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COURT OF APPEALS
DIVISION II

No. 39236-4-II

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

JOEL C. MCCORMICK

Respondent-Plaintiff

v.

DUNN & BLACK, P.S., et al.

Appellant-Defendant

Reply Brief of Appellant-Defendant Dunn & Black, P.S.

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I. Introduction

Respondent-Plaintiff Joel McCormick (“McCormick”) argues that the Employment Agreement he executed in 1992 does not apply to his shareholder interest in the law firm Dunn & Black P.S. (“Dunn & Black” formerly McCormick, Dunn & Black). He also argues that the trial court correctly held that the Professional Services Corporation Act, RCW 18.100. et. seq. governs the parties’ rights and duties as to his shareholder interest. McCormick’s arguments and the trial court’s rulings misapply Washington law, ignore the evidence in the record, and fundamentally contradict the principles underlying this Court’s ruling in *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007) (“McCormick I”) as well the rulings of the trial court in *McCormick I*.

In *McCormick I*, this Court enforced the principle that courts may not interfere with the internal affairs of corporate management or substitute their judgment for that of the parties in ruling that McCormick could claim no buy-out rights upon the termination of his employment. 140 Wn. App. at 891-92. McCormick’s recent resignation from the Washington State Bar Association (“WSBA”) undeniably leaves McCormick ineligible to remain a shareholder in the law firm, Dunn & Black. Further, his change in status (a change he elected) cannot

somehow create buy out rights that have no basis in the parties' agreements, history, and past dealings. Nevertheless, the trial court mistakenly ruled that McCormick is entitled to "fair value" for his equity interest under RCW 18.100 et seq. In doing so, the trial court ignored undisputed evidence that the founders of Dunn & Black, including McCormick, intended to extend no buy out rights to one another under any circumstances - a conclusion unequivocally reached by the previous trial court and noted in *McCormick I*. 140 Wn. App. at 890.¹ For the following reasons, McCormick's arguments are not persuasive and do not warrant affirmation of the trial court's erroneous February 4 Order (CP 44).

¹ The transcript of Judge Allen Nielson's original trial court's ruling in *McCormick I* was provided to the Judge David Frazier in this case and is part of the record on this appeal. In granting summary judgment of dismissal on McCormick's claim for oppression, the Judge Nielson held:

"So, just as an example if Mr. McCormick in his mind felt he was still - had this one-third payout available to him, I don't believe that's the question. The question is whether objectively, given the way the is employment agreement reads, that that was a reasonable expectation on the part of Mr. McCormick. And I don't believe it's an issue of material fact; I believe that it's clearly not a reasonable expectation on his part."

(CP 25, Ex. C. pgs. 5-6)

II. Argument

1. *McCormick's shareholder interests are subject to his Employment Agreement. (Issue No. 1)*

McCormick argues that this Employment Agreement has no current legal effect because it was terminated nearly seven years ago. (Response Br., pg. 8-9). McCormick misses Dunn & Black's point. Dunn & Black recognizes that the Employment Agreement was terminated in 2002 at the time he was fired for announcing his intent to compete for the clients of Dunn & Black and other misconduct. However it is specious to suggest his Employment Agreement is no longer relevant in shaping his broader relationship to the law firm. In fact, by its own terms his Employment Agreement is as binding on the successors, assignees, heirs, and beneficiaries of McCormick as it is on McCormick himself. Section 20 states:

This agreement shall be binding upon the parties hereto, their successors, and assigns, and to the estate, heirs, legatees, executors, administrators, and beneficiaries of the attorney.

(CP 25, Ex. A). If the Employment Agreement binds someone in the future who assumes McCormick's rights and duties, surely it is binding on McCormick himself despite his termination in 2002.

Even more fundamentally, the trial court's conclusion that the Employment Agreement does not affect McCormick's interest as a shareholder ignores the explicit intent of Dunn & Black's founders, including McCormick. The founders of Dunn & Black affirmatively chose not to create and extend buy out rights to any shareholder who chose to leave the firm. This intent is unequivocally expressed in the Employment Agreement. John Black—another of the Dunn & Black's founders – stated in his Declaration:

6. [Messrs. Dunn, Black, and McCormick] had practiced together as shareholders ... for many years prior to forming the new firm. During our meetings in December 1992 prior to formation of McCormick, Dunn & Black, P.S. one of the founding [principles] that we discussed for our new firm was the issue of whether the firm would provide a buyout to outgoing principals. In our old firm, one of the key problems that the law firm had encountered was that there were numerous senior lawyers who had recently decided to withdraw or retire from the firm and that had saddled that firm with significant buyouts of their shareholder interests payable over a period of time. The effect of that situation was that there was little or no monies left for the practicing lawyers for any raises, which in turn had lead to the departure of many other lawyers in that firm. The three of us specifically discussed and agreed that McCormick, Dunn & Black, P.S. would be founded on the principal that there would be no buyouts for any leaving principal/shareholder other than the original monies which each contributed to form the new firm. We specifically agreed that the intent would be that the practicing partners would maximize their income during the life of the firm but that if any of us left the firm or their employment was terminated, that they would only be entitled to the return

of the original money contribution. This would in turn ensure that incoming attorneys would not be saddled with significant buyouts after they had left the firm and at a time when they were providing no benefit to the firm after their departure. We absolutely rejected the concept of a 'buyout' should any of us retire or withdraw from the firm. We discussed and agreed that if a shareholder left the law firm, the shareholder would receive back his \$5,000 in capital and would be entitled to nothing more."

7. [Mr. Dunn] and I left it to Mr. McCormick to draft the documents necessary to implement this intent and expected him to do so as he promised he would. It was my belief that the employment agreement that Mr. McCormick prepared for McCormick, Dunn & Black and signed by the three of us reflects our agreement concerning a buyout. I still believe that to be the case.

(CP 21)(emphasis added).

In the proceedings before the trial court, McCormick offered nothing to contradict the Black Declaration and the premise that the founders affirmatively discussed and agreed that they would provide no buy out rights if and when a shareholder left the law firm. Indeed, McCormick has failed to explain why Section 18 of the Employment Agreement would even be necessary if it was not intended to express the parties' intent to limit and define the rights of a departing shareholder. In any event, the trial court did not address the effect and significance of the Black Declaration. This failure alone is sufficient reason to reverse the trial court and vacate the February 4 Order.

McCormick now attempts to deflect the significance of the Black Declaration by arguing that the law firm cannot rely on extrinsic evidence to modify the terms of an integrated contract. (Response Br., pg. 9-12). McCormick's argument is fatally flawed. A party is free to offer extrinsic evidence in a contract dispute to help determine the contracting parties' intent provided the evidence is not used to show intention that is independent of the contract itself. See *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 202 P.3d 960 (2009).

In *Brogan*, the trial court entered summary judgment based upon its conclusion that a real estate purchase and sale agreement was an integrated contract and that explanatory affidavits were inadmissible to extrinsic, explanatory affidavits were inadmissible to explain certain contract terms. The Court of Appeals affirmed the trial court but the Supreme Court reversed holding that extrinsic evidence is admissible to determine the parties' intent as long as it is not offered to alter, modify or contradict the contract terms or show an independent intent. 165 Wn.2d 775-76.

As in *Brogan*, Dunn & Black offered evidence through the un rebutted Black Declaration to reiterate the parties' intent to offer no buy-out rights to a departing shareholder as expressly set out in the Employment Agreement. This is not an independent intent and the

Declaration modifies nothing in McCormick's Employment Agreement. The Black Declaration simply explains the intent expressly embedded in the Employment Agreement. Notably, Section 18 states:

SECTION EIGHTEEN
TERMINATION

This agreement may be terminated by either party upon thirty days written notice to the other. Termination by the corporation requires a two-thirds vote of corporate shareholders. The terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm, said amount being payable over a three year period in equal monthly installments. The terminating attorney shall not be entitled to any other amounts, unless agreed to by the remaining principals.

In addition, Section 1 includes this provision:

Nothing contained in this agreement shall be construed to give the attorney any interest in the tangible or intangible assets of the corporation.

(CP 25, Ex. A; emphasis added).

It was error for the Black Declaration not to have been considered and addressed by the trial court even if the Employment Agreement is viewed as a partially integrated contract.² A partially integrated contract is a final expression of those terms which a contract contains but is not a complete expression of all terms to which the parties have agreed. See *DePhillips v. Zolt Construction Co.*, 136

² The Employment Agreement does not contain an integration clause.

Wn.2d 26, 33 n.2, 959 P.2d 1104 (1998) citing *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990).

Here, the Black Declaration offered admissible and undisputed evidence that the founders of the law firm agreed that no buy out rights would be extended to a departing shareholder. (CP 25). Even if this intent is not fully expressed in the Employment Agreement, it is properly proven through the Black Declaration. Had the trial court considered this evidence, the only conclusion it could have reached is the same conclusion reached by the original trial court in *McCormick I* (CP 25 Ex. C): that the parties' intended a departing shareholder to receive the return of his capital (\$5,000) and nothing more in exchange for any and all ownership and employment interests. In failing to consider the Black Declaration, the trial court erred as a matter of law.

McCormick argues repeatedly that his Employment Agreement is not a stock redemption agreement. (Response Br., pg. 12-13). The law firm has never argued to the contrary. Yet McCormick contends further that references to "stock redemption agreement" in the Articles of Incorporation and the By Laws must mean that the parties intended to have redemption rights but simply never reduced the terms of redemption to writing. This is a contrived argument that contradicts the parties' intent as established by the Black Declaration and the plain

terms of the Employment Agreement. Indeed, as noted by the trial court in *McCormick I*, the Articles of Incorporation and By Laws pre-dated the Employment Agreement. (CP 25, Ex. C). There simply is no evidence in the record or otherwise that the parties intended to offer themselves buy out rights. In reaching a contrary conclusion, the trial court erred as a matter of law.

2. *Judicial estoppel has no application to this case. (Issue No. 2)*

McCormick argued and the trial court found that Dunn & Black is judicially-estopped from asserting that the Employment Agreement applies to his shareholder interests. (Response Br., pg. 14-16). In doing so McCormick led the trial into an error of law. The law firm has never taken a position in this case that is inconsistent with a position taken in *McCormick I*. In the prior litigation it was acknowledged by all parties that McCormick's Employment Agreement is not a stock redemption agreement and the law firm does not argue otherwise here. The argument of Dunn & Black here is not that the Employment Agreement has suddenly become a redemption agreement but rather that the Employment Agreement expresses the founders' intent in establishing a limitation on the monetary duties owed by the law firm to a departing shareholder, i.e., the return of capital.

In any event, McCormick failed to meet his burden to establish the elements of judicial estoppel and the trial court's February 4 Order provides no analysis to support application of the doctrine here. The elements of judicial estoppel are: (1) the party to be estopped must be asserting a position inconsistent with an earlier position; (2) the party seeking estoppel must have relied upon and been misled by the other party's first position; and (3) injustice would result from allowing the estopped party to change positions. See *Save Columbia Credit Un. v. Columbia Cred. Un.*, 134 Wn. App. 175, 186, 139 P.3d 386 (2006). Neither McCormick nor the trial court attempted to apply these elements to the facts. There has been no inconsistency by Dunn & Black. Judicial estoppel does not fit this case and it was error for the trial court to apply it here. *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008)(Judicial estoppel should not be invoked in a technical manner or as "a sword to be wielded by adversaries" unless necessary to secure substantial equity.)

3. *McCormick's Employment Agreement is a "private agreement" within the meaning of RCW 18.100.116(1). (Issue No. 3)*

McCormick contends that Dunn & Black does not challenge the trial court's rulings regarding the interpretation of RCW 18.100 et. seq. (Response Br., pg. 21-22). McCormick misunderstands the issues and

arguments asserted by the law firm. Dunn & Black does contend, and has consistently maintained, that the trial court fundamentally misapplied RCW 18.100.116 in several respects.

In the *February 4 Order*, the trial court declared “as a matter of law that [McCormick’s] shares have not been transferred or extinguished, and [the Act], including both RCW 18.100.116(1) and (2) applies to govern the rights and obligations of the parties with regard to the shares currently held by Plaintiff.” (CP 44; VT, pgs. 8-11). The trial court stated its oral ruling:

“... I feel as a matter of law that the fact that Mr. McCormick resigned from the bar and became ineligible doesn’t automatically result in a transfer.” (CP 44).

The trial court’s conclusion that McCormick’s shares did not transfer once McCormick became ineligible on August 12, 2008, cannot be reconciled with the language of RCW 18.100.116(2). RCW 18.100.116 states in pertinent part:

(1) If: (a)(i)

(ii) A shareholder of a professional corporation becomes an ineligible person;

(iii)

(iv); and

(b) The shares held by the deceased shareholder or by such ineligible person are less than all of the outstanding shares of the corporation, then

the shares held by the deceased shareholder or by the ineligible person may be transferred to remaining shareholders of the corporation or may be redeemed by the corporation pursuant to terms stated in the articles of incorporation or by laws of the corporation, or in a private agreement. In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder of the corporation.

(2) If such a redemption or transfer of the shares held by a deceased shareholder or an ineligible person is not completed within twelve months after the death of the deceased shareholder or the transfer, as the case may be, such shares shall be deemed to be shares with respect to which the holder has elected to exercise the right of dissent described in chapter 23B.13 RCW and has made written demand on the corporation for payment of the fair value of such shares. The corporation shall forthwith cancel the shares on its books and the deceased shareholder or ineligible person shall have no further interest in the corporation other than the right to payment for the shares as is provided in RCW 23B.13.250. For purposes of the application of RCW 23B.13.250, the date of the corporate action and the date of the shareholder's written demand shall be deemed to be one day after the date on which the twelve-month period from the death of the deceased shareholder, or from the transfer, expires.

(emphasis added).

The dilemma created by the trial court's ruling is inescapable.

By its own terms, RCW 18.100.116(2) applies only when a redemption

or a transfer of the shares of an ineligible person remains incomplete 12 months after the “transfer.” If, as the trial court held, McCormick’s resignation from the WSBA was not a “transfer,” what then triggers the 12 month period to complete the redemption or transfer and, if not completed, channels the parties into RCW 23B.13.250?

McCormick’s response to this problem is puzzling. McCormick argues that the term “transfer” actually means “transfer to.” (Response Br., pg. 27). In fact, RCW 18.100.116(2) says nothing of the kind. The statute simply says “transfer.” If the Legislature meant to say “transfer to” it could easily have said so just as it used the term “transferred to” in the final paragraph of RCW 18.100.1116(1).

Moreover, if “transfer” is deemed to mean “transfer to,” how could McCormick’s shares possibly “transfer to” McCormick himself upon his resignation from the WSBA? This is nonsense. The resignation is precisely the event that McCormick now contends is the “transfer” that commences the 12 month period provided for in RCW 18.100.116(2). (Response Br., pg. 27-28). Given that the trial court expressly ruled, at McCormick’s urging, that McCormick’s shares did not transfer to Dunn & Black at the time of McCormick’s resignation, the fallacy of McCormick’s strained interpretation is even more apparent. If the shares did not “transfer to” Dunn & Black when

McCormick resigned effective August 12, 2008, how can the shares “transfer to” McCormick from McCormick himself?

When interpreting a statute, this Court must avoid unlikely, strained, and absurd results and strive for a rational, sensible construction. See *City of Wenatchee v. Owens*, 145 Wn. App. 196, 202, 185 P.3d 1218 (2008), rev. den., 165 Wn.2d 1021 (2009). The only way to make rational sense of RCW 18.100.116(2) is to view the term “transfer” as a process³ which, in this case, had its starting point on August 12, 2008 when McCormick’s resignation took effect.

It is, in any case, unnecessary for this Court to interpret RCW 18.100.116(2) if it does not apply. For the reasons that follow, the trial court erred in failing to recognize the existence of a “private agreement” under RCW 18.100.116(1). Had the trial court not erred in this respect, there would have been no occasion to consider RCW 18.100.116(2) at all.

³ “Transfer” is not defined by RCW 18.100. et seq. Accordingly, it is accorded its common and ordinary meaning. *Glavis v. Dept. of Trans.*, 140 Wn. App. 693, 709, 167 P.3d 584 (2007) citing *American Legion v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). A common dictionary definition of “transfer” is: to make over the possession or legal title of something from one to another. (CP 30, Ex. C). Webster’s Ninth New Collegiate Dictionary states that a “transfer” is “a conveyance of right, title or interest in real or personal property from one person to another” and describes it as “an act, process, or instance of transferring.” Nothing about a “transfer” suggests that it must be an exchange for value but even if value is implied, the parties’ agreed that the value is the return of capital.

4. *The trial court should not have reached RCW 18.100.116(2). (Issue No. 4)*

RCW 18.100.116(1) authorizes the shares of an ineligible person to be redeemed or transferred pursuant to terms stated in the articles of incorporation or by laws of the corporation or in a “private agreement.” The trial court and McCormick focused exclusively on the “redemption” alternative, placing particular emphasis on the absence of a stock redemption agreement. This is an overly restrictive reading of RCW 18.100.116(1) which clearly authorizes, as an alternative to redemption, the transfer of shares held by an ineligible person pursuant to the terms of a “private agreement.”⁴

Like the term “transfer,” “private agreement” is not defined by RCW 18.100. et seq and must be accorded its common and ordinary meaning. *Glavis v. Dept. of Trans.*, supra, 140 Wn. App. at 709. There is no basis in law or logic to construe the Employment Agreement executed by McCormick as anything other than a “private agreement” for

⁴ McCormick mistakenly asserts that Dunn & Black previously argued there was no private agreement. (Response Br., pgs. 23-25). Dunn & Black previously acknowledged there was no “private agreement” for purposes of a redemption. Dunn & Black has not argued there is no private agreement for purposes of a transfer. As noted above, RCW 18.100.116(1) authorizes either “transfer” or “redemption” of an ineligible person’s shares according to the terms of a private agreement such as the Employment Agreement. (See, e.g., CP 26 and CP 29).

purposes of RCW 18.100.116(1). This interpretation is fully consistent with the plain language of the statute and the undisputed evidence that the law firm's founders intended to extend no buy-out rights to a departing shareholder.

Moreover, even if the Employment Agreement is disregarded completely, the Black Declaration provides undisputed evidence of the parties' verbal "private agreement" to extend one another no buy out rights. Consequently, even if the trial court correctly found that the Employment Agreement does not limit or define McCormick's rights as a shareholder, the Black Declaration established the terms of the "private agreement" among the founders to pay one another nothing beyond the return of capital once the shareholder's relationship to the firm came to an end. Nothing whatsoever in RCW 18.100 et seq. requires the "private agreement" to be a written agreement.

Dunn & Black tendered to McCormick the return of his capital pursuant to the Employment Agreement shortly after he became an "ineligible person." Under these circumstances, the trial court should have held the requirements of RCW 18.100.116(1) to have been satisfied and the "transfer" of McCormick's shares to Dunn & Black complete as a matter of law. Had the trial court done so, there RCW 18.100.116(2) would not have been implicated. Appellate courts review issues of

statutory interpretation de novo. See, e.g., *State v. Lilyblad*, 163 Wn.2d 1,5, 177 P.3d 686 (2008). This Court can, and should, approach the questions raised by RCW 18.100.116 with a fresh perspective and avoid the statutory interpretation errors committed in the trial court.

III. Conclusion

This Court should vacate the trial court's *February 4 Order* and direct the entry of summary judgment in favor of Dunn & Black, P.S..

Respectfully submitted this 10th day of September, 2009.

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