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Division II
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No. 51516-4-II

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

TODD GAMACHE, Appellant

v.

DARICE GAMACHE, Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

The appellant is Todd Gamache; the Respondent is Darice Gamache.¹ Judge G. Helen Whitener entered a Decree of Dissolution of Marriage in the underlying case, over Todd's objection, based upon Darice's interpretation of the CR 2A Settlement Agreement the parties signed. Todd appeals Judge Whitener's denial of his Motion for Relief from Decree of Dissolution, her denial of his Motion for Reconsideration, and her Order Enforcing Decree and Granting other Relief.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by not granting Todd's motion for relief from Decree under CR 60(b).

2. The trial court erred by granting Darice's motion to enforce the Decree of Dissolution and by distributing all of the outstanding cash in the case to Darice.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court abuse its discretion in denying Todd's motion for relief from the parties' Decree of Dissolution under CR 60(b) when it was shown that the terms of the underlying CR 2A Settlement Agreement

¹ For clarity, the parties will be referred to herein as Todd and Darice. No disrespect to the parties is intended by the use of these designations.

were disputed, were not mutually assented to, and were ambiguous?
Assignment of Error 1.

2. Did the Court abuse its discretion in denying Todd's motion for relief from the parties' Decree of Dissolution under CR 60(b) when it had declined to conduct an evidentiary hearing before interpreting the parties' CR 2A Agreement and entering the Decree? Assignment of Error 1.

3. In the alternative, did the Court abuse its discretion in denying Todd's motion for relief from the parties' Decree of Dissolution under CR 60(b) when it had not referred the dispute over the meaning of the CR 2A to arbitration as contemplated by the agreement itself? Assignment of Error 1.

4. Did the Court err in distributing all the parties' cash to Darice when such distribution was not contemplated by the parties' CR 2A Agreement or by the Decree? Assignment of Error 2.

5. Did the Court err in distributing 100% of Darice's award of assets to her with its January 26, 2018 order, while distributing a mere fraction of Todd's assets to him? Assignment of Error 2.

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY/BACKGROUND

Darice and Todd were married on April 11, 1992 and they separated on October 3, 2016. CP 72. While together, the parties owned

two assets of significant value; their company, Todd Gamache, Inc., which owned and operated six Federal Express delivery routes, and their home on Lake Spanaway in Pierce County. CP 1-7.

Darice commenced this action by filing a Petition for Divorce on October 3, 2016. She obtained a Temporary Restraining Order the next day, giving her control of the parties' business. Although Todd had been clean and sober for several years, Darice alleged that he relapsed and was using cocaine. Darice lived in the family home, and ran the business, while the case was pending. Todd drove one of the Fed Ex delivery routes and was paid as an employee of the business.

The parties engaged in mediation on July 17, 2017. CP 1-7. After an all-day session, they produced a written Settlement Agreement. CP 1-7. Thereafter, however, the language and meaning of the settlement agreement were in dispute. Darice filed a motion and declaration to enforce the Settlement Agreement and enter final pleadings on October 26, 2017. CP 22-23; CP 24-50. A hearing was held by Judge G. Helen Whitener on November 17, 2017 at which time she entered Findings of Fact and Conclusions of Law and a Decree of Dissolution, adopting Darice's interpretation of the Settlement Agreement. CP 71-76; CP 77-83. Todd disputed that interpretation. CP 63-66. He argued that the CR 2A Agreement was not enforceable because the parties did not have a meeting of the minds. CP 63-66. He argued that the CR 2A Agreement was, at best, ambiguous. CP 63-66. Judge Whitener did not conduct an

evidentiary hearing before interpreting the Decree. Judge Whitener did not refer the dispute to arbitration, despite an arbitration clause in the agreement.

On November 30, 2017 Todd filed a motion and a declaration for relief from the Decree under CR 60. CP 107-110; CP 111-114. A hearing was held on December 8, 2017 at which time Judge Whitener denied Todd's motion. The written order denying the motion was entered on January 26, 2018. CP 255-256. Todd filed a Motion for Reconsideration on February 5, 2018. CP 260-261. Judge Whitener entered an Order denying that motion on February 22, 2018. CP 298.

On January 25, 2018 Darice filed a motion to enforce the Decree of Dissolution. CP 236-254. Among other things, she requested that all the parties' remaining cash (which was being held in the registry of the court) be disbursed to her, despite there being no language to that effect in either the parties' CR 2A Agreement or the Decree of Dissolution. The hearing was held on January 26, 2018, at which time Judge Whitener entered an order disbursing the remaining funds directly to Darice. CP 257-259.

Todd filed a Notice of Appeal on February 23, 2018. CP 299-306.

V. ARGUMENT AND AUTHORITY

A. THE TRIAL COURT ERRED BY NOT GRANTING TODD'S MOTION FOR RELIEF UNDER CR 60

The trial court erred by not granting Todd's motion for relief under CR 60(b). The trial court abused its discretion by not granting Todd's motion.

1. The standard for review in this case is abuse of discretion.

Abuse of discretion is the standard of review for a decision granting or denying a motion to vacate a judgment for a mistake or justifiable reason. *Barr v. MacGugan*, 119 Wash.App. 483, 78 P.3d 660 (2003). "Abuse of discretion" is present if a showing is made that a decision was 'manifestly unreasonable' or was based on 'untenable grounds' or made for 'untenable reasons.' A decision is based on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard, and the decision is 'manifestly unreasonable' if the Court, despite applying the correct legal standard to the supporting facts, adopts a view that no reasonable person would take and arrives at a decision outside the range of acceptable choices. *Mitchell vs. Washington State Institute of Public Policy*, 153 Wash.App. 803, 225 P.3d 280 (2009). The trial court in this case made a 'manifestly unreasonable' decision based on untenable grounds and for untenable reasons.

2. The grounds for relief under CR 60 are mistake, unavoidable casualty, and other reasons justifying relief.

CR 60(b) provides that "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding . . ." for various reasons set forth in the Court Rule.

The Court should have granted the motion under CR 60(b)(1), mistake, under CR 60 (b)(9) unavoidable casualty and or under CR 60(b)(11) any other reason justifying relief from the operation of the judgment. Each of these will be discussed separately.

a. The first ground for relief is mistake.

The first ground for relief is mistake. This takes on two forms in this case. The first is that there was a mutual mistake over the terms of the settlement. If the Court refers to the CR 2A Settlement Agreement, it will see that it is vague, ambiguous and difficult to read. CP 1-7. As Todd said in his declaration, he agreed to receive 41% of the community assets, which is what is indicated in Exhibit "C" to the CR 2A. CP 112. The way the Decree reads, however, Todd stands to receive a mere pittance in the divorce because once the designated bills are paid there will be no cash remaining. CP 112-113. That is certainly not what Todd agreed to.

Part of the problem stemmed from the fact that while Darice was running the business while the case was pending, she was not paying all

of the bills. CP 112-113. This was not disclosed to Todd prior to, or at, the mediation session. CP 112-113. After the settlement agreement was signed the sale of the business closed, Darice disclosed that there were \$75,000 in unpaid business expenses. CP 112-113. Payment of an additional \$75,000 in debt necessarily threw off the settlement structure under either party's interpretation of it.

And, as will be shown below, the trial court compounded the error by releasing all of the cash the parties' had to Darice, ordering that Darice receive 100% of everything she claimed she was entitled to under her interpretation of the decree, while Todd received just a fraction of what Darice even said he was entitled to. CP 257-259. CP 207-209.

b. Contract law applies to CR 2A agreements.

The trial court should not have ignored the fact that the CR 2A Agreement was ambiguous, and that Darice's interpretation lacked mutual assent and created an unconscionable result. Since these issues were raised by Todd, the question is how such issues should have been addressed. They should have been addressed by applying contract law and conducting an evidentiary hearing.

Parties to a marriage may enter into a written separation contract² providing for maintenance, the disposition of property and the mutual release from obligations. RCW 26.09.070(1).

² The terms "separation contract," "settlement agreement" and "CR 2A agreement" are used interchangeably. See e.g., *In re Marriage of Coy*, 160 Wn.App. 797, 802, 248 P.3d 1101 (2011);

Washington Superior Court Civil Rule (CR) 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 2.44.010(1) similarly provides:

An attorney and counselor has authority [t]o bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney [.]

The rules governing contract interpretation apply to contracts entered into between spouses. *Stottlemyer v. Reed*, 35 Wn.App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wn.2d 1015 (1983); *Lavigne v. Green*, 106 Wn.App. 12, 20, 23 P.3d 515 (2001). *In re Estates of Wahl*, 31 Wn.App. 815, 818, 644 P.2d 1215 (1982), *aff'd*, 99 Wn.2d 828, 664 P.2d 1250 (1983).

Angelo v. Angelo, 142 Wn.App. 622, 629, 175 P.3d 1095 (2008); *Kwiatkowski v. Drews*, 142 Wn.App. 463, 472, 176 P.3d 510 (2008); Black's Law Dictionary, 1369 (7th ed. 1999).

The parties' "objective manifestation of mutual assent" is an essential element of the valid formation of any contract. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). If a contract is ambiguous, however, the question is what did the parties agree to. *Id.*

c. The CR 2A Agreement in this case is ambiguous.

A contract provision is ambiguous if a given term can have more than one meaning. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. 416, 421, 909 P.2d 1323 (1995). Exhibit C to the CR 2A Agreement indicates that Todd would receive 41% of the distribution of the parties' net assets and \$100,000 cash. CP 7 and Appendix A.

Ambiguities in a contract are interpreted against the drafter. *Lamar Outdoor Advertising v. Harwood*, 162 Wn.App. 385, 395, 254 P.3d 208 (2011). A reviewing court must also consider that spouses "do not deal with each other at arm's length," *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972), and therefore owe each other "the highest fiduciary duties." *Peters v. Skalman*, 27 Wn.App. 247, 251, 617 P.2d 448 (1980).

"If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts." *In re Marriage of Thompson*, 97 Wn.App. 873, 878, 988 P.2d 499 (1999). A reviewing court focuses on both the words and the context in which the words are

used. *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn.App. 238, 249, 46 P.3d 812 (2002).

The parties' intent at the time a CR 2A Agreement is made and as reflected in the agreement is controlling and must be ascertained by a reviewing court. *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987); *In re Marriage of Smith*, 158 Wn.App. 248, 255-56, 241 P.3d 449 (2010).

This determination is made by examining the parties' "objective manifestations, including both the written agreement and the context within which it was executed." *In Re Marriage of Boisen*, 87 Wn.App. 912, 920-21, 943 P.2d 682 (1997).

A reviewing court generally gives words in a CR 2A agreement 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 (2004).

As is the case here, when a party moving to enforce a CR 2A agreement relies on documentary evidence, the trial court must treat the motion to enforce as if it is a summary judgment motion. *Condon v. Condon*, 177 Wn.2d 150, 161, 298 P.3d 86 (2013); *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 696, 994 P.2d 911 (2000). The submissions of the parties are therefore read in the light most favorable to the nonmoving party. *Condon*, 177 Wn.2d at 162.

The Supreme Court of Washington clarified the rules of contract interpretation in Washington when it rejected the “plain meaning rule” and adopted the “context” rule. *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P. 2d 222 (1990). Under the “context rule,” extrinsic evidence is admissible to interpret the meaning of a specific contract term. *Berg*, 115 Wn. 2d at 663. The *Berg* court also held that extrinsic evidence is admissible to interpret the original meaning of a contract term, even if that term appears to be unambiguous. *Berg*, 115 Wn. 2d at 669. Accordingly, the trial court in this case should have conducted an evidentiary hearing to garner the extrinsic evidence necessary to determine the meaning of the parties’ CR 2A Agreement.

d. The trial court should have conducted an evidentiary hearing in this case.

When there is an issue of material fact, the issue should be resolved by the trial court with an evidentiary hearing. *Brinkerhoff*, 99 Wn.App. at 697.

If the facts are disputed and the trial court does not hold an evidentiary hearing before enforcing the agreement, that decision is manifestly unreasonable and based on untenable grounds or reasons. In other words, the decision is an abuse of discretion. *Brinkerhoff*, 99 Wn.App. at 696-97; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). See also *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008).

Finally, when there is an arbitration clause in the underlying agreement, as there is in this case, enforceability of parties' stipulated agreement is a matter for an arbitrator and not the Court. *In Re the Matter of Pascale*, 173 Wash.App. 836, 295 P.3d 805 (2013). CP 3. This matter should have been referred to arbitration by the trial court, as contemplated by the agreement and requested by Todd, rather than entering final pleadings based upon a disputed interpretation of the CR 2A Agreement. CP 3. It was error for the trial court to deny Todd's request for relief under CR 60 and not refer the matter to arbitration as contemplated by the Agreement, or to conduct its own evidentiary hearing.

e. The CR 2A Agreement lacked mutual assent. It is therefore unenforceable.

The other "mistake" in this situation is that the CR 2A Agreement and the Decree do not say the same thing. CP 1-7; CP 77-83. Again, the CR 2A indicates that Todd will receive 41% of the community estate. The Decree does not say that. The Decree should not have been entered. The reason is because the only basis for entry of the Decree was enforcement of the CR 2A Agreement as interpreted by Darice. Under the CR 2A Agreement, however, the agreement is only enforceable if its material terms are not disputed. As mentioned above, the rule itself states that:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The CR 2A Agreement itself was in dispute, and therefore did not did not and could not resolve the underlying dispute. Todd made that clear in his declarations. CP 63-66; CP 111-114. The Decree should have never been entered under the circumstances, because the Court could not conclude that the language of the CR 2A Agreement was captured by the language of the Decree. Again, the CR 2A Agreement did not contemplate Todd receiving 10% or less of the total marital estate.

Under principals of contract law, which govern settlement agreements, mutual assent is an essential element for the formation, or existence, of a valid settlement agreement. *Cruz v. Chavez*, 186 Wash.App. 913, 347 P.3d 912 (2015). There is no mutual assent unless there is a “meeting of the minds.” *Id.* Further, a settlement agreement is not enforceable under CR 2A and RCW 2.44.010 unless all of the significant terms are agreed to. *Howard v. Dimaggio*, 70 Wash.App. 734, 855 P.2d 335 (1993). If the procedures in CR 2A and RCW 2.44.010 are not followed, the agreement is not enforceable. *Howard v. Dimaggio, id.*

An agreement is disputed, and unenforceable, if there is a genuine dispute over a material term of the agreement. *In Re Patterson*, 93 Wash.App. 579, 969 P.2d 1106 (1999). In this instance, and as mentioned above, summary judgment procedures are applied to determine whether there is a genuine dispute over a material term. *In Re Patterson, id.* In our case, there is clearly a genuine dispute over the material terms of the agreement, given the vague and ambiguous language of the agreement and the opposing interpretations of the parties. Had summary judgment standards been applied at the presentation hearing, as they should have been, the decree would not have been entered as there is a genuine issue of material fact regarding the meaning of the CR 2A Agreement. The trial court should not have ignored this fact when considering Todd's motion for relief.

3. Todd Was The Victim Of Unavoidable Casualty, Which Is A Ground For Relief.

These legal mistakes were compounded by Todd's unavoidable casualty and/or misfortune; he was hospitalized in a treatment facility at the time the motion to enforce was brought and was not fully able to assist his attorney in responding to the motion. Despite the fact that the hearing was continued two weeks, Todd's release date provided him little time to assist his attorney and fully flesh out the discrepancies between

the CR 2A Agreement and the Decree. This is yet another reason why an evidentiary hearing should have been conducted.

4. Todd Was Entitled To Relief Under CR 60(b)(11)

CR 60(b)(11) gives the Court some discretion in granting relief for “Any other reason justifying relief from the operation of the judgment.” A motion for relief from judgment for any other reason justifying relief is the catch-all provision of the rule governing such motions, by which the courts may vacate judgments for reasons not identified in the rule’s more specific subsections. *Tatham v. Rogers*, 170 Wash.App. 76, 283 P.3d 583 (2012). Given that the trial court was dealing with a settlement contract that purportedly divided two people’s lifelong accumulation of wealth, as opposed to a business contract for a singular transaction, and given the court’s rather summary procedure for interpreting the contract, the court erred by not granting relief after having heard Todd’s motion and after having had an opportunity to consider the situation it’s decree created.

Further, and as mentioned above, a reviewing court must also consider that spouses “do not deal with each other at arm’s length,” *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972), and therefore owe each other “the highest fiduciary duties.” *Peters v. Skalman*, 27 Wn.App. 247, 251, 617 P.2d 448 (1980). In addition, RCW 26.09.080 states that when disposing of property and liabilities in a

dissolution case, the trial is to consider the “. . . economic circumstances of each spouse or domestic partner at the time the division of property is to become effective . . .” “[T]he economic circumstances of each spouse upon dissolution [are] of paramount concern.” *In re Marriage of Olivares*, 69 Wn. App. 324, 330, 848 P. 2d 1281 (1993). Finally, RCW 29.09.070 (3) provides that a separation contract shall be binding *unless* the court finds “. . . after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court . . .” that the contract was unfair at the time it was executed.

Given the heightened duties and considerations discussed above, it was error under the circumstances of the case for the court to not grant relief from the Decree of Dissolution. CR 60(b)(11) was created for situations like this, where justice demands a remedy and the circumstances of the case may not neatly fit into other CR 60(b) categories.

B. THE TRIAL COURT ERRED IN RELEASING ALL OF THE FUNDS TO DARICE.

Exhibit C to the parties' CR 2A Agreement provided that Todd would receive a 41% distribution of the net assets \$100,000 cash. CP 7 and Appendix A. The terms of the CR 2A Agreement were adopted into

the Decree of Dissolution. Todd has not received either 41% of the net assets or \$100,000.

Exhibit C to the CR 2A Agreement also provided that Darice receive 59% of the net assets and \$32,750 in cash. CP 7 and Appendix A.

Judge Whitener entered an order on January 26, 2018 which directed that certain checks be written from the Court Registry to pay bills as set forth in the CR 2A Agreement and the decree. CP 257-259. Inexplicably, Judge Whitener ordered that Darice be paid \$32,750 while Todd would not be paid anything. CP 257-259. The order goes on to say that all remaining funds be paid to Darice so she could pay remaining bills and "allocate leftover funds pursuant to the Final Order of dissolution [sic]." CP 259. Darice received 100% of everything she was awarded under her interpretation of the CR 2A (over \$400,000) while Todd received, at best, \$40,000 and that amount is disputed. Under no interpretation of the CR 2A Agreement or the Decree of Dissolution is this contemplated or justified.

The Decree of Dissolution states:

It is anticipated that after the debts listed in 1-7 are paid, that approximately \$32,750 shall be awarded to the wife, and \$100,000 shall be awarded to the husband. If less, the amounts shall be reduced pro rata. If more, the amount shall be split 59% to the petitioner and 41% to the respondent.

CP 82

How could that language be read to say that Darice is to be paid a full \$32,750 with possibly nothing else being paid to Todd? Remember that Judge Whitener adopted Darice's disputed interpretation of the CR 2A Agreement when she entered the decree, including the language above, but then created an even more one-sided result with the January 26, 2018 order. CP 257-259. The judge took an already unconscionable outcome and made it an even more unconscionable outcome, with no legal or factual basis.

VI. CONCLUSION

In conclusion, Todd requests the following relief:

1. That Judge Whitener's order of January 26, 2018 denying Todd's Motion for Relief be vacated and, accordingly, the property and debt provisions of the parties' Decree of Dissolution also be vacated;
2. That Judge Whitener's order of January 26, 2018 granting Darice's Motion to Enforce be vacated; and
3. That the case be remanded to Superior Court for further proceedings in accordance with this Court's rulings.

Dated this 13th day of August, 2018.

RESPECTFULLY SUBMITTED,



Joseph J. Loran, WSBA #14746
Attorney for Appellant

VII. APPENDIX (ATTACHED)

EXHIBIT "C" to the CR 2A Agreement dated July 17, 2017.

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 email, and delivered a copy of this document via e-mail to:

Jamie R. Walker
McKinley Irvin
1201 Pacific Avenue, Suite 2000
Tacoma WA 98402
jwalker@mckinleyirvin.com

Signed at Tacoma, Washington on this 13th day of August, 2018.



Joseph J. Loran WSBA #14746
Attorney for Appellant, Todd Gamache

APPENDIX

A-1

SEALED

Exhibit C

Pay ~~\$139,000~~ credit card out
of closing - so \$132,750
cash
no more

50,000

140,000

- 180,000

10,000

66,375 *

66,375 *

386,355

216,375

- 64,000

36,000 -

- ~~247,000~~
69,625 *

+ ~~247,000~~
33,425 *

- 33,425

+ 33,425

352,730

250,000

310,730

\$ 290,375

~~599,000~~
599,000

~~417,000~~
417,000

~~# 41,750~~
* # 32,750 cash

32,750

~~# 100,000~~
* # 100,000 cash

100,000

J&W | A.B.

A | B

LORAN & RITCHIE, P.S.

August 13, 2018 - 4:06 PM

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