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FEB 21 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 338771-III

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

JESS ORTIZ,

Plaintiff/Appellant,

v.

INGA STERLING,

Defendant/Respondent

RESPONDENT'S BRIEF

Submitted by:

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I. INTRODUCTION

This case arises out of a romantic relationship between Jess Ortiz, the Plaintiff/Appellant, and Inga Sterling, the Defendant/Respondent. The parties began dating in approximately 2003 and within a short period of time developed an intense relationship. During the course of the relationship, Mrs. Sterling advanced most of the funds for the parties' entertainment. At some point, Mrs. Sterling focused on the fact she was picking up most of the entertainment expenses. When she brought this to Mr. Ortiz's attention, he said "Just keep track of what I owe you and I'll pay you back." Mrs. Sterling did, in fact, keep track of the expenses for which Mr. Ortiz told her he would pay her back. In addition, Mr. Ortiz began borrowing money from Mrs. Sterling. Mrs. Sterling also kept track of those amounts. Mrs. Sterling tracked the expenses and loans on miscellaneous slips of paper, a calendar and her credit card statements. Approximately two years into the relationship in the

year 2005, the parties (both of whom had an interest in vintage cars) located a 1958 Chevrolet Impala (hereafter "Chevrolet"), which Mrs. Sterling purchased.

In December of 2005, Mr. Ortiz began making payments to Mrs. Sterling. Throughout the course of their relationship Mrs. Sterling's log (Ex 6) showed the monies advanced and/or loaned to Mr. Ortiz. The dollar amount advanced and/or loaned came to approximately \$68,450. During the course of the relationship, Mr. Ortiz paid to Mrs. Sterling \$42,616.

After the parties separated in July of 2009, Mrs. Sterling learned for the first time that Mr. Ortiz was claiming that part of the \$42,616 that he had paid her included \$30,000 for the Chevrolet, which he was claiming was his.

Mrs. Sterling's testified she had not sold the Chevrolet to Mr. Ortiz and that the payment of the \$42,616 was reimbursement for numerous loans that she had made to him, as well as monies advanced for entertainment, travel and other miscellaneous expenses.

At the conclusion of the case, the Trial Court found that Mr. Ortiz was entitled to the Chevrolet, that Mrs. Sterling's expenditures for Mr. Ortiz were, for the most part, gifts; but, that Mrs. Sterling was entitled to reimbursement of the monies (with the exception of some minor advances) that she had lent to Mr. Ortiz.

II. STATEMENT OF THE CASE

The Respondent/Defendant Inga Sterling began a romantic relationship with the Appellant/Plaintiff Jess Ortiz in 2003. Mrs. Sterling had previously been married for 40 years. (RP 158) Her husband, Mike, died in 2000. She had been a widow for several years before meeting Mr. Ortiz. Mrs. Sterling first met Mr. Ortiz in 2002 (RP161); but, did not develop a relationship with him until September of 2003. (RP 163) Shortly thereafter, their relationship became a very close one and they began to see each other several times a week. (RP 163, 164)

At the time the parties met, Mr. Ortiz was a pensioner. He had been the recipient of various pensions, since he was 36. He was

56 years old at the time the parties met. His pension income was approximately \$4,500 per month. (RP 327)

As the relationship evolved, it became evident that Mrs. Sterling was picking up a significantly greater share of the expenses. Mrs. Sterling's income—derived from Social Security and a part-time job--was relatively modest. Mrs. Sterling was earning approximately \$30,000 per year at the time she met Mr. Ortiz. (RP 327)

During the initial period of the relationship, Mrs. Sterling would periodically bring to Mr. Ortiz's attention that she was paying the majority of the expenses and that there ought to be some sharing of those expenses.

In addition, the Plaintiff began a history of borrowing money from Mrs. Sterling. (RP 234, 235, 242) (Ex 6) The parties periodically incurred significant expenses, such as cruises, concerts and airline travel, which were paid by Mrs. Sterling. (Ex 6) (RP 211-215, 237-238, 207-209) Often, Mr. Ortiz would say that his credit cards were "maxed-out"; or, he did not have his man bag, requesting the Defendant to cover the expense. (RP 227) At the

time of trial, Mrs. Sterling submitted into evidence an Exhibit (Ex 6) comprised of multiple categories, showing monies that she had advanced, paid on behalf of the Appellant (RP 168-171) or loaned him (RP 234-237) At the time the parties separated in 2009, that indebtedness had, according to the Defendant's records, reached approximately \$68,450.¹ (EX 6) (RP 247) Exhibit 6 was a compilation of notes, calendar, and credit card statements logged by Mrs. Sterling at Plaintiff's request. (RP 166-170) Of that \$68,450, \$32,188 was for money advanced on loans. (RP 242)

Mr. Ortiz told Defendant to "keep a record of what I owe you." He said, "Mark it down", (RP 247) I'll pay you. When I tell you I'll pay you back, I'll pay you back" (RP 166, 188) or, "Keep a log and I'll tell you what I am going to pay you back for." (RP 249, 250) After several years of prodding, Mr. Ortiz finally began making payments to Mrs. Sterling on monies advanced, with the first payment coming on December 30, 2005 in the sum of \$1,500. (RP 250)

¹ The *Findings of Fact and Conclusions of Law* (CP 59 – 62) reflect the amount advanced or loaned to Plaintiff was \$67,851.46.

In the summer of 2005 both Mr. Ortiz and Mrs. Sterling, who had an interest in vintage cars, located a 1958 Chevrolet Impala (hereafter “Chevrolet”) in Spokane, Washington. (RP 28-33) Ultimately, the parties traveled to view the car (RP 252-257). Mrs. Sterling elected to purchase it. She advanced the full price of the car by cashing in an annuity. She suffered loss of interest by an early termination of the annuity. (RP 255)

Periodically, during the succeeding years of the relationship, Mr. Ortiz would request that Mrs. Sterling sell him the Chevrolet. (RP 274-275) Her response was, generally, to the effect, “I don’t know how you’re gonna buy the Chevy, when you can’t even afford to pay me back what you owe me now.” (RP 275)

The parties continued their relationship for several years thereafter. There is a dispute about who paid for the repairs to the Chevrolet during the following years. Testimony by Mr. Haberman, the mechanic, who both parties testified worked on the car, was that the repair bills had been all paid by Mrs. Sterling. (RP 196-197)

As the parties moved forward from 2007 through 2009, emotions would erupt periodically as Mr. Ortiz was seeing other

women. (RP 277, 280) The relationship finally ended in the summer of 2009, when Mr. Ortiz decided to move to Arizona. Mr. Ortiz did not take the Chevrolet with him. After Mr. Ortiz moved to Arizona, he sent a check to Mrs. Sterling for \$7,653. (RP 683) Mr. Ortiz initially sent the check to his niece in Wapato, Washington to deliver to Mrs. Sterling. When Mrs. Sterling went to pick up the check, the niece asked where the Title was. Mrs. Sterling queried her, stating, “For what?” The niece informed her--the Title to the car. This was the first notice Mrs. Sterling had that Mr. Ortiz was going to take a position that he had been paying for the Chevrolet. (RP 282-283)

Subsequently, the parties engaged in a series of communications in which Mrs. Sterling attempted to get Mr. Ortiz to return to Yakima, by misleading him with misrepresentations and by using the vehicle as leverage. (RP 301) Those facts, while most likely affecting the Court’s decision, do not affect the issues on Appeal. (RP 286-291)

In October of 2010, Mr. Ortiz's attorney wrote to Mrs. Sterling requesting the Chevrolet. This was 14-15 months after Mr. Ortiz moved to Arizona. (RP 129-130) Mr. Ortiz sued Mrs. Sterling for specific performance of the Chevrolet Impala. (CP 1-4, 3-4) In her Answer, Mrs. Sterling denied agreeing to sell the Chevrolet and countersued for the money that she had lent and provided to Mr. Ortiz. (CP 9-11) At trial, Mrs. Sterling acknowledged Mr. Ortiz had reimbursed her in part for the monies loaned and advanced for expenses. The total sum paid by Mr. Ortiz was \$42,616. (Ex 3, RP 23)

In its *Conclusions of Law* the Trial Court held that the Statute of Frauds was not applicable. (CP 59-62) The Court further ruled that there was an agreement by Mrs. Sterling to sell the Chevrolet to Mr. Ortiz. The Court ruled that many of the financial benefits to Mr. Ortiz were not obligations to be repaid by him, as they were gifts. However, the Court did rule that Mr. Ortiz was obligated to pay the amounts (with minor exceptions) that Mrs. Sterling had loaned him. (CP 59-62) The total amount of the loans made by Mrs. Sterling to

Mr. Ortiz was \$32,188. The Court struck \$1,190 from the amount of the loans, leaving a balance owing to Mrs. Sterling by Mr. Ortiz of \$30,998.00. (CP 25-29) The Appellant raised an issue of the Statute of Limitations with respect to the loans. The Court held that RCW 4.16.270 applied, as payment had been made on the various loans prior to the Statute of Limitations' expiration, thereby extending the Statute of Limitations. (CP 59-62)

III. ASSIGNMENTS OF ERROR

Defendant Sterling's Brief does not include Assignments of Error, as none were raised by her during the time to appeal. Defendant's Brief does address Plaintiff Ortiz's issues pertaining to Assignment of Error as submitted by Plaintiff.

IV. ARGUMENT

A. The Appellant's representation that the Trial Court erred in finding and concluding the cost of the 1958 Impala was \$35,000 is a misstatement of the *Findings of Fact and Conclusions of Law*.

The Plaintiff, Mr. Ortiz, represents the Trial Court found the cost of the Chevrolet Impala was \$35,000. Appellant cites to no portion of the Clerk's Papers or the Report of Proceedings to support his contention. The first set of *Findings of Fact and Conclusions of Law* entered (CP 59-62) did contain an error as to the cost of the Chevrolet Impala, as it listed the cost at \$35,000. However, these *Findings of Fact and Conclusions of Law* were corrected by *Amended Findings of Fact and Conclusions of Law* entered on January 29, 2016. (CP 59-62)

Even with such an error, the figure of \$35,000 was not used by the Trial Court in its calculations of damages or the amount it awarded against the Defendant. (CP 25-29) (CP 59-62)

B. Claims for Loans made by the Defendant Sterling to the Plaintiff Ortiz prior to November 12, 2007 are not barred by the Statute of Limitations.

Defendant agrees that the loans made by the Mrs. Sterling to Mr. Ortiz were individual loans – albeit, with a continuing theme of regularity. An examination of Exhibit 6 (G) shows loans amounts made in the following years:

2003 -- \$2,000

2004 -- \$ 6,950

2005 -- \$ 4,130

2006 -- \$ 6,414

2007 -- \$ 5,750

2008 -- \$ 2,535

2009 -- \$ 4,409

TOTAL: \$32,188 (Ex 6)

Mr. Ortiz agreement to repay was oral, governed by RCW 4.16.080(3). In *Nilson v. Castle Rock School District*, 88 Wn.App 627, 945 P2nd 765 (1997), the facts were as follows: The Castle Rock School District hired Mr. Nilson as the head basketball Coach. Nilson alleged that he entered into an oral agreement with Lisa Dallas, Athletic Director for Castle Rock High School regarding payment for new high school boys' basketball uniforms. According to Nilson, Castle Rock agreed to reimburse him over time, upon his demand. Nilson purchased the uniforms with \$3,900 of his own money. On November 27, 1991, upon his request, Castle Rock paid Neilson \$1,000, as part payment for the uniforms. In April of 1992, Castle Rock notified Nilson that his coaching contract would not be renewed. On June 12, 1995, Nilson filed suit against Castle Rock for breach of an oral contract. Castle Rock answered, denying there was an oral contract and asserted as an affirmative defense the three-year Statute of Limitations. The Appellate Court held, at page 330, as follows:

Here, the parties entered into an oral loan agreement that did not provide a specific time or period for repayment. This type of loan is known as a “demand loan.” See BLACK’S LAW DICTIONARY 430 (6thed. 1990).

The statute of limitations on an oral agreement is three years from the date the cause of action accrued. RCW 4.16.080(3); RCW 4.16.005. Absent other facts, the cause of action accrues on the date when the loan is made. *[Citing other authorities.]* But an exception to the rule exists when, at the time of contracting, the parties contemplated delay in making the demand and where “speedy demand would violate the spirit of the contract.” *[Citing other authorities.]* This exception is more specifically set forth in *Hopper v. Hemphill*, 19 Wn.App 334, 335-36, 575 P.2d 746 (1978):

[I]f an actual notice or demand is required for a cause of action to accrue on a demand loan obligation, then the statute of limitations does not commence running until notice is given or demand is made, or until a reasonable time has elapsed.

The Court ultimately held that the three-year statutory period for repayment of the balance of the money provided by Nilson did not commence to run until Nilson made demand for repayment of the balance on July 6, 1992.

Here, Mr. Ortiz did not have the funds to immediately pay Mrs. Sterling, (RP 227), hence, the statute of limitations would not begin to run until Mrs. Sterling made demand for payment. Payment was made as a result of Mrs. Sterling's demands for repayment. Unfortunately, the date of the "demand" is not known.

That Statute of Limitations (RCW 4.16.080 (3)) would begin to run at the time each loan was made. See Section G of Exhibit 6 for the date each individual loan was made.

However, even taking a position the Statute of Limitations does not start upon a "demand" being made, the Statute of Limitations is nonetheless tolled under RCW 4.16.270, which provides as follows:

When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

See also *Hopper v. Hemphill*, 19 Wn.App334, 575 P2d 746 (1978).

In discussing RCW 4.16.270, the Court in *Hamilton v. Pearce*, 15 Wn.App 133, 547 P2d 866 (1976) stated:

[W]hen any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

RCW 4.16.270. We will refer to this as the 'partial payment statute.'

...

It should first be noted what the partial payment statute is. It is substantially a codification of the common-law rule. ... Most, if not all states, have a similar rule of law, if not by statute then as a part of their common law. ...The underlying principle upon which partial payment will start the limitation period running anew is that part payment amounts to a voluntary acknowledgment of the existence of the debt and from this the law implies a new promise to pay the balance. ...

The courts of this State have consistently referred to the partial payment statute as being a 'tolling statute'. In discussing the effect of partial payments on statutes of limitation, they have also consistently referred to such payments as 'tolling' the statutes of limitation.

...

[W]hen the fact of a partial payment is shown, the partial payment statute removes the bar of the statute of limitations that was running at the time such payment was made. It does so by starting the statute running anew.

We, therefore, hold that the partial payment statute, RCW 4.16.270, is a statute which tolls statutes of limitation.

Here, the first loan was \$2,000 made to Mr. Ortiz for Christmas monies for his daughter Sandra and children. The loan was made on December 13, 2003. (RP 248-250) Hence, the Statute of Limitations, excluding a ruling under *Nilson, supra*, or RCW 4.16.270, would expire on December 13, 2006. However, on December 30, 2005, Mr. Ortiz made a payment of \$1,500 --- thus, restarting the Statute of Limitations, with an ending date of December 30, 2008, as to that loan. As reflected in Section G of Exhibit 6, there were 56 loans, of which the Court struck 11. Each loan would have a different Statute of Limitations, which Statute of Limitations would be extended by payments made after that particular loan had been made. Exhibit 23 shows the individual checks paid by Mr. Ortiz to Mrs. Sterling. Each payment made may go to the oldest obligation. See *Warren v. Washington Trust Bank*,

92 Wn.2d 381, 598 P2d 701 (1979). Payments by Mr. Ortiz to Mrs. Sterling were regularly and periodically made from December 30, 2005 to August 1, 2009.

The Plaintiff commenced his lawsuit against Defendant Sterling on November 12, 2010. The Statute of Limitations on Defendant's Counterclaim relates back to the filing of that lawsuit.

Bennet v. Dalton, 120 Wn.App 74, 84 P3rd 265, 268 (2004).

However, under the analysis set forth above, no Statute of Limitations had expired before the filing of Plaintiff's lawsuit.

Plaintiff Ortiz may argue that the first payment he made on December 30, 2005 was a payment on the Chevrolet Impala and that payments thereafter were in increments of \$500 a month, the amount alleged by him that he was going to pay monthly to Mrs. Sterling for the Chevrolet. (RP 32, 36) However, on June 5, 2006, the Defendant made an \$85 payment and on July 21, 2006, he made a \$70 payment. Even discounting the payments that are divisible by the number 500, those payments made by the Defendant toll the Statute of Limitations to June 5, 2009. Those payments continually move the Statute of Limitations forward in time. Of the total checks

written by Mr. Ortiz to Mrs. Sterling, 19 checks were not divisible by 500. Those “odd amount” payments begin, as stated, on June 5, 2006, with the last payment being an amount not divisible by 500, being made on August 1, 2009. More significantly, not one of those checks indicate on the memo line that it is for payment on the Chevrolet. (RP 78)

The Court, here, made a finding of fact, based on the evidence presented, that the payments made by Mr. Ortiz were payments not only on the vehicle; but, on the loan, as well, thus, tolling the Statute of Limitations. The Trial Court’s findings are supported by the evidence presented. Of the \$42,616 paid by Mr. Ortiz, the Trial Court allocated \$30,000 toward the purchase of the Chevrolet, leaving the difference of \$12,616 to be applied to the loan balance of \$19,572.²

V. CONCLUSION

The Defendant/Respondent submits that the Plaintiff/Appellant’s Assignments of Error are not well-taken. First,

² In the spirit of disclosure, it is believed the Trial Court should have deducted the \$12,616 from \$30,998—the amount left on Ex 6 (G) after removing the loans the Court did not approve, which totaled \$1,190.

the Trial Court did not error in finding the cost of the 1958 Chevrolet Impala was \$35,000; but, in fact, found that the costs of the 1958 Chevrolet Impala was \$30,000.

Secondly, the loans made to Mr. Ortiz are not barred by the Statute of Limitations, as RCW 4.16.270 allows for the Statute of Limitations as to each individual loan to be tolled and that the first payment by Mr. Ortiz to Mrs. Sterling was on December 30, 2005—well within the Statute of Limitations. Thereafter, Mr. Ortiz continued to make regular payments on his indebtedness to Mrs. Sterling, thereby continuing to extend the Statute of Limitations as to each individual loan.

For the foregoing reasons, the Defendant/Respondent Sterling requests that the Court of Appeals uphold the Trial Court's decision.

Respectfully submitted this 16th day of February, 2017.



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By _____

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **RESPONDENT'S BRIEF** on the following individual:

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via personal delivery on February 16, 2017.

DATED this 16th day of February, 2017



Monique Vincent, Legal Assistant to
RUSSELL J. MAZZOLA