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COURT OF APPEALS
DIVISION ONE

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NO. 67458-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MERRILEE A. MACLEAN, CHAPTER 7 TRUSTEE, et al,

Appellants,

vs.

STACEY DEFOOR

Respondent.

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STATE OF WASHINGTON
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OPENING BRIEF OF
APPELLANTS TERRY DEFOOR AND G.W.I., INC.

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I. INTRODUCTION

Appellants Terry Defoor and G.W.I., Inc. (“Terry”),¹ appeal the trial court’s erroneous entry of an amended judgment “*nunc pro tunc*” and the trial court’s denial of Terry’s motion for reconsideration of the same.

The trial court should be reversed, and this Court should issue a mandate to revise the judgment to (1) state that post-judgment interest is to run from March 7, 2011, not November 20, 2008, (2) delete the phrase “*nunc pro tunc* to November 20, 2008”, and (3) account for partial satisfaction of the original judgment or the new judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law when it attempted to (1) incorporate by reference and modify its prior judgment, (2) enter an amended judgment *nunc pro tunc* so as to state that post-judgment interest was to run from November 20, 2008, and (3) issue a new judgment that did not credit Terry for payments made after the original judgment.
2. The trial court abused its discretion when it refused to reconsider its amended judgment in light of the error of law made when the trial court (1) awarded interest from November 20, 2008, rather than the date of the judgment that was entered after this Court reversed and remanded the property distribution and (2) did not account for payments or credits to offset or partially satisfy the original judgment or the new judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Court of Appeals reversed the property distribution.

¹ Because the parties have the same last name, they are referred to by their first names for clarity, and not out of any disrespect.

On remand, the trial court made new findings of fact and conclusions of law. The trial court then entered an amended judgment *nunc pro tunc*, stated that postjudgment interest was to run from the date of the original judgment, and did not credit Terry for payments made after the original judgment. Did the trial court err as a matter of law when it entered an amended judgment *nunc pro tunc* after the Court of Appeals reversed and remanded the prior judgment? (Assignments of Error 1 and 2)

2. The Court of Appeals reversed the property distribution. RCW 4.56.110(4) permits postjudgment interest to run from the original date of the judgment only on those portions of the judgment that are affirmed on appeal. Did the trial court err when it stated that postjudgment interest was to run from the date of the original judgment that was reversed? (Assignments of Error 1 and 2)
3. Did the trial court abuse its discretion when it refused to reconsider its erroneous entry of an amended judgment *nunc pro tunc* with interest running from the date of the original judgment? (Assignment of Error 2)

IV. STATEMENT OF THE CASE

This Court again is called upon to rectify the trial court's erroneous property distribution necessitated by the end of the parties' committed, intimate relationship and the end of their joint ventures. This Court first reversed and remanded portions of the trial court's distribution order on August 16, 2010.

On remand, the trial court entered an amended judgment and additional findings of fact and conclusions of law. Appellant Terry Defoor and his closely held corporation, G.W.I., Inc., seek relief from the trial court's orders and amended judgment following remand.

A. The parties' history and final separation.

Terry and Stacey Defoor married in 1987 and divorced in 1992. *Defoor v. Defoor*, 2010 Wash. App. LEXIS 1851 at *2 (2010). They reconciled but did not remarry. *Id.* They lived together until their relationship ended on September 20, 2006. *Id.* Stacey petitioned for an equitable property distribution under the committed, intimate relationship doctrine. *Id.*

The trial court entered written findings of fact and conclusions of law, concluding that all of Terry and Stacey's assets as of September 20, 2006, were subject to a just and equitable distribution under the doctrine. *Id.* at *8. In doing so, the trial court stated that "to the extent there is any uncertainty as to the value of the assets, the equities lay in support of making inferences in favor of [Stacey.]" *Id.*

The trial court awarded both Terry and Stacey a list of specific assets that it valued at \$4,533,282 each, including an equalizing cash payment of \$723,652 to Stacey. *Id.* The court valued the Sea-Tac property at \$1,625,000 based on its purchase price and awarded it to Stacey. *Id.* It valued the Missouri properties at \$2,660,000 based on Stacey's expert's opinion and awarded the property to Terry. *Id.* at **8-9. The trial court also credited Terry with the \$725,000 value of the promissory note for sale of the Costa Rica condominium. *Id.* at *9. In addition to the \$4,533,282 in

valued properties, the trial court awarded each party half the value in United Bank of Switzerland (“UBS”) account BK 0264235 as of October 31, 2007 (\$992,194 each). *Id.* And it awarded half of GWC’s interest in pending assignment agreements with Camwest to Stacey through 2011, with decreasing amounts thereafter, through 2019. *Id.*

The trial court allocated GWC’s liabilities to Terry. *Id.* Terry was awarded the corporation and its goodwill. *Id.* GWC’s reported debts included \$425,000 in real estate commissions owed to Ed Flanigan and Shelly Hyatt. *Id.* The trial court did not specifically refer to the \$1,568,997.82 that GWCA borrowed against its UBS credit line. *Id.* at *10. Terry Defoor appealed, *inter alia*, the trial court’s property distribution. *Id.* at *1.

B. This Court reversed and remanded the judgment, because (1) the trial court improperly counted a quasi-community asset twice and (2) clarification was required as to the character and allocation of the debt.

On appeal, this Court held that the trial court improperly counted proceeds from the sale of a community-like asset twice, thereby reversing the property distribution. *See id.* This Court also instructed the trial court to clarify the character and allocation of an approximately \$1.6 million debt on a UBS line of credit. *Id.*

C. **Following remand, the trial court erroneously amended the judgment, attempting to render it “nunc pro tunc.”**

Following remand, Stacey moved to amend the judgment. CP 1–13. Terry opposed this motion, arguing that Terry was entitled to credits for (1) \$812,500 to account for Stacey’s share of the obligation under the UBS business line of credit, (2) \$725,000 to account for the Costa Rica promissory note that had already been paid and deposited into the UBS account from which Stacey was awarded her judgment, (3) payments made to Stacey following the separation and the entry of judgment, and (4) costs awarded to Terry by the Court of Appeals as the substantially prevailing party. *See, e.g.*, CP 171–82. Terry maintained that a new judgment should be entered in the amount of \$452,963.56, and because this Court reversed the property distribution, post-judgment interest should commence upon entry of the new judgment. *Id.* Terry submitted a declaration regarding the subject bank accounts, which included evidence that he made post-judgment payments toward Stacey’s mortgage on the Duval residence. *See, e.g.*, CP 185–86, 274.

The trial court went on to enter new and additional findings of fact, notwithstanding the evidence demonstrating that Terry had made payments following the original judgment that was reversed. The trial court struck the second sentence of paragraph 66 and added a new finding

that none of the potential debts or liabilities of GWC, Inc., except for the Heritage Bank Loan and the UBS Lines of Credit, were substantiated. *See* CP 345. Previously, the Court found that only the Heritage Bank Loan was substantiated. *See* CP 47. The trial court then added a sentence “GWCA and/or GWC borrowed a total of \$1,568,997.82 against [the UBS] business lines of credit.” CP 345. The trial court did not stop there, but went on to add six additional findings of fact. CP 345–46. Using these new findings of fact, the trial court concluded that Stacey was awarded the Sea-Tac property free and clear of encumbrances, and that Terry was solely responsible for the obligations under the UBS Lines of Credit and all obligations of GWC and GWCA. CP 346.

The prior judgment was entered in the amount of \$2,223,368.60. CP 16. The amended judgment was entered in the amount of \$1,845,576.06. CP 342. The trial court apparently struck the portion of its judgment that provided Terry with a \$42,477.40 offset. *Compare* CP 277 with CP 343. But the trial court did not strike the portion of its original judgment that provided that Stacey was solely responsible for paying the mortgage on the Duvall residence following the entry of judgment. *See* CP 278, 341–43. Terry moved for reconsideration of the order amending the judgment, arguing that the trial court erred as a matter of law by awarding Stacey postjudgment interest *nunc pro tunc*. CP 349–53. The trial court

denied this motion. CP 356. Terry timely appealed.

V. ARGUMENT

This Court should vacate the amended judgment, reverse, and remand with clear instructions that the trial court must enter a new judgment, with postjudgment interest to run from the date of entry, not November 20, 2008. Moreover, Terry should receive credit for payments made before the new judgment was entered.

A. Standard of review

The characterization of property as community or separate is a question of law, which this Court reviews *de novo*. *In re Marriage of Zier*, 136 Wn. App. 40, 45, 147 P.3d 624 (2006). A trial court's distribution of property is reviewed for abuse of discretion. *In re Meretricious Relationship of Sutton & Widner*, 85 Wn. App. 487, 491, 933 P.2d 1069 (1997). A court's entry of a *nunc pro tunc* order is reviewed for abuse of discretion. *State v. Hendrickson*, 165 Wn.2d 474, 478, 198 P.3d 1029 (2009). Denial of a motion for reconsideration is reviewed for manifest abuse of discretion. *Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

In applying these standards, this Court should reverse and remand, instructing the trial court to enter a new judgment providing that all post-judgment interest on the judgment run from the date of the new judgment,

not November 20, 2008. The Court should also credit Terry for payments made following the original judgment.

B. The trial court erred in issuing the new judgment and awarding post-judgment interest *nunc pro tunc* as of November 20, 2008, rather than March 7, 2011.

1. The trial court erred in issuing the new judgment, not accounting for credits against the original judgment or the new judgment, and setting post-judgment interest to start running as of November 20, 2008, because the judgment was not entered until March 7, 2011.

The trial court erred by setting interest to run from the date of the original, reversed judgment. When an appellate court reverses a judgment and remands it to the trial court for entry of a new judgment, post-judgment interest may only run from the second judgment. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373, 798 P.2d 799 (1990). When an appellate court wholly or partly affirms a judgment entered on a verdict, the prevailing party is entitled post-judgment interest that accrues from the date that the verdict was rendered. RCW 4.56.110(4). But an award that is reversed on review does not bear interest. *Hadley v. Maxwell*, 120 Wn. App. 137, 146, 84 P.3d 286 (2004).

When the award is reversed, postjudgment interest will not run from the date of the first judgment of the trial court. *Coulter v. Asten Group, Inc.*, 155 Wn. App. 1, 15–16, 230 P.3d 169 (2010). The limited exception to this rule pertains only when an appellate court “merely modifies the trial court award and the only action necessary in the trial

court is compliance with the mandate” rather than reversing the trial court judgment and directing that a new money judgment be entered. *Fisher Properties*, 115 Wn.2d at 373 (quoting *Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 522, 610 P.2d 387, rev. denied, 93 Wn.2d 1030 (1980)); see also *Edwards v. City of Renton*, 67 Wn.2d 598, 607, 409 P.2d 153 (1965) (reversing and remanding judgment with instructions that interest will not run until entry of new judgment).

In this case, this Court reversed the first award and instructed the trial court to make additional findings and conclusions to clarify the character and allocation of the UBS debt:

[I]t is not clear from [conclusion of law 6] and the factual findings whether the trial court meant to allocate to Terry the UBS line of credit debt Terry claims he incurred to acquire the Sea-Tac property. The trial court did not include this specific debt in its list of debts or expressly address it in its factual findings. ***Because we cannot determine from the trial court’s findings and conclusions whether it allocated the debt to Terry as part of its fair and equitable property distribution, we remand for additional findings and conclusions to clarify the character and allocation of this debt.***

Defoor, 2010 Wash. App. LEXIS at *15 (emphasis added). The instruction required more than simply modifying the original judgment and complying with the mandate. The trial court had to do more than merely recomputed the money judgment. The trial court had to avoid double counting of the Costa Rica note, which would necessarily alter an analysis and determination of a fair and equitable property distribution.

Moreover, Terry made payments after the original judgment but

before the new judgment. When a judgment for the payment of money is paid or satisfied, the clerk of the court is to note upon the record the satisfaction. RCW 4.56.100(1). The statute also applies to the partial satisfaction of a judgment, stating in relevant part as follows:

Every satisfaction of judgment and every partial satisfaction of judgment which provides for the payment of money shall clearly designate the judgment creditor and his or her attorney if any, the judgment debtor, the amount or type of satisfaction, whether the satisfaction is full or partial, the cause number and the date of entry of the judgment.

RCW 4.56.100(1). Even in cases of a setoff that is less than the plaintiff's debt or demand, the plaintiff has a judgment for the residue only. RCW 4.56.060. The trial court's amended judgment or new judgment did not account for Terry's partial satisfaction.

Post-judgment interest should not have started to run until the date of the amended judgment, and Terry should have received credits against the original judgment or the new judgment. The trial court labeled the judgment as "*nunc pro tunc*," but this, too, was error.

2. The trial court erred in its improper attempt to enter the judgment "*nunc pro tunc*."

The trial court erred in labeling the judgment as "*nunc pro tunc*." The court entered new findings and conclusions that had not been previously made. The purpose of an order *nunc pro tunc* is to record some act of the court done at a prior time but not at that time carried into the record. *State v. Mehlhorn*, 195 Wash. 690, 692–93, 82 P.2d 158 (1938). It

is not a proper means to remedy omissions. *Id.*

A trial court's authority to act *nunc pro tunc* is limited to recording judicial action that was actually taken. *State v. Ryan*, 146 Wash. 114, 116–17, 261 P. 775 (1927). When a court does not render a judgment that it might or should have rendered, it has no power to remedy those omissions by ordering the entry *nunc pro tunc* of a proper judgment. *Id.* When recording a prior act, a *nunc pro tunc* order “may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.” *In re Marriage of Pratt*, 99 Wn.2d 905, 911, 665 P.2d 400 (1983) (quoting *Ryan*, 146 Wash. at 117).

A “*nunc pro tunc* judgment” is merely “[a] procedural device by which the record of a judgment is amended to accord with what the judge actually said and did, so that the record will be accurate.” BLACK’S LAW DICTIONARY 848 (Garner 7th ed.1999) (emphasis added). That cannot be what happened here. The trial judge had to respond to instructions from this Court. When an appellate court reverses a judgment and remands to the trial court for entry of a new judgment, postjudgment interest may run only from the second judgment. *See Fisher Properties*, 115 Wn.2d at 373.

In this case, the Court of Appeals did not affirm. This Court reversed the property distribution, because it was unable to determine whether the trial court would have made the same property distribution absent the errors. *Defoor v. Defoor*, 2010 Wash. App. LEXIS 1851 at **1–2 (2010). Following appeal, the trial court entered additional findings of fact and conclusions of law that it did not make before. CP 341–46.

This was not amending the record as to what the judge had actually said and done; the judge did more. It was improper to enter a judgment *nunc pro tunc*.

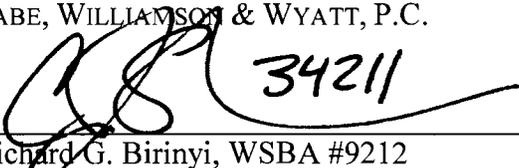
VI. CONCLUSION

The Court of Appeals reversed the property distribution. On remand, the trial court incorrectly entered a judgment *nunc pro tunc* and set postjudgment interest to run from the date of the original judgment. The trial court also ignored credits to Terry that should have offset or partially satisfied the original judgment that was reversed or the new judgment that issued after reversal and remand by this Court.

This Court should reverse and remand with instruction to strike the phrase “*nunc pro tunc*” and enter a new judgment, accounting for Terry’s credits and setting postjudgment interest to run from the new date, not November 20, 2008.

Respectfully submitted on January 3, 2012.

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF SERVICE

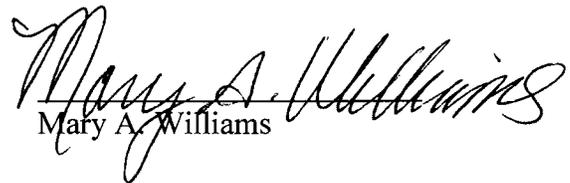
I hereby certify that on the 3rd day of January, 2012, I caused to be served the foregoing OPENING BRIEF OF APPELLANTS TERRY DEFOOR AND G.W.I., INC. on the following parties at the following addresses:

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Mary A. Williams