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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LLOYD HARA, an individual,

Appellant,

v.

KUNATH KARREN RINNE & ATKIN LLC., a Washington company

Respondent.

BRIEF IN REPLY OF APPELLANT

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A. Issues of Standard of Review and Assignments of Error

1. Summary Judgment Based on Legal Issue Reviewable

In reviewing a summary judgment the appellate court engages in the same inquiry as the trial court. *Sisters of Providence v. Snohomish Cy.*, 57 Wash.App. 848, 850, 790 P.2d 656, (1990). KKRA cites to *Weiss v. Lonquist* 173 Wash.App. 344, 293 P.3d 1264 (2013) but fails to note that Court's opinion also states that a summary judgment decision based on a legal issue remains reviewable following trial. *McGovern v. Smith*, 59 Wash.App. 721, 734, 801 P.2d 250 (1990)(citing *Bullo v. City of Fife*, 50 Wash.App. 602, 749 P.2d 749 (1988), see Fn. 1 therein); *GMAC v. Everett Chevrolet, Inc.*, 179 Wash.App. 126, 134, 317 P.3d 1074 (2014)(A denial of summary judgment is reviewed de novo, and an appellate court performs the same inquiry as the trial court.).

Mr. Hara maintains that there was no material fact in dispute justifying the denial of his summary judgment motion. *Opening Brief of Appellant*, pgs. 11, 12, 15. A case concerning the presence or absence of ambiguity in a contract and of the legal effect of that written instrument are questions of law, and are reviewed as such on appeal. *McGary v. Westlake Investors*, 99 Wash.2d 280, 661 P.2d 971 (1983); *Yeats v. Estate of Yeats*, 90 Wash.2d 201, 580 P.2d 617 (1978). The trial court in this

matter made no finding that the Agreement was ambiguous, despite proceeding as if it had made such a finding. A court must not read ambiguity into a contract where it can reasonably be avoided. *GMAC v. Everett Chevrolet, Inc.*, 179 Wash.App. at 135.

Cases involving mixed questions of law and fact are reviewed under the error of law standard. A mixed question of law and fact exists when there is a dispute both as to the inferences drawn from the raw facts and the meaning of a statutory term. *Vergeyle v. Department of Empl. Sec.*, 28 Wash.App. 399, 623 P.2d 736 (1981).

Review of a trial court's findings of fact is whether there is substantial evidence in support of the findings. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). The findings of fact must support the trial court's conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

2. Assignments of Error

KKRA contends that Mr. Hara has failed to comply with RAP 10.3(g). *Brief of Respondent*, pg. 12. Mr. Hara submits that the assignments contained in "Assignments of Error" when read in conjunction with the subsequent specific assignments of error from the

trial court's findings and conclusions is compliant with RAP 10.3. *Opening Brief of Appellant*, pgs. 2-3, 31-33. However, even if this is not technically compliant with RAP 10.3(g) the assignments and argument provide enough clarity concerning the dispute for resolution. *Daughtry v. Jet Aeration Co.*, 91 Wash.2d 704, 710, 592 P.2d 631 (1979); *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wash.App. 379, 321 P.3d 1261 (2014).

B. KKRA's analysis of the parol evidence with regard to consideration is inconsistent with the law.

KKRA cites a series of cases for the proposition that extrinsic evidence is permissible to interpret consideration. *Respondent's Brief*, p. 28. However, the admission of extrinsic evidence to interpret consideration is an exception to the general rule of inadmissibility stated consistently throughout the case law. Evidence to modify consideration is allowed in one of two scenarios. First, parol evidence has been held to be admissible where the contract contains a mere recital of consideration (e.g., 'one dollar and other valuable consideration') *Seattle-First Nat. Bank v. Pearson*, 63 Wash. 2d 890, 894, 389 P.2d 665, 669 (1964). Second, parol evidence is also admissible to show any consideration which is consistent with the stated consideration. *Id.* For example, in *Roberts v. Stiltner*, the purchaser was allowed to show that the seller had

accepted property worth \$2,700 in lieu of the \$2,700 cash consideration stated in the contract. 101 Wash. 397, 172 P. 738 (1918). Neither of these exceptions apply in this case. Contrary to KKRA's assertions, the failure of the parties in this case to use the actual word "consideration" has no bearing on the issue of whether one of these exceptions should apply.

The applicable analysis that must be done in this case, and what was set forth in *Ryan v. Ryan*, 48 Wash. 2d 593, 595, 295 P.2d 1111, 1112 (1956), is as follows:

Where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol evidence than any other part. A party has the right to make the consideration of his agreement the essence of the contract. When this is done, the provision, as to consideration, stands on the same plane as other provisions of the contract. They are conclusive and immune from attack by parol or extrinsic evidence.

KKRA provides no basis on which to conclude the consideration in the Severance Agreement fits within one of the two exceptions discussed above. Moreover, there is no reference to any at-will employment agreement within the four corners of the Severance Agreement. While it is undisputed that Mr. Hara was employed by KKRA, that employment relationship is not pertinent to promises exchanged in the Severance Agreement. This is absolutely the case because it is undisputed that the obligations between the parties regarding the employment relationship had

completely terminated when the Severance Agreement was executed. The mere existence of a prior employment arrangement is not a basis to admit parol evidence.

The trial court erred by admitting parol evidence even to interpret the terms of the Severance Agreement. Ultimately, the parol evidence was used for far more than interpreting the Agreement. The trial court used parol evidence to not only evaluate the legality of the original employment arrangement between Mr. Hara and KKRA, but also to determine that the actual consideration described in the Severance Agreement was legally insufficient. What started as a breach of contract trial turned into an investigation of the inner-workings of KKRA and its dealings with Mr. Hara that preceded the trial by fifteen years.

While KKRA maintains the position, erroneously agreed to by the trial court, that the terms of the original at-will employment were necessary to interpret the Severance Agreement, there is no basis in law for this position. The Severance Agreement was a separate contract with its own separate and distinct consideration. While the Severance Agreement does follow in time the term of Mr. Hara's employment, which had been terminated by the time he entered into the Severance Agreement, this relationship does not give rise to an exception to the parol evidence rule.

Furthermore, the trial Court's error in admitting parol evidence was severely compounded and magnified when it admitted further documentary evidence, not submitted by either party as a trial exhibit, to argue that Mr. Hara was paid what KKRA deemed to be commissions while he was employed KKRA. Because of this error, the trial became about reconstructing memories from unauthenticated documents and inadmissible evidence improperly before the court. Without reaching into history through the application of parol evidence, KKRA cannot construct any perceived illegality argument. Unfortunately, the trial Court exercised a level of interpretation barred under the parol evidence rule. Ultimately, the Court used the evidence to re-characterize the otherwise perfectly valid consideration of the Severance Agreement. Rather than giving the consideration found in the Agreement an objective interpretation based on the language of the Severance Agreement, the trial court substituted its own interpretation and found that the consideration was for illegal solicitation activities.

However, regardless of whether parol evidence was appropriately admitted and relied upon, the fact remains that the Severance Agreement is lawful and does not require either party to engage in illegal activities under either state or federal Law.

Payments made under the Agreement are for the promises contained in the Agreement. Without providing any analysis, KKRA mimics the trial court and summarily states that payments under the Agreement were actually made with respect to solicitation activities and thus were made in violation of state and federal law. *Brief of Respondent*, p. 16-17, citing CP 315, Conclusion 12. However, KKRA's only witness, Ned Karren, did not testify that the payments made pursuant to the Agreement were for solicitation activities. The Court admitted evidence that was not submitted as a trial exhibit over Mr. Hara's objection and Ned Karren then testified that commissions were paid to Mr. Hara while he was employed with KKRA.

Mr. Karren then testified that payments made under the Agreement to Mr. Hara after he left KKRA were to be encouraging as well as to prevent Mr. Hara from seeking employment with a competing firm and from disparaging KKRA. RP 114:10-16; 116:23-25; 138:5-25. Mr. Karren testified that any obligation to pay him commissions had ceased when Mr. Hara left KKRA. 124:12-16. Thus, KKRA's own evidence demonstrates that Mr. Hara was not being paid for solicitation activities after he left KKRA. The evidence is irrefutable that even if commissions were paid during Mr. Hara's employment, they stopped when his employment terminated. Even with the improperly admitted parol

evidence before the Court, the only reasonable interpretation is that the payments made to Mr. Hara after he left KKRA pursuant to the Agreement were for the promises he made in the Agreement and not for any other reason.

To summarize, the parol evidence was not used to support KKRA's own recollection of events presented at trial (e.g. payments to encourage and support Mr. Hara after he left, to not compete for MIT and NAB as clients with another firm, to waive legal rights, and to not disparage KKRA), but to create a new interpretation that KKRA wanted the trial court to apply in order to find the Agreement illegal and avoid payment (e.g. the payments under the Agreement were commissions for solicitation activities). This impropriety, and the disruption it caused, is why parol evidence is not admissible. The idea that the payments were being made with respect to solicitation activities after Mr. Hara left KKRA and executed the Agreement are cut out of whole cloth.

C. Application of State and Federal Law

Even if it is held that the trial court properly admitted parol evidence and that KKRA has proven the existence of an oral employment

agreement made contrary to law¹ that does not impact the enforceability of the Severance Agreement upon which Mr. Hara brought suit.²

KKRA's argument that the Agreement violated state law is essentially circular, asserting that because the trial court concluded the Agreement violated state law that state law was violated by the Agreement. The lack of substance in this argument is demonstrated by the only citation in Respondent's brief on this point being the trial court's Conclusion 7. *Brief of Respondent*, pg. 18.

Contrary to KKRA's assertion, courts have found severance agreements to not be related to the services performed by the employee during their term of employment. *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1195-1197 (2007) ("We are unpersuaded that the plain meaning of "wages and salary," for purposes of defining "earnings" in the NPC Plan, includes Gilliam's severance pay. Simply put, "wages and salary," as used in the definition of "earnings" in the plan, includes only payment for *services*. Gilliam's severance pay was not for services, but for her voluntary termination of employment, confidentiality, non-competition, and waiver of claims against Nevada Power Company.") Therefore, Mr.

¹ Rather than an agreement consistent with the law during the course of which the parties engaged in some illegal activity.

² KKRA states that "[t]his case, however, does not concern the legality of the Employment Agreement." *Brief of Respondent*, pg. 7. While Mr. Hara agrees with this statement, it must be pointed out that KKRA spent much of the trial and related briefing describing activities related to this alleged agreement and failed to identify any actions under the written Severance Agreement that are illegal.

Hara's position that the Severance Agreement is not for any services performed while at KKRA is neither unusual nor logically inconsistent.

This analysis applies equally to the Interpretative Statement cited by KKRA, which was concerned with the active and ongoing relationship between a credit union and investment advisor operating on its premises. As noted, there is no allegation that Mr. Hara is actively engaged in any activities arguably covered by any of the statutes cited by KKRA.

As formulated by KKRA, the violation under federal law is premised upon acceptance of the fact that the payments to Mr. Hara are being made for solicitation on behalf of KKRA. As above, KKRA cites only to one of the trial court's conclusions in support of this argument. *Brief of Respondent*, pg. 17.

The central premise upon which Mr. Hara based this litigation is that the Severance Agreement required him to forebear from competition with KKRA and in exchange KKRA would make payments in order that Mr. Hara would not solicit those clients to whom he had developed a professional, and completely legal, relationship.

Under either state or federal law, the case turns on whether the Agreement required KKRA to make payments to Mr. Hara for actions in violation of the law. The undisputed testimony is that no payments under the Agreement were made for solicitations performed by Mr. Hara on

behalf of KKRA and that Mr. Hara engaged in no improper activities following his resignation. RP 53:18-56:4, 137:22-139:1.

The testimony of KKRA's only witness as well as the testimony of Mr. Hara was that all obligations for KKRA to pay any compensation to Mr. Hara had ceased before the Agreement was executed. This is consistent with the law of employment cited by Mr. Hara in his initial brief. *Appellant's Opening Brief*, pgs. 14-15. KKRA now argues that it was making payments in violation of state and federal law for solicitation activities. However, the evidence at trial was that even if some part of Mr. Hara's employment compensation prior to his resignation had been related to solicitation, such compensation had concluded when he resigned, and no subsequent payments under the Agreement were for solicitation.

Notably, KKRA cites to nothing aside from the trial court's conclusion that the payments were for solicitation. It is the trial court's conclusion on this point, as well as others, which is the subject of this appeal. The trial court's conclusion is not supported by any evidence.

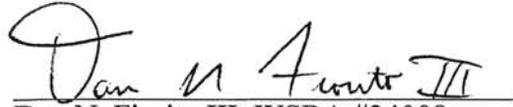
Additionally, the trial court made no finding that any payments under the Agreement were for activity that could be construed as illegal. In fact, the trial court made no finding as to what the payments by KKRA under the Agreement were for in any respect.

The absence of a finding on an issue is construed against the party having the burden of proof on that issue. *City of SeaTac v. Cassan*, 93 Wash.App. 357, 362, 967 P.2d 1274. “KKRA asserted illegality as its sole defense” and therefore bore the burden of proof on this issue. *Brief of Respondent*, page 11. To sustain a finding of illegality under state and federal law, there must be a finding of illegal activity. Even if this Court were inclined to transform Conclusion 7 into a finding that could imply payment under the Agreement was made for solicitation activities, there is not any evidence in the record to support this finding. KKRA failed to identify or produce any evidence tending to prove this fact in any respect.

D. Conclusion

This case became much more complex than necessary because the trial court improperly allowed KKRA to admit irrelevant parol evidence. None of the exceptions to the admission of parol evidence applied to the facts of this case. Despite this the evidence at trial indisputably demonstrated that nothing in the Severance Agreement required the performance of any actions in violation of either state or federal law. Thus the Severance Agreement is valid and legal.

REPECTFULLY SUBMITTED this 8th day of December 2014



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on December 8, 2014 I served the foregoing Brief in Reply of Appellant on the following parties:

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