

64739-3

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No. 64739-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BLAINE J. WEBER, Appellant,

v.

CORRIE WEBER., Respondent.

2018 AUG 27 PM 3:54
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

BRIEF OF APPELLANT

 ORIGINAL

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I. INTRODUCTION

The Court should reject the invitation to view this appeal through Respondent's narrow frame; the core issue is broader than merely one of the assets awarded to the Husband lost value. The premise of the settlement was the interest in Husband's architectural firm was valuable and secure, justifying it being 80% of his award. The premise included that the firm would continue to generate the income for maintenance payments, the interest on the property transfer payment, and in a few years, \$465,000 to pay the balance of the property transfer payment. The issue in this appeal turns on what happens when the premise of the contract fails. Under the facts of this case, it is not equitable to enforce the decree, or the contract incorporated by the decree, when the very cornerstone of the asset distribution crumbled and the premise of the entire property division proved false.

Respondent warns if the Court grants relief to Appellant, every dissolution party experiencing an asset losing value will seek relief. The Court need not be wary of the "parade of horrors" Respondent predicts. A ruling in Appellant's favor will not have such a result as the principle justifying reversing the trial court is embodied in well established case law.

II. REPLY TO FACTUAL INACCURACIES

The property awarded to Corrie did not lose value. Corrie received a condo in Aliso Viejo, California which she sold for unknown reasons. At the time she sold it, Blaine was still making maintenance payments of \$6,000 per month as well as the \$2,450 monthly interest payment to Corrie. She received 56% of the sale proceeds from the Cristalla Condo. She received 56% of the sale proceeds from the sale of the Huntington Beach Property. These were cash awards which did not lose value.

Blaine too received some assets in cash. He received some of the sale proceeds from the Seattle condo and the Huntington Beach property. He received 401k funds. While Blaine did use some funds to purchase the condo he was awarded, the majority of these assets were liquidated and expended to avoid being in default of the maintenance and interest payment obligations. When faced with zero and then negative income, Blaine was forced to liquidate his property award to generate the funds that the architectural firm did not.

A simple mathematical equation creates the picture. Blaine's overall property award was \$888,588. Of this \$888,588, \$700,000 was the interest in the architectural firm (78.8%) of his award. It was presumed by both parties this \$700,000 asset would generate \$465,000 in excess income between March 2008 and August 2012 to be paid to Corrie. This

did not happen. The premise of the contract proved false and the basis of the contract failed. *It is not equitable to shift the entire consequence to Blaine when both parties shared the premise and neither party played a role in the failure.*

III. REPLY TO ARGUMENT THIS APPEAL IS LIMITED TO A POST-DECREE CHANGE IN THE VALUE OF AN ASSET.

Respondent frames this appeal narrowly: one of the assets awarded to Blaine lost value post dissolution. This is not the issue presented. The legal issue presented here is controlled by the holdings of *Metropolitan Park District of Tacoma v. Griffith*, 106 Wash.2d 425, 723 P.2d 1090 (1986) and *Wyerhaeuser Real Estate Company v. Stoneway Concret, Inc.*, 96 Wash.2d 558, 637 P.2d 647 (1981).

The property settlement agreement (incorporated into the Decree of Dissolution) is a contract which is controlled by basic contract principles. *Byrne v. Ackerlund*, 44 Wash.App. 1, 4, 719 P.2d 1363 (1986) *reversed on other grounds Byrne v. Ackerlund*, 108 Wash.2d 445, 739 P.2d 1138 (1987).

The contract doctrines of impossibility, impracticality and frustration set forth in the Restatement of Contracts §§288, 454 and 460 compels the conclusion CR 60(b)(6) and (b)(11) justify vacating the

decree. These principles are exemplified in *Metropolitan Park District of Tacoma*, 106 Wash.2d 425, 723 P.2d 1090 and *Wyerhaeuser Real Estate Company*, 96 Wash.2d 558, 637 P.2d 647.

In *Metropolitan Park*, the District argued a fire and utter destruction of a restaurant and gift shop operated by Griffith under a lease justified terminating the lease contract. The District asserted CR 60(b)(6) could relieve its lease obligation under the doctrines of impossibility and commercial frustration. The *Metropolitan Park* Court cited Restatement of Contracts § 454 and stated “performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss.” The event which makes performance impossible must be “fortuitous and unavoidable on the part of the promisor.” *Metropolitan Park*, 106 Wash 2d at 440.

While the fire was fortuitous, unavoidable and not due to any action taken by the District, the Court found the District was nonetheless able to perform its obligations under the lease. The District’s lease obligation was to allow Griffith to operate concessions in the park. The loss of the boathouse did not render the District unable to allow Griffith to operate concessions at other locations in the park. The Court found the defense inapplicable, thus denial of the CR 60 motion was found proper.

In *Weyerhaeuser Real Estate Company*, 96 Wash.2d 558, the Supreme Court relieved the defendant of its contractual obligations to Weyerhaeuser under the doctrine of commercial frustration. There, Weyerhaeuser and Stoneway entered into a strip mining contract. Stoneway's obligations included paying annual minimum rents to Weyerhaeuser with a provision that "minimum annual rental shall be due and payable irrespective of whether Lessee [Stoneway] produces any minerals from the leasehold." *Weyerhaeuser Real Estate Company*, 96 Wash.2d at 560. Weyerhaeuser's obligations included helping Stoneway to obtain zoning and pollution control permits.

While King County granted Stoneway a permit, there was a public outcry, a referendum and litigation to stop the strip mining. Stoneway incurred legal fees and eventually was going to be required to obtain an environmental impact statement which would be costly and there was no guarantee the strip mining would be allowed after the EIS was prepared. Stoneway abandoned the strip mining and Weyerhaeuser sued seeking recovery of its minimum lease payments.

The Supreme Court affirmed the trial court's finding Stoneway was relieved of its contractual obligations under the doctrine of commercial frustration. This was defined as:

Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

Restatement of Contracts § 288, at 426-27 (1932). See also 18 S. Williston, *Contracts* s 1954 (3d ed. 1978); 6 A. Corbin, *Contracts* §§ 1355, 1356 (1962).

Weyerhaeuser Real Estate Company, 96 Wash.2d at 562. The purpose of this contract was for Stoneway to strip mine the land. This purpose was frustrated by its inability to obtain the permits. Stoneway was not at fault in causing the supervening event, i.e. the non-issuance of the permit. The only issue in dispute was whether the contract allocated the risk to one party or the other. The Court explained if the supervening event is one in which the parties did or should have foreseen, then the inference is that the promisor assumes the risk unless the contract provides for an alternate allocation of the risk. 96 Wash.2d at 563.

The supervening event in *Weyerhaeuser* was the onset of the environmental movement resulting in unprecedented public opposition to strip mining and enactment of specific legislation requiring EIS statements and barriers to permitting. This was not anticipated by either Weyerhaeuser nor Stoneway and the Court found it was inequitable to make Stoneway responsible for this risk. Implicitly, the Court found the event was not nor should not have been foreseen by either party.

Applying this rationale to the Property Settlement Agreement here, it is undisputed Blaine and Corrie anticipated the architectural firm would continue to generate substantial income to pay the maintenance, interest payments on the property transfer payment note, and the property transfer payment. The intervening occurrence which frustrated the performance of this contract was the complete economic meltdown of the financial and housing industries in this country, industries in which Blaine's income is fully reliant. While one can perhaps foresee a contraction in the economy, no one foresaw or anticipated the protracted economic depression that continues to plague this country's entire housing industry. Every project in Blaine's design studio was cancelled or put on indefinite hold. Many of his clients have declared bankruptcy. Blaine has had no income since the end of 2008 and his losses in tax year 2009 were \$228,000. This economic depression resulted in the architectural firm to completely stop generating income for Blaine and instead, actually begin requiring partners to contribute significant capital to the firm in order to keep the business on life support. At the time of settlement, the architectural firm was debt free. The firm now has over \$1,000,000 in debt.

The property settlement contract provisions imply, and more specifically, require the continued economic success and cash outflow from the architectural firm. This is the undeniable premise and

assumption both Blaine and Corrie made when contracting. Just as it was inequitable in *Weyerhaeuser* to place the entire risk and result of the intervening event upon Stoneway, it is unfair to place the risk of an unprecedented economic crisis and the resulting cessation of income flow upon Blaine. It is not Blaine's fault the economy fell off a cliff. The fact that it is unprecedented means no one could have foreseen the economic crisis. Unforeseen intervening events which make performance impossible and frustrate the contract relieve the obligation under the contract. This is the reason it is no longer equitable to give prospective application to the decree and the reason CR 60 (b)(6) justifies vacating the Property Settlement Agreement and remanding this case.

Blaine asks this Court to reverse the trial court's denial of the CR 60(b)(6) and (11) motion with instructions to set aside that portion of the property division which pertains to the interest in the architectural firm. A new trial on the division of the remaining assets is warranted as was done in *Marriage of Thurston*, 92 Wash.App. 494, 498, 963 P.2d 947 (1998). Blaine requests the Court to deny Corrie's request for legal fees, as this request was denied by both the Commissioner and the Superior Court.

Respectfully submitted this 27th day of August, 2010.

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A handwritten signature in black ink, appearing to read "LuAnne Perry", written over a horizontal line.

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