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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

No. 38567-8-II

Court of Appeals
State of Washington

In re the Marriage of:

Amber Lynn Heath,

Petitioner

And

Michelle Denise Heath

Respondent

APPELLANT'S OPENING BRIEF

Pro Se

Amber Heath

43466 McKay dr

Pendleton, OR 97801

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Assignments of Error

1. The Superior Court failed to just and equitable divide the Harstene Island Property when issuing a judgment against Ms. Amber Heath for \$16,198.00 as required by RCW 26.09.080
2. The Superior Court erred in characterizing the home equity line of credit as obtained by fraud by ignoring the nine elements of fraud as set forth in Stiley V. Block 130 Wn.2d 486, 925 p.2d 194 (1996) and Hoffer V. State, 110 Wn,2d 415, 755 p.2d 781 (1988) and WAC 192.100.050

Issues Pertaining to Assignments of Error

1. Ms. Amber Heath did purchase, with funds from the home equity line of credit, a trailer for \$16,338.50 Did the trial court err when dividing the Harstene Island property by not classifying this as Ms. Michelle Heath's separate debt, and thereby dividing the property in an unjust manner under RCW 26.09.080
2. Did the Superior Court consider all facts and make a fair judgment in its findings of fraud and/or misrepresentation?¹

Statement of the Case

Amber Heath and Michelle Heath had an agreement with taking out a Home equity line of Credit against the Harstene Island home. RP 9. Amber took out a \$60,000.00 Line of credit. RP 10. A \$16,338.50 trailer was purchased with this line of credit. RP 10 Community debts of \$22,604.00 Were also paid from this debt. RP 11. Michelle was awarded the trailer. RP 17. The court used a

\$55,000.00 balance and subtracted only the community debt of \$22,604.00 arriving at a balance of \$32,396.00. RP 15. The court then decided that Amber was receiving a benefit of \$32,396.00. RP 16. This however does include the \$16,338.50 trailer that was purchased for Michelle. Amber Receives no benefit of this trailer. It is a trailer that Michelle picked out. This is a trailer that Michelle was awarded and still has. This is error that has penalized Amber with a great unfair financial burden.

The pitch given to Michelle for her signature on this line of credit was that it would pay off the community debt and it would purchase a trailer for Michelle to live in. RP 14. There was significant additional funds that were taken on that line of credit, and the court will find that there has been misrepresentation and/or fraud with respect to that transaction between these parties. RP 15.

Applicable Law and Argument

Standard of Review

Instead of this being a just and equal division of the home equity loan. This does in fact penalize Amber and in effect charges her twice for the trailer which Michelle enjoys solely. Amber is now solely responsible for the loan, of which, \$16,338.50 was used to purchase the trailer for Michelle, RP 10, But now has to pay another \$16,198.00 judgment to Michelle. So for the remaining \$32,396.00 Michelle gets a financial benefit of \$32,536.50, Placing an unfair economic burden upon Amber which is even greater than the \$32,396.00 claimed by the court as Amber's separate debt. Another way to state it, is that Michelle gets \$32,536.50 and Amber has to pay all that plus another \$140 to Michelle.

This is error that has penalized Amber with a great unfair financial burden. This makes the division of property to appear not just and equal as required by RCW 26.09.080.

There is no dispute about the core facts such as the amounts paid and what was purchased. The question is whether the trial court properly applied just and equitable division of property.

There are nine essential elements of Fraud as set forth in *Stiley V. Block*, 130 Wn. 2d 486, 925 P.2d 194 (1996), and *Hoffer V. State*, 110 Wn.2d 415, 755 P.2d 781 (1988) aff'd on rehearing 113 Wn.2d

148, 776 P.2d 963 (1989). Each element of fraud must be established by clear, cogent and convincing evidence. The nine elements of fraud are:

- 1) Representation of an existing fact;
- 2) Materiality of the representation;
- 3) Falsity of the representation;
- 4) The speaker's knowledge of its falsity;
- 5) The speaker's intent that it be acted upon by the plaintiff;
- 6) Plaintiff's ignorance of the falsity;
- 7) Plaintiff's reliance on the truth of the representation;
- 8) Plaintiff's right to rely upon it; and
- 9) Resulting damages.

Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. To constitute fraud a misrepresentation must also relate to an 'existing fact' not a promise to do something in the future, unless the person who made the promise did so without any present intent to perform it or with a positive intent not to perform it.

This clearly not the case here. Amber's promise was to purchase a trailer for Michelle. The agreement that was entered on even though not fully executed was that Amber was to pay off the community debt. RP 11. As evident Amber did do that. RP 11. Amber was to pay for a trailer for Michelle. RP 14 Amber did do that. RP 10. The discussion that had occurred at the time parties were making this agreement was that then what was left over. \$16,057.50 although not equal to \$16,338.50 used for the trailer was a fair just and equitable division of the remaining funds of the home equity line of credit.

As to who was and is responsible to pay for this line credit. Amber is the only name in which responsibility to repay the loan resides. Michelle had to sign the loan as a matter of fact that she was on the title. The only person who's credit and credit rating will be affected by this loan is Amber. The original agreement, although oral, was that this would in essence buy out Michelle's interest in the Harstene Island home. At the time that Amber and Michelle were discussing this it was unclear what the value of the home was with it's extensive repairs needed to the foundation and termite damage in several logs of the log cabin.

Amber made an oral agreement with Michelle as to the disposition of their marital assests. That agreement closely resembles the court's decision with regard to everything except the Harstene Island property. While not perfected Amber fulfilled her end of the promises. Community debts were to be paid. Michelle was to receive a trailer and money was to be available for Amber to obtain her surgery. Michelle then had promised to sign off her interest in the Harstene Island home. Amber did fulfill her promises to Michelle and therefore it cannot be said that there was fraud involved on Amber's part.

The court order judgments against Amber and in favor of Michelle in the amounts of \$16,198.00 another one called an equalizing lien for \$4,017.00 and \$24,230.42 and placed these as additional liens against the Harstene island home. The home is ordered sold and is currently under a offer of \$72,000.00. That with the original home equity loan of \$60,000.00 is obligated to the amount of \$104,445.42. Which currently exceeds the current market value of \$70,000.00.

We have a home that is valued at \$70,000.00. Michelle is ordered to receive financial gain, from the Harstene Island home, of \$73,584.84 including half of the community debts that were paid off using the line of credit. Michelle owes the community nothing and as such has a net gain of \$73,584.84 from the community.

Amber receives a current benefit of \$11,250.00 from the community exactly one half of the community debts paid. However Amber has debts to pay to the community. Judgments to Michelle of \$21,765.92 plus 12% interest. Amber also has the Home equity line of credit that is now classified as her sole debt of \$60,000.00 for a total amount owed by Amber of \$81,765.92. Taking into consideration, the community debt paid of \$11,250.00 Amber receives a net loss from the community of \$70,515.42. It would appear that the current divorce decree as ordered has Amber paying for almost the entire net gain of Michelle. One would have to wonder if there was not some form of discrimination going on here? WAC 504-26-220 states Discrimination on the basis of race, color, religion, ancestry, national or ethnic origin, age, gender, marital status, veteran status, sexual orientation, gender identity, or mental, physical, or sensory disability is prohibited in conformity with federal and state laws.

RCW 26.09.080 subsection (4) allows for economic circumstances of each spouse to be considered at the time of divorce. The court found that Amber had income from VA Disability of between \$2,700.00 and \$2,800.00 per month plus receiving Social Security of \$559.00 for a total of \$3,200.00 per month RP 12. The court found that Michelle earns \$2,500.00 per month in her own business and a part-time job RP12. Amber's income is a fixed income and Michelle was recently trained as a massage practitioner. Michelle's income despite being lower also has more of opportunity to increase with experience and developing a cliental. Being reasonable one would not be inclined to think that a \$600.00 dollar per month difference in incomes would warrant such an extreme unfair judgment such as the court ordered. As an illustration, Even if this discrepancy of \$600.00 per month is the basis of the extremeness of the judgment half of that being \$300.00 per month to make the two incomes equal. It would take at \$300.00 per month Amber 236 months or over 20 years to pay this amount to Michelle.

A lien for \$24,242.42 was ordered to Michelle as her separate property. RP 5. This is not disputed or challenged here. The two main challenge's and objects here are; 1) the characterization of there being fraud to Amber's action when all she did was as Michelle asked and trying to make a just and equitable division of the Harstene Island home. 2) the \$16,198.00 judgment against Amber for the remaining balance of the home equity line of credit , because the remaining balance had been justly and equitable divided when Amber purchased a trailer for Michelle.

Conclusion

The trial court erred when making the \$16,191.00 judgment against Amber because the remaining balance of the home equity line of credit had already been equally divided under RCW 26.09.080 And the court erred with the characterization of Amber committing fraud when Amber did live up to the promise that she made with regards to purchasing a Trailer for Michelle.

RESPECTFULLY SUBMITTED this 19th day of June 2009.

A handwritten signature in cursive script that reads "Amber L Heath". The signature is written in black ink and is positioned above a horizontal line.

Amber Heath

Pro Se

