

**FILED**

**JUL 29 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

CASE NO. 315860

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

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SARA G. ARROYO,

Respondent

v.

GLORIA J. FISCHER

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHITMAN COUNTY

The Honorable David Frazier, Judge

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BRIEF OF APPELLANT

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## A. INTRODUCTION

Gloria Fischer and Sara Arroyo were in a committed intimate relationship between 1972 and 1983. In 1978, the parties acquired a house in Kennewick. Ms. Fischer made the full down payment, and paid for all of the initial costs – nearly \$16,000. It is undisputed that Ms. Arroyo did not contribute anything to the initial costs. In order to establish their respective rights to the Kennewick property, the parties executed an Agreement, and an Installment Note. The Note established that Ms. Arroyo owed Ms. Fischer \$13,600 in principal, with interest on unpaid principal to be paid at 10% per annum. The Agreement called for Ms. Arroyo to make all of the mortgage payments. The Agreement provided that if the house was sold, profits would be divided proportionately to the contributions paid to principal by each of the parties by that date. Ms. Arroyo made no payments on the Note, and a total of ten or eleven mortgage payments. Ms. Fischer assumed all responsibility for the house post-separation, and made all of the remaining mortgage payments. The Note was never paid by Ms. Arroyo.

At trial, the trial court held that because the parties were in a committed, intimate relationship, the property should be divided according to family law principles. Based on that reasoning, the Court ignored the Agreement and Installment Note between the parties, and awarded Ms. Arroyo half of the equity in the house as of the date of

separation. This was error, as contracts between spouses – or domestic partners – are to be interpreted in the same manner as any other contract.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred when it impliedly – as deduced from statements made in the Court’s oral decision – found that the Agreement and Installment Note were of no effect, even though both parties acknowledged the existence of these binding documents. The Court further erred when it entered no written Conclusions of Law as to why these documents were unenforceable.
2. The trial court erred when it awarded attorney fees to the Plaintiff because she had “been deprived of the use of her monetary interest in the property for 30 years”, essentially awarding prejudgment interest on a non-liquidated claim.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are contracts between spouses or domestic partners to be interpreted in the same manner as any other contract? Were any of the contracts in this case waived?
2. May a trial court award attorney fees to a prevailing party because she has been deprived of the use of her monetary interest in the property – essentially awarding prejudgment interest on a non-liquidated claim?

### C. STATEMENT OF THE CASE

1. Defendant Gloria Fischer (Appellant) and Plaintiff Sara Arroyo (Respondent) were in a committed, intimate relationship from 1972 until 1983. Clerk's Papers (CP) 48.
2. In 1978, the parties acquired a house in Kennewick, Washington. CP 49.
3. The down payment on the Kennewick property, in the amount of \$15,944.39, was paid by Ms. Fischer, and a mortgage in the amount of \$37,743.44, was assumed by both parties. CP 49.
4. The house was purchased as joint tenants with right of survivorship. Plaintiff's Exhibit 4.
5. Both parties signed an Agreement, which stated that Ms. Fischer would "lend [Ms. Arroyo] the sum of \$13,600.00 at 10% interest for 15 years[.]" Plaintiff's Exhibit 5.
6. The Agreement also stated, "[Ms. Arroyo] will make the monthly payment on [the] mortgage...." Ibid.
7. The Agreement went on to say, "Payments on this note and on the mortgage ... will continue until ... the house is sold, in which case profits or losses on the sale of the house will be divided proportionately to the contribution paid to principal by each of the parties by that date." Ibid.

8. Ms. Arroyo also executed an Installment Note for the amount of \$13,600, in favor of Gloria Fischer. The Note carried an interest rate of 10% per annum. Plaintiff's Exhibit 6.

9. Although Ms. Arroyo made the first 10 or 11 mortgage payments of \$330 each (Report of Proceedings (RP) p. 93, lines 11-13), she made no payments on the Installment Note. RP 83, line 8; CP 49.

10. The parties separated in 1983. CP 48.

11. In addition to having made the down payment, Ms. Fischer made all remaining payments on the Kennewick property, including managing the property from 1979 until the property sold in 2010. The management included finding tenants, overseeing and arranging for maintenance and repairs, trips from Pullman to Kennewick, providing insurance, making loan payments, paying taxes, cleaning the premises when tenants vacated the property, evicting tenants and taking them to court for delinquent rent. CP 49-50.

### **WAIVER**

12. In its oral ruling, the trial court stated regarding the Agreement and Installment Note, "[I]t is very clear because of the personal nature of your relationship here you never followed it, you never lived by it, you never recognized it. I think for the most part until this dispute came about both of you forgot it. You didn't purchase ... that Kennewick property with a purpose of making money. You didn't purchase it,

acquire it here, for the purpose of having an investment.” RP 142, line 24 – p. 143, line 2.

13. The Court’s Memorandum Decision made no mention of the Agreement or Installment Note. CP 45-47.

14. The Court’s written Findings of Fact and Conclusions of Law specifically acknowledged the Agreement between the parties (CP 49), but offered no analysis as to why that Agreement was not considered to be enforceable. CP 46-52.

15. Contrary to the Court’s oral statements that the parties “forgot” (RP 142, line 27) about the Installment Note, Ms. Arroyo – the party against whom the Note was to be enforced – actually testified that she *did* remember the Note (RP 71, lines 5-6: “You know I don’t remember the agreement but yes I do remember the note, yes.”); and that she remembered having signed the note (RP 83, line 9: “I remember having signed a note”).

16. Ms. Arroyo also offered specific testimony as to the circumstances that led the parties to sign the Agreement and the Note. RP 70, line 13 – p. 71, line 11. Indeed, it was Ms. Arroyo’s personal friend that drafted the documents. *Ibid*.

17. Ms. Arroyo then contradicted herself and then testified that she “forgot about the note”. RP 83, lines 9-10.

18. Ms. Fischer certainly did not forget about the Note. She testified that when Ms. Arroyo vacated the Kennewick house in 1979, she said to Ms. Fischer, “[T]his house is yours.” RP 51, line 9.

19. Ms. Fischer explained her understanding of that statement: “I thought she meant it. I mean she had walked out on the bank loan and she had never paid anything on the loan to me so you know I figured she ... I thought she meant it, she was just giving me the house.” RP 51, lines 12-15.

20. In her Answer to Ms. Arroyo’s Complaint, Ms. Fischer claimed as a defense and offset to Ms. Arroyo’s claims the fact that Ms. Arroyo had not made any payments on the \$13,600 Note that had accrued interest at 10% per annum from August 1, 1978. CP 6-7.

#### **PULLMAN PROPERTY**

21. During their relationship, a property was also acquired in the name of both parties, in Pullman, Washington. CP 49.

22. That property was acquired in May 1982, shortly before the parties’ separation. CP 49.

23. That property was purchased for \$9,600, the full price of which was paid by Ms. Fischer. CP 49. The Court found that amount to be the fair market value of the property at the time of separation. CP 50.

24. The Court awarded to each party half of the value of the Pullman property as of the date of separation. That determination by the Court is not challenged by Ms. Fischer, although she claims the Note is an offset.

25. The Court found that Ms. Fischer had forged a deed in 1991 (Plaintiff's Exhibit 16) that purported to transfer Ms. Arroyo's interest in the Pullman property to Ms. Fischer. Although Ms. Fischer disputes that fact, it is conceded that there is sufficient evidence from which the Court could have made such a finding.

### **PREJUDGMENT INTEREST**

26. The Court stated in its Findings of Fact and Conclusions of Law, "Consideration should be given to the fact that Arroyo has been deprived of the use of her monetary interest in the property for 30 years, and that Fischer has gained from the effects of inflation on property values over this time." CP 51.

27. That language also appears in the court's Memorandum Decision. CP 47.

28. The Court's Memorandum Decision continues: "Because no evidence was presented to assist the court in quantifying these factors, the court deems it appropriate to make an adjustment in its oral ruling and to award Arroyo the full amount of her attorney fees and costs to date of \$18,419.26." CP 47.

29. The Court had not awarded a specific amount in fees during its oral decision, but had stated, "I am going to order that Ms. Fischer reimburse Ms. Arroyo for a portion of her attorney's fees. I have a figure in mind that is not to exceed [...] I'm going to require Mr. Ferguson to do an affidavit of the time that he has. I am writing right here in my notes the

figure that it is not to exceed and quite frankly I think it might exceed that amount but I am settling for the amount that I have written right here that I am not going to disclose today.” RP 145, lines 15-21.

30. Attorneys for Ms. Arroyo estimated that \$14,651 of their total fees and costs were related to the forged deed. CP 11.

31. However, the Court awarded a total of \$18,419.26 in fees and costs to Ms. Arroyo. Therefore, the difference between the total fees and costs (\$18,419.26) and the fees and costs related to the forged deed (\$14,651), or \$3,768.26, is in essence an award of prejudgment interest, based on the court’s finding that, “Consideration should also be given to the fact that Arroyo has been deprived of the use of her monetary interest in the property for 30 years, and that Fischer has gained from the effects of inflation on property values over this time.” Thus, Ms. Fischer challenges that award of fees as improperly awarded prejudgment interest.

#### D. ARGUMENT

1. Contracts between spouses – or domestic partners – are to be interpreted in the same manner as any other contract.

The Court’s oral findings indicate that the Court considered the parties’ domestic relationship to have a bearing on the enforceability of the Agreement and the Installment Note. In discussing the Kennewick property, the court stated:

“You didn’t purchase [...] that Kennewick property with a purpose of making money. You didn’t purchase it, acquire it here, for the purpose of having an investment. It was purchased because Ms. Arroyo got a job in Richland and she needed a place to live in the Tri Cities and she did in fact move there, she did in fact live there and Ms. Fischer because of the relationship spent a lot [of] of time there as well and she just thought – gee maybe someday, this is a nice warm place, a nice house, a great place to retire. The acquisition of that property, to me very clearly without any doubt in my mind wasn’t done to make money for any business purpose, it was a domestic decision relating to the relationship that the parties had.” RP 142 line 27 – p. 143 line 9.

But the domestic relationship of the parties should have no bearing on the enforceability of a contract between the parties. That is because agreements between spouses<sup>1</sup> are enforced in the same manner as other contracts.

“Courts interpret agreements between spouses like they do other types of contracts.” In re Marriage of Mueller, 140 Wn. App. 498, 505 (Div. I 2007). “Community property agreements are treated as contracts, and the general rules of contract rescission apply.” Higgins v. Stafford, 123 Wn.2d 160, 165, 866 P.2d 31 (1994). “A community property agreement is a contract. Therefore, the rules of contract interpretation apply.” In re Estate of Wahl, 31 Wn. App. 815, 818 (Div. III 1982) (citations omitted).

The above cases dealt with community property agreements between spouses. The Agreement and Note between Ms. Fischer and

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<sup>1</sup> Although the parties here were not married, and under the law during the term of their relationship could not have been married, Appellant makes no argument that the Agreement and Installment Note should be considered as anything other than contracts between spouses.

Ms. Arroyo is not technically a community property agreement – the parties could not be legally married at the time of their relationship, thus no “community property” could be acquired between them. However, the Agreement and Note were intended to set forth the rights of two individuals in a committed, intimate relationship, in relation to a piece of real estate that they were purchasing together. Therefore, the principles set forth in the above cases regarding community property agreements, and the enforceability of contracts as between spouses in general, should apply.

Indeed, if this Court feels that the legal status of the parties – whether they were allowed to be married or not – has any bearing on the enforceability of the Agreement and Note, it would be to the Appellant’s advantage. Obviously, contracts between unmarried persons are enforceable.

The Agreement and the Installment Note executed by the parties concerning the Kennewick house were valid, enforceable agreements. The Court’s finding that the parties didn’t purchase the Kennewick house “for the purpose of having an investment” has no bearing on whether the Agreement and Note were enforceable. The fact that the parties were in an intimate relationship at the time does not make the Agreement and Note any less enforceable. Indeed, despite the court’s oral statements, the written Findings of Fact and Conclusions of Law specifically acknowledged the Agreement and Note (CP 49, para. 1.5), and contained

no legal analysis or conclusion as to why the Agreement and Note were not enforceable.

2. The parties did not waive the Agreement or the Installment Note.

Although the court never stated a specific reason in either its Memorandum Decision or its written Findings of Fact and Conclusions of Law as to why it was not enforcing the Agreement and Installment Note, the Court seems to have indicated that both the Agreement and the Note were waived. In its oral decision, the court stated:

“And when the property was purchased down in the Tri-Cities, Kennewick, even though Mr. McConnell got involved and drew up some papers that would be in the nature of a business transaction or a partnership, it is very clear because of the personal nature of your relationship here you never followed it, you never lived by it, you never recognized it. I think for the most part until this dispute came about both of you forgot it.” RP 142, lines 22-27.

Insufficient evidence supports the Court’s findings that the parties “never followed it”, “never lived by it”, “never recognized it”, and “forgot it”.

Contrary to these findings, Ms. Arroyo – the party against whom the note was sought to be enforced – testified that she made the first 10 or 11 mortgage payments on the house just as the Agreement called for. RP 92, lines 17-19; RP 93, lines 11-13. She testified that she remembered signing the Note (RP 83, line 9); and was able to recall the specific meeting in which the Note was signed (RP 70, line 13 – p. 71, line 11).

For her part, Ms. Fischer testified that when Ms. Arroyo left she told Ms. Fischer that the house was Ms. Fischer’s, so there was no reason

on Ms. Fischer's part to demand payments on the Note. (RP 126, lines 2-13).

Even if sufficient evidence supported the Court's finding that the parties did not abide by the terms of the Agreement and Note between August 1978 when the Agreement and Note were executed, and 1983 when their relationship ended, such evidence would not be sufficient to support a conclusion of law that Ms. Fischer waived her rights under the Note. Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

Ms. Fischer did not waive her rights under the Agreement or the Note. To the contrary, she testified that when the relationship ended, Ms. Arroyo said the house was Ms. Fischer's. That statement is supported by the fact that Ms. Arroyo paid for no expenses related to the property following the parties' separation, but she did pay for certain expenses prior to separation.

Thus, even if it were true that the parties did not abide by the terms of the Agreement and Note for a brief period of time, that would not constitute an "intentional and voluntary relinquishment" or "unequivocal act or conduct evidencing an intent to waive".

The Agreement and Note are enforceable against Ms. Arroyo. The Note was for a principal amount of \$13,600; Ms. Arroyo was to pay interest on unpaid principal at the rate of 10% per annum. If interest is not capitalized, the outstanding balance on the Note, through August 2013, would be \$61,200. It is unclear from the terms of the Agreement and Note whether unpaid interest is to be capitalized. If unpaid interest is capitalized, then the outstanding balance on the Note, through August 2013, would be \$382,193. Both of these figures are significantly more than the amount that was ultimately awarded to Ms. Arroyo: \$36,844.26.

Ms. Fischer simply asks that the sum due under the Note be offset against any amount otherwise due Ms. Arroyo, she does not ask for any Judgment against Ms. Arroyo.

3. The Statute of Limitations does not run on a defense arising out of Plaintiff's claim.

Anticipating an argument that may be raised by Appellee, the Court should be aware that the statute of limitations has not run on the Agreement or Note, as those documents were raised as defenses to the suit brought by Ms. Arroyo. Ms. Arroyo brought suit "To Dissolve Partnership And To Wind Up Partnership Business". CP 1. In turn, Ms. Fischer Answered and alleged as defenses the fact that Ms. Arroyo had made no payments on the Note. CP 5-8.

“The statute of limitations never runs against a defense arising out of the transaction sued upon by the plaintiff.” Ennis v. Ring, 56 Wn.2d 465 (1959).

Here, Ms. Arroyo brought suit to recover funds allegedly due her from the sale of the Kennewick and Pullman properties. In turn, Ms. Fischer defended that no sums were due Ms. Arroyo, because Ms. Arroyo had contributed nothing to either property, even though she had a legal duty to do so as evidenced by the Agreement and Note. The rationale of Ennis is squarely on point, and no statute of limitations would run against Ms. Fischer’s defense.

4. Ms. Arroyo is not entitled to prejudgment interest on an unliquidated claim.

In the Court’s Memorandum Decision, and again in its Findings of Fact and Conclusions of Law, the trial Court stated:

“Consideration should be given to the fact that Arroyo has been deprived of the use of her monetary interest in the property for 30 years, and that Fischer has gained from the effects of inflation on property values over this time.” CP 47, 51.

The Court then went on to award Ms. Arroyo \$18,419.26 in fees, despite the fact that attorneys for Arroyo only estimated \$14,651 of their fees and costs to be related to the forged deed. CP 11. The difference between those figures, or \$3,768.26, appears to be an improper award of prejudgment interest.

Whether prejudgment interest is allowable depends on whether the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim. See, e.g., Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 442 P.2d 621 (1968); Mall Tool Co. v. Far West Equip. Co., 45 Wn.2d 158, 273 P.2d 652 (1954); Parks v. Elmore, 59 Wash. 584, 110 P. 381 (1910). A liquidated claim is a claim where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion. Hansen v. Rothaus, 107 Wn.2d 468, 472 (1987); citing Prier at 32. An unliquidated claim is one, “where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.” Ibid.

If any sums were due to Ms. Arroyo, the exact amount of such sum was not readily determinable. To ultimately determine the sums awarded to Ms. Arroyo, the trial Court had to determine the fair market value of properties in Kennewick and Pullman, in 1983. The Court’s analysis of this issue was stated in its oral decision:

“So the Pullman property is not going to be hard to ... the only way I can determine the fair market value and the [easiest] way to determine that is to take the purchase price which was just a few months, within a year of that date, and I think it was a little over \$9,000 – I have the ... I call it a 1% affidavit, the tax affidavit – and I think was \$9,500 – and there will be an award to Ms. Arroyo for \$4,500 or whatever half of that comes out. The difficult thing to do will be to determine what the net value of the Kennewick property is. I really don’t think that will be hard. I have

evidence ... Ms. Fischer says well I put all the down payment down, and she did but like a marriage situation it was done as a community effort here and as of ... I am going to try and ascertain what the equity in the property was in 1983. And I don't think it will be too hard from the evidence that I have here." RP 144 line 20 – RP 145 line 4.

Clearly, the Court's estimate of the fair market value of the properties in 1983 was just that – an estimate. Ms. Fischer does not contest the fair market property values that the Court reached, but that does not change the fact that the Court was required to exercise discretion in determining those amounts. As a result, Ms. Arroyo's claims were unliquidated, and she is not entitled to prejudgment interest.

#### E. CONCLUSION

Appellant requests that this Court *reverse* the trial Court's Judgment awarding \$36,844.26 to Respondent, on the basis that the trial Court improperly found that the Agreement and Note had been waived. Appellant requests that this Court *remand* this matter with instructions that the Agreement and Note are to be enforced, and any amount due Appellant under the Note be offset against any amounts that would otherwise have been awarded to Respondent. As the present amount due under the Note is at least \$61,200, which more than offsets the amount awarded Ms. Arroyo, no amount would be owed to Ms. Arroyo.

RESPECTFULLY SUBMITTED: This 29<sup>th</sup> day of July

2013.

Esser & Sandberg, PLLC  
Attorneys for Appellant

By Roger Sandberg  
Roger Sandberg #89020

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on the 29<sup>th</sup> day of July 2013, at my direction, the foregoing Brief of Appellant was served on the following:

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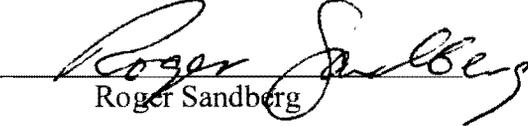
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DATED: This 29<sup>th</sup> day of July 2013.

  
Roger Sandberg