

FILED
COURT OF APPEALS
DIVISION II

No. 09-2-11410-8

10 NOV -4 PM 12:42

STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

JOHN RUMSEY and CHERRIE RUMSEY
Respondent

v.

MATHEW HAGWOOD and BONNIE HAGWOOD,
Appellant

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that the deed of trust executed by Mathew Hagwood is enforceable against Bonnie Hagwood.

Conclusions of Law No. 4 (CP 31)
August 27, 2010 VRP 7 (oral finding)
2. The trial court erred when it determined that the promissory note executed by Mr. Hagwood created a community debt.

Finding of Fact No. 8 (CP 30)
August 27, 2010 VRP 7 (oral finding)
3. The trial court erred when it required Bonnie Hagwood to pay attorney's fees to plaintiff.

Finding of Fact No. 9 (CP 30)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by improperly determining that a unilaterally executed deed of trust is enforceable against the non-joining spouse?
Assignment of Error 1.
2. Did the trial court err by determining that the funds obtained by Mathew Hagwood from Mr. and Mrs. Rumsey created a community debt and thus the obligation of Bonnie Hagwood?
Assignments of Error 2.
3. Did the trial court err by awarding attorney's fees to the plaintiffs pursuant to the language of the deed of trust?
Assignment of Error 3.

STATEMENT OF THE CASE

A promissory note and deed of trust underlies this appeal. At issue is the trial court's final orders finding that Mrs. Hagwood properly joined in the deed of trust against the family home, the loan is a community debt, and that an award of attorney's fees is proper.

Factual background

Mathew Hagwood and Bonnie Hagwood were married for approximately 25 years prior to a final order of dissolution of marriage granted in 2009. VRP 111. During the marriage, Mr. Hagwood worked continuously as a licensed real estate agent for 20 years. VRP 55. Mr. Hagwood's work as a real estate agent had amassed the community a collection of properties with approximately 4.4 million dollars in equity, not including the family home located at 20624 Church Lake Drive East, Bonney Lake, Washington. VRP 18.

During 2005, Mr. Rumsey approached Mr. Hagwood inquiring about the possibility of investing \$300,000.00 in the form of a mortgage or other loan secured by real estate. VRP 56. Mr. Hagwood pondered the proposal for a "few months" before deciding that he could help the Rumseys' by taking the loan himself, even though the Hagwoods' had never previously borrowed from non-traditional lenders. VRP 56, 112.

Prior to accepting the loan from the Rumseys', Mr. Hagwood discussed the possibility of accepting the loan with his wife. VRP 113. Mrs. Hagwood (now known by her maiden name Bonnie Primm) expressed her fears regarding the loan and ultimately told Mr. Hagwood that she did not want to take the loan. VRP 113. Mr. Hagwood then stated to Mrs. Hagwood that he would find a new investor for the Rumseys'. VRP 113.

Mr. Hagwood, with the aid of Diana York, drafted the promissory note and loan agreement to be signed by himself and the Rumseys'. VRP 57. Although Mr. Hagwood was a skilled real estate agent, he did not put his wife, Mrs. Hagwood's, name on either agreement apparently in an effort to make her "life as simple as possible." VRP 57.

The Rumseys', although knowing Mr. Hagwood was married at the time of loan, never had any contact with Mrs. Hagwood regarding the execution of the loan and deed of trust. VRP 79-80. Mrs. Hagwood was unaware that Mr. Hagwood actually accepted the loan until several months after its execution. VRP 113, 127. Mrs. Hagwood did not know that a deed of trust had been used to secure the loan until after divorce proceedings were commenced in 2008. VRP 113-115, 127.

After the execution of the appropriate documents by Mr. Hagwood and the Rumseys', and unbeknownst to Mrs. Hagwood, Mr. and Mrs.

Rumsey delivered a check to Mr. Hagwood for a portion of the loan amount. VRP 73, 115. Mr. Rumsey believed that this initial payment was going to be used to move the Rumseys' into a second creditor position on the Hagwood family home. VRP 74. After receiving verification that they were in second position, the Rumseys' delivered an additional \$225,000.00 to Mr. Hagwood. VRP 96. The Rumseys' and Mr. Hagwood then arranged for repayment of the loan through electronic payments into the Rumsey's bank account. VRP 76.

During marriage, Mr. Hagwood managed most of the property, including collecting rents and paying mortgages. During separation, the duty of collecting rents and paying mortgages passed to Mrs. Hagwood by agreement. VRP 62-63. In accordance with this agreement, Mrs. Hagwood made payments on multiple debts, including the loan from Mr. and Mrs. Rumsey. VRP 62. During the dissolution proceeding, the trial court made a finding that the loan from Mr. and Mrs. Rumsey was the separate debt of Mr. Hagwood and his sole responsibility to repay to the Rumseys'. VRP 63-64.

Ultimately payments on the loan ceased in 2009 and the Rumseys' brought an action for default. VRP 83. After a trial on the merits, the trial court concluded that the Rumseys' may foreclose on a deed of trust unilaterally executed by Mr. Hagwood. CP 31. Furthermore, the court

held that despite the dissolution court's finding, the community received the benefit of the loan and thus Mrs. Hagwood is liable to the Rumseys' for the debt. CP 30. Lastly, the court determined that pursuant to the deed of trust, Mrs. Hagwood is liable to plaintiffs for attorney's fees. CP 30. Mrs. Hagwood appeals.

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THE DEED OF TRUST ENFORCIABLE AGAINST A NON-JOINING SPOUSE.

Standard of Review Pertaining to Spousal Joinder.

The consent of a spouse to a transaction is a factual determination to be evaluated from the circumstances of each case. *Bowman v. Hardgrove*, 200 Wash. 78, 93 P.2d 303 (1939). The reviewing court must determine whether substantial evidence exists to support the trial court's findings. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co .*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

"Washington courts have held that RCW 26.16.030(4) [dealing with the joinder requirement to purchase community real property] should

be construed strictly to shield the marital community from liability for the acts of one spouse acting alone." *Colorado Nat'l Bank of Denver v. Gary Merlino*, 35 Wn.App. 610, 619, 668 P.2d 1304 (1983). The court concluded that, "debts incurred in purchasing personal property presumptively result in community liability. RCW 26.16.030. By statutory exception, the opposite presumption arises from debt incurred in purchases of real property when executed by only one spouse. RCW 26.16.030(4)." *Colorado Nat'l Bank*, at 621. Therefore, the presumption in this action is that the loan and deed of trust are not a community liability.

A. Rev. Code of Wash. 26.16.030 prohibits a spouse from unilaterally conveying, encumbering, or purchasing real property without joinder of the other spouse.

Rev. Code Wash. § 26.16.030 provides in relevant part that:

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

The Washington statute regarding joinder for community property has long required joint action of both spouses to sell, convey, or encumber

community real estate. A 1972 amendment added a joint action requirement in four new situations: (1) to purchase or contract to purchase community real property; (2) to sell, convey, or encumber community household goods, furnishings, or appliances; (3) to acquire, purchase, sell, convey, or encumber community business assets where both spouses participate in the management of the business; and (4) to give community property. Cross, Harry “*The Community Property Law in Washington*,” 61 Wash. L. Rev. 13, 76-77. Therefore, any encumbrance of real property made during the course of the Hagwoods’ marriage must meet the requirements of RCW 26.16.030.

A unilaterally executed obligation against real property is voidable by the non-joining spouse, subject to extremely limited exceptions. See *Sander v. Wells*, 71 Wn.2d 25, 426 P.2d 481 (1967). A spouse may be estopped to avoid or deny the validity of an encumbrance of community property signed only by one spouse if the non-signing spouse has knowledge of the transaction, participates in and encourages the transaction, and does not question or object to rights asserted by the mortgagee, but acquiesces in and accepts the benefits of the mortgage proceeds. *Sander*, at 29.

Ms. Hagwood testified that she did not consent to an encumbrance of the marital property, was not aware of the terms of the negotiation as

she had no contact with the Rumseys', and did not know how the funds acquired were ultimately used. VRP 112-113, 115. The only evidence presented by the Rumseys' that Mrs. Hagwood was aware of and accepted the loan was the testimony of her disgruntled ex-husband, Mr. Hagwood, in addition to improperly admitted hearsay from Mr. Rumsey. VRP 71-72. The trial court only concludes that Mrs. Hagwood knew of the loan a few months after its execution, this is not the same as knowing of a deed of trust, its terms, and encouraging the transaction. August 27, 2010 VRP 6-7 (emphasis added).

The *Colorado* court dealt with an issue analogous to the current matter. In that case, the husband, without knowledge of his wife, executed an agreement to purchase real property through the use of promissory note and deed of trust. *Colorado*, at 611. The husband ultimately ceased making payments on the debt and the creditor sought a judgment against both husband and wife. *Id.*, at 611.

The *Colorado* court concluded that even though Mrs. Merlino, the wife, signed tax forms listing the interest paid toward the loan as a deduction, she lacked sufficient knowledge of the obligation; and therefore, it was the separate debt of her husband Mr. Merlino, and only his assets could be reached to satisfy the debt.

B. Mrs. Hagwood did not ratify, authorize, or otherwise become estopped from voiding the deed of trust executed against the family home.

The court in *Colorado* reasoned that the joinder requirement is met and the community will be held liable for acquisition of land by the unilateral action of one spouse only where it is established that the non-signing spouse had knowledge of and ratified the transaction. *Colorado*, at 619; (See also *Klaas v. Haueter*, 49 Wn. App. 697, 745 P.2d 870 (1987), following the holding in *Colorado*).

At no point in the proceeding was evidence offered that Mr. Hagwood had informed his wife that he actually accepted the loan, executed a deed of trust, or that they were receiving any benefits from the loan. At most, the Rumseys' assert that Mrs. Hagwood drew checks on an account where the loan funds were allegedly deposited, but this is not proof of knowing acceptance of the funds. Mrs. Hagwood testified that she was unaware of where the funds the Mr. Hagwood obtained went, as she had no knowledge regarding the deposits or balance of her checking account. VRP 115-118. Therefore, Mrs. Hagwood could not have had knowledge and ratified the deed of trust.

A marital community is estopped to deny liability due to the failure of one spouse to join a transaction when one spouse permits the other to conduct the transaction, both have a general knowledge of the transaction,

and both are ready to accept the benefits that may come from it. *Reid v. Cramer*, 24 Wn. App. 742, 747, 603 P.2d 851 (1979). However, the court has set a high bar for a defense of estoppel by ratification or acquiescence. While such a defense is judicially recognized, it requires participation by the non-signing spouse in the transaction or evidence of a willingness on the part of the spouse to accept the transaction with all its terms, thus leading the purchasers to believe the non-signing spouse approves the transaction. *Smith v. Stout*, 40 Wn. App. 646, 649-650, 700 P.2d 343 (1985). No evidence has been offered that would allow a reasonable person to conclude that the Rumseys' believed that Mrs. Hagwood approved of the loan.

All evidence offered at trial shows that Mrs. Hagwood did not actively participate in obtaining or securing the loan. Furthermore, trial testimony shows that, at most, she was aware of the fact that her husband was considering obtaining a loan, to which she objected. This is not the same as accepting a transaction with knowledge of all its terms.

The Rumseys' presented testimony that Mr. Hagwood, during the marriage, was often given the power to encumber real property, thus implying that Mrs. Hagwood was ratifying his actions. However, a wife is not estopped to contest the validity of an encumbrance on real property executed by the husband alone merely from the fact that she has always

been satisfied to have her husband handle community affairs. *Benedict v. Hendrickson*, 19 Wn.2d 452, 455, 143 P.2d 326 (1943). Our courts have consistently held that the delegation of authority to manage community property does not cloak the managing spouse with authority to enter into a transaction that specifically requires the involvement of both parties. *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 83, 701 P.2d 1114 (1985). The trial committed an error of law by concluding that any past delegation of authority to Mr. Hagwood to manage community real property removes the requirement of spousal joinder. August 27, 2010 VRP 6-7.

In *Smith v. Dalton*, 58 Wn.App 876, 795 P.2d 706 (1990) the court addressed the requirements necessary to make an obligation signed by only one spouse enforceable against the community through authorization or ratification. In that case, Craig Smith loaned Robert and Sylvia Dalton, husband and wife, money to purchase a boat. The loan was only signed by Robert Dalton, even though trial testimony showed that the couple shopped together for the boat and even “picked it out” together. *Id.* at 878. The couple defaulted on the loan after they separated, resulting in Smith suing Mr. and Mrs. Dalton on the loan amount.

The court in *Smith* reasoned that authorization “occurs when one spouse prior to the initiation of a transaction, indicates his willingness to allow the other to enter into the transactions.” *Id.* at 881. The court

concluded the ratification is “the affirmance by a person of a prior action which did not bind him but which was done or professedly done on his account.” *Id* at 881. Here, Mr. Hagwood’s actions were not done on Mrs. Hagwood’s account. As the testimony at trial shows, Mrs. Hagwood was not seeking a loan and the parties are unable to show exactly how the funds acquired by Mr. Hagwood were used.

The court in *Smith* concluded that the non-signing spouse knew of the transaction, and even possibly supported the purchase. However, since she did not actually see the promissory note, sign it, or discuss it with any parties involved there was insufficient evidence to support ratification. *Id* at 881-882 (emphasis added). Mere knowledge of the transaction, even coupled with failure to repudiate does not establish authorization. *Id* at 882; also see *Nichols Hills Bank v. McCool*, 104 Wn.2d 78 (holding marital property cannot be used to satisfy separate obligation of spouse where non-signing spouse did not authorize or ratify action, but non-signing spouse was aware of the actions of other spouse and even participated in preparing the necessary documents). Here, there was no evidence offered to the trial court that Mrs. Hagwood had actual knowledge of the full terms, or any terms, of the loan and acquiesced to such.

Although the Rumseys' place much weight on evidence of checks drawn by Mrs. Hagwood, payable to the Rumseys', as showing her knowledge and ratification of the loan, their reliance on this action is misplaced. VRP 29-31, 45. The Rumseys' offered the court checks drawn in 2008 and 2009, during the pendency of dissolution proceedings, as apparent evidence of Mrs. Hagwood's acceptance or ratification of the loan. VRP 29-31. However, these checks were drawn pursuant to an agreement between the Hagwoods. VRP 62-63. Even if such an agreement were not dispositive here, *Nichols Hills Bank v. McCool* controls the facts presented in the alternative.

In *Nichols Hills Bank*, a husband acted as guarantor of a loan to his son despite objections from the husband's wife. *Id.* 79. The wife helped draft the appropriate papers, and never voiced her objection to the bank, because she believed that since the loan was executed she was powerless to repudiate the transaction. *Id.*, 85. Similarly, Mrs. Hagwood believed that she simply had to pay the debts that her husband ordered her to pay during dissolution. VRP 126-128. Such action does not rise to the level of acceptance or ratification of her husband's past decisions.

Since Mr. Hagwood failed to comply with the statutory requirements, and Ms. Hagwood took no steps to ratify or otherwise

accept the obligations created through Mr. Hagwood's actions, the deed of trust is not enforceable against the family home.

II. THE TRIAL COURT ERRED BY HOLDING THE LOAN MADE TO MR. HAGWOOD IS A COMMUNITY DEBT.

Standard of Review for Property Determinations.

A trial court's characterization of property as community or separate is reviewed de novo. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). A debt incurred by either spouse during marriage is presumed to be a community debt. *Oil Heat Co. v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980). A presumption is not evidence; its purpose is only to establish which party has the burden of first producing evidence on a matter in issue. *Amend v. Bell*, 89 Wn.2d 124, 128, 570 P.2d 138 (1977); *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 123 P.2d 780 (1942).

The presumption of community liability is reversed when spousal joinder in the transaction is absent. *Colorado*, at 621. Here, the deed of trust and promissory note work together to form an encumbrance on the family home. Mr. Rumsey testified that he was looking for a real property backed investment. VRP 56. Therefore the Rumseys' would not have extended the loan without an encumbrance on real property. Thus, in

determining whether the promissory note is a community or separate liability, the court must consider the two instruments working in unison.

Therefore, the presumption is that Mr. Hagwood is solely liable to the Rumseys' for the loan. This presumption is reinforced by the fact that the Rumseys', knowing that Mr. Hagwood was married, chose to only conduct business with him and never made an effort to bring his spouse into the transaction or otherwise make her aware of the terms. VRP 79-80. Since the Rumseys' took no action to join Mrs. Hagwood in the loan process and proceeded to make a separate loan to Mr. Hagwood the Rumseys' cannot now assert that a community debt was created. Furthermore, Ms. Hagwood not only objected to the creation of debt to the Rumseys', but also received no benefit from the transaction when completed. Ms. Hagwood is unaware of how Mr. Hagwood used the funds acquired. VRP 115.

Mrs. Hagwood has not been unjustly enriched as a result of the promissory note signed by Mr. Hagwood. "A quasi contract or a contract implied in law . . . arises from an implied legal duty or obligation. Quasi contracts are founded on the equitable principle of unjust enrichment which simply states that one should not be unjustly enriched at the expense of another." *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989) (quoting *Milone & Tucci, Inc. v. Bona Fide Builders*,

Inc., 49 Wn.2d 363, 367, 301 P.2d 759 (1956)). The necessary elements of quasi contracts are "(1) the enrichment of the defendant must be unjust, and (2) the plaintiff cannot be a mere volunteer." *Trane Co. v. Randolph Plumbing & Heating*, 44 Wn. App. 438, 442, 722 P.2d 1325 (1986). Here Ms. Hagwood has not knowingly received a benefit from the money lent to her former husband and therefore has not been unjustly enriched through the loan.

III. THE TRIAL COURT ERRED BY AWARDING MR. AND MRS. RUMSEY ATTORNEY'S FEES.

Standard of Review Pertaining to Attorney's Fees Award.

Attorney's fees may be awarded only when authorized by a contract, statute, or recognized ground in equity. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Whether a contract or statute authorizes an award of attorney's fees is a question of law reviewed de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009).

An Unenforceable Deed of Trust Cannot be the Basis for an Award of Attorney's Fees.

Mrs. Hagwood did not properly join, ratify, or authorize the deed of trust, as asserted in section I. Therefore, no contract exists between Mrs.

Hagwood and the Rumseys', leaving the court with no basis to impose attorney's fees.

CONCLUSION

The trial court lacked substantial evidence to conclude that Mrs. Hagwood properly joined her husband, Mr. Hagwood, in the execution of a promissory note and deed of trust in favor of the Rumseys'. Therefore the validity of the deed of trust and award of attorney's fees based upon the deed of trust should be vacated. Furthermore, the loan given to Mr. Hagwood did not create a community liability and is the sole responsibility of Mr. Hagwood.

For the reasons and based upon the authorities cited above, the Appellant respectfully requests that this Court reverse the trial court and hold that the deed of trust executed by Mr. Hagwood is voidable by Mrs. Hagwood due to lack of spousal joinder, the resulting debt is Mr. Hagwood's separate obligation, and attorney's fees may not be awarded based on a deed of trust lacking spousal joinder.

DATED this 4th day of November, 2010.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA #9559
Attorney for Bonnie Hagwood, Appellant

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington
I affirm the following to be true:

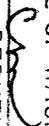
On this date I transmitted the original document to the Washington
State Court of Appeals, Division II, by personal service and delivered a
copy of this document via ABC Legal Messengers to the following:

Douglas Kiger, Attorney
4717 S 19th St #109
Tacoma WA 98405

Signed at Tacoma, Washington on this 4th day of November,
2010.



Lisa Bitz

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