

FILED

AUG 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 298477

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MELISSA ZEIDMAN BRONSTEIN, Appellant,

v.

SEYMOUR MAYNARD BRONSTEIN, Respondent.

BRIEF OF RESPONDENT

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I.	TABLE OF CONTENTS	
II.	TABLE OF AUTHORITIES	ii
III.	STATEMENT OF THE CASE	1
A.	RESPONSE TO APPELLANT’S STATEMENT OF FACTS	1
IV.	ARGUMENT	2
A.	STANDARDS OF REVIEW	2
B.	APPELLANT WAIVED ANY RIGHT TO AN EVIDENTIARY HEARING ON RESPONDENT’S MOTION.	3
C.	THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT ORDERING APPELLANT TO PAY \$51,500 TO RESPONDENT.	3
D.	RESPONDENT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.	12
V.	CONCLUSION.....	13
VI.	CERTIFICATE OF MAILING	14

II. TABLE OF AUTHORITIES

STATE CASES

<i>Berg v. Hudesman</i> , 115 Wn. 2d 657, 801 P. 2d 222 (1990).....	8
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992).....	10, 11
<i>Farm Credit Bank v. Tucker</i> , 62 Wn. App. 196, 207, 813 P. 2d 619, <i>review denied</i> , 118 Wn. 2d 1001 (1991).....	13
<i>Hadley v. Cowan</i> , 60 Wn. App. 433, 441 n. 10, 804 P. 2d 1271 (1991) 4, 6, 7, 10	
<i>Heigis v. Cepeda</i> , 71 Wn. App. 626, 634, 862 P. 2d 129 (1993)	6
<i>J-U-B Engineers, Inc. v. Routsen</i> , 69 Wn. App. 148, 150, 848 P. 3d 733 (1993).....	5
<i>Kofmehl v. Steelman</i> , 80 Wn. App. 279, 286, 908 P. 2d 391 (1996).....	13
<i>Lavigne v. Green</i> , 106 Wn. App. 12, 16, 23 P. 3d 515 (2001).....	3
<i>Lehrer v. State</i> . 101 Wn. App. 509, 515, 5 P. 3d 722, <i>review denied</i> , 142 Wn. 2d 1014 (2000).....	9
<i>Marriage of Schwietzer</i> , 132 Wn. 2d 318, 328, 937 P. 2d 1062 (1997).....	6
<i>Mayer v. Pierce County Medical Bureau, Inc.</i> , 80 Wn. App. 416, 420, 909 P. 2d 1323 (1996)	9
<i>Nast v. Michels</i> , 107 Wn. 2d 300, 308, 730 P. 2d 54 (1986).....	5
<i>Nguyen v. Sacred Heart Hospital</i> , 97 Wn. App. 728, 734-36, 987 P. 2d 634 (1999).....	3
<i>Rainier View Court Homeowners Association, Inc. v. Zenker</i> , 157 Wn. App. 710, 723, 238 P. 3d 1217, <i>review denied</i> , 170 Wash.2d 1030 (2011).....	5
<i>Wilson Son Ranch, LLC v. Hintz</i> , --Wn. App. --, 253 P. 3d 470, 473-74 (2011).....	6, 10
<i>Woody v. Stapp</i> , 146 Wn. App. 16, 22, 189 P. 3d 807 (2008).....	7

STATUTES

RCW 4.84.330	12
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Rules

CR 2A	2
RAP 10.3 (a) (6)	6, 10, 11
RAP 18.1 (a), (b)	12
RAP 2.5 (a).....	4, 6, 10

III. STATEMENT OF THE CASE

A. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

Throughout her brief, Appellant places undue reliance upon certain correspondence between Respondent and his employer, St Mary Medical Center, regarding the terms of repayment of certain first year advances made to Respondent. BA 11-13. Specifically, Appellant relies upon the following documents, a letter dated April 29, 2009 from Michael Parenteau, Vice President of Finance for Providence St. Mary Medical Center with an attached payment plan, a March 11, 2020 letter from Steve Burdick, Chief Executive for St Mary, and a proposed, unsigned promissory note, dated March 10, 2010. CP 125-26, 127-29. None of those documents resulted in a contract or an amendment of the Property Settlement Agreement. None of those documents bear Respondent's signature. Instead, as explained by Respondent in his declaration, those letters were simply part of an ongoing process of negotiation. CP 122.

Appellant also misunderstands the proposal in Mr. Burdick's letter of March 11, 2010. As explained by Respondent in his declaration filed on September 13, 2010, St Mary was simply proposing an alternate form of payment:

If I were to continue working at PSMC until June 1, 2011, is the debt forgiven, as Petitioner's attorney suggests? Not at all; it is paid. The hospital is merely accepting time and labor as an alternate form of payment to money. It is immaterial

whether I pay the hospital with cash or labor, the debt is being collected. If the debt were forgiven, I would be free to leave. But this is not the case; if I were to leave Walla Walla today, the hospital would seek to collect its money. In such case the Petitioner would be expected to pay her share, which stands at \$51,500, either to me or to the hospital.

CP 122.

IV. ARGUMENT

A. STANDARDS OF REVIEW

In his Motion for Entry of an Order, Respondent sought to enforce the terms of the parties' Property Settlement Agreement. CP 196-212.

The agreement was signed by the parties. CP 13. The agreement recites that the parties, in contemplation of the finalization of the dissolution of their marriage, desire to enter into a settlement of their respective rights.

CP 9-10. Appellant disputed a term of the agreement, claiming that she was not obligated to repay one-half of respondent's debt to St. Mary

Hospital. CP 138-56. The agreement is therefore governed by CR 2A:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The standard of review of a trial court's ruling on a motion to enforce a settlement is *de novo*. *Lavigne v. Green*, 106 Wn. App. 12, 16,

23 P. 3d 515 (2001) (“*The standard of review is de novo because the motion to enforce a settlement agreement is like a summary judgment.*”).

B. APPELLANT WAIVED ANY RIGHT TO AN EVIDENTIARY HEARING ON RESPONDENT’S MOTION.

Appellant argues that Respondent’s motion should have been bought as a summary judgment so that a proper record could be developed. BA at 16-21. Appellant’s counsel waived any right to such a hearing by signing the Agreed Order on Briefing Schedule. CP 213-14. The order provided that a decision without oral argument would issue after the parties’ counsel submitted briefs. CP 213. The order necessarily eliminated the opportunity for an evidentiary hearing on Respondent’s motion. Appellant’s counsel acted within her authority in signing that order. *Nguyen v. Sacred Heart Hospital*, 97 Wn. App. 728, 734-36, 987 P. 2d 634 (1999).

C. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT ORDERING APPELLANT TO PAY \$51,500 TO RESPONDENT.

Appellant attempts to create a triable issue of fact regarding the existence of the debt to St. Mary Medical Center, and yet Appellant fails to acknowledge that the parties unequivocally recognized the existence of the debt in the Property Settlement Agreement. “*The parties Shall equally pay the \$170,000 debt to Providence St. Mary Medical Center, provided Husband agrees to pay Wife’s share of this obligation at \$2,000 per month commencing June 1, 2009, so long as she remains in Walla Walla with the*

children, provided, Wife shall have no obligation to pay said \$170,000 if Husband moves from Walla Walla prior to the Wife.” CP 11. Appellant’s signature is affixed to the Property Settlement Agreement. CP 12. The Property Settlement Agreement is clearly referenced in the Decree of Dissolution. CP 56.

The Property Settlement Agreement is *res judicata* as to the existence and amount of the debt, as well as Appellant’s obligation to pay one-half thereof. “*Settlement agreements are given res judicata effect as to the issues that were or should have been resolved in the lawsuit.”* *Hadley v. Cowan*, 60 Wn. App. 433, 441 n. 10, 804 P. 2d 1271 (1991). *Res judicata* requires identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Ibid.* Here, the subject matter, liability for the debt is the same, the cause of action to enforce Appellant’s liability for her share of the debt is the same, the same parties are present, and as is the quality of persons against whom the claim is made. *Res judicata* therefore bars relitigation of Appellant’s liability for on-half of the debt.

The Court may affirm the trial court on grounds of *res judicata*, regardless of whether it was raised in the trial court. RAP 2.5 (a) (“...*A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground...”*); *J-U-B Engineers, Inc. v.*

Routsen, 69 Wn. App. 148, 150, 848 P. 3d 733 (1993) (“[W]e may sustain a trial court result on any correct ground, even though that ground was not considered by the trial court.”); *Nast v. Michels*, 107 Wn. 2d 300, 308, 730 P. 2d 54 (1986); *Rainier View Court Homeowners Association, Inc. v. Zenker*, 157 Wn. App. 710, 723, 238 P. 3d 1217, review denied, 170 Wash.2d 1030 (2011).

Appellant attempts to create a triable issue of material fact regarding the debt by pointing to an unsigned promissory note that Respondent received from his employer in March, 2010. BA 21-22. The note accompanied a letter, dated March 11, 2011, from Steve Burdick, Chief Executive Officer of Providence St. Mary Medical Center to Respondent. CP 127. Therein, Mr. Burdick proposed that Respondent execute the note to address a remaining balance on the debt of \$119,825.47. CP127-128. The letter also proposed the Respondent work off the debt by remaining in service to St. Mary until June 30, 2011. CP 127. The letter and the note were part of negotiations between Respondent and St. Mary that remained ongoing in September, 2010. CP 122. Mr. Burdick’s letter also proposed that if he left St. Mary, Respondent would be required to pay back the debt if he left prior to June 30, 2011, and would be issued a 1099 on a prorated basis for the months that he remained in service. CP 127. Thus, under Mr. Burdick’s proposal, the debt would be collected, either through cash or Respondent’s labor.

Appellant attempts to undermine the Property Settlement Agreement by arguing a lack of meeting of the minds or mutual mistake. BA 23. Appellant fails to indicate where in the trial court she made such arguments. Issues not raised below by Appellant may not be considered on appeal. RAP 2.5 (a) (“*The appellate court may refuse to review any claim of error which was not raised in the trial court...*”); *Wilson Son Ranch, LLC v. Hintz*, --Wn. App. --, 253 P. 3d 470, 473-74 (2011).

Appellant also fails to support her argument on mutual mistake with a single citation to the record. BA 23. Appellant’s argument should therefore not be considered. RAP 10.3 (a) (6) (“*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... (6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record....*”); *Heigis v. Cepeda*, 71 Wn. App. 626, 634, 862 P. 2d 129 (1993).

To the extent that Appellant’s arguments are entitled to consideration here, they amount to an attempt to undermine the finality enjoyed by the Property Settlement Agreement, and are therefore barred by *res judicata*. *Hadley v. Cowan, supra*.

Appellant’s argument regarding mutual mistake requires clear, cogent and convincing proof that both parties were mistaken. *Marriage of Schwietzer*, 132 Wn. 2d 318, 328, 937 P. 2d 1062 (1997). To oppose

Respondent's motion, Appellant was required to present clear, cogent and convincing evidence to support her argument regarding mutual mistake.

Note *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P. 3d 807 (2008):

...However, when reviewing a civil case in which the standard of proof is clear, cogent, and convincing, this court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence. *In re Depend. of C.B.*, 61 Wash.App. 280, 285, 810 P.2d 518 (1991)...

Appellant fails to establish where in the record she presented clear, cogent and convincing evidence of mutual mistake. Appellant's argument therefore fails.

Appellant argues that the parties would not have reasonably bargained for a provision to equally pay a debt to St. Mary that was not yet due and would be forgiven if Respondent provided service in Walla Walla through June 30, 2011. BA 25. Once again, Appellant seeks to undermine the Property Settlement Agreement that she signed.

Appellant's argument is therefore barred by *res judicata*. *Hadley v. Cowan, supra*. Moreover, Appellant's argument that the debt was not due is based on a mischaracterization of the record. The debt was due in April

2009, when Michael Parenteau, Vice President of Finance for St. Mary, wrote Respondent a letter in which he recited a total debt of \$169,464.36, Respondent's reimbursements of \$42,476.13, leaving a balance then owing of \$126,988.23. CP 125. The debt was due in June, 2009, when Appellant signed the Property Settlement Agreement. CP 14. The debt was due in June, 2010, when Mr. Burdick wrote Respondent proposing that he repay the debt with his services. CP 127. Appellant's argument therefore fails.

Appellant mischaracterizes Respondent's statement that he cares little about the \$51,500, by wrenching it out of context. BA 25. Respondent's statement was made in a paragraph in which he states that he places a higher value over a parental relationship with his children than he does with the money. CP 123. Appellant's argument should therefore be rejected.

Appellant argues that the "*plain language*" of the Property Settlement Agreement needs to be interpreted in the applicable context to give effect to the intention of the parties. BA 25 (Citing *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P. 2d 222 (1990)). Appellant misreads *Berg*. The parol evidence rule applies to contract integration, not to contract interpretation. *Berg*, 115 Wn. 2d 670 ("*...The first point to be made is that the question of integration, and the role of parol evidence in deciding the integration question, is not the same inquiry as the role of*

parol, or extrinsic, evidence in interpreting a contract. The “parol evidence rule” relates to the former, but not to the latter.”); Lehrer v. State. 101 Wn. App. 509, 515, 5 P. 3d 722, review denied, 142 Wn. 2d 1014 (2000).

Instead, where the contract is unambiguous, there is no room for parol evidence. *Lehrer*, 101 Wn. App. 516 (“*In sum, parol evidence is not admissible to interpret the clause concerning notification because the contract was integrated and the language was clear and unambiguous.*”).

The same conclusion obtains here. The trial court found the provisions of the Property Settlement Agreement dealing with repayment of the debt to St. Mary to be unambiguous. CP 216. Appellant also recognized the payment provisions of the Property Settlement Agreement to be unambiguous. “*Here, there is nothing for the court to interpret because the terms are clear and unambiguous.*” CP 149.

Because the payment provisions of the Property Settlement Agreement are unambiguous, the trial court did not err in granting Respondent’s motion. Note *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P. 2d 1323 (1996):

Interpretation of an unambiguous contract is a question of law. *Absher Constr. Co. v. Kent School District No. 415*, 77 Wash.App. 137, 141, 890 P.2d 1071 (1995). “If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Voorde Poorte v. Evans*, 66

Wash.App. 358, 362, 832 P.2d 105 (1992).

Appellant argues that a declaratory judgment is appropriate for clarification where the language of a decree is ambiguous. BA 26. Appellant fails to identify where in the record below she made such an argument. Appellant's argument should therefore not be considered. RAP 2.5 (a); *Wilson Son Ranch, LLC v. Hintz*, 253 P. 3d 473-74. A declaratory judgment is not warranted here, as the payment provisions of the Property Settlement Agreement are unambiguous.

Appellant argues that no payment was due to St. Mary. BA 27-28. Appellant fails to support his argument with a single citation to authority. Appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992). Appellant thereby once again attempts to undermine the payment provisions of the Property Settlement Agreement. Appellant's argument is barred by *res judicata*. *Hadley v. Cowan*, 60 Wn. App. 441 n. 10. Appellant's argument that no payment was due cannot be reconciled with the Property Settlement Agreement, which provides that “[t]he parties shall equally pay the \$170,000 debt to Providence St. Mary Medical Center...” CP 11.

Appellant argues that no judgment should have been entered where the debt was subject to forgiveness. BA 28. Appellant again fails to support his argument with a single citation to authority, and so her

argument should not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Appellant argues that the trial court erred by ordering Appellant to pay Respondent when the property settlement agreement directs each party to pay one-half of the debt to St. Mary. BA 28. Because she failed to support her argument with authority, Appellant's argument should not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

The trial court did not err in ordering Appellant to pay \$51,500 to Respondent. Instead, the trial court correctly reasoned that Appellant's relocation to New York triggered the relocation and repayment clause in the Property Settlement Agreement. CP 217. After allowing \$30,000 credit for the time she remained in Walla Walla, and allowing \$5,500 credit for the time share, the trial court calculated the amount of Appellant's repayment owed to Respondent at \$51,500. CP 217. The trial court directed the parties to agree to repayment terms within 30 days, or if no agreement, then the trial court would set forth a repayment plan. CP 217. Respondent did not receive a repayment proposal from Appellant. CP 218. Therefore the Court properly entered its Order Re: Repayment of Debt to Hospital. CP 157-58. CP 157-58.

D. RESPONDENT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.

Paragraph XIII of the Property Settlement Agreement provides, in pertinent part, that “[t]he prevailing party in such a proceeding shall, in addition to any other remedy allowed by law, be allowed to recover reasonable attorney fees and costs.” CP 13.

RAP 18.1 (a), (b) provide as follows:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

RCW 4.84.330 provides as follows:

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.

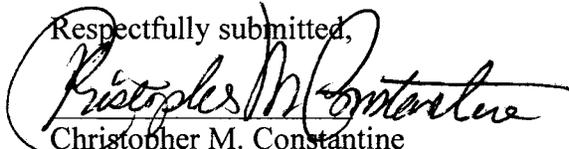
Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

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

In the event that he prevails on appeal, an award of attorney fees to Respondent is mandatory. *Kofmehl v. Steelman*, 80 Wn. App. 279, 286, 908 P. 2d 391 (1996); *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 207, 813 P. 2d 619, *review denied*, 118 Wn. 2d 1001 (1991).

V. CONCLUSION

The trial court's judgment and orders at issue in this appeal should be affirmed. In the event he prevails on appeal, the Court should award Respondent reasonable attorney fees and costs.

Respectfully submitted,

Christopher M. Constantine
WSBA 11650
Of Attorneys for Appellant

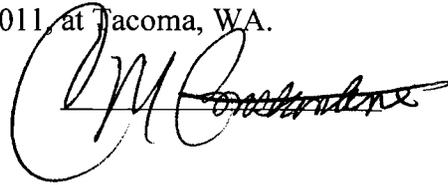
VI. CERTIFICATE OF MAILING

The undersigned does hereby certify that on August 26, 2011, he served a copy of the Brief of Respondent upon Appellant and upon Respondent, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Michael V. Hubbard
145 Main, P. O. Box 67
Waitsburg, WA 99361

Bridie M. Hood
30 West Main
Suite 203
Walla Walla, WA 99362

Dated this 26th day of August, 2011, at Jacoma, WA.

A handwritten signature in black ink, appearing to read "Michael V. Hubbard", written over a horizontal line.