

73439-3

73439-3

No. 73439-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JACK A. CALABRESE, Respondent

v.

JILL S. CALABRESE, Appellant

REPLY BRIEF OF APPELLANT

H. Michael Finesilver (fka
Fields)
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

2015 DEC -1 11:11:56
H. MICHAEL FINESILVER
ATTORNEY AT LAW
SEATTLE, WA

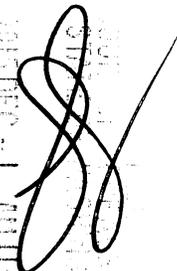


TABLE OF CONTENTS

I. Statement of the Case.....5

II. Argument.....5

 A. Concessions By The Response Brief.....5

 B. Misstatements of the Record or of The Appellate Brief.....6

 1. That Jack Calabrese Was An Insurance Carrier.....6

 2. That NAPA Corporate Controlled NIC’s Access To NAPA Auto Dealers.....7

 3. Calabrese Was Not Owed Back Salary; He Was Owed \$150,000 in Payments of Goodwill.....8

 4. The Trial Court Confused The Terms of The GMI Purchase With Mr. Calabrese’s Economic Circumstances As Of The Time of Trial.....8

 5. That NIC No Longer Exists And Jack Calabrese Did Business As NIC, LLC For Several Years.....9

 C. One Beacon Insurance Group: Its Endorsement and Role Remain Unexplained.....10

 D. The Decision To Repurchase Newco And Forgo \$150,000 in Goodwill Still Owed Him: An Excuse Rather Than A Reason.....11

 E. Implementation of His Retirement Plan.....12

1. The Purchase of 67% of NIC By GMI Was The Beginning Of A Plan To Retire.....	12
2. Perpetuation of the Retirement Plan: Lockton Did Not Replace Federated; It Replaced Calabrese (NIC) As The Broker Of Insurance Policies to Be Provided By Other Insurance Companies.....	12
F. The Applicability of the Holdings In <i>In re Marriage of Fox, supra</i> and <i>Lambert v. Lambert, supra</i>	16
G. Conclusion.....	20

TABLE OF AUTHORITIES

Table of Cases

Fox v. Fox,
87 Wa App 782 at 784, 942 P.2d 1084 (1997).....16,17,18

Henderson v. Tyrrell,
80 Wn. App. 592, 910 P.2d 522 (1996).....6

Lambert v. Lambert,
66 Wa 2d 503 at 508, 403 P.2d 664 (1965).....16

In re Marriage of Bucklin,
70 Wa App 837 at 841, 855 P.2d 1197 (1993).....22

In re the Marriage of McKinney,
14 Wn. App. 921 at 924, 546 P.2d 456 (1976).....23

I. Statement of the Case

The response brief filed on behalf of Jack Calabrese makes a number of factual representations either belied by contradictory evidence presented on his behalf or not supported by the record or. In some instances the response brief also misstates representations and arguments made in the brief filed on behalf of Ms. Calabrese. These will all be addressed in the argument section below. The brief in chief filed on behalf of Jill Calabrese will be referred to as the appellate brief. The brief filed on behalf of Jack Calabrese is referred to as the response brief.

II. Argument

A. Concessions By The Response Brief

The response brief concedes two assignments of error: that the trial court erred in finding that Jack Calabrese's decisions to sell 67% of NIC to GMI and to repurchase, thereby giving up \$150,000 in goodwill still owed him, were involuntary. The response admits at page 33 that both decisions were voluntary. The response brief argues they were choices made in good faith.

The response brief also does not deny the representation, that if GMI were truly the replacement for Federated, that it had two sources of income. One was as the replacement purveyor of business insurance to the

NAPA dealers, and the other, whatever income Newco would derive as NIC's replacement as the broker who was to find those business insurance coverages for the NAPA dealers.

The response brief does not deny that none of the business records of either GMI or Newco were supplied by Mr. Calabrese, and that he had the ability to do so as requested in discovery. Thus the court is justified in concluding that the evidence is unfavorable to Mr. Calabrese. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

In the absence of a reversal, the response brief does not refute the arguments in the appellate brief as to why the restructuring of maintenance payments is inadequate and unfair should his income return to its former level when the obligation went into effect at \$10,000 per month. However, reversal is warranted.

B. Misstatements of the Record or of The Appellate Brief

1. That Jack Calabrese Was An Insurance Carrier

At page 28 the response brief argues that contrary to the argument in the appellate brief neither the Commissioner nor the Revision Judge referred to Mr. Calabrese as a "carrier". The appellate brief did not say that they did. Page 16 of the appellate brief pointed out that the attorney for Mr. Calabrese referred to Jack Calabrese (NIC) as "...the exclusive

recommended **carrier** (emphasis supplied) for all NAPA Auto Parts stores”, citing RP 12.

Federated Insurance Company was the “carrier” for NAPA Auto Parts stores (CP 1437), not Mr. Calabrese. Calabrese, doing business as NIC, was the broker who marketed insurance programs through Federated that the various NAPA parts dealers purchased.

The appellate brief made a point of that mischaracterization of his role, in the context of other inaccurate observations made by the trial court, to illustrate how it ended up so confused about the factual history, that it made unjustifiable findings and unwarranted conclusions as to whether Mr. Calabrese fulfilled his burden to prove that he acted in good faith in making the choices that resulted in his reduced income.

2. That NAPA Corporate Controlled NIC’s Access To NAPA Auto Dealers

The response brief argues at page 2, that NAPA Corporate controls NIC’s access to the nationwide NAPA auto parts stores, citing CP 1172, 1201 and 1202. None of those references to the record say anything about NAPA corporate controlling anything. Nothing in the record supports the contention that NAPA Corporate controlled his access to the individual the NAPA dealers.

3. Calabrese Was Not Owed Back Salary; He Was Owed \$150,000 in Payments of Goodwill

The response brief represents at page 12 that GMI owed him four months of work at \$25,000 per month. This is also not accurate. What GMI owed him was six months of goodwill payments for a total of \$150,000. (CP 1384).

4. The Trial Court Confused The Terms of The GMI Purchase With Mr. Calabrese's Economic Circumstances As Of The Time of Trial

The response brief at page 10 inaccurately states that GMI paid Jack Calabrese a salary of \$200,000 per year. CP 1369 is the page of the purchase agreement that obligates Newco LLC, not GMI, to pay his salary.

At page 27 the response brief argues that the revision Judge correctly stated that he received one time "payments." That is not how the judge viewed the evidence. The judge stated that his sole source of income (as of trial) are one time payments as a consequence of having sold the business. (RP 95). The sale to GMI occurred on September 1, 2012. The payments he received were not his sources of income as of the time of trial. \$150,000 of those payments, as goodwill, were eliminated by his decision to repurchase in 2013. (CP 1384). This is further confirmation

as to how confused by the evidence and the arguments the trial court was, which lead to erroneous and insufficient findings.

He also stated at page 27 of his response brief that “that Mr. Calabrese does not own NIC...” At CP 320 he states: “I owned and operated my own business, a d/b/a called NAPA Insurance Center.”

5. That NIC No Longer Exists And Jack Calabrese Did Business As NIC, LLC For Several Years

Jack Calabrese stated that NIC, LLC was his source of income for over 25 years at CP 325 . The response brief argues at page 23 that he does not own NIC. Both statements are inaccurate and exacerbate the confusion.

NIC as an LLC was created when GMI bought 67% of NIC. The new company, “Newco” did business as NIC, LLC. (CP 1366). Thus NIC as an LLC was created by virtue, of GMI’s buy-in on September 1, 2012, which is confirmed by the face page of the only NIC, LLC tax return: 2013. CP 467 and 1366. Thus his declaration at CP 325, NIC LLC created income for over twenty years is not accurate. He also confirms the LLC was dissolved when he bought out GMI in 2013 (CP 1810). Thus that there is no NIC, LLC is accurate.

The response brief points out at page 2 that NIC still exists citing CP 321, 1171. CP 321 does say that and is a statement in his declaration of August 20, 2014. CP 1171-1172 is from his declaration of December 19, 2014 in which he states: “**Although the business is called NAPA Insurance Center... My role is “Director”** (emphasis supplied). “I work under the guidance of NAPA senior management to help market the NAPA business and health programs.” (CP 1171 and 1172). Thus by the end of December, 2014, four months before trial NIC still existed. That does not mean the NIC went out of existence. There is no record of NIC ever being dissolved or NAPA Corporate authorizing someone else to take it over and do business under that name. NIC itself was not dissolved.

C. One Beacon Insurance Group: Its Endorsement and Role Remain Unexplained

Jack Calabrese represented that GMI was the replacement for Federated at CP 1817 and CP 1177, but at CP 1369 he describes GMI as a mere holding company, doing business through an affiliate EverGuard Insurance Services. His response brief does not explain, if all that were true, why GMI accepted NAPA corporate’s endorsement of the One Beacon Insurance Group instead of GMI or Everguard, to provide business insurance policies as the replacement for Federated Insurance.

Nor does the response brief explain what efforts were made to get NAPA auto parts dealers to purchase business insurance from One Beacon Insurance Group, whether that effort succeeded or failed. The response brief provides an answer that is no answer.

At page 11 the response brief states: “To address the Appellant’s reference to One Beacon, One Beacon is an insurance company. GMI is not an insurance Company; it is a holding company that has an insurance division which operates under the name EverGuard Insurance Services CP 1369”. CP 1369 is page 4 of the GMI purchase agreement. It says nothing about One Beacon Insurance Group. It merely describes GMI as being an affiliate of EverGuard Insurance Services, Inc. Thus there is no explanation as to why One Beacon was endorsed by NAPA Corporate or what efforts One Beacon made to sell business insurance or the results of those efforts through One Beacon.

D. The Decision To Repurchase Newco And Forgo \$150,000 in Goodwill Still Owed Him: An Excuse Rather Than A Reason

At page 12 the response brief argues that Mr. Calabrese’s sale agreement precluded him from competing with GMI. The agreement did not preclude Newco from obtaining business insurance through other purveyors. The non-compete was as to Newco. With GMI giving up on

the effort to sell NAPA dealers, and Newco making no effort to find purveyors, Newco was out of business. There was no entity against which to compete. The re purchase was not necessary for Jack Calabrese to do business as NIC, and find other purveyors of business insurance programs for the NAPA auto parts dealers.

E. Implementation of His Retirement Plan:

1. The Purchase of 67% of NIC By GMI Was The Beginning Of A Plan To Retire

The response brief argues at page 30 that Mr. Calabrese never represented that the sale to GMI was his implementation of a plan to retire. He argues that this was “invented” by Ms. Calabrese and is unsupported by the evidence. That representation was supported by the record at CP 326.

CP 326 is page 7 of the declaration of Jack Calabrese of August 14, 2014. In it he stated: “The goodwill was sold to two investors. At the time, it seemed like a good business proposition, as I am 61 and was trying to figure out a retirement strategy that would allow me to exit the business...” Jill Calabrese did not “invent” that testimony.

2. Perpetuation of the Retirement Plan: Lockton Did Not Replace Federated; It Replaced Calabrese (NIC) As The Broker Of Insurance Policies to Be Provided By Other Insurance Companies

At page 13 the response brief argues that Mr. Calabrese was without a source of income from October 2013 to February 2014 because various insurance companies were not interested. And yet, he produced evidence that NAPA corporate wanted him to find business insurance for NAPA Auto Parts dealers, (CP 96) and that there was a market for such insurance (CP 324).

He presented no evidence that he needed to go through Federated to obtain information as to which Auto Dealers it had sold business insurance. He stated that 18,000 of them currently have his 1-800 phone number. (CP 1183). He presented no evidence and made no claim that he approached a single auto parts dealer directly that had not been serviced by Federated to find out which companies were providing them business insurance and follow up to have those companies which Federated had serviced. The answer to why he did not may lie with the relationship he developed with Lockton Affinity.

At page 13, the response brief states, correctly, that Lockton is an Insurance broker, as Calabrese doing business as NIC had been and then Newco d/b/a NIC LLC. There is no evidence that Lockton provides

business insurance as had Federated and afterwards One Beacon Insurance Group.

In his arrangement with Lockton, Calabrese, is denominated as “client”. His role is that he “facilitates an exclusive endorsement for insurance programs offered to members of NAPA (hereinafter MEMBERS)...” (CP 1397). His role is to endorse Lockton; not to market programs as before.

Lockton’s duties are to “...market programs to MEMBERS ...” (CP 1398). The response brief accurately points out at page 2 that NIC “is” in the business of “marketing business and health insurance programs, as the endorsed provider of insurance programs for NAPA. Lockton’s programs are to package business owners policies, garage liability, garage keepers legal liability, workers compensation, auto, umbrella.” (CP 1405). Lockton provides “...insurance management, insurance administration, risk management, and other insurance related services for corporations, associations and businesses.” Just as Jack Calabrese did as NIC. There is no evidence that Lockton provides business insurance as did Federated and One Beacon Group as NAPA Corporate’s subsequent endorsee.

Lockton is client’s representative... to perform the duties set forth. CP 1397. Thus Lockton did not replace GMI (or One Beacon Insurance

Group) which replaced Federated as the provider of insurance. Lockton is the Broker replacing Jack Calabrese d/b/a NIC as was Newco d/b/a NIC, LLC.

In other words, Jack Calabrese is the facilitator of NAPA endorsements. He lends his name and reputation built up over 30 years of being NAPA Inc.'s exclusive broker of insurance programs for the auto parts dealers. Much as a retiring lawyer would lend his name as a referral source to his or her partners in return for receiving compensation for the referrals as the lawyer phases out his or her law practice.

Here staying around, as a practical matter, means that Jack Calabrese attends distribution center meetings throughout the year, answers his 800 number from the numerous NAPA auto dealers passing on leads to Lockton who does the quoting and selling of those leads to providers of business insurance policies as had Federated (CP 1181 – 1182). Instead of a referral fee, Calabrese gets a percentage of whatever Lockton gets from the insurance companies who sell insurance to the Auto Dealers.

F. The Applicability of the Holdings In *In re Marriage of Fox, supra* and *Lambert v. Lambert, supra*

Lambert v. Lambert, 66 Wn. 2d 503 at 505, 403 P.2d 664 (1965) is analogous because Mr. Lambert lost a regular full-time job just as Calabrese lost the Federated account. Lambert was fired from his job in Bellevue out of concern that his effort to continue his dormant practice in Kirkland on his own free time would hurt his employer's business. No bad faith was found as to that circumstance.

Lambert's subsequent unwise decision to try to revive his practice was voluntary. The lack of evidence of any meaningful effort to find regular full time employment caused our State Supreme Court to reverse the trial judge and determine that his post firing career choices had not met his burden to prove good faith.

The response brief argues at page 23 that reliance on *In re Marriage of Fox*, 87 Wa App 782, 942 P.2d 1084 (1997) is misplaced because the lifestyle of Dr. Fox remained unchanged and that of his ex-wife worsened; that Fox did not involve a retirement decision since he worked part time (response brief at pages 30 – 31). *Fox, supra*, is apposite for the following reasons.

The court of appeals pointed out that the trial court concluded that the ex-husband's "...retirement was within the contemplation of the parties at the time of the dissolution action and was not a basis upon which to find a substantial change in circumstances." *In re Marriage of Fox, supra* at 784 (1997). The ex-husband had not retired outright. For the Court of Appeals noted his argument that "...his voluntary reduction of income was in good faith since he had reached age 66 and was justified in cutting back his work load and preparing for retirement." *In re Marriage of Fox, supra* at 785 (1997). And yet the Court of Appeals did not rule the trial findings unwarranted by the evidence.

While the court also noted the sale of his practice to his wife, was not an arms-length transaction, that fact was not determinative. Pivotal was the observation that "Ross...enjoys the same lifestyle as he did prior to the sale." *In re Marriage of Fox, supra* at 786 (1997). On that basis alone there would be no substantial change in circumstances upon which a modification would be justified, particularly since the circumstances resulting in the reduction of his income were voluntary, and he left too many unanswered questions about the decision to sell the practice to his current wife.

Dr. Fox did not explain why he did not actively try to market the sale of the practice to third parties. Although there was expert testimony attempting to justify why his wife's salary was as high as it was (see *Fox, supra* footnote 3 at 786), the Court of Appeals concluded the explanation did not go far enough to explain why his wife's salary was as high as it was, relative to his proportion of reduced time working in the practice compared to what it was before the sale. *In re Marriage of Fox, supra* at 786 (1997).

The Court of Appeals affirmed the decision not to modify downward his maintenance obligation since his explanations, failed to answer key questions as a result of which he failed to meet his burden to prove good faith. "This is not a reduction taken in good faith and cannot serve as a basis for modifying Ross's maintenance obligation." *In re Marriage of Fox, supra* at 786 (1997).

Thus the references to having similar income available through his wife, and the respondent's worsening economic situation are dicta, because the reality of his failure to meet the burden of good faith alone justified reversal of the trial court's decision.

While the Court of Appeals did not reach the question of whether the evidence of reduced time working was evidence of his retirement and

therefore a contemplated circumstance, it did not indicate that this view of the evidence was not justified by the trial court. Thus the argument in the response brief that Dr. Fox did not retire, as rendering the case inapplicable, is invalid.

The response brief's argument at page 37 that whether GMI or Newco paid his business expenses is irrelevant, itself does not belie the fact that Mr. Calabrese did not experience a reduction in lifestyle from what it was at the time of divorce. He still pays \$10,000 per month for himself alone apart from spousal maintenance (CP 12).

That he loaned out \$200,000 secured by a deed of trust getting payments of only \$10,000 per year, combined interest and principal, that he purchased annuities (CP 1439 – 1453), or loaned out \$25,000 on a real estate deal (CP 2049) are not evidence that his lifestyle diminished. He purchased a boat and provided no evidence of having partners nor efforts to sell it. These are consistent with the implementation of a retirement strategy. (CP 2056). He argues that his supplemental answers to interrogatories confirm that his employment with Lockton is full time, citing CP 1937). All CP 1937 reflects is that he works and describes his duties. It does not say anything about full time work.

G. Conclusion:

The fact is that Mr. Calabrese did not reduce his lifestyle. It continued as it was prior to the divorce. It even improved. There is no evidence that he did not renew his husky football tickets for 2015 while he rents an apartment in Newport Beach, California at \$2,950 per month (CP 15).

The response brief argues at page 36 that when he loaned DiJulio \$100,000 in November 2012, the GMI agreement “had not failed”. It suggests the arrangement was successful during the first three months, but only failed in the last three months before GMI expressed dissatisfaction. There is no cite to the record and no evidence to support any of those observations.

The crux of the arguments in the response brief boil down to the following propositions: that since the loss of Federated was involuntary his decisions to sell NIC to GMI, to repurchase from GMI, and to substitute Lockton for NIC were all made in good faith.

Dr. Fox’s decision to sell his medical practice to his new wife was a voluntary decision resulting in a reduction of income. He left too many important questions unanswered to meet his burden of good faith. His maintenance obligation was therefore not modified.

Here, Mr. Calabrese's decision to sell 67% of NIC to GMI to form NEWCO, was a voluntary decision. His decision to buy it back and forego \$150,000 in good will payments owed by GMI was also a voluntary decision. His decision to be a client for Lockton who replaced NIC LLC as the broker to find Insurance Companies to find NAPA Auto Dealers business insurance as he had done for over 30 years, was a voluntary decision. These decisions resulted in a drastic reduction of income from the \$300,000 per year or so that he was earning when the parties dissolved their marriage in September 2010.

Since each of those decisions were voluntary his burden is to show that they were made in good faith and that the circumstances were an unanticipated change of circumstances.

Implementation of a retirement decision is a contemplated change in circumstances. He stated that the sale to GMI was an implementation of a retirement strategy. His decision to no longer be the broker of insurance products for NAPA auto dealers, but rather substitute Lockton in that role, subject to him performing tasks to persuade NAPA dealers to work with Lockton is consistent with the implementation of a retirement strategy and not an unanticipated substantial change in circumstances.

As an independent reason to deny his petition for modification, how can one conclude that Mr. Calabrese has met his burden of proving good faith in the face of the following inconsistencies and unanswered questions the proof of which was within his power to prove through documentation? (*In re Marriage of Bucklin*, 70 Wash.App. 837, 855 P.2d 1197 (1993).

1. If GMI were truly the replacement for Federated, and it worked through its affiliate, Everguard Insurance Services, what insurance programs did it sell to the NAPA dealers? What Income did it earn doing so? What was its compensation arrangement with Newco d/b/a NIC LLC?

2. If One Beacon Insurance Group were in reality the replacement for Federated since NAPA Corporate endorsed that company, what insurance policies did it sell and to how many NAPA dealers? How much did it earn? Why did GMI insist on NAPA corporate's endorsement of it? What connection to GMI did One Beacon Insurance have? What compensation did Newco obtain from One Beacon? Did it justify Calabrese and GMI seeking to resell to another company?

3. Jack Calabrese has been the exclusive representative of the NAPA Auto Parts dealers. 18,000 dealers across the nation have his 1-800 phone number. There has been a continuing market for business insurance

for those dealers. This belies the court's observation that middle men are being phased out and is cognizable by this court. See *In re the Marriage of McKinney*, 14 Wn. App. 921 at 924, 546 P.2d 456 (1976).

4. There is no evidence of him reaching out to any of the auto parts dealers he represented asking each of them, through what company do they have business insurance? What does it cover? What do they pay for that coverage? He presented no evidence of any follow up to connect those insurance companies to the dealers serviced by Federated.

5. He presented no evidence of what he did or does day in and day out each day that constitutes a 35-40 hour work week.

In the absence of evidence dealing with any of those issues it is clear that by turning his role as their broker representative over to Lockton, as the replacement for NAPA Insurance Center, for reduced compensation, and in return for him using his prestige with NAPA Corporate to persuade NAPA dealers to work with Lockton he was implementing his retirement strategy.

His failure to provide evidence as to all of those unanswered questions must result in the conclusion that Mr. Calabrese did not meet his burden to show good faith. The trial court decision must be reversed.

DATED this 30th day of November, 2015.

Respectfully submitted,

 # 3084

H. Michael Finesilver *for*
(f/k/a Fields)
Attorney for Appellant
W.S.B.A. #5495

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of:)	
)	
JILL S. CALABRESE,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
JACK A. CALABRESE,)	
)	
Respondent,)	
_____)	

I, Lester Feistel, state and declare as follows:

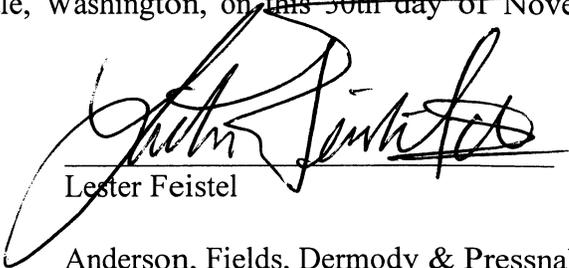
I am a Paralegal in the Law Offices of Anderson, Fields, Dermody,
Pressnall & McIlwain, Inc., P.S. On the 30th day of November, 2015, I
sent for delivery via legal messenger true and correct copies of the Reply
Brief of Appellant to the Court of Appeals to:

Lisa Sharpe
Lasher, Holzapfel, et. al.
601 Union Street, Suite 2600
Seattle, WA 98101
206-624-1230
WSBA# 21047

A handwritten signature in black ink is written over a vertical stamp. The stamp contains the text '2015 DEC 1 AM 11:56' and some faint, illegible text to its right.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on ~~this 30th~~ day of November, 2015.



Lester Feistel

Anderson, Fields, Dermody & Pressnall
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060