

No. 96771-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 77393-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ROBERT P. MCCLESKEY

Respondent,

v.

KATHY A. MCCLESKEY

Petitioner.

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PETITION FOR REVIEW

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MCKINLEY IRVIN

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**A. Identity of Petitioner.**

The petitioner is Kathy McCleskey, appellant in the Court of Appeals.

**B. Court of Appeals Decision.**

Petitioner seeks review of the Court of Appeals' November 26, 2018, decision affirming the denial of her motion to enforce the parties' Separation Contract because it was styled as a motion for contempt and brought in the parties' dissolution action. (App. A) The Court of Appeals denied petitioner's timely motion for reconsideration and publication on December 21, 2018. (App. B)

**C. Issues Presented for Review.**

1. The parties' negotiation of their Separation Contract centered on their most valuable asset – 10,000 shares of stock, worth more than \$7 million, in Sellen Construction Inc., where the husband was CEO and Chairman of the Board. Does the Court of Appeals' decision conflict with *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) and the numerous cases applying its "context rule" by refusing to consider any extrinsic evidence when interpreting the Separation Contract, including the Sellen Stockholders' Agreement governing redemption of Sellen stock and the husband's representations, critical to the parties' negotiations and their

agreement, that he could not accelerate the redemption of Sellen stock?

2. The Court of Appeals affirmed the trial court's refusal to consider the wife's allegations that the husband breached his fiduciary duties to her by misrepresenting his ability to accelerate redemption of Sellen stock, holding that "[a] contempt motion cannot provide Kathy with the relief she seeks." (Op. at 10) Does the Court of Appeals' decision conflict with *Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, ¶ 15, 106 P.3d 212 (2005), holding that a trial court has "the authority to use any suitable process or mode of proceeding to settle disputes over which it has jurisdiction," including a dispute over enforcement of a decree?

#### **D. Statement of the Case.**

- 1. The parties' Separation Contract was negotiated based on the husband's representations that redemption of Sellen stock was the key to equalizing payments, which under the Sellen Stockholders' Agreement meant the wife could expect to share in Sellen dividends for at least a year after divorce.**

Kathy and Bob McCleskey married in 1982. (CP 12-13) Bob eventually became Chairman of the Board and CEO of Sellen Construction Inc. (CP 13, 107) By the time the parties separated in

2015, they owned 10,000 shares of Sellen stock with an agreed value of more than \$7 million. (CP 15, 103)

Bob filed a petition for dissolution on May 19, 2015. (CP 143) The parties engaged in mediation and signed a preliminary CR 2A agreement on April 27, 2016. (CP 12, 63) Bob represented prior to the mediation that he would “need to sell approximately 1,966 shares of his Sellen stock to generate cash to pay Kathy.” (CP 115; *see also* CP 15-16, 97) When the parties thereafter arbitrated before the mediator a dispute about the timing of a transfer payment from Bob to Kathy under the CR 2A agreement, Bob again represented “the only way he will be able to afford to pay Kathy a cash transfer installment is if he has received a payment from Sellen for the redemption of his stock.” (CP 120; *see also* CP 119: “a stock redemption check from Sellen will first need to clear Bob’s account before he can pay Kathy”; CP 119: “Bob will have no ability to pay Kathy until he receives a redemption payment from Sellen”) Bob further represented that he could not afford an immediate transfer payment because “he can’t accelerate the redemption payments from Sellen.” (CP 120)

Bob’s representations were consistent with the Sellen Stockholders’ Agreement, which governs a stockholder’s redemption



of stock prior to retirement. Bob had sent Kathy a copy of the Stockholders' Agreement when he filed for dissolution, advising her "[y]ou'll want to give this to whoever is representing you." (CP 74) Under the Stockholders' Agreement, early redemptions were always to occur on January 1<sup>st</sup> of any year. (CP 231) The Stockholders' Agreement also provides that a stockholder could not redeem stock early unless the stockholder "give[s] written notice to the Board not less than six (6) months prior to the January 1<sup>st</sup> on which such Stockholder wishes to first affect an early redemption." (CP 231)

On November 21, 2016, the parties signed a Separation Contract, which was incorporated into a decree of dissolution. (CP 12, 47-52, 198-218) Based on Bob's representations he would have to redeem Sellen stock to pay Kathy her share of the marital estate (CP 15, 99-100), the parties agreed Bob would make equalizing payments totaling \$3,335,159 to Kathy in a "schedule" (CP 204) of six "installments":

An equalizing non-taxable property transfer of \$3,335,159 cash plus interest, to be paid by the husband to the wife in six installments as follows:

- a. \$500,000 on or before April 29, 2016 (wife acknowledges receipt of this installment);
- b. \$500,000 on the closing of the sale of the Rancho Mirage house awarded to the husband *or* June 1, 2017, whichever is earlier;

- c. \$1,000,000 paid to the Trust<sup>1</sup> . . . within three business days of the husband's receipt of the first payment for the redemption (or other disposition) of his Sellen Construction Company Inc. ("Sellen") stock;
- d. \$500,000 paid to the Trust . . . within three business days of the husband's receipt of the second payment for the redemption (or other disposition) of his Sellen stock;
- e. \$500,000 paid to the Trust . . . within three business days of the husband's receipt of the third payment for the redemption (or other disposition) of his Sellen stock; and
- f. \$335,159 paid to the Trust plus accrued interest . . . within three business days of the husband's receipt of the fourth payment for the redemption (or other disposition) of his Sellen stock.

(CP 203) (emphasis in original)

The parties also agreed that Bob "shall pay [Kathy] . . . 50% of any Profit Distribution paid to him prior to the date he receives the first payment from Sellen for the redemption . . . of his Sellen stock."

(CP 209; *see also* CP 206) Based on the course of negotiations, and because the Sellen Stockholders' Agreement mandated that redemption could occur only on January 1<sup>st</sup> of each year, Kathy should at the very minimum have received half the December 2016 profit distribution. (CP 99)

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<sup>1</sup> Kathy created a trust to receive installments c through f. (CP 64)

**2. Contravening both his prior representations and the Sellen Stockholders' Agreement, the husband accelerated redemption of Sellen stock eight days after signing the Separation Contract, cutting off the wife's right to share in Sellen dividends.**

On November 29, 2016, just eight days after signing the Separation Contract, Bob chaired a meeting of the Sellen Board of Directors that approved his request to accelerate redemption of 500 of the 10,000 shares of stock, with an effective date of December 1, 2016, contrary to the Sellen Stockholders' Agreement requirement that the "effective date of an early redemption shall be . . . January 1st." (CP 67, 77, 231) On December 16, 2016, Bob purported to make the third installment payment of \$1,000,000 to Kathy, "skipping" the second installment payment due on the sale of the parties' house in Rancho Mirage or June 1, 2017, whichever was earlier. (CP 16, 24, 67) On December 22, 2016, Bob received a Sellen profit distribution likely worth at least \$500,000<sup>2</sup>.

Bob refused to pay 50% of that profit distribution to Kathy, alleging that his redemption of 5% of his Sellen stock contrary to the terms of the Stockholders' Agreement, in order to pay Kathy the third installment payment, cut off Kathy's right to Sellen profit

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<sup>2</sup> Bob has, to date, refused to divulge the exact amount of the profit distribution. (CP 12, 45, 78, 80-81)

distributions. (CP 16, 66-67) Bob then failed to make the second installment payment, which bore interest at only 2.25% per annum, by June 1, 2017, claiming that he was “not able to make the payment.” (CP 17, 31, 70, 204)

On June 14, 2017, Kathy moved to hold Bob in contempt and to enforce the Separation Contract, arguing that Bob improperly skipped the second installment payment and violated the Separation Contract by refusing to pay her 50% of the December 2016 profit distribution. (CP 1-53) King County Superior Court Judge Tanya Thorp (“the trial court”) denied Kathy’s motion (CP 193), stating the Separation Contract was “clear and unambiguous on its face” and thus “parol evidence or the intent of the parties . . . based upon a belief as to how the Sellen corporation would act” was irrelevant. (RP 41-42) The trial court also ruled, sua sponte, that it could not consider on the family law motions calendar Kathy’s allegations that Bob breached his fiduciary duty to her, but that Kathy must instead bring a separate civil action. (RP 42, 44)

**3. The Court of Appeals affirmed the trial court’s refusal to consider extrinsic evidence and allegations the husband breached his fiduciary duty.**

The Court of Appeals affirmed the trial court’s refusal to consider Bob’s representations to Kathy during negotiations and the

terms of the Sellen Stockholders' Agreement, characterizing them as "irrelevant" evidence of "subjective intent" and rejecting Kathy's argument they would elucidate the meaning of the terms "installment" and "schedule" in the Separation Contract. (Op. at 9-10) The Court of Appeals also affirmed the trial court's refusal to consider Kathy's allegations that Bob breached his fiduciary duty, holding that Kathy "needed to bring her claims of breach of fiduciary duty and good faith outside of the contempt motion." (Op. at 13) The Court of Appeals denied Kathy's timely motion for reconsideration and publication. (App. B)

#### **E. Why This Court Should Grant Review.**

- 1. The Court of Appeals' decision that extrinsic evidence is irrelevant to interpretation of the parties' Separation Contract conflicts with *Berg* and other well-established precedent.**

The Court of Appeals' decision that extrinsic evidence was irrelevant to interpreting the terms "installment" and "schedule" and the expectations of the parties in the Separation Contract conflicts with the principles of contract interpretation established by this Court thirty years ago in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). The Court of Appeals' decision upending these settled principles of contract interpretation is particularly troubling because it comes in the context of a Separation Contract, where the parties

were not negotiating at arm's length and the wife had a right to rely on the husband's representations about the timing and mechanism of payments he was obligated to make under the Separation Contract. This Court should grant review under RAP 13.4(b)(1)-(2), (4).

“[T]he touchstone of the interpretation of contracts is the intent of the parties.” *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993) (citing *Berg*, 115 Wn.2d at 663). *Berg* established that the “intent of the contracting parties *cannot* be interpreted without examining the context surrounding an instrument's execution.” *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn. 2d 493, 502, ¶ 17, 115 P.3d 262 (2005) (emphasis added); *Kelley v. Tonda*, 198 Wn. App. 303, 312, ¶ 13, 393 P.3d 824 (2017). Relevant extrinsic evidence includes “the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.” *Berg*, 115 Wn.2d at 668 (quoting Restatement (Second) of Contracts § 212 comment b (1981)). Courts examine extrinsic evidence “to determine the meaning of specific words and terms,” not “the unexpressed subjective intent of the parties” or “an intention

independent of the instrument.” *Hearst*, 154 Wn.2d at 503, ¶¶ 19- 20 (quoted source omitted).

The Court of Appeals’ holding that the extrinsic evidence in this case would “add terms to the agreement inconsistent with [its] existing language” and “modify the contract, rather than give effect to the terms as written” (Op. at 9-10), conflicts with *Berg* and the numerous Washington cases applying the context rule. RAP 13.4(b)(1)-(2). The parties agreed that Bob would make six “installment” payments to Kathy on a specified “schedule.” (CP 203-04) Those terms are not defined in the Separation Contract. When the parties disputed their meaning, Kathy offered Bob’s representations during their negotiations, and the Sellen Stockholders’ Agreement, to help the court determine their meaning. Kathy thus did exactly what this Court has instructed litigants to do: “offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties’ intent.” *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, ¶ 7, 202 P.3d 960 (2009).

The Court of Appeals inexplicably dismissed this extrinsic evidence as irrelevant evidence of Kathy’s “subjective intent.” (Op. at 9) *Bob’s* representations to Kathy during negotiations are not

evidence of her unexpressed subjective intent. Nor are the terms of the Sellen Stockholders' Agreement, which Bob told Kathy to consider in their negotiations, evidence of her unexpressed subjective intent. Bob himself confirmed both before and after finalizing the Separation Contract that because the Sellen Stockholders' Agreement would govern his ability to redeem Sellen stock, it was critical context for the parties' negotiations and agreement. (CP 67, 74) *See also* Restatement (Second) of Contracts § 202 comment d (1981) (context includes "other related writings affect[ing] the particular writing").

The Court of Appeals erroneously reasoned that it could ignore extrinsic evidence because "the separation contract includes a clear and unambiguous provision allowing Bob to prepay 'any or all' of the installments without penalty." (Op. at 9) Leaving aside that provision does not mean that "any or all" installments could be paid out of order, this Court in *Berg* "reject[ed] the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible." 115 Wn.2d at 669; *see also Brogan*, 165 Wn.2d at 775, ¶ 7 (a party may offer extrinsic evidence "regardless of whether the contract's terms are ambiguous"). The prepayment provision – like every other provision



– could not be interpreted without consideration of the extrinsic evidence proffered by Kathy.

The extrinsic evidence unequivocally supports Kathy’s interpretation of the disputed terms “installment” and “schedule.” During their negotiations Bob insisted “he can’t accelerate the redemption payments from Sellen” (CP 120) and relied on its Stockholders’ Agreement as proof. (CP 115: “The cash property transfer should be paid on the same terms as Bob is paid by Sellen for the stock”) Further, the Stockholder’s Agreement required Bob to give six months advance notice of any redemption, which can only occur on January 1<sup>st</sup> of each year. (CP 231) There is no evidence that Bob had given this required notice before the parties finalized the Separation Contract on November 21, 2016, and thus the earliest Bob could have redeemed any stock under the Stockholders’ Agreement was January 1, 2018. This informs why the Separation Contract listed the second installment – due on June 1, 2017 at the latest – before the third installment, which could not become due until sometime after January 1, 2018. (CP 203)

Had the parties intended that Bob would be free to violate the provisions of the Stockholders’ Agreement and redeem stock whenever he chose, they would not have focused so intently on it

during their negotiations, created a “schedule” consistent with the requirements of the Stockholders’ Agreement, and made provision for Kathy’s receipt of profit distributions that they knew would be made before Bob redeemed Sellen stock to make the third payment to her. Rather, the parties intended the Separation Contract would operate in conjunction with the Stockholders’ Agreement. Kathy agreed to “installment” payments in lieu of an immediate transfer payment only because she understood that the lost value of accepting a smaller overall transfer payment on the “schedule” set forth in the Separation Contract would be offset by Sellen profit distributions worth hundreds of thousands of dollars. (CP 15, 99)

*Berg’s “context rule”* applies to all contracts, including separation agreements. *Boisen v. Burgess*, 87 Wn. App. 912, 920, 943 P.2d 682 (1997), *rev. denied*, 134 Wn.2d 1014 (1998). The Court of Appeals’ refusal to consider extrinsic evidence is particularly troubling given the parties’ fiduciary duty to one another in this case. Spouses “do not deal with each other at arm’s length. Their relationship is one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement.” *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972). A spouse’s “fiduciary duty

does not cease upon contemplation of the dissolution of a marriage.” *Seals v. Seals*, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979). When one spouse asserts the existence or nonexistence of a fact, the other spouse is entitled to rely on that statement. *Seals*, 22 Wn. App. at 656. Far more than in a typical contract between two parties negotiating at arm’s length, Bob’s representations to his wife of 33 years were critical context that could not simply be ignored.

This Court has stressed the importance of clear and consistent rules for interpreting contracts. *See, e.g., Hearst*, 154 Wn.2d at 502, ¶ 18 (addressing the “confusion over the implications of *Berg*”). This Court should grant review because the Court of Appeals’ decision squarely conflicts with *Berg* and its progeny, and raises an issue of substantial public interest. RAP 13.4(b)(1)-(2), (4).

**2. The Court of Appeals’ decision that the trial court lacked authority to consider the wife’s allegations that the husband breached his fiduciary duty in the context of a post-decree enforcement action conflicts with *Langham* and other precedent.**

Although panel members recognized that Bob’s machinations to deprive Kathy of anticipated Sellen profit distributions were “fishy,” the Court of Appeals held the trial court was powerless to consider Kathy’s assertions that Bob breached his fiduciary duty by lying about his ability to accelerate redemption of Sellen stock

because she had styled her motion as one for contempt. That holding cannot be squared with this Court's precedent recognizing that a trial court has "the authority to use any suitable process or mode of proceeding to settle disputes over which it has jurisdiction," including a dispute over enforcement of a decree. *Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, ¶ 15, 106 P.3d 212 (2005) (internal quotation omitted). This Court should grant review because the Court of Appeals' decision conflicts with *Langham* and other precedent, needlessly confusing and complicating the law governing how spouses may enforce obligations in a decree. RAP 13.4(b)(1)-(2), (4).

In *Langham* this Court rejected an ex-husband's contention that the trial court could not consider his former wife's allegations that he had converted stock belonging to her, raised in a motion to enforce the decree, and that she was instead required to bring a separate tort action. 153 Wn.2d at 559-60, ¶¶ 14-16. This Court held that a court presiding over a motion to enforce a decree has "before it . . . a cause cognizable in equity" and "jurisdiction over the subject matter and the parties to be affected by its decree for all purposes – to administer justice among the parties according to law or equity." *Langham*, 153 Wn.2d at 560, ¶ 15 (quoted source omitted). This

Court stressed that “when the equitable jurisdiction of the court is invoked whatever relief the facts warrant will be granted.” *Langham*, 153 Wn.2d at 560, ¶ 15 (quote and alterations omitted); see also *Farmer v. Farmer*, 172 Wn.2d 616, 624, ¶ 16, 259 P.3d 256 (2011) (trial court properly reopened decree of dissolution to redistribute property after husband’s fraudulent conversion of stock options awarded to wife; “Dissolution proceedings invoke the court’s equitable jurisdiction”); *Newlon v. Alexander*, 167 Wn. App. 195, 203-04, ¶ 17, 272 P.3d 903 (2012) (“Even after a decree of dissolution, the superior court acting as family court has authority to resolve disputes between former spouses.”).

The Court of Appeals attempted to distinguish *Langham* and *Newlon* on the grounds that in both cases “the wife’s motion specifically requested adjudication of the husband’s tortious conduct.” (Op. at 12) But that is exactly what Kathy requested here – she brought a motion alleging Bob “breached his fiduciary obligation to carry out the terms of the parties’ Separation Contract and adhere to the Sellen Stockholders’ Agreement,” and asked the trial court to find that Bob “breached his fiduciary duty of good faith and fair dealing in redeeming Sellen stock.” (CP 175-76, 179-80, 185-86) The Court of Appeals’ conclusion that Kathy was required to seek

relief for these allegations “outside of [a] contempt motion” (Op. at 13) ignores that Kathy brought a “Motion for Contempt Hearing & to Enforce Separation Contract.” (CP 172 (emphasis added))

The trial court “had jurisdiction over . . . the parties via the equitable action to enforce the decree,” and the authority to determine whether Bob breached his fiduciary duty to Kathy. The Court of Appeals’ decision to the contrary conflicts with *Langham*, 153 Wn.2d at 560, ¶ 16. The Court of Appeals’ decision merits review for the additional reason that it confuses a critical area of law, appearing to needlessly impose on family law litigants the requirement that post-decree enforcement actions be pursued in a separate action. RAP 13.4(b)(4). Contempt motions are often used as the means to bring before the court issues of post-decree enforcement in family law cases. *See generally* Washington Family Law Deskbook, Washington State Bar Association, Ch. 67 – Use of the Contempt Power in Domestic Relations (2d Ed. & 2012 Supp.). That is not surprising given the number of statutes that authorize contempt proceedings in family law cases. *See, e.g.*, RCW 26.09.070(6) (separation agreements); RCW 26.09.160 (parenting plans); RCW 26.18.050 (child support and maintenance). Spouses whose marriages have been dissolved are necessarily already parties

to an action which they should be allowed to utilize to address post-decree enforcement issues. *See* RCW 26.09.010(6); RCW 26.09.050. At a minimum, they deserve clarity in what post-decree disputes can and cannot be adjudicated on the family law motion calendar. Rather than provide that clarity, the Court of Appeals muddled the law by misconstruing and needlessly limiting the trial court's authority, just as the trial court did in ruling that Kathy must bring a separate civil action to enforce Bob's duties to her.

This Court expressly rejected in *Langham* the contention that a spouse aggrieved by their former spouse's post-decree conduct must bring a separate action. Indeed, the lower courts have disapproved the use of separate actions to enforce former spouse's obligations to one another. *See Guardado v. Guardado*, 200 Wn. App. 237, 244-45, ¶¶ 22-24, 402 P.3d 357 (2017) (holding that spouse improperly sought modification of decree in separate action).

Bob violated his "highest fiduciary duties" to Kathy, which require spouses to "not only . . . enter into agreements in good faith but . . . to deal with each other fairly so that each may obtain the benefit of the other's performance." *Marriage of Lutz*, 74 Wn. App. 356, 369, 873 P.2d 566 (1994) (quoted source omitted); *Marriage of Sanchez*, 33 Wn. App. 215, 217-18, 654 P.2d 702 (1982). Just eight

days after finalizing the Separation Contract, Bob accelerated redemption of a token amount of stock by more than a year, in direct contradiction to his representation he “can’t accelerate the redemption payments from Sellen” and to the terms of the Sellen Stockholders’ Agreement. (CP 77, 120) In short, Bob lied to his wife of 33 years as part of a scheme to deprive her of hundreds of thousands of dollars in dividends the parties anticipated she would receive. The Court of Appeals placed form far above substance in refusing to consider Kathy’s allegations that Bob breached his fiduciary duty to her because of a supposed deficiency in motions practice. This Court should grant review. RAP 13.4(b)(1)-(2), (4).

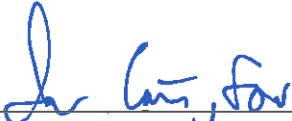
**F. Conclusion.**

This Court should grant review and reverse the Court of Appeals.




Dated this 22<sup>nd</sup> day of January, 2019.

MCKINLEY IRVIN

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Attorneys for Petitioner


**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 22, 2019, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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**DATED** at Seattle, Washington this 22<sup>nd</sup> day of January, 2019.

  
\_\_\_\_\_  
Andrienne E. Pilapil

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Marriage of

ROBERT P. McCLESKEY,

Respondent,

and.

KATHY A. McCLESKEY,

Appellant.

No. 77393-3-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: November 26, 2018

CHUN, J. — Robert (“Bob”) and Kathy McCleskey<sup>1</sup> entered into a separation contract as part of their marriage dissolution. Bob held significant stock from his employer. During negotiations leading to the contract, Bob claimed he could not immediately redeem his stock or accelerate the terms for redemption under the company’s shareholder agreement. As a result, the separation contract entitled Kathy to half of any profit distributions from Bob’s employer prior to his first stock redemption payment. But Bob redeemed his stock and ended the obligation to share profit distributions earlier than Kathy anticipated. Kathy filed a motion for contempt to enforce the separation contract for her share of a profit distribution, which the court denied. Kathy appeals, arguing the trial court erred by failing to hold Bob to the correct interpretation of

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<sup>1</sup> For clarity, this opinion refers to the parties by first name. We mean no disrespect.

the contract. We conclude the trial court interpreted the separation contract correctly and affirm.

I.  
BACKGROUND

Kathy and Bob married in 1982. Bob filed for dissolution in May 2015. The parties settled out of court, signing a CR 2A agreement at mediation in April 2016. After a dispute arose about implementation of the CR 2A agreement, the parties participated in binding arbitration before the neutral who had served as the mediator. They signed a separation contract and finalized their dissolution on November 21, 2016. The final dissolution decree incorporated by reference the separation contract.

Bob served as Chairman of the Board and CEO of Sellen Construction Inc. (Sellen) and held 10,000 shares of the company's stock at the time of dissolution. The stock paid profit distributions once per year in December. The separation contract states, "Profit Distribution amounts are any distributions to holders of shares of capital stock of Sellen other than Tax Distributions, and are set each year by Sellen's Board of Directors, based on the company's business income and need for working capital." Redemption of the stock shares generally occurred on retirement from Sellen after age 60. The 2012 Sellen Shareholder Agreement included specific procedures for early redemption of stock. After age 55, a shareholder could request to redeem up to 50 percent of held stock. According to the terms of the Shareholder Agreement, redemption occurred only on January 1st and required six months' notice and approval of the Board.

The parties negotiated the separation contract with this stock redemption procedure in mind. Upon filing for dissolution, Bob provided Kathy a copy of the Sellen Stockholder Agreement and advised her to share the information with her counsel. The parties discussed the Shareholder Agreement extensively throughout mediation. While discussing possible acceleration of the cash transfers during arbitration, Bob represented through counsel, "[T]he only way he will be able to afford to pay Kathy a cash transfer installment is if he has received payment from Sellen for the redemption of his stock, and he can't accelerate the redemption payments from Sellen."

The separation contract divided the parties' assets, including the Sellen stock. The contract specified Kathy would receive 50 percent of any Sellen profit distributions paid to Bob *prior to* the first payment for redemption of his Sellen stock. The parties also agreed to a "schedule" of installment payments from Bob to Kathy with the following terms:

An equalizing non-taxable property transfer of \$3,335,159 cash plus interest, to be paid by the husband to the wife in six installments as follows:

- a. \$500,000 on or before April 29, 2016 (wife acknowledges receipt of this installment);
- b. \$500,000 on the closing of the sale of the Rancho Mirage house awarded to the husband or June 1, 2017, whichever is earlier;
- c. \$1,000,000 paid to the Trust (see below) within three business days of the husband's receipt of the first payment for the redemption (or other disposition) of his Sellen Construction Company Inc. ("Sellen") stock;

- d. \$500,000 paid to the Trust (see below) within three business days of the husband's receipt of the second payment for the redemption (or other disposition) of his Sellen stock;
- e. \$500,000 paid to the Trust (see below) within three business days of the husband's receipt of the third payment for the redemption (or other disposition) of his Sellen stock; and
- f. \$335,159 paid to the Trust plus accrued interest (see below) within three business days of the husband's receipt of the fourth payment for the redemption (or other disposition) of his Sellen stock.
- g. In the event that husband's Sellen stock is redeemed or otherwise disposed of in fewer than four payments, the balance of the \$3,335,159 cash payment owed to wife plus accrued interest shall be due and paid to the Trust within three business days of the husband's receipt of the final redemption (or other disposition) payment for his Sellen stock.

*Prepayment.* The husband may pre-pay any or all of the foregoing installments without penalty.

*Interest.* Installments a., b., and c. of the non-taxable cash property transfer shall not bear interest. Installments d., e., and f. shall accrue simple interest at 2.25% per annum from the date of the husband's receipt of the first payment for the redemption (or other disposition) of his Sellen stock to the date such installment (d., e., or f.) is paid to the wife. Notwithstanding the foregoing, if installment b. or c. is not timely paid, such installment shall bear interest at 2.25% per annum until it is paid to the wife. The interest accrued on installments d., e., and f. shall be paid on or before the due date for installment f.

Kathy and Bob signed the separation contract in November 2016, effective April 27, 2016, and incorporated the terms into their final dissolution decree entered on November 21, 2016.

Eight days later, on November 29, 2016, the Sellen Board approved Bob's redemption of 500 shares of stock, effective December 1, 2016. Bob received

the proceeds from the redemption on December 15, 2016, and transferred \$1 million to Kathy as installment c. under the separation contract. Bob also received a profit distribution from Sellen on December 22, 2016. He did not pay any portion of the profit distribution to Kathy.

By June 1, 2017, Bob had not sold the Rancho Mirage house or transferred the \$500,000 of installment b. to Kathy, as required by the schedule of payments in the separation contract. Interest began accruing on the \$500,000 as of June 1.

On June 14, 2017, Kathy filed a motion for contempt, asking the trial court to enforce the separation contract.<sup>2</sup> Specifically, she claimed the separation contract required payment of the installments in order, and Bob's \$1 million payment represented prepayment of installment b. and half of installment c. She requested the court order Bob to pay 50 percent of the profit distribution from December 2016 in keeping with the terms of the contract.

After a hearing, a King County Superior Court commissioner denied the motion. The commissioner ruled Kathy did not have a right to the profit distribution because "it was paid after she received \$1,000,000 upon the first redemption of the petitioner's Sellen stock" and "[t]here is no requirement in the Separation Contract that installment b. for \$500,000 be paid before installment c." The commissioner ordered Kathy to pay Bob \$5,000 in attorney fees.

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<sup>2</sup> Bob filed his own contempt motion regarding his access to family photographs and videos. His motion and resulting trial court decisions are not on appeal.

Kathy moved for revision of the commissioner's order. She again argued Bob failed to comply with the terms of the separation contract. She also claimed Bob breached his fiduciary obligation to carry out the terms of the agreement. The trial court conducted a hearing and denied the motion for revision. The trial court concluded the separation contract was clear and unambiguous on its face and declined to consider extrinsic evidence, including the Shareholder Agreement. The court explained, "The contract is clear. It may not have been what people thought. But this Court can't substitute or write in terms that aren't there or consider parol evidence or intent of parties that is directly in contravention of the signed contract." The language of the contract did not reflect a specific timeline for stock redemption and the trial court declined to read one into the terms. The court reasoned as follows:

If the intention of the parties had been that the stock payouts wouldn't start until 2017, then they could have negotiated and contracted for that, but they didn't. And if that was a condition precedent that they were expecting or assuming or intending based on whatever reason, then it either should have been in there or the parties can seek civil relief in terms of seeking to find . . . bad faith and dissolve the contract.

Kathy appeals.

## II. ANALYSIS

### A. Interpretation of the Separation Contract

Kathy moved for contempt to enforce the separation contract as allowed by the terms of the agreement incorporated into the dissolution decree and



RCW 26.09.070(6).<sup>3</sup> "A court in a dissolution proceeding has the authority to enforce its decree in a contempt proceeding." In re Marriage of Mathews, 70 Wn. App. 116, 126, 853 P.2d 462 (1993). Contempt of court is "disobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b). "In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order." In re Marriage of Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995).

A contempt determination rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Mathews, 70 Wn. App. at 126. A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons. In re Marriage of Eklund, 143 Wn. App. 207, 212, 177 P.3d 189 (2008).

Here, the parties incorporated the separation contract into the final dissolution decree. "When an agreement is incorporated into a dissolution decree, we must ascertain the parties' intent at the time of the agreement." In re Marriage of Smith, 158 Wn. App. 248, 255, 241 P.3d 449 (2010). The court attempts to determine the parties' intent "by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Subjective intent lacks relevance if intent can be

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<sup>3</sup> "Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms." RCW 26.09.070(6).

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determined from the actual words used. Hearst, 154 Wn.2d at 503-04. The court must examine the reasonable meaning of the words used, giving effect to their ordinary, usual, and popular meaning unless the entirety of the agreement demonstrates a contrary intent. Hearst, 154 Wn.2d at 504. "Courts will not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves." Condon v. Condon, 177 Wn.2d 150, 163, 298 P.3d 86 (2013).

A trial court may examine extrinsic evidence "for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties." Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 84, 60 P.3d 1245 (2003). Extrinsic evidence relating to the context of the agreement may be examined to determine the meaning of specific words and terms used, but cannot show "intention independent of the instrument" or "vary, contradict or modify the written word." Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). "[E]xtrinsic evidence of a party's subjective, unilateral, or undisclosed intent regarding the meaning of a contract's terms is inadmissible." RSD AAP, LLC v. Alyeska Ocean, Inc., 190 Wn. App. 305, 315, 358 P.3d 483 (2015).

The appellate court reviews the language of a separation contract in a dissolution decree de novo. Smith, 158 Wn. App. at 255.

Kathy claims the contract's use of the words "installment" and "schedule" connotes a series of events in succession and demonstrates the parties intended the payments to occur in a specific order. She does not contend Bob was in

contempt for failing to pay installment b., but by prepaying installment c. to avoid her entitlement to his profit distribution. Bob argues the terms “installment” and “schedule” do not establish a strict order of the payments.

The contract clearly specified Kathy’s entitlement to 50 percent of the profit distributions prior to Bob’s receipt of the first payment for stock redemption. Under the terms of the contract, Kathy’s entitlement to a share of the profit distributions ended after Bob’s first redemption of stock. For installment c., the contract did not include a date, deadline, or condition precedent other than Bob’s first redemption of stock. To require payment of the installments in strict sequence would add terms to the agreement inconsistent with the existing language. See Condon, 177 Wn.2d at 163.

A strict sequence would also improperly contradict the prepayment clause allowing Bob to prepay “any or all” installments. See Hollis, 137 Wn.2d at 695-96. Regardless of the meaning of “installment” or “schedule,” the separation contract includes a clear and unambiguous provision allowing Bob to prepay “any or all” of the installments without penalty. In this case, Bob chose to exercise his option to prepay installment c. Based on the plain language of the contract, he was within his rights to do so.

While Bob redeemed stock earlier than Kathy anticipated, her subjective intent is irrelevant in light of the language of the separation contract. See Hearst, 154 Wn.2d at 503-04. Reliance on extrinsic evidence related to the Shareholder Agreement would serve to modify the contract, rather than give effect to the

terms as written. This is an impermissible use of parol evidence. See Hollis, 137 Wn.2d at 695-96.

Because the separation contract allowed Bob to prepay any installment, his payment of installment c. before installment b. did not violate the terms of the agreement. When Bob redeemed the stock and paid the \$1 million to satisfy installment c., he terminated Kathy's entitlement to a share of the profit distribution. Bob's actions did not contravene the separation contract. Therefore, the trial court did not abuse its discretion in denying Kathy's contempt motion.

#### B. Breach of Fiduciary Duty

Kathy argues Bob violated his fiduciary duties to her by misrepresenting his ability to accelerate redemption of his stock. The trial court determined the issue was not properly before it on the contempt motion, and Kathy would need to bring a separate civil action on any such claims. Kathy contends the trial court had authority to resolve all issues relating to enforcement of the contract and urges reversal of the denial of the contempt motion due to breach of fiduciary duty.<sup>4</sup> A contempt motion cannot provide Kathy with the relief she seeks.

Spouses owe each other the highest fiduciary duty. In re Marriage of Lutz, 74 Wn. App. 356, 369, 873 P.2d 566 (1994). This duty does not cease during dissolution. In re Marriage of Sanchez, 33 Wn. App. 215, 218, 654 P.2d 702 (1982).

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<sup>4</sup> Bob contends Kathy failed to raise the issue of fiduciary duty below. The record shows Kathy's counsel raised the issue of fiduciary duty and good faith and fair dealing in argument for revision of the order on contempt.

[A] party to a property settlement agreement owes a fiduciary obligation and a duty of good faith and fair dealing to attempt to draft formal contract language that will honor that agreement. Any deliberate effort to draft language intended to subvert the agreement is a breach of the fiduciary obligations of marriage and a blatant violation of the duties of good faith and fair dealing in the contractual relationship.

In re Marriage of Sievers, 78 Wn. App. 287, 311, 897 P.2d 388 (1995).

Kathy cites In re Marriage of Langham and Kolde, 153 Wn.2d 553, 106 P.3d 212 (2005), to support the trial court's authority to reach the issue of breach of Bob's fiduciary duty. In Langham, the wife moved for entry of judgment for conversion against her former husband after he exercised stock options awarded to her upon dissolution of their marriage. 153 Wn.2d at 556. The trial court heard and decided the case on the family law motion calendar. Langham, 153 Wn.2d at 560. The Washington State Supreme Court upheld this decision, noting "[t]he superior court unquestionably has authority to enforce property settlements. It further has the authority to use 'any suitable process or mode of proceeding' to settle disputes over which it has jurisdiction, provided no specific procedure is set forth by statute and the chosen procedure best conforms to the spirit of the law." Langham, 153 Wn.2d at 560 (citation omitted) (citing RCW 26.12.010; RCW 2.28.150). The trial court had jurisdiction over the subject matter and parties through the equitable action to enforce the dissolution decree and properly acted within its authority to enforce the property settlement. Langham, 153 Wn.2d at 560.

Similarly, in Newlon v. Alexander, 167 Wn. App. 195, 272 P.3d 903 (2012), Division Three concluded the trial court had jurisdiction over a post-decree dispute involving the remains of the parties' child. The parties filed a motion requesting the court determine the disposition of their son's remains. Newlon, 167 Wn. App. at 198. The appellate court concluded, "[e]ven after a decree of dissolution, the superior court acting as family court has authority to resolve disputes between former spouses." Newlon, 167 Wn. App. at 203-04.

Kathy contends Langham and Newlon demonstrate the trial court's ability to reach any issue in equity as part of an action in equity to enforce the dissolution decree. However, the procedural postures of these cases differ from the case at hand. In Langham, the wife moved to enter judgment for conversion against the husband, and he admitted the facts relevant to the tort of conversion. 153 Wn.2d at 558, 560. Thus, the wife's motion specifically requested adjudication of the husband's tortious conduct and the question was squarely before the trial court. Similarly, in Newlon, the parties filed a motion requesting the trial court resolve their dispute. 167 Wn. App. at 198. The parties placed the specific issue before the court for resolution.

Here, Kathy filed a motion to hold Bob in contempt for failing to obey the court-ordered dissolution decree. As a motion for contempt, the only question before the court was whether Bob disobeyed the court's order. Resolution of this issue required the trial court to determine the meaning of the separation contract and Bob's compliance with that agreement. Bob's duty to Kathy and his conduct was not before the court on the limited motion. Therefore, the trial court properly

concluded Kathy needed to bring her claims of breach of fiduciary duty and good faith outside of the contempt motion.

C. Attorney Fees

Bob and Kathy both request attorney fees pursuant to RAP 18.1(a) and the provisions of the separation contract. The separation contract includes a provision for attorney's fees, "[i]n any proceeding brought to enforce this Contract, the prevailing party shall be awarded his or her reasonable attorney's fees and costs." Because Bob prevails on appeal, he is entitled to his reasonable attorney fees and costs.

Affirmed.

Chun, J.

WE CONCUR:

Andrus, J.

Becker, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

In the Matter of the Marriage of  
ROBERT P. McCLESKEY,  
  
Respondent,  
  
and.  
  
KATHY A. McCLESKEY,  
  
Appellant.

No. 77393-3-I

ORDER DENYING MOTION FOR  
RECONSIDERATION AND  
MOTION TO PUBLISH

The appellant, Kathy A. McCleskey, filed a motion for reconsideration. A panel of the court determined that the motion for reconsideration should be denied.

The appellant also filed a motion to publish. A panel of the court considered its prior determination and has found that the opinion will not be of precedential value.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and

ORDERED that the unpublished opinion filed November 26, 2018, shall remain unpublished.

  
\_\_\_\_\_  
Judge



**SMITH GOODFRIEND, PS**

**January 22, 2019 - 3:16 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 77393-3  
**Appellate Court Case Title:** In re the Marriage of Robert P. McCleskey, Respondent v. Kathy A. McClesky, Appellant  
**Superior Court Case Number:** 15-3-03204-0

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