareholder in GWC.

Respondents *do* assign error to the trial court’s finding that Terry “has shown a continued practice of deception for purposes of strengthening his financial situation.” FF 37 (citing as examples “declarations under penalty of perjury in court proceedings, misstatements as to income in application for loans, misstatements to a state agency for a liquor license, and directing debts to be carried on company books for purposes of minimizing income”). However, extensive evidence at trial supports this finding. *See, e.g.*, Answer. Br., at 22, 36, 38.

Terry’s post-trial conduct continues his “practice of deception,” and further corroborates the trial court’s conclusion that Respondents’ counterclaims and their opposition to Stacey’s claims were based on inequitable and deceptive conduct. At Terry’s request, the trial court stayed enforcement pending appeal of its judgment awarding Stacey a valuable property located near Sea-Tac airport. When Terry failed to pay the Sea-

Tac taxes, Stacey filed a motion asking the trial court to lift the stay or order Terry to pay the outstanding taxes. In response, on January 19, 2010, Terry went to the King County Assessor's office and delivered check number 1348 in the amount of \$17,467.39 for the 2009 Sea-Tac taxes. CP 1750 ¶ 2, 1758. On January 21, 2010, Terry signed a declaration swearing under penalty of perjury that he had "paid the taxes accrued on the Seatac property through 2009," and attaching the January 19, 2010 receipt. *Id.* In fact, on January 20, 2010 – the day before he signed his declaration – Terry intentionally stopped payment on the check he had given to the tax collector the day before. CP 1859-61. When Stacey discovered from public records that the Sea-Tac taxes remained unpaid, she brought Terry's deception to the attention of the trial court. CP 1855-58, 1859-67, 1868-72. On March 10, 2010, Terry filed a supplemental declaration acknowledging that he had lied about paying the Sea-Tac taxes. Supp. CP __ (Doc. Sub. 604 (Decl. of Terry Defoor Correcting January 22, 2010 Declaration)).¹

¹ On March 11, 2010 – the day before the trial court's long-scheduled hearing regarding the status of the Sea-Tac taxes – GWC and another of Terry's companies, GWC & Associates, Inc., filed for bankruptcy. Terry did not file personal bankruptcy. Nevertheless, he argued that the bankruptcy filings divested the trial court of any authority to address his admittedly false testimony regarding the Sea-Tac property. In addition to their dubious timing, the bankruptcy petitions by GWC and GWC & Associates offer further examples of Terry's continued practice of deception. Supp. CP __ (Doc. Sub. 627 (Decl. of R. Leishman, at ¶ 2 & Ex. A)).

Family disputes can bring out the very worst in litigants. As with the dissolution of marriages and domestic partnerships, this Court should hold that Washington courts applying the intimate committed partner doctrine may exercise discretion to award attorneys' fees in appropriate cases. In particular, Terry's continued practice of deception justifies an equitable award of attorneys' fees here.

2. In Any Event, Stacey Should Have Received Half of Her Attorneys' Fees to Off-Set Terry's Use of Pre-Distribution Funds to Pay for His Own Fees.

Regardless of whether the intimate committed relationship doctrine itself authorizes an award of attorneys' fees to prevailing parties when appropriate, the trial court in this case erred in its property division by failing to account for Terry's unilateral use of joint assets to pay for his litigation expenses.

Terry does not deny that he used the couple's *pre*-distribution funds from GWC to pay for his own attorneys' fees, or that those fees were substantial. Nor does he deny that, in contrast, Stacey will be forced to use *post*-distribution funds to pay for her attorneys' fees, which are also substantial. Rather, Terry relies on the superior court's finding – the *same* finding to which he assigns error – that the funds Stacey received prior to the final distribution were “a substantially equal off-set to [Terry's] unilateral post-separation expenditure of the parties' assets.” FF 65 (finding

challenged by both parties). But, as Stacey showed in her Answering Brief (at pp. 18-19), that is simply not the case. Terry spent *far* more of the couple's GWC cash on his own "personal" expenditures, FF 31, than the limited interim relief Stacey received.

Terry's characterization of the Branson-Lea Ridge project as a major recipient of the couple's joint distribution funds that "required funding for the acquisition of property, equipment, and other costs of development" while this case was pending (Cross-Appeal Answer. Br., at 28-29), is particularly galling – given that Terry has admitted that he abandoned the project in summer 2009. CP 1754-55 ¶ 15. And even before abandoning the project, in 2008 and the first part of 2009, Terry admits that he spent only \$30,000 on it. *Id.* That \$30,000 does not come close to leveling the couple's pre-distribution expenditures.

Terry also argues that Stacey was awarded "greater liquid assets" with which she can pay her attorneys' fees. Cross-Appeal Answer. Br., at 29. In focusing only on the property enumerated in the judgment itself, Terry ignores the millions of dollars of joint cash he controlled after the parties' separation. Answer. Br. 18. The fact that the trial court awarded Stacey a portion of the liquid assets that appeared on GWC's books at trial – books that were *maintained by Terry himself* – does not mean that the division was equitable. In particular, Terry's spending on legal fees had

already reduced the couple's funds, which were then (along with other assets) split between the two. By dividing GWC's assets *after* Terry used a substantial portion of them to pay his own fees, Stacey, in effect, paid for half of Terry's fees and was then stuck with the entire bill for her own attorneys.

Terry also suggests that Stacey has already received her money judgment (Cross-Appeal Answer. Br., at 29), which, of course, is not the case. She has yet to see a dime of the judgment because Terry stayed enforcement of it pending appeal. Over three years have passed since Terry unilaterally removed Stacey from their bank accounts. She is still waiting to receive her half of the couple's assets. This Court should ensure that Stacey receives an equitable property division that recognizes that she has incurred substantial legal expenses while effectively subsidizing Terry's scorched-earth litigation tactics.

B. Under the Mandatory Indemnification Statute, Stacey is Entitled to Attorneys' Fees Incurred in Establishing her Status as a GWC Officer and Director.

Terry does not dispute that Stacey was a director of GWC, or that she was wholly successful in defeating Terry's and GWC's meritless lawsuit against her. Terry instead argues that his and GWC's suit against her "was not based on *her actions* as a director or officer of GWC," but rather was targeted at her in her capacity as "the former spouse of Terry Defoor."

Cross-Appeal Answer. Br., at 30 (emphasis added). Respondents' self-serving characterization cannot alter the actual nature of their claim against Stacey. A director is entitled to indemnification if she "successfully defends against claims of personal liability that arise from or *have a nexus to* [her] corporate position." *Witco Corp. v. Beekhuis*, 38 F.3d 682, 692 (3d Cir. 1994) (emphasis added). On their face, Respondents' claims arose from and were connected to Stacey's position with GWC.

Even if, as Respondents argue, the statute's mandatory indemnification provision is triggered only by suits that are directly based on a person's "*actions* as a director or officer," Respondents' suit involved precisely such alleged actions. If Stacey was a director of GWC, then she had an interest in taking action to gain access to GWC's business premises and corporate documents – and Respondents' trespass, conversion, and tortious interference claims were meritless on their face. Because Terry's and GWC's lawsuit challenged Stacey's authority to act as a director and officer, it had a "nexus to [her] corporate position." *Witco Corp.*, 38 F.3d at 692.

Respondents suggest that Stacey may not seek indemnification because she would have been personally liable if they had prevailed on their frivolous claims. Cross-Appeal Answer. Br., at 30. However, "personal liability does not preclude *per se* indemnification." *United States v. Lowe*,

29 F.3d 1005, 1010 (5th Cir. 1994); *accord Weisbart v. Agri Tech, Inc.*, 22 P.3d 954, 958 (Colo. Ct. App. 2001).

Terry and GWC also argue that the mandatory indemnification statute applies only when a director is sued by a third party, not when a director is sued by the company. Cross-Appeal Answer. Br., at 31-32. As in several of the cases cited by Respondents, Stacey *was* sued by another party related to the corporation – Terry himself. In any event, nothing in the text of RCW 23B.08.520 suggests that it excludes fees incurred defending against claims by the corporation, and Terry identifies no policy reasons why that should be the rule. Indeed, “the mandatory indemnification statutes themselves make no distinction between the defense of suits brought by third parties and the defense of suits brought by or on behalf of the corporation.” *Waskel v. Guaranty Nat’l Corp.*, 23 P.3d 1214, 1219 (Colo. Ct. App. 2000).

Finally, Terry and GWC point out that Stacey did not include a request for attorneys’ fees under RCW 23B.08.520 in her answer to their complaint, by they do not actually argue that this precludes her from obtaining fees under the statute. Cross-Appeal Answer. Br., at 31. Stacey’s answer included as a prayer for relief any “further relief [the court] deems just and equitable,” which could, of course, include attorneys’ fees under a different statute. CP 14.

C. Under the Corporate Records Statute, Stacey is Entitled to Attorneys' Fees for Proving Her Shareholder Status.

Terry does not deny that he failed to provide the GWC corporate documents that Stacey requested. Rather, he argues that because Stacey's request for documents was in the context of "the civil rules of discovery," the corporate records statutes do not apply. Cross-Appeal Answer. Br., at 33. But nothing in the statute suggests that it is inapplicable when parties are engaged in litigation. Stacey's written requests obviously complied with the statute's requirement that she give "notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy." RCW 23B.16.020(1).

Terry argues that "[t]here was no evidence that Stacey made such a demand under *this statute*," but does not deny that she made the request. Cross-Appeal Answer. Br., at 34 (emphasis added). Instead, he apparently faults her for not citing the statute in making her request for the documents – as if that would have made a difference in GWC's willingness to produce the documents. Respondents argued in the trial court that they withheld documents because "had a reasonable basis to doubt [Stacey's] shareholder status." CP 1355-56. On appeal, however, Terry and GWC do not rely on their alleged "doubt," perhaps to avoid drawing attention to the fact that Terry fabricated the document that purported to exclude Stacey as a

shareholder. FF 27. Stacey ultimately proved at trial what Terry knew all along: she was a GWC shareholder. FF 28.

Terry tries to have it both ways, arguing that the trial court denied Stacey's request for attorneys' fees after finding that the issue of "costs and expenses to obtain corporate documents was litigated in each individual discovery motion" and, therefore, determined her right to fees under RCW 23B.16.040(3). Cross-Appeal Answer. Br., at 33 (quoting trial court order, CP 1370)). But if Stacey's request for corporate documents was not made "under th[e] statute," as Terry argues, then the trial court could not have determined her right to statutory fees after each motion. Indeed, that is why the trial court's order goes on to address the merits of Stacey's post-trial petition for fees under the statute. CP 1370. Regardless of whether Stacey might have been entitled to attorneys' fees as a *discovery sanction* in particular instances, the trial court erred by failing to award her fees *under RCW 23B.16.020(1)* for the substantial litigation costs she incurred in establishing that Respondents wrongly denied her shareholder status.

D. Stacey is Entitled to Fees for Her Cross-Appeal.²

Terry argues that Stacey is not entitled to attorneys' fees if she prevails on her cross-appeal because the mandatory indemnification and

² Stacey is also entitled to fees for defending against Terry's appeal (Answer Br., at 48-49), but she limits her argument in this brief to her entitlement to fees on cross-appeal. RAP 10.3(c).

access to corporate records statutes purportedly do not allow for fees on appeal. Cross-Appeal Answer. Br., at 34-35. Nothing in the statutes, however, precludes an award of fees on appeal. And, as Stacey has explained, “[i]n general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if [she] prevails on appeal.” *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007). Because she was entitled to attorneys’ fees in the trial court, Stacey should also receive fees for her cross-appeal.

III. CONCLUSION

Stacey respectfully requests that this Court (a) affirm the trial court’s property division, (b) remand the case to the trial court to determine the amount of an appropriate award of attorneys’ fees to Stacey, and (c) award Stacey her attorneys’ fees on appeal and cross-appeal.

SUBMITTED this 12th day of April, 2010.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct. On April 12, 2010, I caused to be filed and served a true and correct copy of REPLY IN SUPPORT OF STACEY DEFOOR'S CROSS-APPEAL to the Court and counsel of record as follows:

<i>Original to Court:</i> Clerk of the Court Division I, Court of Appeals One Union Square 600 University Street Seattle, WA 98101-4170	<input checked="" type="checkbox"/> Hand-delivery via legal messenger
<i>Copy to:</i> Gail N. Wahrenberger STOKES LAWRENCE, P.S. 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3179	<input checked="" type="checkbox"/> Via U.S. Mail

DATED this 12th day of April, 2010.

By Barbara J. McAdams
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