

No. 41787-1-II

COURT OF APPEALS,
DIVISION II
STATE OF WASHINGTON

ROBB NUNN,

Plaintiff / Appellant,

v.

ERIN E. CREAGAN,

Defendant / Respondent.

BRIEF OF RESPONDENT
ERIN E. CREAGAN

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STATE OF WASHINGTON
BY 
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COURT OF APPEALS
DIVISION II

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I.

INTRODUCTION

This appeal is the aftermath of a romantic relationship gone bad. Robb Nunn (“Nunn”) unsuccessfully claimed at trial, and now claims on appeal, that he was entitled to the following monetary relief from Erin Creagan (“Creagan”), his former fiancée – although his own trial testimony and the documentary evidence belied his testimony and refuted his claims, as the trial court correctly found. Nunn claims the trial court erred and now wants a “second bite” at the apple – or more precisely, appellate review of the trial court’s ruling on the following claims:

1. Nunn’s Claim for 1/3 of the “Gross” Sale Proceeds.

Nunn claims he was entitled to receive one-third (1/3) of the GROSS – not “net” – sales proceeds from the sale of a 1.09 acre parcel of land and home located at 10600 SE 17th Street, Vancouver, Washington (the “Property”). Nunn owned a 1/3 interest in the Property; Creagan owned a 2/3 interest.

In January 2006, Nunn and Creagan sold the Property on contract to another developer for \$580,000. (Ex. 61). As Nunn knew,

and had known, Creagan had two underlying mortgages against the Property at the time of sale totaling \$247,500 (Ex. 78 and 93), which Nunn and Creagan expressly agreed that the developer was to pay. (Ex. 61, ¶ 7). Nunn now claims he was shorted \$83,718.80 in sale proceeds (Nunn's Opening Brief at 16), representing his alleged share of the gross sale proceeds that were used to pay off Creagan's mortgage debt on the Property.

There are multiple problems with Nunn's claim. Not only had Nunn expressly and repeatedly agreed in writing that he and Creagan were to receive 1/3 and 2/3, respectively, of the "NET" sale proceeds from the sale of the Property, but he willingly and knowingly accepted each of the three "net" sales proceeds checks issued by the title company to him for his share of the sale proceeds, cashed them and NEVER ONCE complained – either orally or in writing – to the title company or to Creagan at any time about the alleged underpayment until some 14-16 months later when Nunn filed suit.

Moreover, Nunn admitted that he was aware of the underlying mortgage debt against the Property at all relevant times – both before he invested into the Property and before he and Creagan sold the

Property to another developer; that he knew he could have prepared a written addendum to the REPSA clarifying his agreement with Creagan when he initially invested into the Property, but he did not do so; and, finally, Nunn admitted that he knew the difference between “net” and “gross” proceeds when he signed for, agreed to and expressly instructed the title company to only pay him 1/3 of the **NET sale proceeds**. (RP at Vol. 1, pages 69-70, 72, lines 19-24, 73, lines 1-19, 74, lines 17-25, 75-77, Lines 1-15, 78, lines 21-25, 79 lines 1-14, 101-103, lines 1-3). Based on the evidence presented, the trial court properly rejected this claim. (CP 40, Findings of Fact and Conclusions of Law).

2. Nunn’s Claim for \$5,775.00 for “Labor” Charges.

Nunn claims that Creagan should have reimbursed him for the alleged “value” of the work he did on the Property while he and Creagan were living together on the Property, trying to develop it and contemplating marriage. Nunn admitted that there was no agreement regarding payment and that he performed the work without any expectation of payment. Only after the parties’ personal and business relationship had ended, and nearly two years after the fact,

was Nunn heard to complain about entitlement for his labor. The trial court correctly found against Nunn on this claim as well.

3. Nunn's Claim for \$3,300 on an Unrelated Investment.

Nunn claims that the trial court should have awarded him \$3,300 against Creagan on an unrelated and time-barred transaction involving an unrelated company, Elkview Estates, LLC ("Elkview"). Elkview was owned by Creagan, Nunn and eight other individuals. The trial court properly denied this claim as well.

4. Nunn Claim for Attorney's Fees. The trial court apportioned Nunn's attorney's fees and awarded him \$4,450.00 pursuant to RCW 4.84.250 – 280. Nunn claims he should have received another \$7,924.26 in fees, purportedly based on the parties' REPSA, but the REPSA was not at issue and Nunn's claims were not based on it, but rather on the sale of the Property to another developer and division of the sale proceeds between he and Creagan. The trial court has considerable discretion in determining and awarding attorney fees. There is no evidence of abuse of discretion by the trial court.

II.

STATEMENT OF THE CASE

Creagan adds the following facts and chronology to that set forth by Nunn:

1. Robb Nunn (“Nunn”) and Erin E. Creagan (“Creagan”) were romantically involved with one another and contemplating marriage at all relevant times. **(RP Vol. 1 at 10, lines 1-10; 59, lines 4-15; Vol. 2 at 175, lines 17-20).**

2. At some point in their relationship, Nunn and Creagan mutually discussed developing Creagan’s 1.09 acre parcel of land with home located at 10600 SE 17th Street, Vancouver, Washington (the “Property”). **(RP Vol. 1 at 10, lines 18-24; 11, line 1; 62, lines 2-7).** Creagan had owned the Property since 1995. **(RP Vol. 2 at 175, lines 21-24, 176, lines 2-11).**

3. In October 2003, the parties executed a Residential Real Estate Purchase and Sale Agreement (“REPSA”) in which Creagan would sell and Nunn would buy a 1/3 interest in the Property, which the parties planned to jointly develop, improve and re-sell for an anticipated substantial profit. **(Ex. 6 and 64; RP Vol. 2**

at 179, lines 3-15).

4. Prior to purchasing his 1/3 interest in the Property in December 2003, Nunn admitted that he had received a title report on the Property showing Creagan's two outstanding mortgages against it. (Ex. 93; RP Vol. 1 at 68, lines 13-19; 69, lines 2-11, 19-24; 70, lines 1-3).

5. At the time of Nunn's investment in the Property, Nunn admitted that he could have prepared an addendum to the REPSA that would have clarified the terms and conditions of his investment, but he chose not to do so. (RP Vol. 1 at 77, lines 11-15; 79, lines 7-14).

6. By November 2005, the parties were in negotiations to sell the Property to Ellsworth Springs Estates, LLC (the "LLC"), a real estate development company, and a second title report was prepared for the Property. (Ex. 63 and 78).

7. Nunn admitted to receiving this second title report dated November 7, 2005 which, just as the October 31, 2003 title report had done, disclosed the existence of a first and second mortgage against the Property in the amount of \$247,500. (RP Vol.

1 at 101-102, lines 2-15).

8. On January 31, 2006, the parties sold the Property to the LLC for \$580,000, to be paid pursuant to the terms of a Real Estate Contract (“REC”). **(Ex. 61 and 74).** The REC also disclosed the existence of a “first and second mortgage on the property.” **(Id. at ¶ 6).**

9. Nunn and Creagan were to receive the sale proceeds under the REC as the LLC sold the lots it would be developing. **(Ex. 61 and 74 at ¶ 9; RP Vol. 1 at 102, lines 16-24; 103, lines 2-4).**

10. On February 8, 2007, Nunn expressly authorized and directed First American Title to pay the “*net proceeds*” to Creagan and him from the LLC’s sale of Lots 5 and 6 in their respective interests (i.e., Nunn 1/3 and Creagan 2/3). **(See Ex. 79 and 80).**

11. Nunn admitted at trial that he read and signed the “net proceeds” payment authorization for lots 5 and 6 and voiced no objections **(Ex. 79 and 80; RP Vol. 1 at 72, lines 19-24; 73, lines 2-19; 75, lines 15-24; 76, lines 2-16)**; that Nunn knew the difference between “net” and “gross” proceeds **(RP Vol. 1 at 74, lines 17-19)**; and that he had received the title reports disclosing the amount of the

outstanding mortgage balance against the Property before the sale of the Property to the LLC. (**Ex. 74, 78 and Ex. 63 and 93; RP Vol. 1 at 101-102, lines 2-15**).

12. On March 23, 2007, Nunn received his first check from First American Title Co. in the amount of \$39,877.53 representing his share of the “net” proceeds from the sale of Lot 6. (**Ex. 54 and 79, pg. 3; RP Vol. 1 at 74, lines 20-24; 75, lines 2-11**).

13. Nunn admitted at trial that he endorsed and deposited the check without objection (**RP Vol. 1 at 75, lines 3-11**); and that the monies received represented his 1/3 share of the “net” proceeds from the sale of that lot as he had had agreed and instructed the title company. (**Ex. 54 and 79, pg. 1**).

14. On March 28, 2007, Nunn received his second check from First American Title Co. in the amount of \$39,449.49 as his share of the “net” proceeds from the sale of Lot 5. (**Ex. 55 and 80; RP Vol. 1 at 75, lines 12-24; 76, lines 2-16**).

15. Nunn again admitted at trial that he received this second check in the amount of \$39,449.49 which represented the “net proceeds” from the sale of Lot 5 as he had agreed and instructed

the title company. **(Ex. 55 and 80; RP Vol. 1 at 75, lines 12-24; 76, lines 2-16).**

16. On May 24, 2007, Nunn received his third and final check from First American Title Co. in the amount of \$23,725.12 as his share of the “net” proceeds from the sale of Lot 4. **(Ex. 56 and 81; RP Vol. 1 at 76, lines 17-24; 77, lines 2-10).**

17. Nunn again admitted at trial that he endorsed and deposited the check without objection; and that the monies received represented his 1/3 share of the “net” proceeds as he had instructed the title company. **(Ex. 79, 80 and 81, and Ex. 54, 55 and 56).**

18. The “net” proceeds of the sale were divided between Nunn and Creagan according to their respective 1/3 and 2/3 ownership interests as they had instructed the title company. **(Ex. 79, 80 and 81, and Ex. 54, 55 and 56).** Nunn received a total of \$103,052.08 in “net” proceeds from the sale of the Property, and Creagan received \$206,116.28. **Id.**

19. On September 26, 2008, Nunn filed suit in Superior Court against Creagan for breach of contract – claiming he was shorted \$98,000 on his share of the sales proceeds as a result of the

payment of the underlying mortgages on the Property from the sales proceeds . **(CP 3)**.

20. A bench trial was held August 24, 2010 before the Honorable John F. Nichols.

21. At trial, in addition to Nunn's claim for 1/3 of the total \$580,000 in gross sales proceeds from the sale of the Property, Nunn sought reimbursement of \$5,775.00 in "labor" costs he contributed. There was no testimony, however, that there was an agreement between the parties that Nunn would be compensated for doing so.

22. At trial, Nunn also sought \$3,300.00 from Creagan for money he allegedly paid on Creagan's behalf in an unrelated real estate development company known as Elk View, LLC. **(RP Vol.2 at 260-265)**. The money, if paid, was paid in June 2005 according to a Columbia Credit Union statement and would be time barred. **(Ex. 37; CP 3; RP Vol. 2 at 260, lines 14-20)**. Creagan objected to the testimony on relevance grounds. **(RP Vol. 2 at 261, lines 9-10; 262, lines 11-12; 263, line 18)**.

23. Elk View, LLC consisted of Nunn, Creagan and 8 other individuals, all of whom were members of the LLC. **(RP Vol.**

2 at 265, lines 16-20).

24. On January 14, 2011, the trial court entered its Findings of Fact and Conclusions of Law – denying Nunn’s breach of contract claim that he was entitled to 1/3 of the “gross” sales proceeds on the Property, and further denying Nunn’s claims for \$5,775.00 in unreimbursed “labor” charges and \$3,300.00 on the Elkview Estates’ matter. **(CP 40).**

25. On January 14, 2011, judgment was entered. **(CP 41).**

26. On February 10, 2011, Nunn filed a Notice of Appeal. **(CP 43).**

III.

ARGUMENT

1. Nunn Agreed to “Net” Not “Gross” Proceeds.

The evidence overwhelmingly established that Creagan and Nunn agreed to a “1/3 – 2/3” split of the “**net** profits.” Curiously, if the arrangement between Nunn and Creagan was not a “net profits” agreement as Nunn claims, why did Nunn expressly authorize First American Title to pay only “net profits” to him on three separate occasions when he was fully aware of the outstanding mortgages?

And why did Nunn fail to object or do anything else to rectify the error when he received each of his three “net profits” checks from the title company?

The fact is that Nunn never once objected to nor disavowed his agreement with Creagan to split only the “net proceeds” of the \$580,000 sale price until September 26, 2008 – the date Nunn filed his Complaint – which was some 20 months AFTER Nunn first gave First American Title written payment instructions for “net proceeds”. **(Ex. 79 and 80)**. Nunn’s story to the contrary is simply not believable. It comes too late and directly contradicts ALL of the documentary evidence in this case, as well as Nunn’s acts and conduct during the relevant time periods.

**Nunn’s Actions
Confirm the “Net Profit” Agreement**

There is simply too much evidence contradicting Nunn’s self-serving “after-the-fact” story for him to have any credibility on this issue. Here is the relevant chronology:

On February 8, 2007, Nunn expressly authorizes and directs First American Title to pay “*net proceeds*” to Creagan and him from

the sale of Lots 5 and 6 of the Ellsworth Springs subdivision (which had been part of the parties' Property before it was subsequently sold to Ellsworth Springs Estates LLC and subdivided by the LLC). **See Ex. 79 and 80.** Nunn admitted at trial that he read and signed the "net proceeds" payment authorization (Ex. 79 and 80); that he knew the difference between "net" and "gross" proceeds; and that he had received and reviewed the title reports disclosing the amount of the outstanding mortgage balance against the Property both BEFORE he invested and BEFORE the sale to Ellsworth Springs Estates, LLC.

On March 23, 2007, Nunn received his first check from First American Title Co. in the amount of \$39,877.53 representing his share of the "net" proceeds from the sale of Lot 6. Nunn admitted at trial that he endorsed and deposited the check without objection; that he neither objected to the amount of the payment to either Creagan or First American Title at any time prior to filing suit on September 26, 2008; and that the monies received represented his 1/3 share of the "net" proceeds from the sale of that lot as he had instructed the title company.

On March 28, 2007, Nunn received his second check from

First American Title Co. in the amount of \$39,449.49 as his share of the “net” proceeds from the sale of Lot 5. **(Ex. 55 and 80)**. Again, Nunn admitted at trial that he endorsed and deposited the check without objection; and that the monies received represented his 1/3 share of the “net” proceeds as he had agreed and instructed the title company.

On May 24, 2007, Nunn received his third and final check from First American Title Co. in the amount of \$23,725.12 as his share of the “net” proceeds from the sale of Lot 4. **(Ex. 56 and 81)**. Nunn again admitted at trial that he endorsed and deposited the check without objection; and that the monies received represented his 1/3 share of the “net” proceeds as he had instructed the title company originally.

Nunn Failed to Prove His Claim

Nunn clearly failed to prove that the agreement between he and Creagan was anything other than a “net profits” arrangement. Nunn admitted that he had received and reviewed two separate title reports on the Property before he originally invested in the Property and before he and Creagan agreed to sell the Property to Ellsworth

Springs Estates, LLC. Both title reports disclosed the underlying \$250,000 mortgage balance against the Property.

Notwithstanding Nunn's awareness of the underlying mortgage balance, he admitted authorizing the payment of "net proceeds" to himself on two separate occasions in February 2007; he admitted that he willingly and knowingly accepted and cashed each of the three "net proceeds" checks issued by the title company to him in March and May 2007 as payment for his share of the Property sale proceeds; and admitted that he never once objected or complained about the amount of his checks or the payoff of the underlying mortgage against the Property either orally or in writing at any time prior to his filing of the lawsuit some 18-20 months later.

Nunn's claim for \$83,138.47 comes too late to be believable and is utterly devoid of documentary proof that the deal between he and Creagan was anything other than a "net profits" arrangement. ALL of Nunn's actions and conduct belie and refute this claim. Nunn failed to carry his burden of proof on this issue. The claim was properly rejected by the trial court as devoid of proof.

Waiver and Estoppel Bar Nunn's Claim

A “waiver” is in the intentional and voluntary relinquishment of a known right. *Birkeland v. Corbett*, 51 Wn.2d 554, 565 (1958). If a waiver is not found by express agreement, “a waiver by conduct occurs if the actions of the person against whom waiver is claimed are inconsistent with any intention other than waiver.” *Edmonson v. Popchoi*, 155 Wn.App. 376, 389-90 (2010). Nunn’s actions in agreeing to a 1/3 – 2/3 split of “net profits” coupled with his acceptance and cashing of three “net profits” checks from the title company without objection or complaint is a clear waiver of his claim..

Furthermore, Nunn is deemed by law to have “waived” his claim for a share of the “gross” proceeds by failing to object at the time he accepted payment on three different occasions:

An objection to the amount of tender is waived where the objection is not made at the time of tender, or is made on some ground other than the sufficiency of the amount. An objection to the amount of a tender must be taken at the time the tender is made, otherwise it is waived.

86 CJS *Tender* § 12 (2010)(emphasis added). Any reasonable person

under the circumstances would have objected if, as Nunn claims, he was shorted over \$83,000. He failed to object or complain because he got exactly what he bargained for – a 1/3 share of “net profits”.

Similarly, Nunn should be estopped from contradicting his earlier actions and conduct at this late date. Under the principles of equitable estoppel, “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *City of Seattle v. St. John*, 166 Wn.2d 941, 948 (2009)(citations omitted). The “elements of equitable estoppel are: (1) a party’s admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party’s act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Id.* at 949.

Nunn led Creagan to believe that the parties would split the “net profits” after payment of the underlying mortgage balance and other closing costs. Not only did Nunn expressly agree to such a “net profits” allocation, but ALL of Nunn’s acts and conduct misled

Creagan to believe such as well. Nunn can cite to no error by the trial court, or that there was not substantial evidence supporting the trial court's findings and conclusions of law.

2. The Trial Court Properly Rejected Nunn's Other Claims

There was no evidence at trial that Creagan agreed to repay Nunn for "labor" expended on the Property, or for any money allegedly paid by Nunn on Creagan's behalf for Elk View, LLC. The Elk View claim, if Nunn's claim is to be followed, arose in June 2005 – more than 3 years' before Nunn filed suit. The claim would thus be time barred by the 3-year statute of limitations. See RCW 4.16.080(3).

The "labor" claim is equally absurd. Nunn and Creagan lived in the home that Nunn claims he improved and wants Creagan to reimburse him \$5,775.00. Not only is there no evidence of any agreement for repayment, but the parties were engaged and contemplating marriage. The home that Nunn was working on would be the marital home. The trial court properly rejected this claim and Nunn cannot show an abuse of discretion, or that the trial court

erred in its evidentiary findings.

3. **The Trial Court Did Not Abuse its Discretion in Awarding Nunn Only \$4,450 in Attorney's Fees.**

A trial court is given a great deal of discretion in determining fee awards. An appellate court uses the substantial evidence test for factual determinations, and the abuse of discretion standard to evaluate the amount of the fees awarded. *Schmidt v. Cornerstone Investment, Inc.*, 115 Wn.2d 148, 169 (1990).

There is no evidence that the trial court abused its discretion in awarding Nunn \$4, 450.00 in attorney fees. Nunn sought to recover ALL the time expended on the case, not simply to prove the Promissory Note claim for \$10,000. Nunn sought to prove his "labor" claim; he sought to prove the Elk View claim; and he sought, and lost, on the most important claim of all – the "gross" vs. "net" sales proceeds claim. Nunn has no evidence of an abuse of discretion which, as the appellate court knows, is a formidable challenge to overcome. Nunn's claims should be rejected.

V.

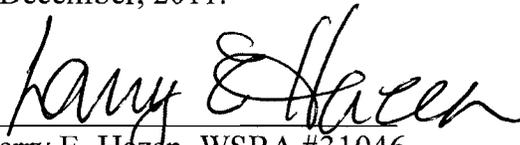
CONCLUSION

Nunn's appeal is without merit. The Court of Appeals should deny Nunn's appeal and affirm the trial court's Findings of Fact and Conclusions of Law and Judgment.

Request for Attorneys' Fees and Costs on Appeal

Pursuant to RAP 18.1 and/or RAP 18.9, respondent Creagan requests an award of attorney's fees and costs incurred by her on appeal.

DATED this 1st day of December, 2011.


Larry E. Hazen, WSBA #31046
Attorney for Respondent Creagan

CERTIFICATE OF SERVICE

I, Larry E. Hazen, certify under penalty of perjury under the laws of the State of Washington that I served the foregoing document by the method, on the date, and on each attorney(s) and/or person(s) identified below.

Method of Service:

 X By **mailing and hand delivery** a full, true and correct copy of the document in a sealed, first class, postage prepaid envelope, addressed to each party or attorney shown below, to the last known address of each party or attorney, and deposited with the United States Post Office in Vancouver, Washington on the date set forth below.

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COURT OF APPEALS
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STATE OF WASHINGTON
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DATED this 1st day of December, 2011.

Larry E. Hazen
Larry E. Hazen, WSBA #31046
Attorney for Respondent