

FILED

JUL 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

BRIEF OF APPELLANT BRONSTEIN

Michael V. Hubbard,
WSBA #8823
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Waitsburg, WA 99361
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I. Introduction

Melissa Bronstein (Melissa) appeals the trial court's entry of an order and judgment requiring her to pay within ten days \$51,500.00 to Dr. Maynard Bronstein (Dr. Bronstein). That sum is one-half of the remaining balance of monies advanced to him by St. Mary Medical Center. However, payment on the debt was not then due and the debt would be forgiven entirely if Dr. Bronstein remained at St. Mary at least through June 30, 2011.

II. Assignments of Error

No. 1 The trial court erred procedurally in entertaining and entering an order and judgment on Dr. Bronstein's request for payment without applying the standards of CR 56 for summary judgment.

No. 2 The trial court erred in deciding payment of \$51,500 was due within ten days from Melissa to Dr. Bronstein even though the Dr. Bronstein was not under present obligation to repay the advances made to him by St. Mary's.

No. 3 The trial court erred in deciding payment of \$51,500 was due within ten days from Melissa to Dr. Bronstein even though Dr. Bronstein would not have to repay the advances made to him in connection with his employment by St. Mary's if he remained at St. Mary's at least through June 30, 2011.

III. Issues Pertaining to Assignments of Error

No. 1 Should the trial court have required or at least treated Dr. Bronstein's request for payment from Melissa as a motion for summary judgment and applied the standards of CR 56, including whether any genuine issues of material fact existed in regards to that request and whether Dr. Bronstein was entitled to judgment as a matter of law against Melissa when the debt to St. Mary's was not then due and would be forgiven if he remained at St. Mary's at least through June 30, 2011?

No. 2 Was any debt actually due and owing between Dr. Bronstein and St. Mary's at the time of entry

of the order and judgment requiring Melissa to pay \$51,500 to Dr. Bronstein?

No. 3 Should the trial court have entered the order and judgment requiring Melissa to pay \$51,500 to Dr. Bronstein when the obligation to repay advances he received in connection with his employment by St. Mary's would be forgiven by that facility if he remained there through June 30, 2011?

IV. Standard of Review

Although most domestic relations decisions are considered on appeal under the abuse of discretion standard, *e. g. In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214, 215 (1985), this case should be reviewed *de novo*, in the manner of an appeal from summary judgment, as the trial court's decision at issue concerned the interpretation and effect of the parties property settlement agreement. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 827 P.2d 1000 (1992) (summary

judgment); *Syrovoy v. Alpine Resources, Inc.*, 68 Wn. App. 35, 841 P.2d 1279 (1992) (timber contract).

V. Statement of the Case

The parties married on August 13, 1990 and separated on March 1, 2008. CP: 50-51. That marriage produced three children. CP: 52. The court dissolved that marriage by decree entered July 24, 2009. CP: 55-58. The parties' property settlement agreement was adopted by the court in establishing the parenting plan, with the mother the primary residential parent and in dividing the debts and liabilities of the Bronstein marriage. CP: 55-58 (decree); CP: 9-25 (property settlement agreement).

The property settlement agreement contained, in relevant part to this appeal, the following provision:

“The parties shall equally pay the \$170,000 debt to Providence Saint Mary Medical Center, provided, Husband agrees to pay wife's share of this obligation at \$2,000 per month commencing June 1, 2009 so long as she remains in Walla Walla with the children, provided, wife shall have

no obligation to pay said \$170,000 if Husband moves from Walla Walla prior to Wife.” CP: 11

The Wife, Melissa, moved from Walla Walla to Rochester, NY on or about August 20, 2010. CP: 110: 4-5.

As to the debt to St. Mary’s, the record reflects an April 29, 2009 letter from the hospital’s VP of finance to Dr. Bronstein. CP: 125 (attached to Dr. Bronstein’s declaration, undated but apparently served on petitioner’s counsel September 13, 2010, CP: 114-129; and (duplicate letter) CP: 156. This letter indicates St. Mary’s agreed to supplement Dr. Bronstein’s cash receipts up to his first year’s guaranteed income of \$365,000. *Id.* The letter continues, “Your cash receipts for June 2007 through May 2008 exceed this guarantee so the cash advances made to you are fully reimbursable. Per the attached documentation you were advanced \$169,464.36 and you’ve reimbursed \$42,476.13 so far, leaving a reimbursable balance of \$129,988.23.” *Id.*

Next follows an unsigned promissory note, dated March 10, 2010 from Dr. Bronstein to St. Mary's for \$119,826.47. CP: 128-129 (attached to Dr. Bronstein's declaration, undated but apparently served on petitioner's counsel September 13, 2010, CP: 114-129; and (duplicate) CP: 151-152. This note indicates it "is executed and delivered under the Letter of Understanding between Hospital and Maker dated July 1, 2007 ('Agreement')". (This writer has been unable to locate that Agreement as part of the trial court record.) As to payment, the note provides, "The first installment shall be due and payable on the first day of the month following the date Maker no long maintains full-time practice in Walla Walla, Washington, if before July 1, 2011." *Id.*

The next day, March 11, 2010, the chief executive officer of St. Mary's, Steve A. Burdick, wrote a letter of "clarification" to Dr. Bronstein regarding "the financial assistance provided to him in the form of income support." CP: 127; and (duplicate) CP: 154. His letter includes the following: "The income support was for a period of one

year and then there was to be a loan forgiveness if you stayed in the community providing services. Otherwise you were required to pay back the loan. It is this requirement that needs clarification. It was intended that you would be provided with income support for one year and then in order to get loan forgiveness you needed to stay in the community for an additional 3 years. 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 load forgiven.” *Id.*

Procedurally then, on August 20, 2010 counsel for Dr. Bronstein filed a motion and declaration for entry of order: “COMES NOW the Respondent, Seymour Maynard Bronstein and moves this court for entry of the attached order.” CP: 194-212. The [proposed] order referred to in that motion was apparently held to side in the court file and was never entered. See, Appendix 1.

The parties each filed position statements in regards to that motion and other pending matters; the petitioner’s

on September 9, 2010, CP: 109-113 and respondent's on September 15, 2010. CP: 130-131. The trial court's letter ruling of January 6, 2011 on that motion stated as to the repayment provision in the property settlement agreement, "...the language at issue here is unambiguous. It clearly says each party will equally repay the \$170,000 debt to the hospital." And, the court continued, "Petitioner's amount owed to Respondent as a result of her voluntary relocation is \$51,500. Respondent is not being paid twice. 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 agree to)." CP: 168-170. The formal order and judgment that are the subject of this appeal followed on February 11, 2011, CP: 171-172, and March 7, 2011, CP: 173-174.

VI. Argument

5.1 Motion on repayment of debt to St. Mary's should have been brought as one for summary judgment under CR 56.

Dr. Bronstein's motion did not identify the relief sought other than "for entry of the attached order." CP 194-212. His counsel's declaration, submitted in support of that motion simply stated, in relevant part, "The parties' Property Settlement Agreement provide for certain things to happen should the Petitioner relocate prior to a certain date. The respondent is asking that a judgment and order be entered to comport with that agreement." CP 194-212. The parties subsequently filed respective position statements on that motion take predictably opposing views: (1) Melissa asserting a lack of proof that Dr. Bronstein had paid any amount of the advance back to St. Mary's and the inequity of requiring Melissa to pay a debt that was scheduled to be forgiven as of July 1, 2011 if Dr. Bronstein remained at that hospital, CP: 109-111; and (2) Dr. Bronstein countering that the debt to St. Mary's is real and

the property settlement agreement be enforced through judgment. CP: 130-131.

In effect this motion was, and should have been brought, as one for summary judgment under CR 56 so that a proper record could be developed from which the trial court determine whether any genuine issues of material fact existed and whether the moving party was entitled to judgment as a matter of law. Evidence should have been presented and issues fully considered of whether a debt existed that would in fact require repayment or be forgiven.

The well established requirements and shifting burdens under CR 56 provide the necessary foundation for the trial court to grant or deny a motion for summary judgment. The trial court should grant summary judgment only if it determines, after reviewing the entire record and drawing all reasonable inferences in favor of the nonmoving party, that there are no genuine issues of material fact and the moving party is entitled to judgment

as a matter of law. CR 56(c); *Retired Public Employees Council of Wn v. Charles*, 148 Wn 2d 602, 62 P. #d 470 (2003). A material fact is one upon which the outcome of the litigation depends. *Capital Hill Methodist Church of Seattle v Seattle*, 52 Wn 2d 359, 324 P. 2d 1113 (1958). The initial burden of demonstrating the absence of material facts rests with the moving party; the burden then shifts to the nonmoving party to come forward with a “showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial.” *Young v. Key Pharmaceuticals, Inc.* 112 Wn 2d 216, 225 770 P.2d 182 (1989) (quoting *Celotex Corp v. Catrett*, 477 U.S. (1986)).

In determining a motion summary judgment the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980); *Aetna Ins. Co. v. Cooper Wells & Co.*, 234 F.2d 342 (6th Cir.1956). Facts presented only in counsel's brief may be disregarded. See, *Bravo v. Dolsen*

Companies, 71 Wn.App. 769, 862 P.2d 623 (1993), reversed on different points, 125 Wn.2d 745, 888 P.2d 147 (1995).

On a motion for summary judgment, the trial court considers evidence and all reasonable inferences therefrom in light most favorable to nonmoving party. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 930 P.2d 307 (1997). “Inference,” for the principle that facts and all reasonable “inferences” therefrom must be viewed in light most favorable to non-movant for summary judgment, is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997).

The motion should be only granted if, from the evidence and the inferences therefrom, reasonable men could reach only one conclusion. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 954, 421 P.2d 674 (1966). Where,

though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, summary judgment is not warranted. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). In ruling on motion for judgment as matter of law, the nonmoving party's evidence, together with all reasonable inferences that may be drawn from it, must be accepted as true. The court may grant the motion only if, as a matter of law, there is neither substantial evidence nor reasonable inference from evidence to sustain a verdict, and if the evidence allowed reasonable minds to reach conclusions that sustain a verdict for the nonmoving party, the question is one for jury. *Holmes v. Wallace*, 84 Wn.App. 156, 926 P.2d 339 (1996).

The court does not weigh credibility in deciding a motion for summary judgment. If the facts as presented by the parties would require the court to weigh credibility on any material issue, a genuine issue of fact exists and summary judgment will normally be denied. Conflicting

affidavits present the classic example. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., *Riley v. Andres*, 107 Wn.App. 391, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967). Similarly, it has been said that the court should not grant summary judgment when there is some question as to the credibility of a witness whose statements are critical to an important issue in the case. *Powell v. Viking Insurance Co.*, 44 Wn.App. 495, 722 P.2d 1343 (1986).

Normally, the existence of mutual assent or a meeting of the minds is a question of fact. *Sea-Van Investments Associates v. Hamilton* 125 n.2d 120, 126, 881 P.2d 1035, 1039 (1994); citing, *Multicare Med. Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 586 n. 24, 790 P.2d 124 (1990). However, a question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff v.*

King County, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

The trial court in the Bronstein case should have required and had the benefit of a record developed under CR 56. For instance, the March 10, 2010 unsigned promissory note from Dr. Bronstein presents a question of fact of whether it was ever signed? CP 151-152. If not signed, was the debt somehow acknowledged and ratified through mutual reliance and performance and thereby legally binding? *Id.* What was the intention of the parties to that note as to forgiveness of the note? *ibid* Particularly, under its terms, if the first installment never becomes due because Dr. Bronstein has remained in full time practice in Walla Walla as of July 1, 2011? *Id.* How does that note tie, if at all, to the April 28, 2009 letter from the VP of finance to Dr. Bronstein regarding reimbursable cash advances—made per his contract with St. Mary Medical Center—with demand for payment of four monthly payments from the doctor of \$14,158.71 each? CP 125-

126. Where is that contract and what are its terms *vis a vis* the subject debt?

The March 11, 2010 letter from St. Mary's CEO to Dr. Bronstein is one styled in regard to a "Letter of Understanding for Income Support" that was apparently entered into in 2007. CP: 127. Where is that Letter of Understanding? What does it provide about the claimed debt? The CEO's March 11 letter states its purpose is for clarification of the Letter of Understanding. What was not clear? Forgiveness of the debt?

That could well be since the CEO there stated, "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". *Id.*

This brings this discussion to the debt repayment provision in the parties' property settlement agreement, which was filed with the trial court on July 24, 2009. Did the parties not understand or just failed to characterize properly the subject debt as one that would be entirely

forgiven if Dr. Bronstein remained “in the community” until June 30, 2011? Was there no meeting of minds between these parties on that issue? Mutual or unilateral mistake? *Tiegs v. Boise Cascade Corp.*, 83 Wash. App. 411, 922 P.2d 115. (1996), decision aff’d, 135 Wash. 2d 1, 954 P.2d 877 (1998) (jury was entitled to reject claim of mutual mistake where one party bore the risk of error in assessing quality of groundwater); *Loeb Rhoades, Hornblower & Co. v. Keene*, 28 Wn. App. 499, 624 P.2d 742 (money paid in exchange for shares of stock was not coverable where the mistake was not shared or suspected by the seller and the buyer was the sole cause of his misfortune).

Washington follows the objective theory of contracts, which focuses on the four corners of the agreement. *Max L. Wells Trust by Horning v. Grand Cent. Sauna and Hot Tub Co. of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (1991) (trustee's subjective understanding of contract not controlling; trustee was bound by written language of contract). However, extrinsic evidence may

be considered under the context rule in determining the parties' intention. *Carpenter v. Remtech, Inc.*, 154 Wn. App. 619, 226 P.3d 159 (2010) (circumstances surrounding signing of indemnity agreement were relevant to determine its scope). Likewise, “[I]n discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract. *Berg v. Hudesman*, 115 Wn.2d 657, 667-668, 801 P.2d 222 (1990) (holding extrinsic evidence is admissible as to the entire circumstance under which a contract was made, as an aid in understanding the parties intent).

Here the parties would not have reasonably bargained as part of their property settlement agreement a provision to pay equally a debt to St. Mary's that was not currently due and would be forgiven completely if Dr. Bronstein stayed “in the community” CP 154 or “maintains a full time practice in Walla Walla” through June 30, 2011. CP: 151. That the debt to St. Mary's would be forgiven,

tends to explain more accurately his statement by declaration that “In truth, I care little about the \$51,500,” although he couched it in terms of the overall assets involved in the property settlement and his parental relationship to his children. CP: 123. The “plain language” of the property settlement agreement needs to be interpreted in the applicable context to give effect to the intention of the parties. *Berg*, supra. Logic informs that Dr. Bernstein would not repay a loan that is entirely subject to forgiveness by the hospital. Reversal and remand to the trial court to determine the true state of that loan—forgiven or not, paid or not—would be the means to a just result in this case.

Even in the domestic relations context, where a claim is based on the terms and the performance or nonperformance of a contract (property settlement agreement), the trial court should handle it like any other civil case by requiring the parties to adhere to the court rules. The court’s discretionary authority to divide the debts and liabilities according to the factors contained in

RCW 26.09.080 ended when it entered the decree of dissolution, approving and incorporating the property settlement agreement. *In re Marriage of Nicholson*, 17 Wn.App. 110, 561 P.2d 1116, (1977) (broad discretion). While subsequent modification of a property settlement is generally prohibited by RCW 26.09.170 (1), a declaratory action is proper for clarification where the language of the decree is ambiguous, or where a party seeks to divide property not disposed of by the trial court at the time of dissolution. *Byrne v. Ackerlund*, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987). Chapter 7.24 RCW (Uniform Declaratory Judgment Act).

Unfortunately, the trial court here erred in allowing Dr. Bronstein to proceed by simple motion post-decree to obtain an order and judgment against Melissa for \$51,500 without creating a record to support it. A summary judgment motion under CR 56 or a declaratory judgment action presumably would have provided the necessary foundation and authority for that court's ruling.

2. No payment was due to St. Mary's. The trial court's judgment required Melissa to pay Dr. Bronstein \$51,500 within ten days of its entry, March 7, 2011. This was in error because at that time no debt or installment payment was due from Dr. Bronstein. This being the circumstance is evidenced by the March 10, 2010 promissory note. CP: 151. It can also be derived from the March 11, 2010 letter from the hospital's CEO. CP: 154. It clarified the condition under which the entire loan would be forgiven and a 1099 issued for the total loan amount, which would include payments apparently made voluntarily by Dr. Bronstein to the hospital up to the point of the loan forgiveness, July 1, 2011. *Id.* The court acted prematurely, before any claim was ripe, a debt may or may not ultimately be owed to St. Mary's depending on where Dr. Bronstein is practicing on July 1, 2011. (To this writer's knowledge, he remains at St. Mary's today, July 8, 2011.)

3. No judgment should have been entered where the debt was subject to forgiveness.

The trial court erred in entering the subject judgment as if Dr. Bronstein's debt to St. Mary's was fixed and certain as of March 7, 2011. The record shows the contrary to be the case. Dr. Bernstein's debt to the hospital would disappear through forgiveness on July 1, 2011 if he were still practicing there at that date, which he is believed to be as of July 8, 2011.

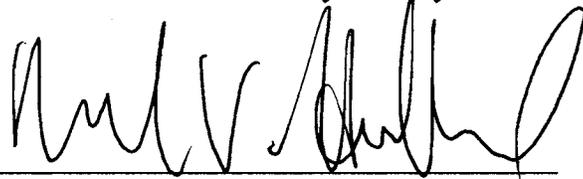
If the debt exists today, the judgment is still flawed because it directs Melissa to pay Dr. Bronstein when the property settlement agreements indicates each party is to pay one half of the debt to St. Mary's. CP: 11.

VIII. Conclusion

The trial court erred by adjudicating a debt to be owed by Melissa to Dr. Bronstein without first requiring a foundation to be made in the record to support it, either through summary judgment or as a matter of clarification of the decree/property settlement through declaratory judgment. As a matter of *de novo* review, justice leads to

the right result of reversal or reversal and remand with instructions to the trial court to determine the true status of the parties' debt obligation to St. Mary's. Even under an abuse of discretion standard, the same result is indicated because the trial court proceeded to judgment without support in the record that the subject debt would ever actually have to be paid.

Respectfully submitted this 28th day of July 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 Bronstein

Appendix #1
Brief of Appellant Bronstein

Hood

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF WALLA WALLA**

In re: The Marriage of

MELISSA ZEIDMAN BRONSTEIN

Petitioner,

and

SEYMOUR MAYNARD BRONSTEIN

Respondent.

NO. 08 3 00083 9

ORDER

JUDGMENT SUMMARY

Creditor	SEYMOUR MAYNARD BRONSTEIN
Attorney for Creditor:	Bridie Monahan Hood
Debtor:	MELISSA ZEIDMAN BRONSTEIN
Judgment Principal	\$51,500
Costs:	\$
Prejudgment Interest	\$
Attorney fees:	\$
Other	\$
Total Judgment:	\$51,500
Post Judgment Interest:	12%

THIS MATTER having come before the court on regularly before the above entitled court on this 27th day of September, 2010, on motion of Respondent Seymour Maynard Bronstein, the Petitioner appearing by and through her counsel of record, Janelle Carman and the Respondent appearing in person and by and through his counsel of record Bridie Monahan Hood, the court having been fully advised in the premises, NOW THEREFORE IT IS HEREBY

Monahan-Hood
ATTORNEYS AT LAW

30 West Main, Suite 203
Post Office Box 1315
Walla Walla, Washington 99362-0034
509-528-5700

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ORDERED, ADJUDGED AND DECREED that the Respondent is awarded his three retirement accounts without any obligation to the Petitioner. It is further

ORDERED, ADJUDGED AND DECREED that the Petitioner shall deliver the relevant title and paperwork to the Hilton Head, South Carolina timeshare to the Respondent. The Respondent shall then assume full responsibility for said time share.

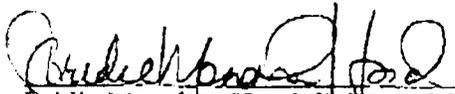
ORDERED, ADJUDGED AND DECREED that the Respondent shall be awarded a judgment in the amount of \$51,500. If said judgment is not paid in full by _____ Respondent shall be entitled to withhold the monthly spousal maintenance payments in the amount of \$_____ per month until the amount of \$51,500 is recovered. It is further

ORDERED, ADJUDGED AND DECREED that maintenance will be adjusted as of March 1, 2011. The Petitioner and Respondent shall provide income and expense information in the form of wage stubs and a financial declaration no later than February 17, 2011.

DONE in open court this _____ day of _____, 2010.

JUDGE

Presented by:


Bridie Monahan Hood, WSBA #26745
Of Counsel for Respondent

ORDER/2

Monahan-Hood
ATTORNEYS AT LAW
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APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

Janelle Carman, WSBA #31537
Of Counsel for Petitioner

ORDER/3

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