

FILED

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DIVISION
STATE OF WASHINGTON
BOSTON

NO. 298477

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

In re the Marriage of:

MELISSA ZEIDMAN BRONSTEIN,

Appellant,

v.

SEYMOUR MAYNARD BRONSTEIN,

Respondent.

REPLY BRIEF OF APPELLANT

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I. Argument

Melissa Bronstein (Melissa) replies to the respondent's brief by respectfully submitting for the court's consideration the following points of authority and argument.

1.1 St. Mary's Documents Show Basis for Debt Forgiveness.

Central to the issues in this appeal is the question of whether the trial erred in entering judgment in favor of Dr. Bronstein and against Melissa in regards to the debt owed to Dr. Bronstein's employer, Providence St. Mary's Medical Center. The various documents generated by St. Mary's concerning that debt, including an unsigned promissory note, together indicate that the debt would be forgiven if Dr. Bronstein remained in Walla Walla, WA and employed by St. Mary's through June 30, 2011. BA 11-13; BR 1; CP 125-29. Consequently, the trial court's entry of judgment on March 7, 2011, CP 161-64, was

premature and done without a record sufficiently developed to support it. *See*, CR 56.

Dr. Bronstein's statement of the case misses the point when he asserts those documents from St. Mary's did not modify the parties' property settlement agreement. If the debt is subject to being extinguished by forgiveness by St. Mary's, the repayment provision in the property settlement agreement would remain but it becomes moot as far as being an enforceable obligation should the condition for forgiveness be met.

1.2 Standard of Review.

The parties agree in submitting that the standard of review here is de novo. BA 9; BR 2.

1.3 No Waiver.

Dr. Bronstein asserts that Melissa waived adherence to the court rule on summary judgment, CR 56, by her then counsel's signing off on the Agreed Order on Briefing Schedule. BR 3, section B; CP 213-14. That Order contains no express language of an intention to effect a waiver or any mention that the parties were suspending the

court rule on summary judgment. However, whether that agreed order otherwise resulted in such a waiver deserves examination.

It is well settled that a waiver is the knowing and voluntary relinquishment of an existing right. *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn App. 899, 909, 247 P.3d 790 (2011). Here, because, CR 56 is not specifically addressed in the subject agreed order it cannot be reasonably presumed or taken by implication that Melissa knowingly intended to waive the necessity for creating a proper record on which to base a summary judgment decision on the debt repayment issue.

Where a local court rule conflicts with a valuable right granted by statewide civil rule, the local rule cannot be given effect. *King County v. Williamson*, 66 Wn. App. 10, 13, 830 P.2d 392 (1992). Likewise, the parties cannot just agree to ignore the superior court rules any more than they could effectively decide that the statutes of this state do not apply to them. It was error for the trial court to proceed without adherence to CR 56.

The result is the incomplete and confusing record on the debt issue now before this court. In that regard, declarations made on first hand knowledge, setting forth facts admissible in evidence should have generated and examined by the trial court to determine whether a genuine issue of material fact existed and whether the moving party was entitled to judgment as a matter of law. CR 56. Where waiver can occur or results from action or inaction of a party is contained within the court rules, e. g. improper venue, CR 12 (h) and right to jury trial, CR 38 (d). However, CR 56 contains no language for waiver of its provisions by the parties or the court. A proper record should have been developed below on the status of the St. Mary's debt. If a genuine, material issue of fact existed as to that issue, then a trial should have ensued.

1.4 Judgment Entered in Error.

Respondent contends in section C of his brief that the judgment requiring Melissa to pay \$51,500 to Dr. Bronstein was proper based on the terms requiring it in the

property settlement agreement and the res judicata effect of that agreement as to the existence and amount of that debt.

First, in reply, the property settlement agreement provided the debt was to be repaid to St. Mary's rather than directly to Dr. Bronstein. CP 11. Secondly, respondent's argument is fine as far it goes but becomes unpersuasive by failing to address the forgiveness aspect attached to that debt. As a matter of logic, if the debt goes (or went away) because Dr. Bronstein was still in Walla Walla and employed by St. Mary's as of July 1, 2011, then the property settlement agreement has nothing to control on that issue nor would there any longer be an obligation to which res judicata could attach.

In an apparent attempt to mask the reality of his debt being subject to forgiveness by St. Mary's debt, the respondent, at page 5 of his brief states, "Mr. Burdick's letter also proposed that if he left St. Mary, Respondent would be required to pay back the debt if he left prior to June 30, 2011, and would be issued a 1099 on a prorated basis for the months that he remained in service." CP 127.

Importantly, and what respondent omitted, is the sentence preceding the one just quoted. That sentence reads, “Therefore, if you remain in the community until June 30, 2011 then the entire amount of the income support will be forgiven and you will be issued a 1099 for the total amount of the loan forgiven.” CP 127. (Mr. Burdick is the chief executive of Providence St. Mary Medical Center. CP 127). The 1099 would issue as the forgiveness of debt creates income to the relieved debtor. 26 U.S.C. sec. 61 (12). Respondent completely ignores that circumstance when he states, “Thus, under Mr. Burdick’s proposal the debt would be collected, either through cash or Respondent’s labor.” BR 5

1.5 Issues Related to Property Settlement Agreement and Debt Forgiveness Raised to Trial Court.

Respondent contends that issues were not raised to the trial court relating to whether there was a meeting of the minds or mutual mistake in regards to the property settlement agreement and should therefore not be considered on appeal. BR 6-7. Actually, the

circumstances and meaning of the property settlement agreement formed the basis for Melissa's position at the trial level. CP 138-156. "Understanding the loan is essential to the central issues in this case." CP 139:9. Moreover, RAP 2.5 gives the appellate court "discretion on whether to review claims depending on the circumstances of the case." *Geroux v. Fleck* 33 Wn.App. 424, 427, 655 P.2d 254 (1982). The intent, understanding and meaning of the property settlement agreement was at issue before the trial court and those issues are reviewable now. RAP 2.5; *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (1988) ("Although appellants did not argue Sullivan to the trial court, they did argue the basic reasoning ... This court can review these issues despite lack of citation to the crucial case law and treatises.").

Further, Melissa urged the trial court, as she does on review, that Dr. Bronstein failed to establish facts upon which he could be granted relief. CP 138-149. Even if not raised below, claimed errors may be raised for the first

time in the appellate court for the failure to establish facts upon which relief can be granted. RAP 2.5 (a) (2).

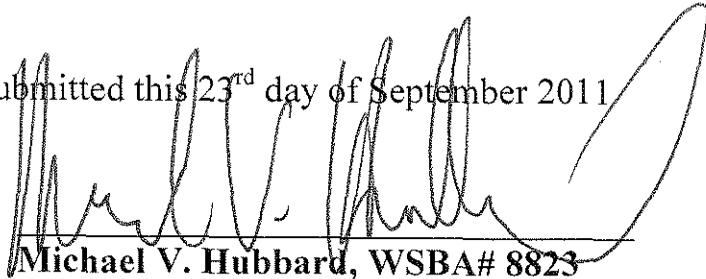
Because the debt was not yet due and subject to forgiveness, CP 151, 154, Judge Schacht misconstrued the debt to the hospital in his letter ruling of January 2, 2011: “The terms of his repayment to the hospital may be cash or sweat equity for a specified period of time (whatever he and the hospital may agree to).” CP 217. The facts do not support the judgment now on appeal and the matter should be reviewed in the interest of substantial justice being done. RAP 2.5.

Conclusion

The problem with this case is that a proper record was not developed in the trial court. Respondent’s brief on appeal does not cure that shortcoming because it ignores the issues of when the debt became due and payable and that it was subject to forgiveness. The trial court should be reversed and the case remanded with instructions to

resolve these issues through summary judgment or trial if
material issues of fact are found to exist

Respectfully submitted this 23rd day of September 2011

A handwritten signature in black ink, appearing to read "Michael V. Hubbard", written over a horizontal line.

Michael V. Hubbard, WSBA# 8823
Attorney for Appellant, Melissa Bronstein