

70164-9

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NO. 70164-9-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

PETER SPOUSE,

Appellant,

v.

KELLY GRACE,

Appellee.

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APPELLANT'S OPENING BRIEF

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Randy Barnard  
Attorneys for Appellant  
O'Shea Barnard Martin & Olson, P.S.  
1500 Skyline Tower  
10900 NE Fourth Street  
Bellevue, WA 98004-5841  
425-454-4800  
Fax 425-454-6575

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COURT OF APPEALS  
DIVISION I

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## I. ASSIGNMENTS OF ERROR

### 1.1 Assignments of Error.

1. The trial court erred when it granted the Motion for Revision, ruling that Appellant Peter Spouse ("Spouse") had breached the Property Settlement Agreement ("the PSA").

2. In the alternative, the trial court erred by ruling, as a matter of law, that Spouse had breached the Property Settlement Agreement when requested discovery and a full hearing had not taken place.

3. The trial court erred in awarding \$21,776.75 in attorneys' fees to Appellee Kelly Grace ("Grace") and \$2,500 in costs for Grace's CPA.

### 1.2 Issues Pertaining to Assignments of Error.

1. Whether the trial court erred by adding terms to an unambiguous Property Settlement Agreement that was drafted by Grace's attorney?<sup>1</sup>

2. In the alternative, if the PSA was ambiguous and the parties disagreed about the intent of the PSA, whether the trial court

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<sup>1</sup> It is well established that ambiguities are construed against the drafter. Guy Stickney v. Underwood, 67 Wn.2d 824, 410 P.2d 7 (1966).

erred by not sending the case for a full hearing pursuant to LFLR 5(F)?

3. Whether the trial court erred when it awarded \$21,776.75 in attorneys' fees to Grace when Spouse had not "breached" the PSA and that is the only basis for an award of attorneys' fees?

4. In the alternative, whether the award of fees should be reversed when the trial court failed to state on the record the method it used to calculate the fees and the award included fees for unsuccessful claims?

5. Whether the trial court erred in awarding \$2,500 for the costs of Grace's CPA when expert's fees are not "costs" within the meaning of RCW 4.84.010?

## **II. STATEMENT OF FACTS**

2.1 The parties were married on August 21, 2000 and separated on April 25, 2012. At the time of the parties' separation they were both employed full time by a company which they owned, TelcoPrime, Inc. ("TelcoPrime"). Grace remained employed by the company until the finalization of the dissolution on September 30, 2012. CP 263, p. 1, ln. 14. Spouse is now the sole shareholder of

TelcoPrime and remains employed by the company. CP 263, p. 1, In. 14.

2.2 After the parties separated in April 2010 they agreed each of them would receive matching distributions from the company until their dissolution was finalized. CP 264, p. 2, In. 6. The parties received money from the company in three ways. They each received a salary. They also paid personal expenses with company funds. And, thirdly, they took cash distributions from the company. CP 264, p. 2, In. 8. The company has never declared shareholder dividends and never contemplated doing so. CP 264, p. 2, In. 10; CP 312, p. 6, In. 1.

2.3 The parties never agreed or discussed paying themselves the company's "revenues", "earned income", "profit" or "taxable income." CP 266, p. 4, In. 2. As a practical matter, it would not have been possible to do so, because the amount of company revenue, earnings or profits far exceeded the cash available to pay the shareholders. Id. It also would be a gross departure from the customary way corporations determine distributions to shareholders. CP 311, p. 5, In. 8.

2.4 The agreement of the parties to receive matching distributions up through the date of the dissolution is reflected in a

settlement spreadsheet prepared by Grace and accepted by Spouse. CP 206. The spreadsheet states: "Equal amount of dividends and distributions up to time of divorce." Identical language appears in the Property Settlement Agreement that Grace's attorney prepared and the parties signed on September 29, 2011, which states at Section 5.1 beginning on line 8: "In addition, the wife shall receive . . . fifty percent (50%) of the dividends and distributions from the business up to the date of the dissolution." CP 487.

2.5 Because of her role in the company, Grace was responsible for determining what distributions would be made to the shareholders and making sure that the distributions were equal. The position Grace held with the company was Executive Vice President of Finance and Administration, the title which appeared on her business cards and email signature block. Grace described the responsibilities of her position in her resume, a copy of which is attached as Exhibit A to the Spouse Declaration. CP 270.

2.6 At all times prior to her separation from the company when the dissolution was finalized Grace had full access to all company financial information. CP 265, p. 3, ln. 5; CP 285, p. 1, ln. 20. An email exchange between Grace and Spouse illustrates that

Grace was in charge of figuring what distributions could be made to the shareholders. CP 273. After exchanging messages about the amount of money each needed to cover personal expenses, Grace replies: "Ok, it is going to be tight for a while but I'll see if I can make it happen." CP 273.

2.7 Grace tracked all distributions to the parties and, if she found that she had received less than Spouse, she would write herself a check or use the company credit card to make up the difference. CP 265, p. 3, ln. 18. As it turns out, at the time of the dissolution, Grace had actually received more than 50% of the distributions. CP 265, p. 3, ln. 21; CP 285, p. 1, ln. 21.

2.8 Early on in the discussions the parties had about dividing their assets, Grace expressed a desire to receive three vehicles owned by TelcoPrime. The parties were advised by the TelcoPrime CPA that the company would likely realize taxable income on the distribution of the cars because they were almost fully depreciated. In an email to Grace and Spouse the CPA wrote:

*Tax rules say that if the fair value of the vehicle exceeds the tax basis (which would be the case since both the 2003 Denali and the M3 have tax basis of less than \$1,000 at the end of 2009), then the gain is recognized to the extent of this excess at the corporate level. This gain would then pass through to*

*the stockholders based on your ownership percentages (50%-50%).*

CP 309, p. 3, In. 14. The company's CPA has advised Spouse that tax laws require that the company report taxable income in the amount of the difference between the depreciated value of the vehicles and the actual market values on the date of distribution.

CP 308, p. 2, In. 16. As a consequence, TelcoPrime realized taxable income in 2011 that passes through to the shareholders, Grace and Spouse, on their K-1s. CP 308, pg. 2, In. 11.

2.9 The PSA provides that "Any party failing to timely carry out the terms of this Agreement shall be responsible for any court costs and reasonable attorney's fees of the other party incurred as the result of such failure." (emphasis added). CP 492, Ins. 12 -14.

### III. ARGUMENT

#### 3.1 The Family Law Commissioner Was Correct; There was No Breach of the PSA by Spouse.

It is well established in Washington that extrinsic evidence may not be used to (1) establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or

modify the written word. Seventh-Day Adventists v. Ferrellgas, 102 Wn. App 488, 7 P.3d 861 (2000). In Seventh-Day Adventists, the Court affirmed the trial court's striking of affidavits submitted by the church that attempted to explain the "intent" of contract terms in a "trade contract." The Court stated:

*Through these affidavits and Ladish's statement that he did not use the Project Manual, the Church attempts to establish subjective intent as to the meaning of the terms "Contract Documents" and "Contract Project Documents." This evidence is not admissible.*

Id. at 497.

In Hollis v. Garwall, 137 Wn.2d 683, 974 P.2d 836 (1999), the Court held that the "context" rule applied to restrictive covenants. However, the Court went on to hold that the trial court was correct in excluding extrinsic evidence of the subjective intent of one of the original contracting parties. The Court said: "*The interpretation suggested by Garwall would require this court to redraft or add to the language of the covenant.*" Id. at 697. That is exactly what Grace convinced the trial court to do here, when the court added an obligation to the PSA that was not mentioned in the PSA. This was error by the trial court.

In Oliver v. Flow Int'l Corp., 137 Wn. App. 655, 155 P.3d 140 (2006), *citing* Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222

(1990) and Hearst v. Seattle Times, 154 Wn.2d 493, 115 P.3d 262 (2005), the Court held that it was proper to exclude extrinsic evidence where an inventor sought to “insert new obligations into the contract” with evidence of his subjective intent. Oliver v. Flow, *supra*, at 660. The Court stated: “*The express terms of the contact do not create the obligation Oliver now attempts to impose, even in light of the context in which the agreement arose.*” Id.

In accord are the following “context” rule cases: Confederated Tribes v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998), Dwelley v. Chesterfield, 88 Wn.2d 331, 560 P.2d 353 (1977) and Lehre v. DSHS, 101 Wn.App. 509, 5 P.3d 722 (2000).

Also in Byrne v. Ackerlund, 108 Wn.2d 445, 739 P.2d 1138 (1987), a marriage dissolution case, the Court held that a property settlement agreement that did not set a date for sale of real property awarded to the husband would not be reformed to add a date by which the property must be sold. The Court said: “*If Byrne had intended to have the power to force a sale of the property, the agreement, which was drafted by her attorneys’ should have specifically provided for such.*” Id. at 454. Here, if Grace had intended that Spouse pay all taxes associated with her K-1, her attorney’s should have drafted such a provision.

The trial court erred by adding terms to an unambiguous property settlement agreement. The trial court erred by considering extrinsic evidence of Grace's subjective intent. At page 22 of the Report of Proceedings, the trial court indicated that sometimes property settlement agreements do not spell out every detail and thus, the court can decide what the parties intended. The trial court said:

*It is true that in settlement – in property settlement agreements sometimes things are spelled out in extreme detail and sometimes they're not and people come back and struggle with "We're supposed to sell the house, but nobody said how we are supposed to do that."*

RP, p. 22, Ins. 4 -8. In this case, the trial court went on to decide that Spouse was to pay income taxes on the K-1 that Grace received, despite it not being mentioned anywhere in the PSA.

But this PSA was clear; the only debts assumed by Spouse were those listed in Exhibit C to the PSA: debts incurred post-separation, debts associated with assets he received, including debts of TelcoPrime and on the Renton property, the payment to Grace in the amount of \$1,035,141.72, the balance owed on the Denali and credit cards in his name.

Courts are to give plain meaning to words used in a contract and dictionary definitions are appropriate. Homestreet, Inc. v. State of Washington, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

A “debt,” as defined by Webster’s Dictionary is “That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability.” So for example, the “debt” associated with the Renton property would be the mortgage or any other liens associated with that property. “Debts” of TelcoPrime, the asset awarded to Spouse, would be amounts that TelcoPrime owed, to vendors, creditors, and the like. The taxes that were associated with Grace’s K-1 are not “debts” of TelcoPrime and her subjective intent that Spouse was to pay taxes she owed after the date of dissolution should not have been considered.

**Surely if Grace believed that Spouse should reimburse her for a portion of her income tax liability, Grace’s lawyer, who drafted the agreement, would have spelled out how such reimbursement would be calculated and when payment would be due.** Because this PSA was not ambiguous, the trial court should not have imposed a liability upon Spouse that was not contained in the PSA.

In addition to the inadmissibility of evidence of one party's subjective intent regarding a contract, there are many dissolution cases holding that court's should not reopen dissolution proceedings when the parties, with full knowledge, entered into a binding property settlement agreement. For example, in Halvorsen v. Halvorsen, 3 Wn. App. 827, 479 P.2d 161 (1970), a wife signed a property settlement agreement and some 2 ½ years later sought to have the community property redistributed. There was conflicting testimony about the values of what the husband and wife received. The Court held that it would be error to redistribute any property. The Court said:

*Even if we were not convinced that the trial court in the divorce case properly exercised its discretion, we think that the result we reach would follow from the rationale in Peste v. Peste, supra. In that case, we sought to advance the strong policy favoring finality in property settlement agreements. See RCW 26.08.110. Parties often, as they have here, base their conduct on a property settlement. New families, new business and other ventures are begun in reliance on the finality of such decrees. The court is properly reluctant to upset such arrangements, absence a strong showing that justice requires such a drastic step. In Peste, we employed reasoning based on a knowing and voluntary waiver of community property rights. We believe that this rationale could be employed here, were the failure to show any abuse of discretion on the part of the trial court not dispositive. Under either rationale, plaintiff here received what she desired. She voluntarily and competently consented*

*to the settlement and so she cannot now be heard to object to her own action.*

Id. at 832.

In In Re Marriage of Campbell, 22 Wn. App. 560, 589 P.2d 1244 (1978), a husband sought review of a divorce decree because he believed his community property agreement should not have been enforced because he did not realize the effect of it upon dissolution.

The Court rejected that argument stating:

*Mr. Campbell's claim that he misunderstood the effect of the agreement upon dissolution does not impair its validity. There was substantial evidence to support the court's finding that he had "extensive experience in drafting and negotiating contracts" and that "(t)he language of the community property agreement is clear and unambiguous."*

Id. at 563. Grace's claim is similar; she was well aware of the effect of a K-1 and did not address it in the PSA.

**3.2 In the Alternative, the Trial Court Should Have Referred the Case to the Assigned Judge for Full Hearing When There Were Significant Disputes of Fact Regarding the Intent of the Parties.**

The trial court relied upon the following language to require Spouse to reimburse Grace for her income tax obligations on pass

through income from the company in excess of actual distributions received:

*The parties shall file separate income tax returns for calendar year 2011 and each party shall be responsible for any and all taxes due on his or her own earned income and income or deductions generated by assets awarded to him or her by this Agreement.*

CP 152. The trial court's interpretation of this language is inconsistent with: 1) the intent of the parties reflected in the agreement as a whole; 2) the testimony of the parties regarding their mutual intent; 3) the circumstances under which the contract was formed; 4) the conduct of the parties after the contract was made; and basic reasonableness.

The family law court commissioner's interpretation of the agreement was consistent with the intent of the parties reflected in the contract as a whole. Grace's significant income tax obligation on her pass through income is not specifically addressed in the agreement even though the document was prepared by her attorney.<sup>2</sup> It also was not identified as an obligation of Spouse under PSA Section 7.1 and Exhibit C. If it had been the intent of the parties that Spouse reimburse Grace for a portion of her income

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<sup>2</sup> The PSA must therefore be interpreted against Grace. Jones Associates v. Eastside Properties, 41 Wn. App. 426, 704 P.2d 681 (1985).

tax liability, her lawyer would have spelled out how such reimbursement would be calculated and when payment would be due. The agreement's silence on the issue confirms that the parties had no mutual intent that Spouse be required to make such a payment. In the Court's oral ruling it acknowledged that the parties never had such an intent:

Barnard: So, Your Honor, are you really saying you think it was an attempt of the parties for Mr. Spouse to pay tax on money actually received by Ms. Grace?

Judge Middaugh: That's what it says. I, I, ... Do I think that was the intent? To be honest with you, I'm suspecting nobody ever thought about it, but that's what it says. And you're kind of stuck with your language.

RP p. 25, Ins. 9-15.

The trial court's interpretation is also inconsistent with the expressed intent of the parties. In her declaration Grace makes clear that the over all intent of the agreement was to leave the parties in a 50/50 position following the dissolution. CP 138, pg. 2, ln. 5. In fact, the parties negotiated the terms of the agreement using a spreadsheet by which they balanced their positions to come out roughly equal. CP 179. However, the trial court's order leaves

the parties in a dramatically unequal position, clearly contrary to the intent of the parties. The impact of the trial court's order on the parties' relative tax burden can be understood from the declaration submitted by Grace's CPA, Tucker Dacey. CP 453. It shows that the tax on a 50% shareholder's pass through income is \$96,402. Under the trial court's order Spouse pays his \$96,402 plus \$58,754 of Grace's tax. This results in Grace paying \$37,648. Spouse would pay \$155,156. This is \$117,508 more than Grace would pay. Spouse would be paying 80% to Grace's 20% in clear contravention of the parties' intent.

The actual mutual intent of the parties is further confirmed by the conduct of the parties after the contract was executed. There is no evidence that Grace ever calculated her tax liability on any portion of her pass through income until after this Court entered its February 15, 2013 order. There is also no evidence that she requested that Spouse reimburse her for the tax obligation. If the parties intended for Spouse to make such a reimbursement, Grace would have requested the reimbursement before incurring penalties and interest. But, she did not do so. It is clear that the parties had no understanding or expectation that Spouse was to make such a reimbursement.

The family law court commissioner properly determined that the most reasonable interpretation of Section 7.5 of the PSA required Spouse to assume full responsibility for tax on income generated by TelcoPrime after the date of the dissolution. This is consistent with the agreement as a whole, Grace's acknowledged intent that the parties end up close to 50/50 after the dissolution, and the conduct of Grace following the dissolution. This Court should reverse the trial court and affirm the court commissioner's decision.

Finally, in response to Grace's Motion, Spouse requested the opportunity to conduct discovery in order to more fully demonstrate that Grace never had an expectation that Spouse would reimburse her for her taxes. Before entering the trial court's order it should have granted Spouse the opportunity to conduct discovery in order to more fully demonstrate the intention of the parties. This Court should reverse the trial court and allow Spouse the opportunity to conduct discovery and have a full hearing regarding the parties' intent. See Go2 Net, Inc. v. CI Host, Inc., 15 Wn. App. 73, 85, 60 P.3d 1245 (2003), holding that summary judgment is improper in a contract dispute unless a contract has only one reasonable meaning.

**3.3 The Motion for An Award of Attorneys' Fees to Grace Should Have Been Denied in Its Entirety.**

The only basis for an award of fees in this matter is found at Section 9.6 of the PSA:

*Any party failing to timely carry out the terms of this Agreement shall be responsible for any court costs and reasonable attorney's fees of the other party incurred as the result of such failure.*

(emphasis added). CP 616.

Under Washington law a contract that provides for attorney's fees for a party successfully prosecuting a claim under the contract is deemed also to provide an award of attorney's fees to a party successfully defending a claim. RCW 4.84.330. In this case Spouse fully prevailed on two of Grace's claims and partially prevailed on her tax reimbursement claim. The only claim on which Spouse has not at least partially prevailed is the request that he pay off the Denali vehicle, an issue that has not been disputed since the family law court commissioner entered her order. The right to attorney's fees by both parties should have been offset and both parties ordered to bear their own fees and costs.

Moreover, the award of fees to Grace was improper because the Court did not state on the record the method it used to calculate

such award. Marriage of McCausland, 129 Wn. App. 390, 118 P.3d 944 (2005). In calculating a reasonable amount of fees, the trial court must consider the following three factors: (1) the factual and legal questions involved; (2) the amount of time necessary for preparation and presentation of the case; and (3) the value and character of the property involved. Marriage of Foley, 84 Wn. App. 839, 930 P.2d 929 (1997). Here, the trial court neither stated the basis for the award or the method used to calculate the award. The award must be reversed.

**3.4 In the Alternative, the Grace Should Only Have Been Awarded Fees for Successful Claims; Because the Fees Were not Segregated, the Motion Should Have Been Denied.**

The majority of the fees incurred by Grace are unrelated to the issues on which the trial court found that Spouse failed to meet his obligations under the PSA. The fees related to the Denali are certainly de minimus. The trial court determined that Spouse failed to reimburse Grace for a portion of her TelcoPrime pass through income. None of the legal fees incurred in the wrangling over the proper form of an NDA relate to the claim for tax reimbursement. Grace had all the information necessary to calculate her tax and to bring her motion for reimbursement. Nothing that Grace sought or

received in the discovery dispute was used to support her claim for reimbursement. The \$8,795.51 requested for this discovery phase was not “incurred as a result” of Spouse’s failure to reimburse Grace for the taxes owed as a result of the K-1.

Grace’s most significant claim sought payment of over \$170,000 from Spouse. The trial court did not find that Grace was entitled to such a payment. Additionally, the request for this monetary relief was not based on any provision in the PSA. Since only fees incurred because the other party failed to meet an obligation under the PSA may be awarded, Grace’s fees incurred seeking this relief cannot be awarded. Also, Grace’s failure to give the trial court any basis for segregation of the fees that may properly be awarded from those that cannot, required denial of the motion in its entirety. Loeffelholz v. C.L.E.A.N., 119 Wn. App 665, 82 P.3d 1199 (2004).

**3.5 It is Well Established that a Court awarding “Costs” to a Prevailing Party may Only Award those “Costs” Authorized by RCW 4.84.010**

The trial court awarded costs of \$2,500 for “professional CPA fees” to Grace. CP 570-571. This was error.

In Estep v. Hamilton, 148 Wn. App. 246, 201 P.3d 331 (2008), a legal malpractice action in which the lawyer prevailed, the Court held that it was error to award the defendant “costs” for his expert witness fees. *Citing Fiorito v. Goerig*, 27 Wn.2d 615, 179 P.2d 316 (1947), the Estep v. Hamilton Court stated: “*Moreover, our Supreme Court has recognized there are no grounds for awarding expert witness fees as costs.*” Id. at 263.

In Colarusso v. Petersen, 61 Wn. App. 767, 812 P.2d 862 (1991), the Court also held that awarding expert witness fees as “costs,” would have been error by the trial court. The Court cited Nordstrom v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987), where it was stated: “*Costs have historically been very narrowly defined, and RCW 4.84.010, which statutorily defines costs, limits that recovery to narrow range of expenses such as filing fees, witness fees, and service of process expenses.*” Id. at 743.

In Gerken v. Mutual of Enumclaw Ins. Co., 74 Wn. App. 229, 872 P.2d 1108 (1994), the Court reversed the trial court’s award of \$1,298.34 for “investigation, photographs and expert witness fees,” as there was no statutory basis for such an award.

Here, the award for expert witness fees in the amount of \$2,500 must be reversed.

#### IV. CONCLUSION

The trial court's ruling that Spouse breached the PSA should be reversed and the decision of the family court commissioner reinstated. The award of attorneys' fees and costs must also be reversed. In the alternative, the award of attorneys' fees must be reduced to account for unsuccessful claims. The award of costs must also be reversed.

DATED this 22<sup>nd</sup> day of September, 2013.

Respectfully submitted,

  
Randy Barnard  
WSBA No. 8382  
Attorneys for Appellant