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Cause No. 34988-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

TIMOTHY J. EPHREM and TINA EPHREM

Appellants,

vs.

CARY FALK,

Respondent.

APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE BEVERLY GRANT

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APPELLANT/ CROSS RESPONDENT TINA EPHREM'S REPLY  
TO RESPONDENT/CROSS APPELLANT FALK'S MOTION ON THE MERITS

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ORIGINAL

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### **A. PROCEDURAL MATTER**

Appellant Tina Ephrem's Brief was filed herein and served on November 17, 2006. Falk did not file a Brief of Respondent pursuant to RAP 10.2(b). He did, however, file a Respondent's Motion on the Merits dated December 29, 2006. On May 29, 2007 this court entered a "Ruling Denying Motion on the Merits to Affirm Without Oral Argument." Thereby Falk's motion on the merits was denied. A little over a month later, on June 28, 2007 the court ruled "Appellant in COA No. 34988-4-II may file a reply to the motion on the merits. A reply is due thirty days from the date of this ruling."

Because the motion on the merits had already been denied, the June 28, 2007 ruling allowing a reply to be filed to that motion was confusing to Tina's attorney. Subsequently, in a telephone call to the Court of Appeals Clerk's office, the clerk explained that the court was treating the Respondent's Motion on the Merits as though it was a Brief of Respondent filed pursuant to RAP 10.2(b). Therefore, Tina is treating Respondent's Motion on the Merits accordingly and files this Reply in accordance with RAP 10.2(d).

### **B. STATEMENT OF THE CASE**

Falk does not deny that the original loan was in the amount of \$31,000.00, with an annualized interest rate of 2,354%, additional late payment rate of 1,200% per annum - all secured by a motor home. See Brief of Appellant, pg. 2. By his silence, Falk concedes that he did not have any contract with Tina and that the marital community theory was the sole basis for Tina's liability plead in Falk's complaint. See Brief of Appellant, pg. 4.

Falk acknowledges that Tina is not now, and never has been, married to Tim. Motion on the Merits, pg. 2; Brief of Appellant, pg. 4.

Falk does not dispute that while the judgment orders the forfeiture of a “lease purchase option,” Tina owns her home and thus she does not have a “lease purchase option” to forfeit. See Brief of Appellant, pg. 4.

Further, Falk does not dispute that there are no facts plead in his complaint that support the court’s joint and several liability judgment. See Brief of Appellant, pg. 5 & 19-20.

There is no dispute that the entire amount of the monetary judgment of the Court has been tendered. CP 362; 367-8.

### **C. ARGUMENT**

#### **1. *Equitable Considerations***

Falk does not deny Tina’s assertion that; “The primary concern is that a decision on a motion to vacate a default judgment must be just and equitable” and that the equitable principles are to be liberally applied to the benefit of the party seeking to vacate a default order. Brief of Appellant, pg. 9, citing *Farmers Ins. Co. of Washington v. Waxman Industries, Inc.* 132 Wn. App. 142, 145, 130 P.3d 874, 876 (2006); *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867, 869 (2004); and *Griggs v. Averbek Realty, Inc.* 92 Wn. 2d 576, 582, 599 P.2d 1289, 1292 (1979). “A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms.” *Morin v. Burris*, \_\_\_\_ Wn. 2d \_\_\_\_, WL 1874771, 4 (2007).

Here, the original loan was in the amount of \$31,000.00. CP 386. The obligation has an annualized interest rate of 2,354% plus 100% interest per month and all costs of collection including attorney fees and court costs. CP 336. The monetary judgment of the court was a little over \$60,000.00 (including post judgment attorney fees, costs and post judgment interest). CP 74 & 348. Falk values Tina's house at approximately \$800,000.00 – well over ten times the judgment debt. CP 357. Regardless whether or not Falk is entitled to, or receives, full payment of the monetary judgment he still insists that Tina must forfeit her home to him. CP 352-8<sup>1</sup>. Yet Falk does not deny Tina's assertion that he "...seeks to displace Tina while "pillaging" her estate..." and that ordering Tina to forfeit her home to Falk "...would result in an "iniquitous and oppressive" and "obnoxious" order that "a court of conscience" would equate to fraud." Brief of Appellant, pg. 14-5 quoting *Malo v. Anderson*, 62 Wn.2d 813, 817, 384 P.2d 867, 869 (1963).

In sum, Tina asserts that equitable principles require that the judgment of the court be reversed. Falk does not deny this assertion. Indeed, while arguing that Tina's appeal is "clearly without merit" (RAP 18.14(e)(1)) Falk does not even address equity - the court's "primary concern."

## 2. *Conclusive Defenses.*

Tina points out that the factors to be considered in a motion to vacate a default are: (1) excusable neglect, (2) due diligence, plus (3) a meritorious defense, and (4) no

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<sup>1</sup> CP 352-8 is Falk's "Motion for Decree Assigning Defendant(s)' Rights to Purchase Real Property to Plaintiff." The trial court denied that motion and, instead, entered an Order Confirming that the Judgments Have Been Paid in Full. CP 363-4. Falk has appealed that order. See *Falk v. Ephrem* Cause No. 34988-4-II.

substantial hardship to opposing party. Brief of Appellant, pg. 9-10. citing *Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999).

Tina asserts that the presence of a conclusive defense controls and is dispositive over the remaining issues. Brief of Appellant, pg. 10. “If a strong defense on the merits exists, the court will spend scant time inquiring into the reasons which resulted in the entry of the order of default.” *Hwang v. McMahill*, 103 Wn. App. 945, 950, 15 P.3d 172, 175 (2000). *Showalter v. Wild Oats*, 124 Wn. App. 506, 512, 101 P.3d 867, 869 (2004). In reply, Falk argues that in Division II of the Court of Appeals the factors are “conjunctive requirements” “of equal importance.” Motion on the Merits, pg. 9. Falk relies solely on the 1995 case of *Prest v. American Bankers Life Assur. Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) to support this argument. However, this argument fails to consider the 2004 holding of Division II in *Showalter v. Wild Oats* as follows:

It is well settled that “[i]f a ‘strong or virtually conclusive defense’ is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful.”

*Showalter v. Wild Oats*, 124 Wn. App. at 512 (quoting *Johnson v Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003) (quoting *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581)). It should be noted that in *Prest* the Court of Appeals ruled that the defaulted insurance company defendant had failed to make a showing of a strong defense. It was under those specific facts that the court held “...that the *White* requirements are of equal importance...” *Id.* at 99.

Unlike the defendant in *Prest*, Tina has strong, indeed conclusive defenses. Brief of Appellant, pg. 11-16. For example the Judgment provides that:

Defendants shall immediately forthwith, but no later than March 15, 2006, assign their *lease purchase option* on the residential property located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446 ....” (the complete legal description recited in the Judgment is here omitted, italic added).

CP 81, para 5. Falk does not deny that there is no “lease purchase option” to assign. Brief of Appellant, pg. 12-13. Indeed, Falk’s Motion on the Merits does not address this issue at all. Therefore, Tina has established a complete defense to Falk’s assertion that he was entitled to an assignment of a “lease purchase option” interest in her home because no such option exists.

**3. *Relief different in kind or exceeding the prayer for relief.***

Falk does not deny that: “There are no facts alleged in the Complaint that support a finding that Tina has any separate liability for the agreements (written or oral) that Tim entered into with Falk.” Brief of Appellant, pg. 19-20. Indeed, there are no facts asserted in any pleading in this case that supports such a finding. Consequently, the trial court’s joint and several liability finding and judgment must be reversed. *State ex rel. Adams v. Superior Court of State, Pierce County*, 36 Wn.2d 868, 872, 220 P.2d 1081, 1084 (1950). Falk provides no argument to the contrary.

With respect to both joint and several liability and the assignment of the “lease purchase option,” the judgment also exceeds and is different in kind than Falk’s prayer for relief. Brief of Appellant, pg. 18-20. While Falk disagrees and asserts that the judgment entered does not exceed the relief he prayed for, he fails to provide any reasoning for this assertion. Respondent’s Motion on the Merits, pg 17. n11. In fact, a review of the documents plainly shows that Falk’s prayer for relief and the judgment are very different.

In paragraph 6.6 Falk's prayer for relief states:

For the entry of orders requiring *Defendant Ephrem* [Tim] to assign *his* interest in the *lease purchase option* on the residential property described in Paragraph 1.2 and for the delivery of the Rolex watch, *all for the liquidation and application against the aforesaid debt.*" CP 6-7. (Italic added).

The default judgment, in relevant part, orders:

Defendants shall immediately forthwith, but no later than March 15, 2006, assign their lease purchase option on the residential property located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446 ...." CP 81, pg. 8, para. 5.

Thus, Falk's prayer was restricted to Tim's "lease purchase option" being "liquidated" with the proceeds being applied to pay off the debt. But, the relief granted requires that both Tina and Tim assign their "lease purchase option" to Falk irrespective of whether or not the debt is paid in full. These are clearly two very different things. The prayer seeks to only acquire Tim's "lease purchase option" interest in the property to be applied to the debt while the judgment requires both Tim and Tina to give up all interest in Tina's home independent of the debt.

Falk does not deny that the monetary debt has been paid in full (See Brief of Appellant, pg. 7). Yet, Falk continues to claim he is entitled to all of Tina's interest in her home. CP 352-8. With the debt having been paid in full, it would be inconsistent with, and certainly grossly exceed the prayer for relief to still give Falk Tina's home.

Falk did not pray for joint and several liability. CP 6-7. In fact, that concept is not even mentioned anywhere in the Complaint. CP 1-8. Nevertheless, the judgment holds Tina jointly and severally liable for Tim's debt. CP 79-81.

Falk does not deny that CR 54 provides:

**(c) Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

See Brief of Appellant, pg. 18. In fact Falk's motion does not address the plain language of this rule at all. Further, the laws is clear that the court is without jurisdiction to grant judgment that is different or exceeds the relief Falk prayed for in his Complaint. See Brief of Appellant, pg. 18 citing *In re Marriage of Hughes*, 128 Wn. App. 650, 658, 116 P.3d 1042, 1046 (2005) quoting" *In re Marriage of Johnson*, 107 Wn. App. 500, 503-4, 27 P.3d 654 (2001), CR 54(c) and *Matter of Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989).

Still, Falk argues that he is entitled to a judgment that both exceeds and is substantially different than he prayed for because he provided Tina a copy of the proposed Findings of Fact, Conclusions of Law and Judgment prior to their entry. Falk's argument is based on *Fonseca v. Hobbs*, 7 Wn. App. 235, 498 P.2d 894(1972). Motion on the Merits, pg. 16.

Falk argues that the facts in *Fonseca* are essentially identical to those present here. Motion on the Merits, pg. 17. That assertion is incorrect. *Fonseca* is a very unique case. In fact, it is so distinctive that this case has never been referenced by any court in any jurisdiction (including Washington, all other state courts and all federal courts) in the twenty-three plus years that has lapsed since it was published.

In *Fonseca* an attorney formally appeared on behalf of the defendant on November 17, 1969, but took no further action. Six months later, after proper notice and no one appearing in opposition, an order adjudging defendants in default was entered. Two weeks thereafter the defendant's attorney moved to vacate the default order noting

the matter for hearing on May 27, 1970. Before that hearing the "...plaintiffs served the defendants' attorneys a copy of proposed findings, conclusions and judgment, *an affidavit detailing and computing the damages alleged in the complaint*, and an affidavit opposing defendants' motion to set aside the default order." (Italic added). Both attorneys then agreed on a single hearing date to hear both the defendant's motion to vacate and the plaintiffs' request for entry of a default judgment. However, no one appeared for the defendant on the agreed date. Therefore, after the plaintiffs presented testimony, the trial court entered the plaintiffs' proposed findings. *Fonseca v. Hobbs*, 7 Wn. App. at 237.

Thus, in *Fonseca*, shortly after the pleadings were served, defendant was represented by an attorney who, without any explanation, did not file an answer for six months. Then, even after receiving a notice for entry of an order of default, the defendant's attorney neither filed an answer nor appeared at the default hearing. Further, without any justification, defendant's attorney failed to appear in court on the agreed date to argue defendant's own motion to vacate the default. And, even though the defendant's attorney had timely received both the proposed default order and a meticulously drafted affidavit detailing the basis for the requested judgment, the attorney did not appear or present any argument to resist the entry of the judgment.

There is ample basis in *Fonseca* to conclude that the defendant had intentionally and voluntarily relinquished any right to challenge both the default and the judgment. *Hirata v. Evergreen State Limited Partnership No. 5*, 124 Wn. App. 631, 641, 103 P.3d 812, 817 (2004). Indeed, the defendant's acts unequivocally demonstrated intent to waive those rights. *Saunders v. Lloyd's of London*, 113 Wn. 2d 330,339-40, 779 P.2d 249,

254 (1989); *Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394, 398 (2004).

In contrast, it is uncontested that Tina was not represented by an attorney. It is also uncontested that Tina cannot read. Tina's attorney did appear in court at the motion to vacate the default. Tina never received any affidavit or declaration that in any way put her on notice that Falk was seeking relief different than he had prayed for. Thus, the facts here are not "essentially identical" to *Fonseca* and do not support a conclusion that Tina waived her rights to vacate the order of default or the judgment<sup>2</sup>.

*Fonseca* is distinguishable for another reason. In contrast to the pleadings in this case, it is readily apparent that the relief in question requested in *Fonseca* was not materially different than that which was granted. Compare the portions of the complaint set forth in *Fonseca v. Hobbs*, 7 Wn. App. at 236-7 with the findings and conclusion detailed on case page 238. See also *Id.* at 239-40. The *Fonseca* court chose not to decide the case on that basis but it certainly could have. *Id.* at 240.

Falk argues that the judgment here is more akin to a matter going to trial than a typical default judgment. Motion on the Merits, pg. 14. However, in every case CR 8(a) requires that complaints "...shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand or judgment for the relief to which he deems himself entitled." These "notice" pleading requirements are generally easy to comply with but compliance is mandatory because due process requires that parties must not be left to guess what claims they must defend, what theories of law the plaintiff is relying upon or the relief the plaintiff is seeking. Unskilled pleadings are

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<sup>2</sup> The party asserting waiver bears the burden of proving an intention to relinquish the right. *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 830-31, 16 P.3d 1278, 1282 (2001).

allowed, but insufficient pleadings are not. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Pleadings are insufficient when they fail to comply with the basic requirements of CR 8. *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847, 851 (1999); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827, 835 (2004).

Falk argues that even if his findings, conclusions of law and judgment exceed and are inconsistent with the complaint Tina was afforded due process because those documents were timely served on her before entry of judgment. Motion on the Merits, pg. 17-18. However, defendants are entitled to rely upon a plaintiff's complaint. It violates basic due process to require a party to guess which claims they will have to defend against and what relief the plaintiff is seeking if those claims and prayers are not contained in a complaint. Consequently, an argument that there were enough assertions intermixed in the other pleadings or filings to give the defending party sufficient notice fails. Even in a trial situation, a party cannot be required to go to trial to defend on the basis of facts that are not plead or to defend an unstated theory of liability. *Trask v. Butler*, 123 Wn. 2d 835, 846, 872 P.2d 1080 (1994).

Falk's reliance on *Rippe v. Doran*, 4 Wn. App. 952, 486 P. 2d 107 (1971) is also misplaced. Rippe filed suit in August of 1997 seeking, in part, a forfeiture of a conditional sales contract, as well as possession of a car wash. Doran filed an answer and counterclaim. *Id.* at 954. At trial in July, 1998 Doran stipulated to the forfeiture and the matter proceeded to trial on Doran's counterclaims. After trial the court entered a decree of forfeiture. Despite that order Doran did not vacate the premises. The trial did not resolve all of the party's issues. Thereafter, the matter was again set for trial, there were

several subsequent court conferences and numerous motions that were heard. All the while Doran fully participated. Ultimately, in January of 1970 the trial court issued its second and final findings of fact, conclusion and judgment. *Id.* at 954-6. The trial court's judgment included an award against Doran for the fair market value of the rent of the car wash for the period of time that Doran continued to occupy the premises after the stipulated declaration of forfeiture was entered.

Thus, Doran did appear, plead and vigorously presented his defense and counterclaims. In fact, Doran was fully engaged in the process throughout the entire trial court proceedings. Nevertheless, on appeal Doran claimed the fair rental issue was not plead, judgment was taken by default and, therefore, the trial court did not have jurisdiction to make the relate award. *Id.* at 957-8.

The Court of Appeals noted that while the record was incomplete it was apparent that the parties had given the trial court latitude "... to decide issues which had been brought up by the pleadings or through the several conferences which the court had conducted." Further, the trial court specifically stated, and Doran conceded, that the parties had given it the latitude to decide the fair rent issue. *Id.* at 956 & 958. Notably, there were two hearings on the "rent" issue. At the second hearing, Doran asked for, and after hearing, received a reduction in the amount of the rental payment award. *Id.* at 956.

Certainly, as the Court of Appeals noted, *Rippe v. Doran* was not a "classical default judgment case." *Id.* at 958. Actually, it was not a default case at all. CR 55 defines a default as occurring "[W]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead or otherwise defend as provided by these rules...." Doran did appear, plead, defended and diligently prosecute his case. Thus,

Rippe's failure to plead a theory of liability that was later the basis of the trial court's award should have been analyzed under CR 15(b). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." CR 15(b); *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847, 851 (1999).

In any event in this case Tina did not appear, plead or defend. Unlike Doran, Tina did not affirmatively give the court the "latitude" to grant relief that was not contained in Falk's prayer. While there were two hearings that Doran attended on the "rent" issue, Tina did not attend any hearings until after the default judgment was issued.

Further, where Doran had full, fair and actual knowledge that relief was being sought that was different than contained in the plaintiff's prayer, Tina had no such notice.

Falk argues that he gave Tina adequate notice of that, despite the clear words in his prayer, Falk was actually seeking forfeiture of Tina home whether or not Tim's debt was paid in full<sup>3</sup>. Falk claims that this notice was given when he served and mailed Tina a copy of his proposed findings, conclusion and judgment. Motion on the Merits pg. 5 & 17. However, while both the pertinent "return of service" and the related affidavit of mailing list several documents being delivered to Tina along with Falk's motion for entry of judgment, Falk's proposed findings, conclusions and judgment are not on either list. CP 12; CP 63-64. Therefore, there is no affidavit or declaration of service in the court's records that confirm that Tina received Falk's proposed findings, conclusions and judgment prior to the entry of the judgment. And, there is nothing in the documents that

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<sup>3</sup> Falk argues that in the Order of Default "[T]he Court further granted Plaintiff leave to conduct discovery in an effort to quantify Plaintiff's damages." Falk referenced CP 17 to support this assertion. Motion on the Merits, pg. 2. However, there is no language in CP 17, or anywhere else in this order that addresses a grant of leave to conduct discovery. CP 16-17.

were served that specifies that contrary to, and in addition to, the relief Falk prayed for in his complaint, Falk was asking the court to order Tina to forfeit her home to him irrespective of whether or not Tim's debt was paid in full.

Even if Falk had served the proposed findings, conclusions and judgment with his Motion for Entry of Judgment and upon Entry of Judgment to Strike Trial Date (CP 27-34), that document would not have provided Tina with fair notice that he was seeking relief different than had had previously prayed for. Tina is an illiterate person. The alleged "notice" in the proposed findings, conclusions and judgment is in one sentence buried in a eight page document (CP 80) that was served with 5 other documents (CP 12 & 67) consisting of 43 pages (if the proposed findings conclusion and judgment had been included in the service). CP 21-22; 58-62; 44-57; 18-19; 27-34; 35-43; 22-26. This would not amount to actual notice to Tina and to the extent it is notice at all it is a far cry from the actual notice Doran received in the *Rippe v. Doran* case discussed above and relied upon by Falk.

#### **4. Partnership**

Falk now asserts, for the first time, that Tina is liable for Tim's debts under a partnership liability theory. See RAP 2.5. Motion on the Merits, pg. 18- 21. There are no facts in Falk's complaint that support this theory and this theory of liability was not pleaded. CP 1-8. Thus, for the reasons set forth above, Tina cannot be held liable under partnership law. *State ex rel. Adams v. Superior Court of State, Pierce County*, 36 Wn.2d 868, 872, 220 P.2d 1081, 1084 (1950); *Lewis v. Bell*, 45 Wn. App. at 197; *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. at 25; *Kirby v. City of Tacoma*, 124 Wn. App. at 470; *In re Marriage of Hughes*, 128 Wn. App. 650, 658, 116 P.3d 1042,

1046 (2005) quoting” *In re Marriage of Johnson*, 107 Wn. App. 500, 503-4, 27 P.3d 654 (2001), CR 54(c) and *Matter of Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989);

In any event, Falk’s entire factual basis for the existence of a partnership is that Tina paid the down payment and Tim paid the monthly payments on Tina’s home. Motion on the Merits, pg. 20. These facts do not establish a partnership between Tina and Tim. A partnership is formed when there is an “...association of two or more persons to carry on as co-owners a business for profit...” RCW 25.05.055(1). The parties must intend to carry on a business for profit. “... [T]he existence of a partnership depends upon the intention of the parties.” *Malnar v. Carlson*, 128 Wn. 2d 521, 535, 910 P. 2d 455 (1996).<sup>4</sup> There is no evidence upon which to conclude that Tim and Tina had any mutual intention to carry on any business for profit.

Further, even if Tim and Tina were in a partnership in Tina’s home that conclusion does not make Tina Tim’s partner in buying and selling cars or in his dealings with Falk. There is absolutely no evidence to support any such assertion. In fact there is no evidence upon which to conclude that Tina had any knowledge of Tim’s dealings with Falk until after the lawsuit was filed.

Falk’s reliance on *Malnar v. Carlson*, 128 Wn. 2d 521, 910 P. 2d 455 (1996) is completely misplaced. Motion on the Merits, pg. 19. In that case Malnar sued Carlson claiming that he was Carlson’s partner in the development of 80 acres of land. Carlson denied that allegation. *Id.* at 523-5. Prior to the suit, the parties had a long history of locating, developing, and reselling real property and sharing in the profits. *Id.* at 524-5.

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<sup>4</sup> However it is not necessary that the parties intend to form a partnership. RCW 25.05.055(1).

Malnar asserted that with respect to the 80 acres, Carlson agreed he would put up the down payment while Malnar would provide the development and marketing. The evidence was that Carlson did put up the down payment and Malnar, to some degree, did develop the land and prepare it for marketing. *Id.* at 524-5. Malnar alleged that Carlson had agreed that when the property was resold, the profits were to be equally split after Carlson's down payment was reimbursed to him. *Id.* at 524. The 80 acres were titled in the name of a corporation. Carlson held all the shares in that corporation. *Id.* at 526. When the parties reach an impasse, Carlson denied the existence of a partnership with Malnar thereby claiming that his corporation was the sole owner. *Id.* at 528-9.

*Malnar v. Carlson* held that: "In Washington an oral agreement of partners for the purpose of buying and selling real estate, whereby the lands are purchased and held in the name of one partner for profit and resale, is not within the statute of frauds." *Id.* at 533. However, that holding has no application here. Falk did not form a partnership relationship with Tina or Tim. Neither Tina nor Tim has asserted a partnership relationship between them. There is no evidence that Tina and Tim had formed any intention to jointly carry on a business for profit in any venture. Tim has not asserted he has any interest in Tina's home. There is no evidence of an agreement to share profits between Tim and Tina should there be a gain when Tina's home is sold. In short the facts in this case are not similar in any way to those present in *Malnar v. Carlson*. Thus, that case does not provide this court with any guidance to decide the issues at hand.

The fact remains that Falk is claiming a right to all Tina's interest in her home. Falk's sole basis for this claim is an alleged oral promise by Tim to assign Tim's lease purchase option interest. CP 3-4. Falk does not assert that Tina made any such promise

– oral or written. CP 1-8. An oral agreement to transfer an interest in land violates the Statute of Frauds and is therefore void. RCW 64.04.010. “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” Therefore, irrespective of other defenses, pursuant RCW 64.04.010, Tina has a conclusive defense. See Brief of Appellant, pg. 11.

**5. *Falk’s assertion regarding Tina’s ethnic heritage.***

Falk asserts that Tina and Tim are Gypsies. His sole basis for this argument is that Tina can speak the Gypsy language. Motion on the Merits, pg. 17 citing to CP 261. The mere fact that one is educated to converse in the language of a particular ethnic group does not mean that they are members of that group. Thus, it is illogical to conclude that just because one speaks Japanese that person must be of Japanese descent or adheres to Japanese traditional customs.

Falk asserts that “[T]hey purport that they are not legally married because marriage is not recognized in their ethnic background as Gypsies.” Motion on the Merits, pg. 2. This is a conclusory assertion advanced without any reference to the record.<sup>5</sup> Accordingly, Falk failed to comply with the RAP 10.4(f). Only under extraordinary circumstances will the Court of Appeals consider unsupported factual assertions for which a party has not cited to the record. *Keiffer v. Seattle Civil Service Commission*, 87 Wn. App. 170, 172 n.1, 940 P.2d 704 (1997). Indeed, the court is authorized to impose sanctions under RAP 10.7 when a party neglects to meet the requirements of

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<sup>5</sup> I could not find any support for Falk’s assertion in my review of the entire record.

RAP 10. *Litho Color, Inc. v. Pacific Employers Insurance Company*, 98 Wn. App. 286, 305-6, 991 P.2d 638 (1999)<sup>6</sup>.

In any event, Falk does not deny that Tina and Tim are not now and have never been married. See Brief of Appellant, pg 4.

**6. *Servicemembers Civil Relief Act of 2003.***

Falk does not deny that he failed to comply with the mandatory requirements of 50 USC § 521. Brief of Appellant pg. 18. Instead, he argues that Tina cannot raise this issue because: “The law is clear, the Court of Appeals with [sp] not consider issues raised for the first time on appeal.” Motion on the Merits, pg.13. This assertion is simply incorrect.

It is correct that as a *general matter* the Court of Appeals will not consider issues not raised below. RAP 2.5 (“appellate court may refuse to review any claim of error which was not raised in the trial court”). However, while RAP 2.5 allows the Court of Appeals to refuse to hear such an issue it is not mandatory and the rule has several exceptions. *Roberson v. Perez*, 156 Wn.2d 33, 39-41, 123 P.3d 844, 848-11 (2005).

A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. The exception to the rule is a salutary one. Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

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<sup>6</sup> Falk also discusses a document he refers to as “Plaintiff’s Reply” without any citation to the record. Motion on the Merits, pg. 5. I could not find this document amongst the designated record on appeal. Likewise, Falk discusses the timing of events at a hearing held on March 2, 2006. Motion on the Merits, pg. 5. Falk does not supply any citation to the record to support his factual assertions.

*Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657, 661 (1970).

A new issue raised on appeal has consistently been heard “ ‘when the question raised affects the right to maintain the action.’ ” *Bennett v. Hardy*, 113 Wash.2d 912, 918, 784 P.2d 1258 (1990) (quoting *Maynard Inv. Co. v. McCann*, 77 Wash.2d 616, 621, 465 P.2d 657 (1970)); *In re Parentage of M.S.* 128 Wn. App. 408, 412, 115 P.3d 405, 407 (2005); *Jones v. Stebbins*, 122 Wn.2d 471, 479-80, 860 P.2d 1009,1013 (1993); *Roberson v. Perez*, 156 Wn.2d at 40.

Further, RAP has the following stated exceptions within the rule: “(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” The exceptions under subparagraphs (1) and (2) are both applicable here.

50 USC§ 521 provides:

**Protection of servicemembers against default judgments.**

(a) Applicability of section.

This section applies to any civil action or proceeding in which the defendant does not make an appearance.

(b) Affidavit requirement.

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, *shall require* the plaintiff to file with the court an affidavit--

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. (Italic added).

Congress thus limited the trial court's authority to act by establishing a mandatory prerequisite before a default can be entered. The Court must require the plaintiff to file the required affidavit so that the Court has a basis upon which to determine whether or not a non-appearing defendant is in military service. Neither the Court nor Falk adhered to this requirement. Consequently, the Plaintiff failed to establish necessary facts required before a default can be entered and the Court acted beyond its authority as limited by Congress.

Falk's reliance on *Lyle v. Haskins*, 24 Wn.2d 883, 902, 168 P.2d 797, 808 (1946) and *Interinsurance Exchange v. Collins*, 37 Cal. Rptr 2d 126, 30 Cal. App. 4<sup>th</sup> 1445 (1994) is misplaced. Motion on the Merits, pg.14 (See n.6). Both of these cases were decided under the Soldiers' and Sailors' Civil Relief Act of 1940<sup>7</sup>. However, 50 USC § 521 quoted above became law in 2003. This statute is a near total revision of the Soldiers' and Sailors' Civil Relief Act of 1940. Congress updated and increased the civil protections provided to members of the military service under the prior act. The new statute includes additional requirements that must be met before a court can enter a default judgment. In strengthening the act's intended protections, Congress has made it clear that all courts must determine whether or not a defendant is in military service prior to entering any default order. The clear intent of the statute is that this determination be made in all cases before entry of an order of default, irrespective of whether it is later discovered that a party was not in the military service. This procedure reduces the possibility of a default order being entered against a person serving in the military who,

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<sup>7</sup> Before the 2003 modifications The Soldiers and Sailors Civil Relief Act of 1940 statute was significantly amended in 1991 renamed "Servicemembers Civil Relief Act".

upon discovery of the default order, would then have to move to vacate the order after the fact.

7. *Homestead Act*

With respect to the Homestead Act, Falk repeats his argument that “The law is clear, the Court of Appeals with [sp] not consider issues raised for the first time on appeal.” Motion on the Merits, pg. 22. The inaccuracy of this assertion is addressed above and incorporated here by this reference.

Falk argues that “Moreover a homestead right is extinguished by a conveyance of all right, title and interest in the homestead property.” In making this argument, Falk relies upon *Security Sav. and Loan Ass'n v. Busch*, 84 Wn.2d 52, 56, 523 P.2d 1188, 1190 (1974). Motion on the Merits, pg. 23. However, *Security Sav. and Loan Ass'n v. Busch* does not provide guidance for the issue before this court.

In *Security Sav. and Loan Ass'n v. Busch* the court’s relevant ruling was that:

While the original declaration of homestead apparently was valid when executed, it cannot be said to have survived the later execution and delivery of the quitclaim deed by the Frisones in July of the same year. This is so even though at a later date, they reacquired the same property from the Busches by real estate contract. It matters not whether the Frisones' interest in the property was extinguished for a day or for a period of years. It is of consequence only that subsequent to making the declaration of homestead they voluntarily parted with All interest in the McGilvra Blvd. property by means of a quitclaim deed.

*Id.* at 55-6. Thus, the issue addressed by the *Security Sav. and Loan Ass'n* court centered upon the timing of the execution of the then required “declaration of homestead” and a subsequent voluntary transfer of all interest in land via a quitclaim deed.

The statute *Security Sav. and Loan Ass'n* relies upon, RCW 6.12.060, was repealed. It was replaced in 1981 by RCW 6.13.040 which provides that homestead rights are created automatically.

Tina did not execute a quitclaim deed or otherwise voluntarily transfer any interest in her home.

The Complaint paragraph 6.6 asserted Falk's prayer for relief as follows:

For the entry of orders requiring *Defendant Ephrem* [Tim] to assign *his* interest in the *lease purchase option* on the residential property described in Paragraph 1.2 and for the delivery of the Rolex watch, *all for the liquidation and application against the aforesaid debt.*" CP 6-7. (Italic added).

Thus, Falk only requested that the "lease purchase option" be "liquidated" to pay off the debt. Tina owns her property. Tim has no interest in it. There is no evidence that Tim (nor anyone else) ever held a "lease purchase option" in Tina's home. There is no evidence that Tina voluntarily transferred all interest in her home to Falk.

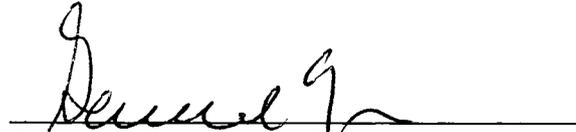
Consequently, for all the reasons set forth above, the ruling in *Security Sav. and Loan Ass'n v. Busch* is not applicable here.

#### **D. CONCLUSION**

For the reasons set forth above and in the Brief of Appellant it is respectfully submitted that the default order and judgment against Tina be vacated, the Order Deeming Admissions Admitted be reversed and that Tina be relieved of any order to pay Falk's attorney fees. Finally, pursuant to RAP 18.1, Tina again asks the court for an award of her attorney fees and costs incurred in processing this appeal.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2007.

MANN, JOHNSON, WOOSTER  
& MCLAUGHLIN, P.S.



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Attorneys for Appellant Tina Ephrem

**CERTIFICATE OF SERVICE**

I, Christine Spake, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Mann, Johnson, Wooster & McLaughlin, P.S., 820 A Street, Suite 550, Tacoma, Washington 98402. On the 27<sup>th</sup> day of July, 2007, a true and correct copy of:

*Comm*

- (1) Appellant/Cross Respondent Tina Ephrem's Reply to Respondent/Cross Appellant Falk's Motion on the Merits;

was delivered to:

Ed Winskill Davies Pearson 920 Fawcett Ave. Tacoma, WA	
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by the following method:

Depositing same postage prepaid in the United States Mail addressed to the person(s) identified above.

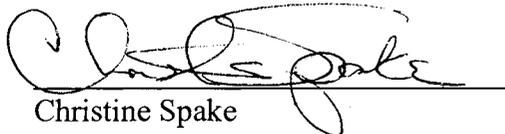
Depositing a true and accurate copy of the same with ABC-Legal Messenger Service, Inc., with appropriate instructions to deliver the same to the person(s) identified above on \_\_\_\_\_, 2007.

Personally delivering copies to the person(s) identified above.

I hereby certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 27<sup>th</sup> day of July, 2007.

MANN, JOHNSON, WOOSTER  
& MCLAUGHLIN, P.S.

  
Christine Spake