

70164-9

70164-9

NO. 70164-9-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

PETER SPOUSE,

Appellant,

v.

KELLY GRACE,

Appellee.



APPELLANT'S REPLY BRIEF

Randy Barnard
Attorneys for Appellant
Barnard & Searing, PLLC
1800 – 112th Avenue NE, Suite 265E
Bellevue, WA 98004
425-454-4800
Fax 425-454-6575

TABLE OF CONTENTS

	<u>Page</u>
I. Argument	1
1.1 The Property Settlement Agreement does not require Appellant to reimburse Respondent for taxes due on her K-1 income.....	1
1.2 It was error for the trial court to award Respondent attorneys fees.....	7
1.3 It was error for the trial court to award Respondent's professional fees.....	10
II. Conclusion	11

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<u>Berg v. Hudesman</u> , 115 Wn.2d 657, 801 P.2d 222 (Wash. 1990).....	2, 3, 4, 5
<u>DP Aviation v. Smiths Industries</u> , 268 F.3d 829 (9 th Cir 2001).....	1
<u>Stender v. Twin City Foods, Inc.</u> , 82 Wn.2d 250, 510 P.2d 221 (1973).....	3
<u>Statutes</u>	
RCW 4.84.330.....	7, 8

I. ARGUMENT

1.1 The Property Settlement Agreement does not require Appellant to reimburse Respondent for taxes due on her K-1 income.

Section 7.5 of the Property Settlement Agreement provides:

Income Taxes. The parties prepared and filed a joint tax return for calendar year 2010. Husband and wife shall be equally responsible for any taxes, penalties, or interest later assessed by the IRS related to this return. The parties shall file separate income tax returns for calendar year 2011 and each party shall be responsible for any and all taxes due on his or her own earned income and income or deductions generated by assets awarded to him or her by this Agreement.

CP 152. The court below erroneously relied on this provision to conclude that Appellant had a duty to reimburse Respondent for the portion of her personal income tax liability derived from the pass through income on her TelcoPrime K-1 for which she had not received cash from the company. By doing so the trial court essentially rewrote the parties' contract and construed the agreement contrary to the acknowledged intent of the parties.

In DP Aviation v. Smiths Industries, 268 F.3d 829 (9th Cir 2001) the court summarized the basic tenets of contract interpretation in Washington as follows:

Washington law holds that “extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.” *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222, 229 (Wash.1990). In *Berg*, the Washington Supreme Court also expressly adopted the RESTATEMENT (SECOND) OF CONTRACTS §§ 212, 214(c) (1981) to determine the intent of contracting parties. 801 P.2d at 229. Section 212 provides:

- (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
- (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.

Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

801 P.2d at 229 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981)). *Berg* also relied on comment b to that section, which provides, in part:

Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

At 837.

In this case the trial court relied solely on the language in the agreement to reach its decision. RP, p. 25, Ins 9-15.

The court did not attempt to construe the agreement to conform to the intent of the parties. That intent, acknowledged by the Respondent, was that the two parties expected to divide their assets so each would receive approximately 50% of the total assets.

The intent of the Agreement, as demonstrated through the parties' settlement discussions, was that all assets and liabilities of the marriage be divided 50/50. See Grace Declaration and Exhibit 3, Settlement Spreadsheets.

Motion to Enforce Terms, CP 121-2; See also Declaration of Kelly Grace, CP 138. Since the court below did not rest its interpretation of the agreement upon the credibility of extrinsic evidence or what inferences should be drawn from such evidence, the interpretation of the agreement is a question of law. DP Aviation v. Smiths Industries, supra. This court should apply the lessons of Berg v. Hudesman, 115 Wn.2d 657, 801 P.3d 222 (1990) and consider:

. . . the contract as a whole, the subject matter and object of the contract, all circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg, supra., at 228 quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 510 P.2d 221 (1973). Applying these considerations in

this case leads to the conclusion that the ruling of the trial court was erroneous.

The first, and most critical, consideration is the undeniable intent of the parties to divide their assets 50/50. As they negotiated their agreement the parties worked with each other to prepare a spreadsheet on which they made adjustments so that the division of assets was equal. As the Respondent stated in the declaration she presented to the trial court:

Peter and I negotiated the terms of our settlement ourselves. At all times we intended to divide our marital assets equally. This is shown in our settlement spreadsheet, entitled "Personal financial Report – Peter & Kelly 112910" which confirms that Peter and I were both intended to receive ½ of the estate. Many of the assets are non-valued but explicitly "split 50/50" and others are "split per spreadsheet." The bottom line on the last page shows that Peter and I intended to balance the asset division so that we each received ½ of the valued assets. See Exhibit 3, Asset Division Spreadsheet.

CP 138. However, despite this unequivocal expression of the parties' intent the trial court's order creates a staggering imbalance in the division of the parties assets.¹

A reading of "the contract as a whole", as Berg requires, confirms that the trial court's ruling was in error. If Section 7.5 and

¹ See Appellant's Opening Brief p. 15.

7.7 of the Property Settlement Agreement were intended to require Appellant to reimburse Respondent for taxes payable by her on pass through income, the agreement would necessarily provide a mechanism to determine the amount of the obligation and a deadline for payment of Appellant's obligation. The agreement, however, is silent on these issues and does not introduce the concept of reimbursement.²

A further Berg consideration that runs contrary to the trial court's interpretation of the contract is the "subsequent acts and conduct of the parties." Here, it did not even occur to Ms. Grace that an obligation to reimburse her for taxes on her pass through income existed. In fact, Respondent's Motion to Enforce included only the following in its Statement of Issues:

Whether the court should issue an order enforcing the terms of the September 29, 2011 PSA and the agreement of the parties such that Petitioner (1) is awarded her half of the adjusted unpaid earnings of the company in the amount of \$173,385; (2) issued a corrected K-1 form for 2011 which allocates distributions to her in the amount of \$171,386 for 2011; (3) is paid a sufficient amount to satisfy her 2011 tax burden as it relates to income and distributions paid to her; (3) is provided with clean title to the 2008 Denali XL awarded to her; and (4) is awarded attorney fees and professional costs in the amount of \$28,710.

² The assertion in Respondent's Brief that Appellant's attorney participated in drafting the agreement is contrary to the evidence. CP 264.

CP 127. Thus, the concept that the agreement required Appellant to reimburse Respondent for a portion of taxes she was obligated to pay was developed only after the fact as Respondent's other legal theories proved untenable.

The court commissioner who first ruled on Respondent's motion concluded reasonably that the date of the dissolution established a line. Each of the parties would be liable for the taxes on the pass through income generated prior to that date and Appellant would be liable for the taxes on the pass through income generated after that date. The reasonableness of this approach is immediately apparent. Until that date Appellant and Respondent were 50/50 owners of the company each receiving equal benefit from ownership. After that date only Appellant was getting the benefit of owning the company. It only makes sense that each should bear the tax responsibility associated with being an owner for the period in which they were an owner and were enjoying the benefits of ownership. The trial court's interpretation, on the other hand, results in a lopsided allocation entirely inconsistent with the indisputable intent of the parties. The concept that the Appellant would be responsible to pay a portion of Respondent's personal tax

liability is problematic also because the magnitude of that liability is determined by a number of factors including Respondent's other taxable income and available deductions. CP 387.

1.2 **It was error for the trial court to award**

Respondent attorneys fees.

Respondent argues that RCW 4.84.330 is not applicable to this case because the Property Settlement Agreement at issue here contains a distinct formula for determining whether a party is entitled to recover its attorneys fees:

Contrary to Spouse's argument, RCW 4.84.330 does not apply to this case. The award of attorney's fees is not an issue of who was the prevailing party. The proper analysis in applying ¶9.6 is not to review the claims and determine who won which and by how much. The PSA provided the parties with a different standard to determine attorney's fees awards. The PSA standard is far simpler and far more direct than that contained in RCW 4.84.330.

Brief of Respondent/Wife pgs 13-14. To the contrary, however, the plain terms of the statute clearly apply.

RCW 4.84.330

Actions on Contract or lease which provides that Attorneys' fees and costs incurred to enforce provisions be awarded to one of parties – Prevailing party entitled to attorneys' fees – Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which

are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

(Emphasis added.)

The action below was an action to “enforce the provisions” of the Property Settlement Agreement. It was entitled “Motion to Enforce Terms of 9/29/11 property Settlement Agreement. CP 121. The relief requested was for an “. . . order enforcing the terms of the September 29, 2011 PSA . . .” CP 127. Consequently, the attorney fee provisions in the Property Settlement Agreement fall squarely within RCW 4.84.030. As a result the prevailing party in the action, whether the party is seeking relief or defending the action, is entitled to recover its attorneys fees.

In this case Respondent sought five kinds of relief:

- 1) Judgment in the sum of \$173,385 for “unpaid earnings”;
- 2) Order requiring that she be issued a “corrected K-1” showing pass through income of \$171,386;

- 3) Judgment in an amount sufficient to “satisfy her 2011 tax burden as it relates to income and distributions paid to her”;
- 4) Order requiring delivery of clear title to the Yukon Denali;
- 5) Award of “attorneys fees and professional costs.”

CP 127.

The trial court denied Respondent’s request for a judgment for unpaid earnings. RP pg 22, ln 17-pg 23, ln 13.

The trial court also denied the request to order “correction” of the K-1. RP pg 35, lns 14-20. In her brief to the court the Respondent persists in suggesting that the K-1 received by the Respondent was manipulated by the Appellant to artificially shift tax liability onto the Respondent notwithstanding clear evidence that the contents of the K-1 are dictated by the Internal Revenue Service rules, CP 307-313, 387-9, and the trial court’s determination that the K-1 is what it is.

Thus, in the court below the Appellant prevailed to as great, or greater, extent than did Respondent. The right of Appellant to recover attorneys fees on the claims where he prevailed should have offset the attorneys fee claim of Respondent. Award of attorney fees without an offset was error.

Respondent's brief does not address the trial court's failure to state the basis for the award or the method used to determine the reasonableness of the requested fees.³ The award of attorney fees must be reversed on this ground, as well.

1.3 **It was error for the trial court to award**

Respondent's professional fees.

Section 9.6 of the Property Settlement Agreement provides in part:

Any party failing to timely carry out the terms of this Agreement shall be responsible for any court costs and reasonable attorney's fees of the other party incurred as the result of such failure. The law applied shall be the law of the State of Washington.

CP 155. The fees charged by Respondent's accountant, Julia de Haan, were neither attorneys fees nor court costs as defined by Washington law. See Appellant's Opening Brief pgs 19-20. The trial court did not identify any authority under which it ordered Appellant to pay Ms. de Haan's fees and no such authority is identified in Respondent's Brief. The assertion that it would be inequitable to require Respondent to pay her own expert because she needed the expert's assistance with the case is one that could be made anytime a litigant hires an expert. Notwithstanding,

³ See Appellant's Opening Brief pg 17-18.

Washington law is clear that such expenses are not recoverable as court costs. Respondent's further argument that Ms. de Haan should be paid by the Appellant because the trial court asked her to calculate the tax due is unsupported by any legal authority and is misleading. Ms. de Haan did not calculate the tax. The Respondent engaged a different CPA for that task. CP 453.

IV. CONCLUSION

The trial court's ruling that Appellant breached the PSA should be reversed and the decision of the family court commissioner reinstated. The award of attorneys' fees and costs must also be reversed. In the alternative, the award of attorneys' fees must be reduced to account for unsuccessful claims. The award of costs must also be reversed.

DATED this 6th day of December, 2013.

Respectfully submitted,


Randy Barnard
WSBA No. 8382
Attorneys for Appellant