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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

CARY FALK, a single man, Respondent/Plaintiff, vs. TIMOTHY J. EPHREM and TINA EPHREM, husband and wife, and the marital community composed thereof, Appellant/Defendants.	CASE NO. 34988-4-II **RESPONDENT'S MOTION ON THE MERITS**

A. IDENTITY OF THE MOVING PARTY

Respondent Cary Falk is the moving party.

B. STATEMENT OF RELIEF SOUGHT

Respondent Cary Falk moves for an order affirming the decision of the Pierce County Superior Court dated May 19, 2006 entitled *Order Denying Defendant's Motion to Vacate* (CP 270-271) and the decision dated August 11, 2006 entitled *Order Granting Plaintiff Motion for Attorney Fees* (CP 348-349).

C. FACTS RELEVANT TO MOTION

1. Background

Cary Falk is the Respondent/Plaintiff.

ORIGINAL

Tim Ephrem and Appellant Tina Ephrem[1] are Gypsies. CP 261. They purport that they are not legally married because marriage is not recognized in their ethnic background as Gypsies. They do however, live together, have a child as issue of their relationship and profess to be second cousins. CP 205. Aside from a marriage license they appear to be a married couple. Sharing the same last name.

2. Commencement of the Action and Obtaining Order of Default

On September 1, 2005, the Plaintiff commenced a lawsuit against the Defendants. CP 1-8. On September 17, 2005, the Summons and Complaint in this action were served personally served upon the Defendants, Tim and Tina Ephrem. CP 9-10. No issue has ever been raised concerning service of process or sufficiency of process.

After waiting nearly forty-four (44) days following service of the summons and complaint in order to give these Defendants over twice the normal time period to appear, answer or defend, Plaintiff brought a Motion for an Order of Default against Defendants. CP 11-15. The Court granted Plaintiff's motion on October 31, 2005, and entered an Order of Default against the Defendants. CP 16-17. The Court further granted Plaintiff leave to conduct discovery in an effort to quantify Plaintiff's damages. CP 17.

[1] Only Tina Ephrem has chosen to appeal.

3. Service of Requests for Admission

On January 11, 2006, via personal service on both Defendants Tim and Tina Ephrem, the Plaintiff propounded Plaintiff's First Requests for Admission on the Defendants. CP 56-57. Despite personal service of the Requests for Admissions of Fact, these Defendants failed to make any response. No issue has been raised concerning service of Plaintiff's Requests for Admission.

4. Service of Motion to Deem Admission Admitted and Motion for Entry of Findings, Conclusions of Law and Judgment.

On February 16, 2006, after the Defendants failed to make any response to the Requests for Admission of Fact, Plaintiff's counsel mailed Plaintiff's Motion to Deem Admission Admitted and Plaintiff's Motion for Entry of Judgment together with all supporting pleadings and exhibits to these Defendants. CP 63-66. In order to assure timely and traceable delivery of these important pleadings, the same were sent to these Defendants via Express (overnight) Mail tracking number EQ34 1083 453U S. The very next day, on February 17, 2006, the U.S Postal tracking shows that this mailing was delivery at 11:44 A.M. CP 66. After receiving all these pleadings on February 17, 2006, these Defendants still failed to make any response. Defendants Ephrem have never denied receiving service of the motion and supporting pleadings by mail.

In order to be absolutely certain that the important Express Mail was not overlooked, Plaintiff Falk insisted that the pleadings be personally served on the Defendants so that there would be no question as to the Defendants' receipt of these motions. Following Plaintiff Falk's directives, and in addition the Express Mailing of those documents, the Motion to Deem Admissions Admitted and the Motion for the Entry of Findings, Conclusions of Law and Judgment were personally served all over again by delivery to Defendant Tina Ephrem on February 21, 2006. CP 67-68.

After the service of these important Motions by both Express Mail and by personal service through the Office of the Pierce County Sheriff, these Defendants still failed to make any response. Defendants Ephrem have never denied receiving service of the motion and all the supporting pleadings.

5. Service of Plaintiff's Reply Brief

On February 28, 2006, Plaintiff's Reply, informed the Court that these Defendants failed to provide any response to the motions. A copy of Plaintiff's Reply was mailed to Defendants via Express Mail. CP 71-73. On March 1, 2006, these Defendants received Plaintiff's Reply via Express Mail (confirmation # EQ34 1083 524U S). CP 145. After their receipt of Plaintiff's Reply by Express (overnight) Mail on March 1, 2006,

Defendants still failed to make any response. Defendants have never denied receiving Plaintiff's Reply Brief.

6. Defendants' failed to appear in court for the hearing

On March 2, 2006, on the very date scheduled for trial, a hearing on Plaintiff's Motion was held before Judge Elizabeth Grant of the Pierce County Superior Court. Although the hearing was set for 9:00, the start time was delayed until 9:30. This provided extra assurance that these Defendants were not merely late but had knowingly elected not to appear to protest the relief requested by Plaintiff Falk. Defendants failed to appear for the hearing on these motions or for trial.

The Trial Court, being fully advised concerning this matter and the opportunities repeatedly given to these Defendants, GRANTED Plaintiff Falk's Motion to deem the Admissions Admitted. CP 69-70. Thereafter, this Court signed Findings of Fact, Conclusions of Law and entered Judgment against Defendants Tina and Timothy J. Ephrem all in precisely the same form as previously served on these Defendants. CP 74-82.

7. Defendants ignored a Certified Copy of the Findings of Fact, Conclusions of Law and Judgment and the Deadlines imposed in that Order.

The very next day, March 3, 2006, Plaintiff's counsel sent a certified copy of this Court's Findings of Fact, Conclusions of Law and

Judgment to the Defendants along with a letter requesting the Defendants compliance with the March 15, 2006 deadline set by the Court. This letter and the Certified Copy were sent by Express Mail (#EQ34 1083 538U S). Defendants failed to make any response even though they undeniably received this Express Mailing on March 4, 2006. CP 155. Defendants have never denied receiving the mailed copy of the Findings, Conclusions, Judgment or letter. The Court's March 15, 2006 deadline passed but the Defendants chose to ignore the Order of the Pierce County Superior Court.

8. Judgment Enforcement Action

On March 20, 2006, after the deadline for compliance with the Pierce County Superior Court's Order had gone unheeded, Plaintiff's counsel subpoenaed Granville Brinkman, who was believed to have property of the Defendants that was subject to the Judgment entered by this Court. CP 156-158. On March 20, 2006, notice of the deposition of Mr. Brinkman was mailed to Defendants via Priority Mail (confirmation #0305 2710 0000 7827 6006). This Priority Mailing was received by these Defendants the very next day on March 21, 2006. CP 158.

In a last minute effort to avoid enforcement of the Judgment, the Defendants finally appeared the very next day through an attorney, George Kelley, on March 22, 2006. CP 83-84.

9. Defendants' Motion to Vacate

On April 3, 2006, Defendants brought a Motion to Vacate (1) the Court's Order of Default; (2) the Court's Order Deeming Admissions Admitted; (3) the Court's Findings of Fact; (4) the Court's Conclusions of Law; and (5) the Court's Judgment before the Honorable Beverly Grant of the Pierce County Superior Court. CP 96-102.

On April 14, 2006, an initial hearing was held before this Court on Defendants' Motion to Vacate (1) the Court's Order of Default; (2) the Court's Order Deeming Admissions Admitted; (3) the Court's Findings of Fact; (4) the Court's Conclusions of Law; and (5) the Court's Judgment. At the conclusion of the hearing the Court permitted discovery after which the Defendants would be permitted to re-note their Motion to Vacate. VP April 11, 2006, pages 22-23.

On May 19, 2006, and following a second hearing on the record, the Honorable Judge Grant denied the Defendants' Motion to Vacate. CP 270-271.

On August 11, 2006, and following a hearing on the record, the Honorable Judge Grant granted Plaintiff attorney fees in the amount of $11,735.75. CP 348-349.

D. ISSUES

1. Has the Appellant failed to show that the Trial Court abused its discretion or that the Trial Court's exercise of discretion was manifestly

unreasonable or based on untenable grounds when the Trial Court denied Defendant's Motion to Vacate on May 19, 2006?

2. Has the Appellant failed to show that she is entitled to relief under the Servicemembers Civil Relief Act because she is not a servicemember, the Servicemembers Civil Relief Act applies only to default judgments, and this issue was raised for the first time on appeal?

3. Where the Appellant was given notice and a fair opportunity to defend against the judgment entered, and she fails to appear at the hearing, is Appellant precluded from objecting to the relief granted, even if it exceeds the demand in the complaint?

4. Is Appellant Tina Ephrem precluded from challenging the admissions that have become verities in the case?

5. Is the Homestead Act inapplicable to this case where the real property was not pledged to satisfy a debt?

6. Were Attorney's Fees properly awarded?

E. GROUNDS FOR RELIEF AND ARGUMENT

1. Trial Court did not abused its discretion nor did it exercise its discretion in a manifestly unreasonable manner or based on untenable grounds in denying the Defendants motion.

A motion to vacate or set aside a default judgment is addressed to the sound discretion of the trial court. **Prest v. American Bankers Life Assur. Co.**, 79 Wash.App. 93, 900 P.2d 595 (1995). A trial court's decision in this regard will not be disturbed on appeal unless the trial court abused its discretion. **Id**. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. **Id**.

In ruling on a motion to vacate the entry of an order of default, the court should consider whether the moving party has (1) a defense on the merits and (2) whether the "moving party's failure to timely appear in the action ... was occasioned by mistake, inadvertence, surprise or excusable neglect." **Hwang v. McMahill**, 103 Wn. App. 945, 15 P.3d 172 (2000) citing **White v. Holm**, 73 Wn.2d 348, 438 P.2d 581 (1968). Division Two has stated that both these conjunctive requirements are of equal importance. See **Prest**, 79 Wash.App. at 100.

In this case, the Appellant Tina Ephrem and Tim Ephrem moved to vacate the orders granted to Plaintiff based on alleged illiteracy and their failure to obtain counsel. CP 97. The Trial Court was extensively briefed regarding these issues and denied the relief requested by the Appellant Tina Ephrem and Tim Ephrem. Not only was the Trial Court well within its discretion to deny Defendants' Motion to Vacate, but Trial Court's decision was mandated by prior Washington cases.

Specifically, the Trial Court was presented with the case of **Moody v. Reichow**[2] following the April 21, 2006 hearing. CP 218-219. In **Moody**, our Supreme Court found that that defendant failed to present any excuse justifying vacation of the default and judgment upon the claim that the defendant had an imperfect understanding of the English language.

[2] 38 Wash. 303, 80 P. 461 (1905)

Moody, at 307. The court called the defendant's conduct 'persistent neglect' which did NOT justify vacation of the default and judgment. **Id**.

In **Moody**, our Supreme Court of Washington rejected the defendant's argument and specifically found that inability understand the English language is not excusable neglect where the defendant has not exercised diligence to protect his rights. **Moody**, at 308. In **Moody**, the court cited the Georgia case of **Sutton v. Gunn**, 86 Ga. 652, 12 S.E. 979 (1891) as follows:

> [In that case], **it was held that illiteracy will not excuse one from due diligence,** and that, if he is wrongly informed, such misinformation not being caused by any act or omission of the adverse party, he, like all other suitors, must abide the legal consequences of regular procedure in a pending action. It is said that the court was authorized to act with discretion. **Discretion must, however, be exercised for reasonable cause, and upon such grounds as may reasonably happen to a person in the exercise of ordinary diligence in the protection of his rights.** [3]

The Trial Court also heard argument on the Appellant Tina Ephrem's and Tim Ephrem's duty to protect their rights. Specifically, the was Trial Court was informed that parties of average prudence who have notice of sufficient facts have a 'duty to inquire.' *See* **Tjosevig v. Butler**, 180 Wn. 151, 38 P.2d 1022 (1934) (holding that notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of

[3] **Moody**, at 308 [Emphasis Added]

everything to which such inquiry might have led in the context of statute of limitations); *and see* **Enterprise Timber, Inc. v. Washington Title Ins. Co.**, 76 Wn.2d 479, 457 P.2d 600 (1969) (holding that one who has notice of facts sufficient to prompt a person of average prudence to inquire is deemed to have notice of all facts which reasonable inquiry would disclose in the context of fraud).

The Trial Court considered the fact that the Ephrems were personally served with court papers on three separate occasions and twice served by mail in the impressive packaging of Express Mail. In two of the personal services, Pierce County Sheriff Deputy Rick Wasson showed the servee(s) his official Sheriff's badge and told them that he had "Court Papers" for them. CP 237-238. Appellant Tina Ephrem was forced to admit that she failed to protect her own rights by relying on Tim Ephrem to handle this matter:

> Q Okay. Do you recall going to the door and getting papers in the Cary Falk case?
> A Yes.
> Q Okay. What did you do with the papers when you got them?
> A I gave them to Tim.
> Q And what did he say to you?
> A He told me he'll take care of it.
> Q So each time you went to the door and got papers in the Cary Falk case, you gave them to Tim?
> A Yes.[4]

[4] CP 251.

In this case, the Trial Court even continued the hearing on Defendants' Motion to Vacate for over 30 days so that further discovery could be provided for consideration. VP April 11, 2006, pages 22-23. When all the facts were before the Trial Court, the Trial Court concluded that Appellant Tina Ephrem and Tim Ephrem failed to establish the "excusable neglect" requirement. In particular the court noted:

> THE COURT: Doesn't she have a duty or an obligation to be diligent to protect any of her interest, especially when there has been service upon her even though she says I can't read? I relied on ——
> MR. KELLEY: She relied on Tim.
> THE COURT: Yes, but that's not a defense.
> . . .
>
> THE COURT: I just don't see -- and I hear your argument but I think that those arguments should have been raised in particular by Tina and that there is nothing to indicate that she, you know, if she is going to rely upon Ephrem to handle her real estate transactions or to defend in a lawsuit, she has an obligation to ensure that that is being done. Especially when she has been served. She knows some papers came with her name on it.[5]

This requirement is fatal to Appellant's pursuit of an order vacating the default.

In **Prest**, the appellate court reversed the trial court's grant of a motion to vacate because the defendants failed show that there failure to

[5] VP May 19, 2006, pages 16 and 19.

answer of excusable. **Prest**, 79 Wash.App. at 100. In **Prest**, the defendants failed to answer a complaint, which was properly served, because the complaint was mislaid when the person who was supposed to receive it was reassigned and was out of town. The appellate court concluded that defendants failure to make alternate arrangements was not excusable, and it was error for the trial court to vacate the default. **Id**.

In this case the Trial Court noted, "I just don't think that the arguments, the Ephrem's arguments, when I look at all of the facts presented, are credible al all." VP May 19, 2006, page 21.

2. Appellant is not entitled to relief under the Servicemembers Civil Relief Act because she is not a servicemember, the Servicemembers Civil Relief Act applies only to default judgments, and this issue was raised for the first time on appeal.

Appellant Tina Ephrem claims that the judgment taken against her is voidable based on the Servicemembers Civil Relief Act. Appellant's Brief at 16-18. This issue is raised for the first time on appeal. The law is clear, the Court of Appeals with not consider issues raised for the first time on appeal. See **Better Financial Solutions, Inc. v. Caicos Corp.**, 117 Wn.App. 899, 73 P.3d 424 (2003) citing **Bradbury v. Aetna Cas. & Sur. Co.**, 91 Wn.2d 504, 589 P.2d 785 (1979).

Even if the issue was properly before this Court, Appellant's reliance on the Servicemembers Civil Relief Act is misplaced.

First, Appellant Tina Ephrem admits she is **not** a servicemember. Appellant's Brief at 17. In **Lyle v. Haskins**, 24 Wn.2d 883, 168 P.2d 797 (1946) the Court recognized that the act is for the exclusive benefit of the serviceman. The serviceman alone can take advantage of it, and then only upon showing that the serviceman's interest has been deleteriously affected. **Lyle**, at 902.

Second, the Servicemembers Civil Relief Act applies only to default judgments not orders of default.[6] In this case, it is perhaps an unfortunate misnomer that the judgment is being referred to as a default judgment. In reality, the judgment taken against Appellant Tina Ephrem is just like the typical judgment obtained at the conclusion of a trial (on the date of trial), and therefore is not a default judgment to which the Act applies.

3. Appellant was given notice and a fair opportunity to defend against the judgment entered. She failed to appear at the hearing. Therefore she is precluded from objecting to the relief granted, even if it exceeds the demand in the complaint.

[6] **Interinsurance Exchange v. Collins**, 37 Cal.Rptr.2d 126, 30 Cal.App.4th 1445 (1994) (holding that Congress sought to protect military personnel not from default, but from default judgment).

Appellant Tina Ephrem claims Plaintiff is strictly limited to the relief requested in his complaint, and that the Trial Court lacked jurisdiction to award the relief granted. Appellant's Brief at 18-20. This issue was raised for the first time on appeal. The law is clear, the Court of Appeals with not consider issues raised for the first time on appeal.[7] Even if the issue was properly before this Court, which it is not, the Appellant's arguments are not well founded and the relief that she seeks must be denied.

In a typical default situation, plaintiff is permitted to obtain the judgment *ex parte*, without notice to the defendant. In fact, most default judgments, to the delight of plaintiffs, are obtained *ex parte* and without notice. Under those circumstances, a judgment which exceeds or contains relief not sought in the complaint is generally void. **Sceva Steel Buildings, Inc. v. Weitz**, 66 Wn.2d 260, 401 P.2d 980 (1965). As the Court of Appeals stated in **Rippe v. Doran**, 4 Wn.App. 952, 958, 486 P. 2d 107 (1971):

> The obvious purpose of, and underlying reason for, these rules regarding default judgments are to assure the defendant, who consciously allows a default judgment to be taken against him, that he may rest secure in the knowledge that the judgment will not be entered in excess of the complaint. (citation omitted). This effectively does no more than guarantee the defendant a right to notice and a

[7] See **Better Financial Solutions, Inc. v. Caicos Corp.**, 117 Wn.App. 899, 73 P.3d 424 (2003) citing **Bradbury v. Aetna Cas. & Sur. Co.**, 91 Wn.2d 504, 589 P.2d 785 (1979).

reasonable opportunity to be heard – in a word – due process.

But the general rule against allowing a judgment in excess of the complaint does not apply where that due process has been accorded.[8]

Occasionally, the plaintiff will choose to give full, formal notice of presentation to the defendant even though, as in the present case, the defendants have already been found to be in default and, technically, are not entitled to notice. However, when the defendant is given notice that on a specified date, the plaintiff will present a judgment for entry, and that the court may hear evidence and argument on the content of the judgment, the burden, in effect, shifts to the defendant. ***If the defendant then fails to appear at the hearing, he cannot later object to the relief granted, even if it exceeds the demand in the complaint.*** **Fonseca v. Hobbs**[9]

In **Fonseca**, the plaintiffs obtained an order adjudging defendants to be in default. Plaintiffs served on defendants' attorneys a copy of proposed findings of fact, conclusions of law and judgment together with written notice of the hearing regarding the entry thereof. At the time and date of the scheduled hearing, no one appeared for the defendants. Plaintiffs presented their evidence and the court granted their request. The

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[8] In **Rippe**, the court held that it had the power to enter a default judgment in excess of the relief sought in the complaint when the defendant has been given notice and a fair opportunity to defend against the claim upon which the judgment is based. **Id.** at 959.
[9] 7 Wn.App. 235, 498 P.2d 894 (1972).

court held that since the defendants had been given notice and copies of the proposed findings, conclusions, and judgment well in advance of the hearing date, and since they did not appear at the hearing to raise any objections they may have had:

> "[u]nder these circumstances, if it be assumed that the judgment entered is substantially in excess of or different from that sought in the complaint, the judgment is nevertheless a valid one."[10]

The circumstances of the present case are essentially identical to those of **Fonseca**.[11] In the present case, Respondent obtained an Order of Default against Appellant and Tim Ephrem which might have been entered *ex parte,* without notice as any ordinary default judgment. Instead, Respondent chose to give Appellant and Tim Ephrem full notice and provided an undeserved opportunity to be heard at a hearing. Appellant and Tim Ephrem were served, both personally and by Express mail, with the proposed Findings, Conclusions and Judgment.[12] The proposed findings and conclusions were all documented by footnotes referencing the basis for fact or conclusion. Despite this formal notice and opportunity to appear and be heard, no one appeared for the Appellant or Tim Ephrem at the time the Findings, Conclusions and Judgment were

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[10] **Fonseca** at 240.
[11] Although Respondent disagrees with Appellant's argument that the judgment is in excess of the relief sought in the complaint or the relief supported by the Appellant's own admissions of fact.
[12] CP 74-82

presented for entry. Appellant was accorded due process throughout the entry of judgment procedure and responded by ignoring each and every opportunity to object. Just as in **Fonseca**, this Court should follow the established law and rule that the judgment, whether or not in excess of the relief sought in the complaint, is valid as presented. The Appellant's attempt to overturn this judgment should be DENIED, and the judgment of the Trial Court should be AFFIRMED.

4. Appellant is precluded from Challenging Admissions.

On January 11, 2006, Defendants Tim and Tina Ephrem were personally served with Plaintiff's First Requests for Admission. CP 56-57. Neither Tim Ephrem nor Appellant Tina Ephrem answered the requests for admission. On February 16, 2006, Plaintiff's counsel brought a Motion to Deem Admission Admitted and served said motion on the Defendants by both personal service and Express Mail. CP 63-66. Despite notice of Plaintiff's motion, the Ephrems still did not respond. On March 2, 2006, the Trial Court entered an Order Deeming the Admission Admitted and entered Findings of Fact based on those admissions. CP 63-66, 74-82. In the instant matter, Appellant Tina Ephrem appeals the admissions entered against her; however, Tim Ephrem has not disputed the same admissions entered against him.

Appellant Tina Ephrem is precluded from challenging the

admissions of Tim Ephrem based on the law of partnership. In this case, Tim and Tina Ephrem claim not to be legally married (CP 86); however, their long term, stable relationship that has produced a child and established a household like arrangement, can be characterized as either a partnership or a joint venture.

A partnership means an association of two or more persons to carry on as co-owners a business for profit. RCW 25.05.005(6). In **Malnar v. Carlson**, 128 Wn.2d 521, 910 P.2d 455 (1996) the Washington Supreme Court recognized that a partnership may be found to exist even though title to the alleged partnership property is held in the name of only one of the alleged partners.

In **Davis v. Alexander**, 25 Wn.2d 458, 171 P.2d 167 (1946), the court stated that the partnership did require a formal writing:

> In **Froiseth v. Nowlin**, 156 Wash. 314, 287 P. 55, 56, which was an action for the dissolution of a partnership and an accounting, **we held that an oral agreement of partners for the purpose of buying and selling real estate, whereby lands were purchased and held in the name of one partner for profit and resale, is not within the statute of frauds**; since the property, as between the parties, is considered as personal property. We quoted with approval 27 C.J. 220 to the effect that an oral agreement between two or more persons for joint acquisition of real property from a third person and not contemplating any sale or conveyance between the parties is not a contract for the sale of land within the meaning of the statute of frauds. We said: '**Where land is purchased for sale and profit, it may, in equity, be regarded as personalty as among the**

partners.' 47 C.J. 766.'

Emphasis Added.

In this case, Appellant admitted that both she and Tim Ephrem contributed to the purchase of the house. Specifically, she stated:

> Q Okay. Did you pay the Brinkmans $80,000 when you bought the house?
> A Yes.
> Q Okay. Where did you get the $80,000?
> A I saved it.
> Q From house cleaning, yard cleaning, and baby-sitting?
> A Yes.
> Q Okay. What is the monthly payment to the Brinkmans?
> A 4,000.
> Q Okay. And are you current with the Brinkmans right now or are you behind?
> A No, we're current.
> Q Okay. Do you pay the Brinkmans the $4,000?
> A No. Tim does.
> Q Okay. Does Tim have a checking account?
> A No.
> Q He just gives them cash?
> A He puts it in their account.
> Q Okay. Is the $4,000 each month from you or from Tim?
> A It's from Tim.
> Q Okay. Where does Tim get his money?
> A He buys and sells cars. [13]

A partnership creates a mutual agency relationship among the partners. RCW 25.05.100. In such circumstances each partner becomes an agent of the other. RCW 25.05.100. Partnership law generally applies

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[13] CP 249-250.

to joint ventures, so that the act of one co-venturer may bind the co-venture partnership. **Pietz v. Indermuehle**, 89 Wn.App. 503, 949 P.2d 449 (1998). See also **Poole v. Schrichte**, 39 Wn.2d 558, 236 P.2d 1044 (1951) (holding that regardless of whether the parties lived together the law would view property purchased by a couple as part of a joint venture if not a partnership.)

In this case, the act or admissions of one partner or joint venturer, Tim Ephrem, are binding on the partnership. Here, Tim Ephrem has admitted various facts which establish his liability and his pledge of this property as consideration for a forbearance from collection. Tim Ephrem has chosen not to appeal those admissions. Under partnership law, each partner acts as an agent for the partnership and a partner's acts bind the partnership and the other partners when the acting partner is apparently carrying on the normal and usual business of the partnership. See RCW 25.04.090 and **Barnes v. McLendon**, 128 Wn.2d 563, 910 P.2d 469 (1996).

A contract does not need to be signed by all partners or even mention the name of the partnership in order to bind the partners. **Id**, at 573. Admissions or representations made by any partner regarding partnership affairs within the scope of his authority is "evidence against the partnership." See RCW 25.04.110 and **Id**, at 574.

5. The Homestead Act Is Inapplicable In This Case.

Appellant Tina Ephrem's claim that Plaintiff must follow the Homestead Act is raised for the first time on appeal. The law is clear, the Court of Appeals with not consider issues raised for the first time on appeal. See **Better Financial Solutions, Inc. v. Caicos Corp.**, 117 Wn.App. 899, 73 P.3d 424 (2003) citing **Bradbury v. Aetna Cas. & Sur. Co.**, 91 Wn.2d 504, 589 P.2d 785 (1979).

Even if the issue was properly before this Court, which it is not, Appellant's claim that the assignment of the interest in the real estate is in satisfaction of a debt is incorrect. The admissions on record conclusively establish that the assignment of the interest in real estate was not to satisfy the underlying obligation on the loan, as follows:

- **REQUEST FOR ADMISSION NO. 7:** Admit that at the time you requested the forbearance of Cary Falk, you represented that the option had significant value in order to support your request for a forbearance.
- **REQUEST FOR ADMISSION NO. 15:** Admit that the option was to provide additional consideration to support the agreement to forbear.
- **REQUEST FOR ADMISSION NO. 16:** Admit that your agreement to assign the option to purchase the residence was not intended to satisfy the underlying obligation on the loan, but rather to obtain the forbearance.[14]

RCW 6.13.070 specifically provides that "the homestead is exempt from **attachment and from execution or forced sale for the debts of the**

[14] CP 50, 52 and 69-70

owner up to the amount specified in RCW 6.13.030." In this case, it is admitted that the assignment of the interest in real estate was independent from the obligation on the loan.

Moreover, a homestead right is extinguished by a conveyance of all right, title, and interest in the homestead property. **Security Sav. and Loan Ass'n v. Busch**, 84 Wn.2d 52, 523 P.2d 1188 (1974). The Act does not apply.

6. Attorney Fee Award Proper.

In Washington, an award of reasonable attorney's fees is mandatory where the contract between the parties includes an attorney's fees clause. Specifically, RCW 4.84.330 requires that fees be paid to the prevailing party and the "language of the statute is mandatory with no discretion except as to the amount." **Kofmehl v. Steelman**, 80 Wn.App. 279, 908 P.2d 391 (1996).

A prevailing party is one who receives an affirmative judgment in his or her favor. **Riss v. Angel**, 131 Wn.2d 612, 934 P.2d 669 (1997). In this case, Plaintiff Falk received an affirmative judgment in his favor on March 2, 2006 when the Court entered Findings of Fact, Conclusions of Law and Judgment against Defendants Tina and Timothy J. Ephrem. CP 74-82. Attorney fees were awarded to Plaintiff Falk as a result.

It is of no consequence that Appellant Tina Ephrem was not named in the loan contract. Under Washington law, an award of attorney fees based on a contractual provision is appropriate when the action arose out of the contract and the contract is central to the dispute. **Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n**, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991).

Here, the Defendants moved to vacate the orders of the Trial Court which arose out of the original loan agreement. In **Leen v. Demopolis**, 62 Wn.App. 473, 815 P.2d 269 (1991) the court held that a contract providing an award of attorney fee and costs for "collection" under the agreement, logically encompasses fees incurred in upholding default judgment. In this case, the Trial Court granted attorney's fees to the Plaintiff for opposing Defendants' Motion to Vacate. CP 271.

Therefore, Respondent Falk was entitled to attorney's fees for upholding the order of default and the judgment rendered after full notice on the contract.

F. RESPONDANT ENTITLED TO ATTORNEYS FEES

In compliance with RAP 18.14(c) and 18.1, Falk respectfully requests that this court award him attorney's fees in defending against Appellant's appeal. Just as the award of attorney's fees was proper against Appellant Tina Ephrem at the trial court level, for the reasons set

forth in Section E(6) immediately above, an award of attorney's fees against Appellant is proper on appeal. Falk incorporates by this reference his argument for attorney's fees from Section E(6) immediately above.

G. CONCLUSION

For all of the reasons stated above, Respondent respectfully requests an Order affirming the decision of the Pierce County Superior Court dated May 19, 2006 entitled *Order Denying Defendant's Motion to Vacate* (CP 270-271) and affirming the decision dated August 11, 2006 entitled *Order Granting Plaintiff Motion for Attorney Fees* (CP 348-349).

RESPECTFULLY SUBMITTED this 29th day of December, 2006.

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BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

CARY FALK, a single man, Respondent/Plaintiff, vs. TIMOTHY J. EPHREM and TINA EPHREM, husband and wife, and the marital community composed thereof, Appellant/Defendants.	CASE NO. 34988-4-II **DECLARATION OF SERVICE**

I, Debi Ryan, declare under penalty of perjury under the law of the state of Washington that on this date I served a copy of the Respondent's Motion on the Merits and this document upon the following parties as indicated:

George Scott Kelley 535 Dock Street, Suite 100 Tacoma, WA 98402-4629 Attorney for Defendant Tim Ephrem	Delivered Via: ☐ First Class Mail ☐ Facsimile ☒ Messenger/Next Day Service ☐ Hand Delivered
Gary Johnson Mann Johnson Wooster & McLaughlin 820 A Street, Suite 550 Tacoma, WA 98402-5220 Attorney for Defendant Tina Ephrem	Delivered Via: ☐ First Class Mail ☐ Facsimile ☒ Messenger/Next Day Service ☐ Hand Delivered

ORIGINAL

DATED this 29th day of December 2006, at Bellevue, Washington.

Debi Ryan