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83960-3

NO. 83960-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

TERESA FARMER,

Respondent,

and

DANIEL J. FARMER

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

The Court of Appeals decided this appeal based on settled law that applied to the record established in the trial court. Because the case does not present novel issues and there was no error by the Court of Appeals which properly decided the matter as an unpublished decision, there is no need or basis under RAP 13.4 for this Court to take review. Review should be denied and Respondent awarded fees.

II. RESTATEMENT OF ISSUE.

Whether review should be denied under RAP 13.4 because the decision is consistent with established law and the record established below?

III. STATEMENT OF THE CASE.

A. Overview.

This case involves the challenge to a judgment of \$487,325.00 in favor of Respondent Teresa Farmer arising out of the parties' dissolution property settlement. It was awarded after uncovering Petitioner Daniel Farmer's conversion of Teresa's property by his fraudulent exercise of PACCAR stock options in his control, and then lying about it to Teresa and to the Superior Court. The issues before the trial court and the Court of Appeals were the measure and amount of the damages which flowed from the undisputed and fraudulent conversion. Teresa sought and received a genuine make-whole remedy for the loss of the options.

The trial court, Hon. Vickie Churchill of Island County, correctly determined the damages required to enforce the CR2A agreement between the parties based on the range of evidence before her. The Court of

Appeals, through Judge Schindler, properly affirmed in an unpublished decision (“Decision” or “Slip Op.”). The damages were a make-whole valuation to enforce the parties’ CR2A agreement after Daniel fraudulently converted his then-wife Teresa’s share of marital property (in the form of vested stock options extending to the year 2013), then repeatedly lied about it to Teresa and to the trial court to delay both its discovery and then, once the conversion was revealed, proper resolution. When the issue of damages could finally be presented to Judge Churchill, six months after the conversion was first exposed and only after Daniel was repeatedly held in contempt in order to get him to provide the underlying documents, Judge Churchill determined the amount of damages amount based on the only thing she could: the evidence presented by the parties. That evidence included unrebutted expert testimony proffered by Teresa of the basis and amount of the make-whole remedy, the amount required to compensate Teresa for the full value of the options including the valuable, intangible right to choose the time of exercise.

B. Court of Appeals Decision.

The Court of Appeals carefully reviewed the briefing and the record and applied well-established rules of substance and procedure to affirm Judge Churchill’s careful decision and award Teresa her attorneys fees on appeal pursuant to the CR2A agreement between the parties. The Decision was unpublished. The Court of Appeals also rejected Daniel’s effort to submit new evidence on appeal in the guise of additional

authorities when he sought to place before the appellate court updated stock prices, evidence which was not before the trial court. Slip Op., p. 17, n. 8.

C. Underlying Facts and Procedure.

The facts are set out in the Court of Appeals decision at length and the Court is respectfully referred there. Teresa will only emphasize a few points.

As he did in the Court of Appeals, Daniel avoids the full facts of the case out of which the damages issue arose, again trying to avoid placing the legal issue in its proper and full context of the case, seeking to have the analysis begin with the damages hearing in April, 2007. But as the Decision recounts, the material substantive and procedural facts in this case began in July, 2006, with the signing and filing of the underlying CR2A agreement. They continued with Daniel's surreptitious sale of Teresa's designated stock options in August, 2006, his repeated efforts to get Teresa to unknowingly agree to that sale in August and September, the final order submissions and hearing in the fall of 2006, and the multiple contempt and other motions and hearings in the winter of 2006 – 2007 which were required to get the information to let Teresa ultimately proceed with her Rule 60 motion. *See* Slip Op., pp. 2 – 8; Response Brief, pp. 6 – 17. The majority of the Clerk' Papers related to these facts had to be designated by Teresa. *See* CP 532 - 714.

These facts and the full record as set out in the Decision and in the Response Brief help emphasize two important elements to the case and its

context that Daniel wants to avoid. First, Teresa had great difficulty in getting the damages issue to hearing because of Daniel's continued refusal to provide the underlying documents which demonstrated the fraud and events and timing that occurred in the fraudulent exercise of the stock options and what Daniel did with the money. Daniel fought very hard to avoid being held fully accountable, even after he was caught red-handed with both conversion of Teresa's options *and* lying to both Teresa *and* the trial court.

Second, Daniel was seasoned and experienced in the ways of the courts and presenting evidence. *See* Response Brief, pp. 9-11 (recounting Daniel's submissions of expert financial evidence in very short order); pp. 18 – 19 (Daniel's tactical choices at damages hearing); pp. 31-35 (arguing that Daniel's tactical decisions bind him). So the fact that he failed to present an expert witness on the damages issue in April 2007 when the issue was heard reflects a tactical decision he made.

A major aspect of his appeal continues to be to try and undo the consequences of his tactical decisions in the trial court so he can get another bite at the apple. At this juncture that means seeking review by this Court. The Court should bear in mind that Daniel's own tactical choices below make this a much different case than he tries to present in the Petition, a case in which settled law controls and was properly applied by the Court of Appeals.

IV. ANSWERING ARGUMENT.

A. The Court of Appeals Decision is Consistent With Washington Law.

Daniel tries to argue that the Court of Appeals decision conflicts with Washington law that the damages for conversion are assessed as of the time of conversion or a reasonable time thereafter, again arguing *Brougham v. Swarva*, 34 Wn. App. 68, 661 P.2d 138 (1983) and *Langham v. Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005) as he did to the Court of Appeals. See Petition, pp. 6 – 10. But review of the Decision and the record shows it is consistent with Washington law as appropriate to this record, as was the trial court decision, and is also distinguished because the circumstances are different.

In this case the trial court ended up enforcing the parties' CR2A agreement. As explained by the Court of Appeals:

Here, unlike in *Langham* and *Brougham*, the trial court exercised its equitable authority to enforce the specific terms of the final decree and the CR 2A Agreement in order to put Teresa in as good a position as she would have been if Daniel did not act in bad faith and complied with the terms of the decree and the CR 2A Agreement.

It is just, fair and equitable to award to the petitioner judgment against the respondent in the sum of \$487,325.00, said sum representing the amounts which he petitioner would have realized on future exercises of stock options awarded to her pursuant to the terms and conditions of the decree of dissolution of marriage from April 26, 2009 to January 13, 2013 using an estimated federal tax rate of 35% plus Medicare of 1.56%.

On this record, we conclude the court did not abuse its discretion in enforcing the specific terms of the final decree and the CR 2A Agreement and awarding Teresa damages to

compensate her for the loss of her right to exercise the stock options before the future expiration dates set forth in the decree.

Slip Op., p. 15-16. There was no abuse of discretion by Judge Churchill in enforcing the parties' CR2A agreement and awarding a make-whole measure of damages under the circumstances of this case, and no conflict between the Decision and Washington cases. *Id.* There is no need for this Court to grant review.

At trial, as the Decision notes, Judge Churchill applied the language in *Langham* that the aggrieved party is entitled to "at least its value at the time of conversion," indicating that the value at the time of conversion was the minimum or "threshold" amount of damages that may be awarded where the value declines. See 6/04/07 RP, pp. 27-28; Slip Op., p. 10 & n.5. This language protects an aggrieved party from being limited to damages of the reduced value of the property after it was converted. Thus, in *Langham* the wife was entitled to "at least" the higher value at the time of conversion, rather than the later, lower value at the date of sale. Basic to this analysis is that the aggrieved party is entitled to be made whole for the full value of what was converted.

As the Decision and Judge Churchill recognized, stock options with a long expiration date such as Teresa had here are a unique form of property with two aspects to value, the inherent stock value and the value flowing from the right to choose the time to exercise the options and associated future profits, or the time value. 6/04/07 RP, pp. 28-29. Judge Churchill's remedy was to make Teresa whole so that, as Judge Churchill said: "It's not a windfall. It's the amount that she had the ability to

exercise of her own free will. He took her own free will away from her.” *Id.*, p. 29:22-24. The ruling honors and gives effect to the first premise stated in *Brougham* (and which Daniel’s Opening Brief neglected to quote): “[t]he innocent victim should not suffer a loss because of the wrongful taking and withholding of [her] property.” *Brougham, supra*, 34 Wn. App. at 78. Teresa did not get a windfall. She got the present value of *the whole of* her property – the time value and the inherent value – that Daniel took from her but to which he had agreed in the CR2A agreement that she was entitled.

B. The Amount of Damages Was Proper and Was Within the Range of the Evidence.

Daniel tries to create a case worthy of review by contending that the calculation of damages in this case was speculative and therefore creates an issue of substantial public interest. Petition, pp. 10 – 14. This argument fails for at least two reasons.

First, the Decision is unpublished so that, by definition, it only affects and controls the parties since the decision cannot be cited as authority. GR 14.1. As a practical and legal matter, the unpublished decision does not raise or affect a “substantial” public interest.

Second, the Decision is not wrong. Rather, Daniel’s complaint about the amount of damages is both incorrect and is of his own making. The Decision notes that the damages awarded by Judge Churchill were within the range of the evidence before her. Slip Op., p. 16. Teresa’s expert, Mr. Nelson, calculated that net value, Daniel did not submit any

contrary valuation, and Judge Churchill accepted Mr. Nelson's un rebutted valuation, as she was entitled to do. *In re Marriage of Sedlock*, 69 Wn. App. 484, 490-491, 849 P.2d 1243 (1993). The appellate court then had to affirm. See *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007) (the appellate court must affirm if the damage amount is within the range of evidence); *Brougham, supra*, 34 Wn. App. at 70-79 (same). This Court should only grant review if it is inclined to reverse this line of cases.

The amount of damages is also of Daniel's own making (at least in part) because, as the Decision notes, Daniel failed to timely present any expert testimony to the contrary, including for values which contain the future lost profits that conversion of the stock options entailed. *Id.* The Decision also recognized that un rebutted expert testimony can support a damages award for future losses, including future lost profits. Slip Op., p. 16 citing *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 695, 132 P.3d 115 (2006) and *Larson v. Walton Plywood Co.*, 65 Wn.2d 1, 17, 390 P.2d 677 (1964). Given these cases and the record in this case, this Court would have to *reverse* *Mayer v. Sto Industries* and *Larson* and their underlying authorities if it were to grant Daniel his requested relief. It thus is Daniel's position that conflicts with established case law, not the Decision.

C. Teresa Should be Awarded Fees for Her Answer.

The panel decision awarded Teresa fees at page 21 pursuant to the CR2A agreement, which states at CP 458-59:

20. The court will retain continuing jurisdiction to enforce the terms and conditions of this agreement. Disputes as to the terms of this agreement shall be resolved on the motion calendar. The court may award attorney's fees in the event the court concludes in its discretion that either party has by his or her actions frustrated the terms of this agreement and or has acted in bad faith.

The Decision makes plain that Daniel committed fraud on Teresa and that she should not suffer any costs as a result of his fraud. For the same reasons Teresa should be awarded fees for having to answer Daniel's petition for review. RAP 18.1(j).

V. CONCLUSION.

The petition for review should be denied because the case does not meet the criteria of RAP 13.4(b). Teresa should be awarded her attorney's fees and costs for her answer per RAP 18.1(j).

Respectfully Submitted this 25th day of June, 2010.

CARNEY BADLEY SPELLMAN, P.S.

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Counsel for Respondent Theresa Farmer

OFFICE RECEPTIONIST, CLERK

To: Norgaard, Cathy
Cc: cate@washingtonappeals.com; doug@skinnerlaw.net; Ken Manni's assistant; Miller, Greg; Fox, Claire
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Rec. 1-25-10

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Documents to be filed:

1. Teresa Farmer's Answer to Petition for Review
2. Certificate of Service

Case Name: In re the Marriage of Teresa Farmer/Respondent and Daniel J. Farmer/Petitioner
Case No. 83960-3 (COA No. 61638-2-I)
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NO. 83960-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

TERESA FARMER,

Respondent,

vs.

DANIEL J. FARMER,

Petitioner.

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DATED this 25th day of January, 2010.

/s/ Catherine A. Norgaard
Catherine A. Norgaard
Assistant to Gregory M. Miller