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

In Re the Marriage of
KRISTINE RUTH DONOVICK
Appellant

and

MATTHEW MICHAEL DONOVICK
Respondent

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENT OF ERRORS

A. ASSIGNMENT OF ERROR No. 1.

In concluding that estoppel or other defenses to a contract or note are not available, the Court below erred when it based its conclusion on a finding that the parties had failed to modify, abrogate or waive any portion of their contract in writing, pursuant to an unenforceable "no-oral-modification" or "non-waiver" clause in the contract.

Issue 1: Does the trial court use a clearly erroneous legal standard when it expressly bases its Order nullifying defenses to a contract based on an unenforceable "no-oral-modification" clause?

B. ASSIGNMENT OF ERROR No. 2.

In concluding for purposes of estoppel that a party did not establish reasonable reliance, the Court below erred when it based its conclusion (1) on a finding that the parties had not modified their contract in writing pursuant to a "no-oral modification" clause and/or (2) on statements only, when other conduct of the party against whom estoppel is claimed was in the record and consistent with reasonable reliance and estoppel.

Issue 2: May a trial court "find" (or more properly "conclude") that there was no reasonable reliance on which to base estoppel when the trial court's opinion is either (1) based on the existence of a "no-oral-modification" clause in a related contract and/or (2) based only on the *statements* of the party against whom estoppel is claimed, without considering other conduct?

a. May a court base its conclusion that a party did not reasonably rely on oral statements of another when it bases its conclusion on a "non-waiver" or no oral modification clause contained in a subject contract?

b. Did the court below, by relying solely on *statements* of the Respondent, apply an improper standard for assessing reasonable reliance under the law of estoppel, whether promissory or equitable?

C. ASSIGNMENT OF ERROR No. 3.

The Court below erred in concluding that no reasonable reliance occurred when it based its conclusion on statements that only the maker could verify.

Issue 3: May a trial court assume that certain statements are true, for the sake of determining reasonable reliance under a theory of estoppel, and find no reasonable reliance when the statements assumed can only be verified by the maker, and not the person claiming estoppel?

II. STATEMENT OF THE CASE:

A. NATURE OF THE CASE.

This case concerns (1) a note payable by its terms in 2007 from the Petitioner Mother to the Respondent Father, created as part of the parties 2002 marital Dissolution and Property Settlement Agreement, and reflecting the parties' arrangements for post-majority support for their childrens' education; and (2) the failure of the trial court to properly designate, according to law, the post-dissolution statements *and conduct* of the parties in relation to this note. The trial court, in a cursory decision devoid of necessary findings and a proper application of the law, and despite overwhelming evidence to the contrary, ruled that the Father was not estopped from collecting on the note. In its most serious error, the Court below based its opinion on the operation of a "no-oral modification" clause in the parties Property Settlement Agreement, contrary to a century of Washington law. See *Pacific N.W. Group A v. Pizza Blends*, 90 Wn. App. 273, at 277-279, 951 P.2d 826 (Div'n.I, 1998) ("hereafter "*Pacific N.W. Group A*").

In addition, the Court below failed to consider relevant *conduct* of the parties in concluding that reasonable reliance had not occurred under either equitable or promissory estoppel. Yet

the record shows that over a period of five years the Father repeatedly stated that he was forgiving and would forgive the note; he did not collect or make any demand for over twenty installments of interest due during this time; he was silent as to any continuing intention to enforce the note while stating and acting otherwise. This conduct was *partly* in exchange for the Mother's forbearance of collecting child support. Relying on the Father's actions and inactions the Mother incurred obligations for the children's education that were considerably more than originally contemplated in the Decree, did not seek modification of Support to cover unanticipated actual increases in college costs above the estimate in the Decree, and did not seek Support from the Father. The trial court's decision has and will, if left unchecked, continue to have a considerable detrimental effect on the welfare of the children, not to mention the Petitioner in this matter. Not only has the Petitioner now expended significant sums on the children's educations that were not anticipated, and is facing a decline in income to pay these debts; but the decision has now left the college plans of two of the parties' sons in jeopardy.

B. ORIGINAL DISSOLUTION PROCEEDINGS

As part of their marital Dissolution entered December 10,

2002, the parties entered an agreed Order of Child Support ("OCS") which outlined the parties' obligations for post majority support for the parties' three children, David, Dana and Mark. At the time, the parties' oldest child David was attending Gonzaga University, which the OCS adopted as the standard for college expenses for all three sons (the Mother and Father agreed to include David even though he was past the age for court ordered post-majority support). See OCS, Secs. 3.14 and 3.15, CP 5-6

. The OCS also provided: (1) that the *estimated* cost for post-secondary education and remaining private school education for the three sons would be \$375,000, with the Father to pay 20% of the estimated cost or \$75,000, whichever came first (Lines 1-3, second paragraph, Sec. 3.14, and Sec. 3.15 of the OCS, CP 5-6); and (2) that Respondent Father should pay to the Petitioner \$400 per month in support, or \$9,600 per year. OCS, CP 3, at line 9. The Order also states at Par. 3.7:

The child support amount in paragraph 3.5 deviates from the standard calculation for the following reasons:
The children have become accustomed to a lifestyle which the parties have agreed to maintain for the children's benefit. Father is starting a new job and believes that he can earn \$3,000 per month.

CP 3, lines 17-21 .

This arrangement was reflected in the parties' Property

Settlement Agreement ("PSA"), which was not filed in the Court below but was incorporated in the Dissolution Decree. As part of the PSA, the parties reduced both their property considerations and the post-majority child support considerations to a single Note executed on December 6, 2002. The note provided that the Petitioner Mother pay \$459,879 to the Respondent Father, with \$150,000 payable within 60 days of the Decree, the balance due five years from the entry of the Decree, i.e. on December 10, 2007; and with interest payments of \$4,648 payable *quarterly* in the ensuing five years commencing April 1, 2003, i.e. payments of \$18,592 per year for the ensuing five years (CP 40-41). Credit was given to the Father, in reckoning the amount due on the Note, for two years payment in advance of Child Support at \$9,600 (PSA, at Par. 7.8, CP 242, lines 8-9). The Mother timely paid the initial \$150,000 by depositing sums where indicated.

C. POST DECREE CONDUCT RELATING TO THE NOTE.

It is undisputed that for at least five years following the Decree, the Father (1) took *no* action and made *no* demand to collect any of the *twenty quarterly interest* payments from the Mother on the Note, even though these payments were about twice the amount of any support payments that he might have to pay;

and (2) took no action to request payment or enforcement of the Note until after December, 2007, when the Mother presented the Father with a Satisfaction of Judgment form for his signature. During this time, it is also admitted that the Mother (1) did not collect *any* support payments from the Father, even after the initial two years of pre paid support payments and (2) did not seek to modify support. As demonstrated below, she also incurred significantly more educational expenses than had been planned for the children.

According to the Mother and each of the parties' three adult sons, in addition to the actions and inactions listed above, the Father repeatedly *stated* that he would forgive the Note, if the Mother would not seek support from him, and that this was for the benefit of the children or the former family unit. The Mother summarized the timing and content of the Father's statements in her responsive Declaration below:

8. The reason Respondent never asked for any of those interest payments is that he agreed after the Decree of Dissolution was signed that I would not be required to make any payment on the promissory note. The Respondent first told me this at a birthday dinner on March 31, 2003, and he has repeated it many times through the years, often in front of numerous witnesses. Each of our children has heard the Respondent state numerous times that he would not require payment of the note, and the children have each indicated they would sign declarations

regarding these statements made by Respondent, and he never asked me to make any of the payments. Over the course of the ensuing five years, there would have been twenty interest payments that became due, and not once did he request a payment, so it seems clear to me that he was honoring the agreement.

9. In return, I did not pursue the Respondent for support. He has correctly stated in his declaration that he made none of the support payments that are required by the Order of Child Support commencing July, 2004. I did not pursue collection of child support, and I also refrained from seeking any adjustment or modification of child support, despite the fact that it became clear almost immediately that I was going to incur significantly more expense for the children's education than we had contemplated at the time of settlement.

Declaration of Kristine Donovan dated Aug. 29, 2008 ("Mother's Responsive Declaration" or "MRD") at Pars. 8-9, CP 268-269. The Mother also specifically recalled consistent statements, actions and inactions by the Father again in December 2003, August 2004, and June 2005. (MRD at Pars. 12 and 13, CP269-270).

The adult sons were equally clear in the Declarations they submitted below. They each, specifically and in words different from each other but consistent in meaning, recalled a family meeting in June 2005, among other instances, when the Father stated that both parties would forbear any further legal actions and that he would forgive the Note. At the time they made their Declarations, in August, 2008, the sons were all competent to testify, living apart from each other, and had or were attending

college away from home.¹ The sons stated independently that their Father had, while sober and clear headed, attended a lunch with the entire family in June, 2005, where he stated that he did not want more lawyers or legal related activities involved in the family; that he would not seek any judgment against the Mother; and that she was not going to seek any child support from him. The sons were also clear that the Father confirmed this arrangement several times after the lunch in June, 2005. A few lines from each son's statement are revealing and appropriate:

Dad appeared to be completely sober during this brunch. At that meal, my Dad apologized to my mom, brothers and I for the emotional strain caused by the divorce and that all legal interventions were done. Concretely, he told us that he verbally and independently communicated that he would not pursue any judgments against mom and end any legal-related activities providing she did not pursue any obligations on his side and given the past sufferings of our family and his commitment to investing in our futures, fully knowing that Mom was financially responsible for making it reality. . . . [H]e reiterated (confirmed) this many times since then on the phone, in person 1 on 1 during the next several years.

Declaration of David Donovick dated August 28, 2008, ("David's Decl.") at, p. 2, Ins. 1-16, CP 312.

¹ Specifically, David, the oldest, was 25, had attended a private 4 year college and was located in Butharest, Romania (CP312, line 26; CP 313, line 1, CP 314, lines 5-6); (b) Dana was 22, living in Tucson and enrolled in the University of Arizona (Declaration of Dana Donovick dated August 27, 2008, (CP 309, line 10, CP 2, lines 4-5); and (c) the youngest child Mark was 19 and living in Boston to attend Northeastern University during the school year (CP 2, lines 4-5, CP 317,

It was obvious at lunch that it was my dad's intention to discuss his eagerness to overcome his hardships and seek to rejuvenate our relationship with him. My dad was in complete control of his faculties during this brunch, and it did not appear that he had been drinking. He assured us at the table that he loved our Mom and that the failure of their marriage was because of his struggles as a father. He apologized for the emotional pain caused by the first round of legal action but specifically promised us that we had reached the end, that he wouldn't pursue my mom financially or legally any further *for our sake* providing she did not pursue his obligations. I truly believed these promises, feelings and enthusiasm to collect himself. These promises were also confirmed many times on the phone and in person during the next two years, hence I do not understand why he is pursuing my mom legally and financially today.

(Declaration of Dana Donovick dated August 27, 2008 ("Dana's Decl."), at p. 1, ln. 26, and p. 2, Ins. 1-12 (CP 307-308 (emphasis added)).

It was sometime around June, 2005, when Dana, David, my mother and I met with my dad at Chinook's restaurant. . . . It did not appear during this meeting that dad had been drinking. He also mentioned that he loved my mother and was tired of having lawyers come between our family and that he would not go after my mom anymore as long as she didn't go after him. . . .

My dad repeated this commitment many times in person and on the phone. . . .

(Declaration of Mark Donovick dated August 27, 2008 ("Mark's Declaration"), p. 1, ln 26, p. 2, Ins. 1-15; CP 316-317.

The Father's responded to the Mother and his sons in pertinent part as follows:

3. I can remember telling my family that the divorce was over and there would be *no more attorneys or fights between us*. That is not to say the I forgave her the payment of the \$309,789 that she owed me. I think that Kristine and our sons have built my statement that the divorce and fighting are over with into I will not enforce my right to collect what is owed to me, which is not true.

4. *Early on, I admit that we discussed that a payment was due. I don't recall if my discussion with Kristine was related to a single payment or more than one payment. I can say that nothing was finalized, not verbally or in writing. It was just chit-chat. I never made any promise to Kristine not to collect. . . . I am not wealthy. I don't have that kind of money to walk away from \$300,000.*

Declaration of Matt Donovan dated Sept. 9, 2008 ("Father's Strict Reply Declaration" or "FSRD")at p. 2, lines 4-23 (CP 59,emphasis added). In addition, he later states, in a rather incredible abrogation of responsibility for his own Declaration:

9. **DELAY IN COLLECTING.** I admit that I have delayed collecting what is owed to me. That is not because I had decided not to collect it from her. It is because I cannot stand conflict. That is why I am an alcoholic. . . . I have been so upset by the reaction from Kristine and the boys, *I could not bring myself to read most of what was said in the declarations. I have relied on my family and attorneys to keep me informed of whatever I need to know.*

FSRD, p. 4, lines 14-22, CP 61. And finally, after this statement of lack of responsibility, the Father states:

12. My ex-wife has filed declarations signed by my children. I think they are confusing things Kristine and I did say that

the divorce was final and ended. *That we would not be dealing with each other through our divorce attorneys. . . . I don't recall ever discussing the financial terms of our divorce with our children. My children love their mother and of course, will interpret what was said to support their mother.*

FSRD, p. 5, Ins. 8-14, CP 62.

After March, 2003, when the Father apparently made his first statement to the Mother about the Note and support, the Mother continued and increased her support of the children, especially concerning their education. As she states, this increased support was in reliance on her understanding of the statements and conduct of the Father:

16. In the years since the PSA was signed, the cost of college education for the children skyrocketed far beyond what anyone anticipated at the time. I am attaching hereto schedules that show the amount estimated now to be necessary for completion of college degrees for all three of our children, and as the Court can see, the total is going to be more than double the \$375,000 figure we were working with in December, 2002.

17. In reliance upon the repeated assurances from Respondent that I would not have to pay the promissory note, I have already spent \$565,802 on the children's education, and I am committed to spending another \$292,152 over the course of the next three years. I would not have incurred these expenses, or agreed to provide the remaining education expenses for the children, if I had thought at any time that I had not been forever released from any obligation to pay the promissory note.

MRD, pp. 5-6, Pars. 16 & 17, CP 270-271. In support of her statements, she attached summary expense sheets for all three

sons, indicating that for David, the eldest, she spent over \$170,145 for his education at Gonzaga, including one year abroad at \$45,000; for Mark she had expended \$284,791 for his education since the entry of the Decree, including \$225,116 alone for Northeastern University; and an expected total of \$348,843 for Dana's education for enrollment in a six year architecture program. All the expense sheets indicate significant increases in tuition and expenses above the amounts for Gonzaga. See MRD, Ex. B, CP 292-294, and CP 129, containing an inadvertently omitted expense sheet from Dana Donovan; The Mother supported these figures with pages from the websites of the applicable colleges, as well as confidential financial records for 2007 showing general agreement with some of these expenses. See MRD, Exh B, CP 295-305. In addition, the Mother indicated significant additional items of expense that she felt were incurred due to the Respondent's statements that he would not enforce the Note. MRD Par. 18, pp.5-6, CP 271-272.

In response to the Mother's statements concerning educational expenses, the Father tacitly admits that he remained ignorant of his sons' college expenses and that he believed that it was the Mother's duty to inform him of their sons' expenses. "I

absolutely deny that she ever kept me apprised of what was going on in her life financially relative to what she was spending with the children. She is just saying that to build a case for promissory estoppel." FSRD, p. 3, Ins. 7-11 (CP 60). He does not state here that he ever asked her for the information. The Father also objected to the Mother's use of website information since she did not include (1) an exact accounting, which he allegedly never requested due to his fear of conflict, and (2) statements of efforts to keep college costs down. FSRD at p. 8, Par. 19, lines 6-14 (CP 65). However, the Father also admits a penchant for accuracy by the Mother, and tacitly indicates that he did not even check various websites himself to contest any figures the Mother presented. Instead he just states his opinion that he does not think her figures are accurate without more than internet support: "Given how impeccably she keeps her books for her business, I find it hard to believe that she does not know how much the childrens' expenses really were." FSRD at p. 8, lines 8-10 (CP 65).

Sadly, nowhere in the Father's papers below does he indicate any expression of financial concern for his college sons' future plans. Instead, a declaration submitted by the Father's brother suggests that the reason the Father needs funds is to pay

back the Father's relatives for their support of him. Declaration of Michael Donovan dated Sept. 15, 2008, at p. 1, lines 21-23, CP 56.

D. PROCEEDINGS BELOW GIVING RISE TO REVIEW.

Some seven months after the Mother presented the Father with the Satisfaction of Judgment that he refused to sign, the Father brought a "Motion and Declaration for Judgment and Other Relief", seeking Judgment based on the Note. The Motion was not entitled a "Motion for *Summary* Judgment", but functioned the same, as the parties submitted only proof by declaration or affidavit, as indicated by the title "Motion and Declaration for Judgment". The motion was heard on the Family Law Motions Calendar, where a Court Commissioner awarded the Father judgment for principal and interest on the Note. The Mother timely moved for Revision, and Judge Patricia Clark affirmed the Order of the Commissioner, stating:

The order of this court is based on the finding that the parties Property Settlement Agreement required that any modification be in writing (paragraph 10.6) and no such written agreement was signed by the parties. Kristine Donovan alleges that she relied on statements from Matthew Donovan that she did not have to pay the promissory note to him. Court [sic] finds that Kristine Donovan did not reasonably rely on such statements, if made.

This order affirms the Commissioner's ruling re the promissory note and imposes atty[sic] fees of 3,500. Laches does not apply.

Order at p. 3, CP 132. The Order was prepared by Respondent's attorney (CP 132, lines 22-25). From this Order the Petitioner Appeals.

III. ARGUMENT

A. STANDARD OF REVIEW.

This matter is reviewed de novo, although under either the de novo or error of law standard, the decision below should be reversed. However, in determining de novo as the proper standard, the name of the Motion below suggests, without correctly stating it, that it was the functional equivalent of a summary judgment motion, as it was for judgment without hearing and based on declarations. As such, review is de novo and the court is to consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).. Any doubts as to the existence of factual disputes must be resolved against the moving party. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This seems particularly appropriate

here since the Judge below made *no* findings about the *conduct* of the parties, which is critical in considering any theory of estoppel, as argued below.

The second reason for de novo review that according to the Order below, the Judge applied the legal principles of estoppel to *uncontested* facts, having assumed that at least the Father's *statements* were true for the sake of concluding that reliance was not justified. Again, the Order state:

Kristine Donovick alleges that she relied on statements from Matthew Donovick that she did not have to pay the promissory note to him. Court [sic] finds that Kristine Donovick did not reasonably rely on such statements, if made.

CP 132, lines 9-16. The only true finding of fact made in the Order below was that the parties Property Settlement Agreement contained a "no-oral-modification" clause, which is also uncontested. Legal conclusions concerning estoppel that are based on uncontested facts are subject to de novo review. *Kramerevcky v. DSHS*, 64 Wn. App. 14 at 18, 822 P.2d 1227 (Div'n. I, 1992); *aff'd* on other grounds at 122 Wn.2d 738, 863 P.2d 535 (1993).

B. LEGAL ISSUES

Issue 1: Does the trial court use a clearly erroneous legal standard when it expressly bases its Order nullifying defenses to a contract on an unenforceable "no-oral-modification" clause?

The Court below addressed the first section of its Order to a re-iteration of the “no-oral-modification” clause at Par. 10.6 of the parties’ Property Settlement Agreement “PSA”). That paragraph states:

No modification or waiver of any of the terms of this Agreement shall be valid as between the parties unless made in writing and executed with the same formalities as this Agreement; and no waiver or any breach or default hereunder shall be deemed a waiver of any subsequent breach or default of the same or similar nature no matter how made or how often recurring.

CP 249, lines 22-26). The Order stated, without further explanation, that it was “based on the *finding*” that the parties had not executed a written modification of the PSA in writing (CP 132, lines 2-9).

It has long been the law in Washington, recently re-iterated in this Division, that :

[A] clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification. [citation omitted] *The common-law rule has been lauded as allowing parties to quickly modify their contractual obligations when faced with unforeseen circumstances [citations omitted]* and has been consistently followed in Washington, see *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 554-56, 71 P.2d 382 (1937) (citing *Ritchie v. State*, 39 Wash. 95, 81 E 79 (1905)); *Consolidated Elec. Distributions, Inc. v. Gier*, 24 Wn. App. 671, 677-78, 602 P.2d 1206 (1979).

For example, in *Kelly* the issue was whether a guaranty could be orally modified despite a contractual prohibition of such modification. There the guarantor claimed that the respondent tire company orally agreed to release the guarantor from his obligations. The trial court precluded the

presentation of such a defense, finding that it was barred by the written agreement, which required that "any variance be in writing [and] signed by specific officers . . . of the [tire] company." The Supreme Court *reversed*, stating that

[I]t is well settled that ... a contract may be modified or abrogated by the parties thereto in *any manner* they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner.

Kelly, 191 Wash. at 556.

This court more recently addressed the issue in *Consolidated Electric*, which like *Kelly*, asked whether a guaranty could be orally modified despite a clause prohibiting such modification. The guarantor claimed that the creditor orally released the guaranty. The trial court stated that "it [was] clear that the contract could be abrogated by a subsequent oral agreement[.]" but refused to enforce such an agreement finding no consideration. Summary judgment was then entered for the creditor. On appeal, this court found that the parties' mutual surrender of contract rights comprised adequate consideration. The *summary judgment ruling was therefore reversed* because the debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guaranty was orally terminated. *Consolidated Elec.*, 24 Wn. App. at 672, 675, 677-78, 680-81.

Pacific N.W. Group A, supra., 90 Wn. App. at 277-279 (emphasis added).

There could be no clearer statement that the finding on which the Trial Court explicitly *based* its opinion is *invalid* as a matter of law. As stated above, such a "inding or conclusion has mandated *reversal* of the trial Court in decisions made at trial and by summary judgment. It should do so here as well. Here there is at

the very *least*, as in *Consolidated Electric*, an alleged “mutual surrender of contract rights” between creditor and debtor in that the Mother and Father *agree* that they had discussions about payment under the note, and that no interest payments were made from the Mother to the Father during the five years in question; and that the Mother sought no support payments from the Father and did not seek to modify support. This, coupled with the consistent conduct of the parties, would at least form a *prima facie* case for consideration and a new contract, and if not novation with adequate consideration, then estoppel, whether promissory or equitable. But the Court below did not properly consider any of those theories or the *conduct* of the parties. Instead, the Court attempted to enforce an unenforceable provision barring modification of the contract. Thus the finding concerning the no-oral-modification clause is not relevant to this case, is clear error, and by itself mandates reversal or remand.

Issue 2: May a trial court “find” (or more properly “conclude”) that there was no reasonable reliance on which to base estoppel when the trial court’s opinion is either (1) based on the existence of a “no-oral-modification” clause in a related contract and/or (2) based only on the *statements* of the party against whom estoppel is claimed, without considering other conduct?

- a. May a court base its conclusion that a party did not reasonably rely on oral statements of another when it bases its conclusion on a “non-waiver” or no oral modification

clause contained in a subject contract?

The second relevant portion of the Trial Court's order states:

Kristine Donovick alleges that she relied on statements from Matthew Donovick that she did not have to pay the promissory note to him. Court finds that Kristine Donovick did not reasonably rely on such statements, if made.

The first sentence of the Order concerning the "no-oral-modification" clause suggests that the Court's conclusion of law that there was no reasonable reliance, is *based* on the existence of a no waiver or no modification order in the Property Settlement Agreement. To the extent that this is the conclusion of the Court below, it is also error. As stated concerning a similar situation in *Pacific N.W. Group A*:

Pizza Blends has raised a question of fact that it relied on McAleer's assurance that the holdover rent would not be assessed. Despite the contractual language prohibiting oral modifications, we cannot, as a matter of law, decree that this reliance is unreasonable. First, no-oral-modification clauses have consistently been deemed unenforceable in this state. Therefore, to hold that Pizza Blends' reliance was unreasonable merely because of the existence of the prohibition clause is to hold that a century of precedent is also unreasonable. Second, whether Pizza Blends was entitled to assume that McAleer's alleged promises were competently made in good faith cannot be determined on summary judgment.

Pacific N.W. Group A, 90 Wn. App. at 281.

As the Order below suggests, the trial court's ruling concerning reasonable reliance is based on the existence of the

no-oral-modification clause. As this Division has stated, this is contrary to well established law and mandates reversal.

b. Did the court below, by relying solely on *statements* of the Respondent, apply an improper standard for assessing reasonable reliance under the law of estoppel, whether promissory or equitable?

The second part of the trial Court's Order considering reasonable reliance does not state whether the trial Judge is considering the doctrine under equitable or promissory estoppel. Since the Respondent mentioned promissory estoppel several times in its papers (FSRD, p.3, lines 9-10, CP 60; FSRD p. 8, line 5, CP 65; Memo of Law, p. 7, lines 20-21, CP 90) and since the doctrine of reasonable or justifiable reliance in Washington is common to both equitable and promissory estoppel, it will serve judicial economy to determine whether the trial Court's determination of reasonable or justifiable reliance was correct under either doctrine. As shown below, it was not, since the trial court restricted its consideration only to *statements* made by the Respondent that it assumed to be true, without more.

Washington courts have adopted the same standard of justifiable reliance for both equitable and promissory estoppel. The standard was expressed as an element of *promissory* estoppel in *Weitman v. Grange Ins. Ass'n.*, 59 Wn.2d 748, at 752, 370 P.2d

587 (1962), the court stated:

The rule with reference to whether a person has been influenced, to his damage, by the conduct of another, and whether he can justifiably rely upon such conduct so that the doctrine of promissory estoppel applies, is as follows:

""The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." [citations omitted]

This definition of justifiable reliance was adopted for equitable estoppel in *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, at 280, 461 P.2d 538 (1969). This adoption continues in Washington law. See *Ellis v. Wm. Penn Life Assur. Co.*, 124 Wn.2d 1, at 15, 873 P.2d 1185 (1994).

Washington courts have also adopted a definition of equitable estoppel that includes much more than the *statements* of a party against whom estoppel is claimed:

"Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary *conduct* of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his *acts, representations, or*

admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained. When a party unjustly contrives to put another in a dilemma and to subject him to necessity and distress and he acts one way, it is not for the wrongdoer to insist that he should have acted another way." To the same effect, see 31 C. J. S. 236, Estoppel, § 59.

The Court then stated the elements of equitable estoppel as often expressed:

[5] To constitute estoppel in pais, three things must occur: (1) An admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Kessinger v. Anderson, 31 Wn.2d 157, at 169-170, 196 P.2d 289 (1948). Cases adopting this well-established definition are still currently cited, in part for the relevant proposition that Washington State recognizes estoppel by silence. See, for example, *Sorenson v. Pyeatt*, 158 Wn.2d 523, at 540, 146 P.3d 1172 (2006), citing *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943) and *Business Factors, Inc. v. Taylor Edwards Warehouse & Transfer Co., Inc.*, 21 Wn.App. 441, 449, 585 P.2d 825 (Div'n I, 1978), citing

Kessinger v. Anderson, supra.

The elements of promissory estoppel include:

"(1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." [case citations omitted]; see Restatement (Second) of Contracts 90 (1981). (fn4)

[Obviously] Promissory estoppel requires the existence of a promise. [citation omitted]; Restatement (Second) of Contracts 90. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts 2(1); see 90 cmt. a (referring to promise definition in 2).

Havens v. CD Plastics, 124 Wn.2d 158 at 172, 876 P.2d 435 (1994).

It is axiomatic that Washington subscribes to the objective manifestation theory of contracts, reflecting the definition of promise stated above. According to this theory:

To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words *and acts*. [citation omitted]. Accordingly, if [a party], judged by a reasonable standard, manifested an intention to agree to the arrangements in question, that agreement is established regardless of the [party's] real, but unexpressed, intent. [citations omitted].

Multicare Medical Center v. DSHS, 114 Wn.2d 572, at 586-587, 790 P.2d 124 (1990).

Thus, under either promissory or equitable estoppel, a Court must assess reasonable reliance based on both the words *and acts* of a party. It is error to base a conclusion about estoppel only on statements without considering the *acts* of the party against whom estoppel is claimed. There were, as stated above, numerous examples of admitted conduct by the Respondent that could support a claim of estoppel against him, in addition to the statements alleged. To re-iterate, he admitted that he had not sought interest payments during the five year period in question, even though interest payments were nearly double the amount of support payments he might have had to make (CP 3 at Par. 3.5, CP 90), and even though he admittedly was “not wealthy” (FSRD, p. 2, lines 22-23, CP 59). He admitted at least one discussion of a payment or payment due on the note (FSRD, p.2, lines 18-23, CP 59), but he never later sought payments. He was admittedly inattentive to the college expenses of his children (FSRD, p. 3, lines 1-9, CP 60), suggesting in addition to his stated fear of conflict culpable neglect on his own part, since possible increase in college costs could be sought in modification. He was allegedly silent about payments that should have been due due when the parties met for Christmas in 2003 (MRD Par. 12, CP 269, lines 27-28). The Court

below, as expressed in its Order, simply failed to properly address these items of conduct, among others. This violated well established legal principles and was error.

Issue 3: May a trial court assume that certain statements are true, for the sake of determining reasonable reliance under a theory of estoppel, and find no reasonable reliance when the statements assumed can only be verified by the maker, and not the person claiming estoppel?

As indicated above, the gravamen of justifiable reliance in equitable (and promissory) estoppel is the ability of the person claiming estoppel to independently verify whether *the representations or statements made and relied on were true or not.*

To restate:

""The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." [citations omitted].

Leonard v. Washington Employers, Inc., supra., 77 Wn.2d at 280.

In this case, the statements made and accepted as true by the Court for the Court's conclusion of law included:

1. Repeated statements by the Father that he would forgive the Note, if the Mother would not seek support from him, allegedly made in: March, 2003; August, 2004; June, 2005; and December,

2007. MRD at Pars. 8, 9 and 12, CP 268-270.

2. A statement in March, 2003 that the Respondent wanted the funds that would otherwise have gone to him from the note to be used to take care of the sons' expenses. This statement was allegedly made just before the first interest payment was due on the note. MRD at Par. 13, CP 270.

3. The statements made in June, 2005 included an apology to his sons for problems he felt he had caused (Declarations of David and Dana, CP 308, lines 5-6, CP 312 lines 2-5).

4. The statements Respondent admits that he did not want any more attorneys or legal action in this matter (CP 62, lines 9-10, if made when alleged (June 2005 – CP 269, 307, 311,316), would at least be arguably consistent with not collecting past due support or interest payments.

Simply put, *the only person who could know if these statements were true or not was the Respondent himself. There was simply no independent means for the Mother to know if the Father meant what he said or no if the statements were made, as the Court assumed below.*

This case is clearly unlike estoppel cases where the party claiming estoppel could have determined the truth of the

statements for him or herself. Compare, for example, *Safeco Insurance v. Butler*, 118 Wn.2d 383, at 405-406, P.2d 499 (1992), where an insured could not claim estoppel when he had no knowledge of the statements on which he allegedly relied, or *Laymon v. Dep't. of Natural Resources*, 99 Wn. App. 518, 994 P.2d 232 (Div'n II, 2000), where the party claiming estoppel could have checked publications of law to determine if he was properly processing his claim. Instead, the words and conduct of the Respondent here indicated both his intent and confirmed past acts that he, as a creditor, was waiving his rights under the note and had formed a different agreement with the Mother. The Mother simply had no way of knowing that he was not going to continue to do so. Her reliance was justified. See *Carter v. Curlew Creamery Co, Inc.*, 16 Wn.2d 476, 134 P.2d 66 (1943). To hold otherwise, as the Court did below, would elevate Respondent's unexpressed intentions about his conduct and words to contradict his manifest intentions. This is unacceptable under Washington law.

Issue 4: Should attorneys' fees be awarded to Petitioner?

The Respondent sought attorneys' fees and costs below under a fees provision of the Property Settlement Agreement. In addition, the Note provides for fees payable to Respondent in the

event of collection action on the Note. Washington law provides that where a contract accords the right to fees to one party, the right will also be accorded to either party. As the Respondent has defended revision below on invalid grounds under the property settlement agreement (CP 86, lines 15-20), and should the Mother prevail on appeal. fees to this point should be awarded to the Petitioner.

IV. CONCLUSION

The Court below made numerous errors of law. Whether under a de novo or error of law standard of review, the decision below should be reversed and either: (1) remanded for proper testimony and consideration of the issues, or (2) under a de novo standard, this Court may establish that the Respondent is estopped from collecting on the note. Attorneys' fees and costs should also be awarded to the Petitioner.

RESPECTFULLY SUBMITTED

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