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NO. 73038-0

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

In Re the Marriage of

Diane Kownacki,

Respondent

And

Victor Vasquez,

Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPELLANT VICTOR VASQUEZ'S OPENING BRIEF

Lucky Lufkin
WA State Bar No. 33531
TSAI LAW COMPANY, PLLC
2101 Fourth Avenue, Suite 2200
Seattle, WA 98121
(206) 728-8000
Co-Counsel for Appellant, Victor
Vasquez

Suzanne K. Pierce
WA State Bar No. 22733
DAVIS ROTHWELL EARLE &
XÓCHIHUA, P.C.
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7097
(206) 622-2295
Co-Counsel for Appellant, Victor
Vasquez

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A. INTRODUCTION

The issue is whether, in interpreting the parties' settlement agreement, extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent. Court Commissioner and then Judge Rasmeyer incorrectly refused to consider Vasquez's extrinsic evidence. They supported their holdings with the guideline that "[only] paper modifies paper." No published case, in any federal or state court, includes the phrase "paper modifies paper." Rather, *Berg* and its progeny have long articulated the law of contracts in this state that extrinsic evidence is admissible to interpret the parties' intent in forming a contract, including an oral element of the contract. The trial court decisions ignored and contradicted *Berg*, and should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Vasquez's motion to enforce the judgment, by order dated October 6, 2014.
2. The trial court erred in denying Vasquez's motion for revision of the commissioner's ruling denying his motion to enforce, by order dated January 9, 2015.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Satisfaction of Judgment is part of a contract between the parties to the judgment. (Assignments of Error #1, 2)

2. Whether Vasquez may introduce extrinsic evidence (*i.e.*, his own testimony) to support his contention that a contract existed, of which the Satisfaction of Judgment is a part. (Assignments of Error #1, 2)

3. Whether Vasquez may introduce extrinsic evidence (*i.e.*, his own testimony) to support his contention that the mutual intent of the parties regarding the Satisfaction of Judgment was to reflect a payment of \$115,000 from Kownacki to Vasquez. (Assignments of Error #1, 2)

4. Whether Vasquez may introduce extrinsic evidence (*i.e.*, his own testimony) to support his contention that one element of the parties' contract was that Kownacki would pay Vasquez \$115,000 in exchange for Vasquez executing the Satisfaction of Judgment. (Assignments of Error #1, 2)

D. STATEMENT OF THE CASE

The Parties:

Respondent Diane Kownacki (“Kownacki”) was the wife of Appellant Victor Vasquez (“Vasquez”). This appeal arises out of the property settlement in their marital dissolution.

The Dissolution:

Kownacki and Vasquez divorced in April 2009, agreeing in their property settlement that by April 2014 she would give him \$115,000 for his half of their shared house. (CP 4, at lines 15-25.)

The Post-Judgment Litigation:

In August 2014, Vasquez moved to enforce the judgment. (CP 3-6.) He declared that Kownacki had never paid Vasquez the \$115,000. (CP 4, at lines 31-33.) In response, Kownacki admitted that she had never paid Vasquez the \$115,000, rationalizing that “I do not have the money to pay Victor [Vasquez].” (CP 15, at lines 6-7.)

Kownacki then produced two Satisfactions of Judgment (one partial and one full) from Vasquez, both dated mid-2012. (CP 48-49, CP 45.) Kownacki asserted – extrinsic to the Satisfactions of Judgment themselves -- that she guessed Vasquez had “forgiven” her debt to him as a balance “for [his] not having participated as a parent.” (CP 15, at lines 22-25, and CP 16, at lines 1-2.) Elsewhere in the same declaration, Kownacki guessed that Vasquez hoped to exchange her \$115,000 owing to him, with the mere \$27,000 he owed her on a separate issue. (CP 14, at lines 24-25; CP 16, at lines 17-19.)

In contrast, Vasquez offered the extrinsic testimony that he had signed the Satisfactions of Judgment so that Kownacki could refinance the

house (in August 2012) and thus finally pay him the \$115,000 she owed. (CP 60, at lines 43-47 and CP 61, at lines 1-5, 13-27.) In other words, Kownacki paying Vasquez \$115,000 was one (orally-expressed) element of the parties' contract that consisted *only in part* of the Satisfaction of judgment.

Decisions Below:

The court commissioner denied Vasquez's motion (CP 105-106.) She explained at oral argument:

It's been a billion years since I was in law school, but I remember with commercial paper, paper modifies paper. He had a judgment. He satisfied it.

* * * *

I don't think you can go outside of the written document for evidence when it comes to commercial paper. I could be right – wrong. But if I am wrong, it will have to be a judge saying it.

(VR of 10/6/14 hearing, at 7:22-25, 9:3-7); and then held:

The court bases its ruling on the premise that paper modifies paper under the law dealing with commercial paper, and notes and [sic] that the only writing in evidence is a Satisfaction of Judgment entered subsequent to the promissory note and deed of trust....

(CP 106.) After Vasquez's motion for revision of the commissioner's order, trial court judge Judith Rasmeyer declined to revise it, citing factual disputes:

Respondent [Vasquez] filed in this case a Satisfaction of Judgment. He now implies it was fraudulently induced, which Petitioner [Kownacki] denies. A factual dispute of this nature cannot be decided in this proceeding or on this record.

(CP 105.)

Vasquez then appealed both orders. (CP 128-132).

E. ARGUMENT

In order to support her argument that Vasquez is not entitled to payment for the \$115,000 judgment, Kownacki relies on *Hearst Commc'ns* and its holding that the “objective manifestation” of a written agreement control. *Hearst Commc'ns v. Seattle Times*, 154 Wn.2d 493, 115 P.3d 262 (2005). But Kownacki’s reliance is misplaced.

It is hornbook contract law that a court is to ascertain the intent of the contracting parties by “viewing the contract provisions as a whole, the subject matter and objective of the contract, all the 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 v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

Vasquez’s Satisfaction of Judgment is (part of) a contract. Our supreme court has held that “a release is a contract and its construction is governed by contract principles subject to judicial interpretation.” *Barton v. Dep’t of Transp.*, 178 Wn.2d 193, 209, 308 P.3d 597 (2013). “A court’s primary task in interpreting a written contract is to determine the intent of the parties.” *Id.* In *Shelby v. Keck*, the court found that an agreement

whereby one party received money and the other party agreed not to execute a judgment was a settlement agreement governed by general contract principles. 85 Wn.2d 911, 541 P.2d 365 (1975). As held in *Berg* and its progeny, in evaluating a parties' contract, "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." 115 Wn.2d at 667.

In *Dave Johnson Ins., Inc. v. Wright*, Division Two explained *Hearst Commc'ns*, and held that a party *could* introduce extrinsic evidence to support its contention that an agreement existed. 167 Wn. App. 758, 771, 275 P.3d 339 (2010). In *Wright*, the plaintiff hired his son-in-law, defendant, to work at plaintiff's insurance company. Plaintiff claimed that his intent in hiring defendant was so that defendant could be plaintiff's successor to the business. As a result, plaintiff executed a buy and sell agreement with defendant providing defendant with a right of refusal in the event that plaintiff died or became incompetent. The agreement provided that defendant's purchase of the business could be funded by life insurance. At the same time that plaintiff executed the buy and sell agreement, he also transferred two personal life insurance policies providing payment to defendant in the event of plaintiff's death. Plaintiff testified at trial that he did this because he was concerned that defendant would not have the financial means to execute the buy and sell agreement

if plaintiff died. Plaintiff further contended that the only reason that he transferred the existing life insurance policies to defendant was for the purpose of giving defendant the financial ability to execute the buy and sell agreement if plaintiff died, and that defendant had a “clear understanding” that the transfer of plaintiff’s life insurance policies was for the sole purpose of funding the buy and sell agreement. *Id.* at 765-66. Defendant opposed plaintiff’s contentions that the insurance policies were transferred for the purpose of funding the buy and sell agreement. Defendant claimed that plaintiff transferred the policies to defendant as a gift. Several years later, plaintiff and defendant’s relationship had deteriorated, and defendant resigned from the company. Defendant did not return the insurance policies, and plaintiff brought suit to recover them.

The issue in *Wright* was “[w]hether there was any agreement (written or oral) between the parties requiring [defendant] to return the insurance policies . . . in the event of employment termination.” *Id.* at 768. “The touchstone of contract interpretation is the parties’ intention, which we attempt to determine by focusing on the agreement’s objective manifestations.” *Id.* at 769 (citations omitted). “If relevant for determining mutual intent, we may use surrounding circumstances and other extrinsic evidence to determine the meaning of specific words and

terms used, but not to show an intention independent of the instrument or to vary, contradict, or modify the written word.” *Id.* The court found that, following this reasoning, plaintiff could not introduce oral evidence that the agreement was supposed to contain a term that defendant would return the insurance policies if he terminated employment because that term was not found in any provisions. However, the court held that plaintiff’s oral testimony *could* be offered to show an oral agreement “reflecting the purpose of the insurance policies transfer from plaintiff to defendant.” *Id.* at 771. “People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the court’s duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.” *Id.* (citations omitted). “Whether the oral agreement is viewed conceptually as a separate ‘collateral contract’ or as a ‘partially integrated contract’ with one part oral and the other part written, the intent of the parties is the critical fact to be ascertained.” *Id.*

Following the reasoning of *Berg*, the *Wright* court found that because plaintiff’s extrinsic evidence was determined to be more credible that “the parties’ purpose (intent) as articulated in [plaintiff’s] testimony controlled” and that the policies should therefore be returned. *Wright*, 167 Wn. App. at 773. Based on the fact that the buy and sell agreement

contained no integration clause and that it was signed on the same day that the policies were transferred, the court found that “the parties’ intent at the time the policies were transferred form[ed] the basis of the agreement regarding the life insurance policy transfer to [defendant].” *Id.* at 772. The end result of the court allowing plaintiff to introduce extrinsic evidence (oral testimony) of a provision that was not expressly included in a contract was that defendant was required to return the insurance policies to plaintiff upon termination of employment.

In this case, Vasquez filed a satisfaction of judgment for the \$115,000 that he was owed so that Kownacki could refinance the real property that the lien was encumbering. Vasquez only filed the satisfaction of judgment because Kownacki promised that she would repay the Vasquez the sum of \$115,000 pursuant to the final decree of dissolution. Vasquez’s repayment of the \$115,000 was thus an additional, oral term of their contract. Kownacki argues that the words contained in the satisfaction of judgment control over the “subjective intention” of Vasquez, and therefore Vasquez cannot introduce evidence of the “future payment” that he expected Kownacki to pay. However, as the court held in *Wright*, parties have the right to make their agreements partly oral and partly in writing. Similar to *Wright*, Vasquez executed a transfer (satisfaction of judgment as opposed to insurance policies) on the

understanding that he would be re-paid, and it was solely for the benefit of Kownacki. Therefore, the commissioner erred in refusing to hear Vasquez's extrinsic evidence that there was a "collateral contract" or that the satisfaction of judgment was a "partially integrated contract." Vasquez should be permitted to introduce extrinsic evidence to show that the "parties' intent at the time the" satisfaction of judgment was signed "formed the basis of the agreement regarding" Vasquez signing the satisfaction of judgment.

According to Kownacki, Vasquez "released" the judgment that Kownacki owed him in exchange for the compromise of the claimable child support debts. Therefore, Kownacki and Vasquez had a settlement agreement, which is governed by general contract principles. As held in *Berg*, the commissioner should have admitted Vasquez's extrinsic evidence proving that there was an understanding or collateral contract that Kownacki was still to repay the \$115,000.

D. CONCLUSION

The commissioner's order denying Vasquez's motion to enforce the judgment, and the judge's order denying Vasquez's motion for revision of the commissioner's ruling, should each be reversed. This case should be remanded for further action (calculations) on Vasquez's motion to enforce the judgment.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by several smaller, connected loops and a final horizontal stroke.

Suzanne Pierce, WSBA No. 22733
Co-Attorney for Appellant

DECLARATION OF SERVICE

I, Kristine Dirsie, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of APPELLANT VICTOR VASQUEZ'S OPENING BRIEF via U.S. mail, first class, postage prepaid, to all counsel of record as follows:

Dominik Musafia
Wechsler Becker
701 5th Avenue, Suite 4550
Seattle, WA 98104
Phone: (206) 624-4900
Email: dom@wechslerbecker.com

Counsel for Respondent

Valerie A. Villacin
Catherine Smith
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA 98109-3007
United States
Phone: (206) 624-0974
Email:
valerie@washingtonappeals.com
cate@washingtonappeals.com

Counsel for Respondent

DATED at Seattle, Washington, on this 30th day of September,
2015.


Kristine Dirsie