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NO. 50920-2-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

SHANE D. REGO, Appellee/Petitioner

v.

SUZANNE J. REGO, Appellant/Respondent.

OPENING BRIEF OF APPELLANT

Trial Court No. 16-3-0052-1

Submitted by:
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III. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by considering and adopting the spreadsheet submitted with Petitioner's trial brief.
2. The trial court erred by interpreting the CR2A agreement to require a transfer payment by the Petitioner.

Issues Pertaining to Assignments of Error

1. Petitioner submitted a trial brief and attached a spreadsheet purporting to explain intent of the CR 2A agreement. Was the spreadsheet extrinsic evidence improperly considered by the trial court?
2. The trial court interpreted the CR 2A agreement to require the Respondent to make a transfer payment of \$10,717. Did the Court properly apply the rules of contract interpretation to the CR 2A agreement?
3. The spreadsheet submitted by the Petitioner was submitted the morning of trial. The spreadsheet was not supported by testimony from either party and was not submitted as an exhibit during trial. Was the trial court's consideration and adoption of the spreadsheet a violation of the rules of evidence and Respondent's due process rights?

IV. STATEMENT OF THE CASE

On February 16, 2016, Petitioner (hereinafter "Mr. Rego") filed a petition for dissolution. On May 16, 2017, the parties entered into a CR 2A agreement (hereinafter the "Agreement"). CP 72. The Agreement provided specifics regarding the distribution of the parties' personal property and real property. CP 72. In addition, the Agreement stated that

the real property located in Sequim, WA would be sold, the proceeds would first be used to pay off the mortgage and costs of sale and the remaining funds would be used to equalize the property distribution. CP 72. The parties did not agree as to the specific allocation of the remaining funds. CP 72. The parties did not agree on whether Mr. Rego would be reimbursed for costs of preparing the home for sale or the distribution of personal property. CP 72.

Bench trial was set for August 28, 2017 to resolve issues not addressed in the Agreement. Specifically, the following issues: (1) extraordinary child-related expenses; (2) attorney fees; (3) distribution of personal property; (4) reimbursement for costs related to preparing the home for sale; and (5) reimbursement for mortgage payments. CP 63.

On August 28, 2017, the morning of trial, counsel for Mr. Rego filed a trial brief. CP 65. Attached to the trial brief was a spreadsheet purporting to set out the necessary distribution of assets and liabilities according the Agreement (hereinafter the "Spreadsheet." CP 65. The trial brief and attached spreadsheet were provided to counsel for Respondent (hereinafter "Ms. Rego") at the time of filing. The Spreadsheet listed the assets and debts of the parties, excluding the real property, and provided a conclusion that a marital lien in the amount of \$10,717 should be awarded to Mr. Rego. CP 65. The Spreadsheet also included an estimated value for

the Lexis that was not included in the Agreement. CP 65.

The trial proceeded as scheduled on August 28, 2017. During trial, Mr. Rego did not introduce the Spreadsheet as an exhibit and neither party introduced testimony regarding the intent of the Agreement. RP 7.

Counsel for Ms. Rego objected to the trial court's consideration of the Spreadsheet because of the lack of testimony, notice, and because the Agreement should speak for itself. RP 7. Counsel for Ms. Rego further objected to the trial court's interpreting the term "equalize property distribution" in the Agreement to mean Ms. Rego would be required to make a transfer payment. RP 22.

On August 29, 2017, the trial court issued a Memorandum Opinion resolving the issues listed above. CP 57. In addition, the trial court's memorandum adopted the spreadsheet submitted by Mr. Rego and determined Ms. Rego would be required to make a transfer payment of \$10,717. CP 57.

On September 8, 2017, Ms. Rego filed a timely motion for reconsideration of the trial court's interpretation of the Agreement and its decision to require Ms. Rego to make a transfer payment to Mr. Rego. CP 50. On September 12, 2017, the trial court issued a memorandum opinion denying Ms. Rego's motion for reconsideration. CP 44. On September 27, 2017, Ms. Rego filed a timely appeal of the trial court's decision. CP 30.

V. ARGUMENT

1. The Spreadsheet submitted by Mr. Rego was extrinsic evidence and should not have been considered by the court.

Standard of Review

Questions of law and a trial court's conclusions of law should be reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Findings of fact should be reviewed under a substantial evidence standard. *Pardee v. Jolly*, 163 Wash.2d 558, 566, 182 P.3d 967 (2008). A trial court's findings of fact must justify its conclusions of law." *Hegwine v. Longview Fibre Co.*, 162 Wash.2d 340, 353, 172 P.3d 688 (2007). Where the parties present a mixed question of law and fact but do not dispute the facts, the question is one of law for the court. *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 75, 137 P. 342 (1913). In this case, the decision whether to consider extrinsic evidence to interpret the intent of a contract is a conclusion of law and the facts are not in dispute. The Court should review this case de novo.

Analysis

The spreadsheet submitted by Mr. Rego with his trial brief was extrinsic evidence and should not have been considered or adopted by the trial court. A trial court cannot consider extrinsic evidence "(a) to show a

party's unilateral or subjective intent as to the meaning of a contract word or term; (b) to show an intention independent of the instrument; or (c) to vary, contradict, or modify the written word. *Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 129 Wn.App. 303, 311, 119 P.3d 854 (2005). Under the "context rule" the trial court may consider certain types of extrinsic evidence to assist for the purpose of ascertaining the parties' intent. *Id.* The court may consider "(1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties. *Id.* However, extrinsic evidence should only be "admitted for the purpose of aiding in the interpretation of what is in [a written] instrument, and not for the purpose of showing intention independent of the instrument." *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

In the present case, the Spreadsheet submitted by Mr. Rego is extrinsic evidence. The Spreadsheet listed the agreed distribution of assets and liabilities pursuant to the Agreement, but it included a conclusion regarding the value of one of the vehicles and a conclusion that the intent of the Agreement was to create a marital lien in favor of Mr. Rego in the

amount of \$10,717 by splitting the net community property distribution 50/50. However, the Agreement stated that the parties were not in agreement regarding what amount would be necessary to equalize the *property* awards (not the net community property awards) and did not include any agreement regarding a transfer payment or marital lien. The conclusions included in the Spreadsheet were meant to show an intention other than that plainly stated in the Agreement. Because this Spreadsheet included conclusions independent of the Agreement, the Spreadsheet was submitted to show an intention independent of the instrument. The purpose for submitting the Spreadsheet does not fall under any of the six categories of extrinsic evidence that a court may consider. Extrinsic evidence submitted to show an intention independent of the instrument cannot be considered by the court and therefore the trial court erred in considering the Spreadsheet.

During closing, Mr. Rego argued that the purpose of the Spreadsheet was to summarize the first page of the Agreement. RP 14. However, because the Spreadsheet included conclusions regarding intent that was not included in the Agreement, the Spreadsheet went further than simply providing a summary. The Spreadsheet provided a conclusion that was meant to show an intent independent of the instrument.

In this case, the trial court considered and adopted extrinsic evidence

submitted to show an intention independent of the Agreement in the form of the Spreadsheet submitted by Mr. Rego. Because the Spreadsheet was submitted to show an intention independent of the Agreement, the trial court erred in considering and adopting the Spreadsheet.

Because the Spreadsheet cannot be considered as evidence of the parties' intent regarding the Agreement, and because neither party submitted evidence during trial regarding their intent, the interpretation of the Agreement is a question of law that should be determined by the appellate Court. A discussion of required interpretation of the Agreement is explained below in Section 2.

2. The trial court incorrectly interpreted the Agreement.

Standard of Review

Following a bench trial, the appellate court should begin by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Casterline v. Roberts*, 168 Wn.App. 376, 381, 284 P.3d 743 (2012). The court should review the application of the law to the facts de novo because it is a question of law. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The interpretation of a contract is usually a mixed question of law and fact. However, neither party presented evidence during trial regarding the intent of the Agreement, leaving the court to

make an interpretation of the terms of the Agreement. This Court should review de novo the trial court's conclusions of law regarding the contract terms.

Analysis

The trial court failed to apply the principles of contract interpretation and therefore incorrectly interpreted the Agreement. CR 2A Agreements are an agreement made in writing between both parties and signed by their attorneys. CR 2A. These agreements are governed by general rules of contract law. *Stottlemyre v. Reed*, 35 Wash.App. 169, 171, 665 P.2d 1383 (1983).

“The primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 712, 334 P.3d 116 (2014). The focus should be the reasonable meaning of the contract language to determine the parties’ intent (objective manifestation theory). *Id.* at 713. Courts will generally give terms in a contract “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). When the plain language is unambiguous, extrinsic evidence should not be considered. *City of Seattle v. Nazarenius*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962).

If terms are vague or ambiguities exist, those ambiguities should be construed against the drafter of the contract. *Pierce County v. Sate*, 144 Wn.App. 783, 813, 185 P.3d 594 (2008). Here, the Agreement was drafted by Mr. Rego's attorney and therefore any ambiguities in the Agreement must be construed against Mr. Rego.

In this case, the provision of the Agreement at issue is the sentence:

"The parties agree the remaining funds are to be used to equalize the property distribution but do not agree as to the specific allocation of the remaining funds." CP 72.

Mr. Rego's argument was that the intent of the parties in including this provision was to require the parties to calculate each person's total award of community property (not including the income from the house), subtract each person's total liabilities (which the Agreement did not characterize as community or personal), and require whoever came out with the higher number to make a payment to the other person such that those numbers would become equal. This interpretation fails for multiple reasons.

The plain meaning of the term property does not include liabilities. Webster's Dictionary defines property as "something owned or possessed." "Property." Merriam-Webster.com. Merriam-Webster, n.d. Web. 30 Jan. 2018. Further, the Agreement significantly does not include liabilities or debts under the items listed under the "property" headings.

CP 72. The Agreement does not distinguish the liabilities as community or separate, which means the parties could not have intended to include them in any “net community property” calculation. Therefore, the plain meaning of property should simply be those property items awarded to each party, not including liabilities.

In adopting Mr. Rego’s interpretation, the trial court makes multiple erroneous assumptions regarding the intent of the terms of the Agreement and fails to apply contract interpretation principles. The trial court assumes the term “property distribution” to mean community property minus liabilities (community and separate). However, the Agreement did not say “*community* property distribution, or *net community* property distribution, or even property *minus liabilities*,” it simply stated, “property distribution.” The ordinary and reasonable meaning of this term would only include the items owned or possessed by each party. In addition, the Agreement was drafted and reviewed by attorneys who are sophisticated enough to specify the type of property intended. Even RCW 26.09.080 separates the terms “property” and “liabilities.” The trial court also assumed that the “obligations” listed in the Agreement were community liabilities, even though the Agreement does not specify them as such. At a minimum, the trial court should have interpreted the Agreement to require equalization of the total property awarded.

The trial court's interpretation of the intent of the parties is not logical because if their intent was to equalize net community property awarded, Mr. Rego's calculation could have easily been done when the Agreement was drafted. Instead, the parties stated that they did not agree on the specific allocation of the remaining funds. In its Memorandum Opinion re: Reconsideration, the trial court stated that it did not interpret the provision this way because the issue of Mr. Rego's reimbursement for cost associated with selling the house could have affected the equalization. CP 44. However, this argument fails because in its first Memorandum Opinion, the court did not even consider Mr. Rego's reimbursement in its decision to award him a marital lien. CP 57. The trial court stated,

"Based upon this agreement, Mr. Rego receives a (net) community property awarded of \$19,785 and Ms. Rego receives a community property award of \$41,218. The difference between the two awards is \$21,433 and a marital lien of \$10,717 is required to equalize the awards."

The trial court's own calculation fails to take into consideration the other "financial issues" it claims would have had an effect on the decision. Further, the costs of selling the house were to come out of the proceeds per the terms of the Agreement and therefore would not have affected the calculation.

As previously stated, the relevant provision made it clear that the parties did not agree on an amount that would "equalize" the property

distribution and there is no mention of including liabilities in the calculation to equalize the property distribution. In this case, the court should look to the Agreement as a whole in order to interpret the intent of the parties, taking into consideration that both parties were represented by attorneys, and Mr. Rego's attorney drafted the Agreement. The question here is, what did the parties mean by "equalize the property distribution."

The only interpretation of the intent of the parties that would make sense in this case is that the parties intended to take the property distributed to each party (real, personal, liquid), calculate its total value and then use the remaining proceeds from the house to equalize that amount, but not to include the debt awarded to Mr. Rego as in the Agreement, he agreed to assume all the debt of the parties.

The parties did not present sufficient evidence regarding the value of the personal property retained by each person. Therefore, the proceeds of the sale of the real property should first be used to pay the mortgage and the remaining funds should be used equally divided pursuant to the Agreement.

Because the trial court failed to apply principles of contract interpretation, the appellate court should order that the dissolution decree be amended to reflect the above interpretation of the Agreement that does not include a marital lien that is essentially a division of the debt and

requires a transfer payment from Ms. Rego to Mr. Rego.

- 3. The trial court's admission and adoption of the improperly submitted spreadsheet was a violation of Ms. Rego's due process rights.**

Standard of Review

Questions of law and a trial court's conclusions of law should be reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). In addition, constitutional violations are reviewed de novo. *Bellevue School Dist. v. ES.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The interpretation of court rules is an issue of law and should be reviewed de novo. *State v. McEnroe*, 174 Wash.2d 795, 800, 279 P.3d 861 (2012). In this case, the decision whether to consider and admit evidence is a conclusion of law involving a constitutional violation and should be reviewed de novo.

Analysis

The Spreadsheet submitted by Mr. Rego was not properly submitted to the trial court. If a party intends to admit an exhibit, the exhibit must be authenticated or identified as a condition precedent to admissibility. ER 901(a). In the present case, the Spreadsheet was never submitted to the trial court as an exhibit and was never authenticated. Ms. Rego did not have an opportunity to object to the admission of the Spreadsheet as evidence or present opposing evidence.

State and federal constitutions protect their citizens from the deprivation of life, liberty, or property, without due process of the law. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 380 U. S. 552. In this case, the court improperly considered as evidence a spreadsheet that was not properly submitted by Mr. Rego. The Spreadsheet was not provided to Ms. Rego until the morning of the trial. Because Ms. Rego was not given sufficient notice that the Spreadsheet would be considered as evidence and because Ms. Rego was not given an opportunity to object to its admission, the trial court failed to protect Ms. Rego's procedural due process rights. Without proper notice and an opportunity to be heard on the issue, the outcome of the proceeding cannot grant confidence. Because Ms. Rego's right to procedural due process was violated, the appellate court should determine that the Spreadsheet was improperly submitted and interpret the Agreement accordingly that does not award a marital lien on behalf of Mr. Rego to be paid by Ms. Rego.

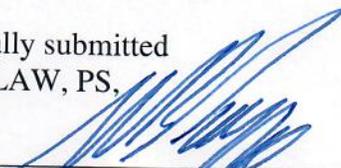
VI. CONCLUSION

In conclusion, Ms. Rego respectfully asks the Court to find that the trial court erred in admitting, considering, and adopting the Spreadsheet

submitted by Mr. Rego, failed to apply appropriate principles of contract interpretation and remand the case accordingly and provide any other relief appropriate in the premise.

Dated: January 30, 2018

Respectfully submitted
PAYNE LAW, PS.



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