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No. 57296-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLORIA BERNARD,

Respondent,

and

THOMAS BERNARD,

Appellant

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The apparent need to demonize a litigant is an all too common occurrence, especially in dissolution actions. Here, respondent, Gloria Bernard, apparently believes she must demonize her former husband in an attempt to “make points” with this Court.

There is nothing “noblesse oblige,” as pejoratively used by Gloria, about Tom Bernard’s position in this case. Brief of Respondent at 2. The economic facts of their lives before and during their marriage are what they are. The Trial Court certainly did not criticize Mr. Bernard in this fashion in making what she stated was one of the most difficult decision she had ever made in her career as a Judge.

Even more inappropriate is Gloria’s allegation that this appeal is “a transparent attempt to starve the wife into complying with [Mr. Bernard’s] unreasonable demands....” *Id.*, at 1 and 49-50. There is no evidence of this anywhere, let alone that Ms. Bernard is starving or destitute. One would have hoped the level of Gloria’s briefing would have found a higher plane.

Ms. Bernard’s lament that she was never given “a fair opportunity to negotiate” an agreement with her husband is, largely, what this case is about. Had Gloria engaged an attorney earlier and worked with him reasonably, it is probable we would not be in litigation now. But, since

she delayed so long in retaining her attorney before her marriage, and was not diligent in working with him on the First Amendment negotiations after her marriage, we will never know.

Finally, not being content with the strength of her other arguments, Gloria now finds it necessary to inject irrelevant fault, hearsay and other disputed issues into her case. *See, e.g.*, Brief of Respondent at 23.¹ These self-serving accusations about Tom Bernard that post-date even the First Amendment, are irrelevant, partially hearsay, and appear to only be injected into this proceeding to try and prejudice this Court against Tom. Moreover, they were strongly objected to at the time they were raised. *See, e.g.*, CP 47, 49.

II. RESPONDENT EXAGGERATES THE EVIDENCE

Respondent exaggerates much of the trial evidence in her brief.

For example:

- Gloria states: “Thomas promised Gloria that if she stayed with the company she could eventually manage properties” Brief of Respondent, at 2. The actual testimony was that she understood Mr. Bernard to infer “. . . if I stayed on, then as the industrial park became full and the construction part was done,

¹ The referenced Exhibit 134 was introduced only to impeach respondent by showing she acknowledged her Prenuptial Agreement as being her “employment contract.” I RP, 67-68.

that that would lean into the property management, lean more into the property management side” I RP, 36:2-6.

- Gloria states: “After they became engaged, Thomas told Gloria that she no longer needed bonuses or salary increases because they were engaged to be married.” *Id.*, at 4. The actual testimony was: “In December of 2000 . . . I asked Tom what would my bonus and salary increase would be, and he kind of laughed at me and said, well, you don’t need one anymore. Q. So - - and what did you understand him to mean? A. I don’t know exactly what he meant other than I didn’t need one anymore, and I was not going to get one any more” V RP, 8-9. In fact, she did receive a salary increase in 2004. V RP, 9-10.
- Gloria states: “Gloria told Thomas that she expected that he and Mr. Keefe would first prepare a draft of an agreement and that she would then retain an attorney to review the draft.” *Id.*, at 5. As to this, the Trial Court found:
 - Neither Tom Bernard nor his attorney intentionally delayed the process and that Tom had not manipulated Gloria into signing the agreements. VI RP, 2-3.
 - Tom repeatedly told Gloria she needed an attorney and “specifically” because this was necessary “so Mr.

Keefe would have someone to negotiate with.” *Id.*, at 5:4-18.

- Gloria “could have found a lawyer had she been interested in doing so.” *Id.*, at 5:14-18.
 - Tom gave Gloria the names of several qualified attorneys in late May or early June, 2000, but she rejected them. *Id.*, at 5:19-25.
 - Despite Tom’s effort in this regard, Gloria delayed contacting any attorney until three days before her wedding. *Id.*, at 6:14-21.
 - Gloria “. . . steadfastly resisted Tom’s encouragement to find an independent attorney in a timely manner.” *Id.*, at 10:3-15.
- Gloria states: “As part of the [prenuptial agreement negotiation process] check list, Mr. Keefe advised Thomas that Gloria should make an appointment once he and Thomas prepared a working draft of the prenuptial agreement.” Brief of Respondent at 5, citing Exhibit 140 at 2. Exhibit 2, the May 24, 2000 checklist, states in part that Mr. Keefe will prepare a “working draft” of the agreement and “At that stage—or sooner if Gloria desires—she should make an appointment with an attorney of her choosing . . .

.” (Emphasis added.) Several qualified attorneys were then suggested. Exhibit 140 at 2. This checklist was provided to Gloria. Exhibit 141 at 3.

- Gloria attempts to resuscitate Dr. Stuart Greenberg’s questionable testimony about her “emotional dependence” and response to stress. Brief of Respondent at 6-7. Gloria conveniently neglects to tell this Court that the Trial Judge stated Gloria’s “psychological make up” was not relevant to this case and further “It is undisputed that Gloria had the legal capacity to enter into a contract.” VI RP, 10:9-15.

III. RESPONDENT ARGUES SHE SHOULD BE EXCUSED FROM HER AGREEMENTS BECAUSE HER ATTORNEY WAS NOT COMPETENT; EVEN IF TRUE, THIS WAS UNKNOWN TO TOM BERNARD

In her zeal to make points in this appeal, respondent now throws her attorney, Marshall Gehring, to the wolves and pejoratively headlines that he was merely a “neighborhood lawyer.” She then infers he was not competent to represent her in this matter. Brief of Respondent at 8.

While we do not believe this was true, even if true, Mr. Gehring was selected by Gloria on the eve of her wedding, after dragging her feet for months, despite Tom’s repeated urging that she must employ an

attorney. Tom had nothing to do with Gloria's choice of attorneys, *see*, VI RP, 2-3, other than agreeing to reimburse Gloria for their fees.²

Gloria is highly educated, with broad business experience. I RP, 29-32. Had Gloria acted prudently to protect her own interests, and as advised by Tom, Mr. Gehring would have had the six weeks, and possibly even the six months, he desired to participate in the prenuptial agreement negotiation process.³ II RP, 7:6-19. *See, also*, Brief of Respondent at 11. Moreover, there is no evidence that Tom knew of any reason why Mr. Gehring could not competently represent Gloria as to the fair negotiation of a prenuptial (or postnuptial) agreement. Indeed, as expressed in his Opening Brief, Tom Bernard was entitled to rely on the fact that Mr. Gehring was fully competent to represent his client in this important matter.⁴ Appellant's Opening Brief at 39-41. And, Tom was certainly entitled to assume Gloria and her attorney were negotiating in good faith as to all matters before them.⁵

² The cost of an attorney for respondent was not an issue because Mr. Bernard agreed to reimburse Gloria for those costs. III RP, 34-36, 62

³ Mr. Gehring had over 14 months to negotiate the First Amendment. There is no reason why he could not have taken the initiative in doing so since the negotiation was largely intended to benefit his client.

⁴ *See, e.g., State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

⁵ *See, also, Trask v. Butler*, 123 Wn.2d 835, 840-41, 872 P.2d 1080 (1994) (discussing the duty owed to a non-client and citing to *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987) regarding, for example, the duty owed by an attorney, who drafts a will for a client, to the non-client intended beneficiaries.

IV. THE FIRST AMENDMENT WAS ENTERED INTO CONSISTENT WITH *MATSON/FORAN* REQUIREMENTS⁶

A. The Side Letter Agreement Was Intended To Indicate The Door Was Open For Amendments To The Prenuptial Agreement

Despite all of the problems leading up to the July 7, 2000 Prenuptial Agreement, Exhibit 101, Gloria signed it over Mr. Gehring's objections.⁷ I RP 146; Exhibit 102. Whatever the infirmities in the July 7, 2000 Prenuptial Agreement, the parties and their attorneys agreed it should be amended. Exhibit 103. This was the reason for the July 7, 2000 "side letter agreement."⁸

B. The Side Letter Agreement Does Not Limit Other Amendments To The Prenuptial Agreement

Gloria argues the side letter agreement limited the changes that she could be make to the Prenuptial Agreement. Yet, there is nothing in that document that limits it. Yes, the side letter states the parties will attempt to negotiate in good faith an amendment" "covering the

⁶ *In re Marriage of Matson*, 107 Wn.2d 482-83 and *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992).

⁷ Respondent contradicts her attorney by claiming he told her to sign it. I RP, 146. It is also clear at least some of Mr. Gehring's concerns with the Prenuptial Agreement drafts he reviewed "were in part addressed by changes to the Prenuptial Agreement" itself. Exhibit 132. This shows he did have some influence over the language of the Prenuptial Agreement.

⁸ Signed by respondent on July 8, 2006.

following matters....” But there is nothing in the writing that says the negotiation process is limited to only those matters, let alone substantial evidence of that fact. This limitation is solely the convenient invention of respondent for this lawsuit.

Indeed, we know there was no such limitation and that the side letter agreement was more flexible. For example, the aspirational October 7, 2000 date in the side letter agreement for executing an amendment was long abandoned and, Tom added other issues to the negotiation and ultimate First Amendment, which Gloria and her attorney knew as part of their involvement in the negotiation process. Exhibit 104. *See, also*, Brief of Respondent at 19, 21-22.

C. Neither Gloria Nor Her Attorney Communicated To Tom Any Reservations About The First Amendment; Indeed, They Communicated Just The Opposite

Gloria and her attorney knew all of this as they negotiated the First Amendment from at least about September 28, 2000 to August 28, 2001, when it was signed. Exhibits 104; 136. For these 11 months, the parties actually negotiated the First Amendment. If Gloria and her attorney believed the July 7-8 side letter agreement was invalid or unfair, they never told this to Tom or his attorney. If they believed their options

were limited, that Gloria had “no bargaining power,”⁹ etc., they never communicated any of this to Tom or his attorney. Instead, all Tom and his attorney knew was that Tom and Gloria (with the advice of her attorney) had fairly negotiated an agreement on how the Prenuptial Agreement should be amended to satisfy Gloria and to make it fair for Gloria and her attorney. This knowledge was materially reinforced by Mr. Gehring’s letters of November 27, 2000 (Exhibit 131) and August 17, 2001 (Exhibit 132) declaring that the then existing version of the First Amendment had resolved the difficulties in the Prenuptial Agreement and had sufficiently concluded the matter (Exhibit 131) and that the First Amendment “further addressed” his concerns, making substantial improvement to the existing Prenuptial Agreement.” Therefore, Gloria should sign and notarize the Amendment. Exhibit 132.¹⁰

Tom’s belief that he and his wife had successfully negotiated a mutually agreeable and valid Amendment was further reinforced by the notarial acknowledgement that Gloria had “acknowledged to [the notary]

⁹ Much as been made of respondent’s alleged lack of bargaining power at this juncture. However, she could have insisted on a more favorable—in her eyes—amendment, refused to sign the amendment, walked away from the marriage, etc. But no, she signed the First Amendment. No one forced her to sign it. But she did so, with the express approval of her attorney, because she wanted to continue with her marriage, and all of the benefits to her and her children the marriage yielded.

¹⁰ It is also significant that negotiation of the First Amendment continued from November, 2000 to August 2001. Gloria knew there would be no agreement until it was signed, III RP 18, and she and her attorney continued the negotiation process until it was signed.

that she signed the [First Amendment] as her free and voluntary act and deed for the uses and purposes therein mentioned.”¹¹ Then she proceeded to honor it, and Tom and Gloria continued receiving the benefits of their marriage. *See, generally*, III RP, 21-25.

Tom’s belief that an enforceable marriage agreement had been entered into was further reinforced by Mr. Gehring’s “Certification” as follows:

I, Marshall F. Gehring, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Washington, that I have consulted with Gloria L. Whitehead who is a party to the foregoing First Amendment to Prenuptial Agreement dated July 7, 2001, which Prenuptial Agreement was made in contemplation of her marriage to J. Thomas Bernard, and that I have fully advised her of her property rights and of the legal significance of the foregoing agreement; that she has acknowledged her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing instrument.

DATED: 8/17, 2001.

/s/ _____
Marshall F. Gehring

In the face of all of this, it was entirely reasonable for Tom to have believed the First Amendment negotiation had been successful. It was entirely reasonable for Tom to believe that, whatever substantive fairness concerns Gloria and her attorney had concerning the Prenuptial

¹¹ Gloria concedes this is the “focus” in this appeal. Brief of Respondent at 38.

Agreement, they had all been procedurally remedied, in accordance with law, by the new substantive provision of the First Amendment. To hold otherwise, that Tom could not reasonably rely on the unambiguous written representations of Gloria and her attorney, would fatally undercut the purpose for acknowledgments, under oath, and the attorney certification as prima facie evidence of the recited facts.¹² In essence, this certification was like an attorney's opinion letter intended for Tom to rely upon. *See, e.g., Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236, 240 (Colo. Ct. App. 1998).

D. Gloria's Acknowledgement, And Gehring's Certification, Were Intended To Be Relied Upon By Tom Bernard

The First Amendment acknowledgement by Gloria, and the related Certification by Mr. Gehring were given with the knowledge and intent that they would be relied upon by Tom and bring an end to the First Amendment negotiation process. They accomplished their intent, Tom did rely upon them, and Tom agreed to the resulting First Amendment.¹³ Assuming there was no fraud or any improperly

¹² *See*, RCW 64.08.050 (as to the acknowledgments); *cf.*, CR 11 and 26(g) concerning certifications.

¹³ As such, Tom was either a third party beneficiary of the work performed by Mr. Gehring or Mr. Gehring had a duty of care toward Mr. Bernard. *Cf., Trask v. Butler* 123 Wn.2d 835, 872 P.2d 1080 (1994). The obligation of an attorney who represents either

undisclosed reservations that were contrary to the acknowledgment and certification, Gloria should be promissory estopped from now arguing the unfairness of the First Amendment which she signed as her “free and voluntary act” and from asserting facts contrary to her attorney’s certification. *See, Kim v. Dean*, 133 Wn. App. 338, 348, 135 P.3d 978 (2006) (elements of promissory estoppel).

On the other hand, if Gloria and her attorney possessed unexpressed reservations about the fairness and unenforceability of the First Amendment when it was executed,¹⁴ and failed to disclose them, Gloria should be equitably estopped from repudiating her agreement. *See, Snoqualmie Valley School District No. 401 v. Van Eyk*, 130 Wn. App. 806, 813, 125 P.3d 208 (2005) (elements of equitable estoppel).

E. Gloria’s Actions Materially Compromised Tom Bernard’s Bargaining Power In The First Amendment Negotiations And Execution

If Tom Bernard had known before the First Amendment was signed the objections Gloria now makes about the First Amendment and the process leading up to it, he could have abandoned seeking any marriage agreement, continued the negotiation process in an effort to

party to a prenuptial contract has broad obligations as “A client is not well served by an unenforceable contract.” *Foran*, 67 Wn.App. at 255, N. 14.

¹⁴ *See, generally*, Appellant’s Opening Brief at 21, 24-26.

reach a compromise on the complaints, ended his short-term marriage, etc. Gloria's signature on the First Amendment, her attorney's Certification and advice (communicated to Tom) that she sign it, intentionally or otherwise, mislead Tom and prevented him from even addressing the issues about which Gloria now complains, except in this unfortunate lawsuit.

Gloria now seeks to punish Tom for believing that his wife and her attorney had in good faith negotiated a marriage agreement Gloria believed was, under all circumstances, fair.¹⁵

F. Gloria Asks This Court To Disregard The Second Prong Of The *Matson/Foran* Test

As noted in Appellant's Opening Brief at 31-32, the Court looks to the settled law of the *Matson/Foran* "two prong test" in deciding the validity of a marriage agreement.

The validity of a prenuptial agreement is evaluated by means of a 2-prong analysis:

First, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated. . . .

¹⁵ Compare, *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977). See, also, *In Re Marriage of Cohn*, 18 Wn. App. 502, 569 P.2d 79 (1977). Not only is Gloria attempting to punish Tom for her foot dragging in retaining a lawyer in the first place, but also for the fact that her attorney did not competently represent her or that the two of them withheld from Tom critical information he should have received before he signed the First Amendment.

The second prong of this analysis involves two tests...

(1) whether full disclosure has been made by [the parties] of the amount, character and value of the property, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.

Foran at 249. This is the *Matson/Foran* test.

Gloria essentially urges the Court to refuse to enforce a marriage agreement that is substantively unfair without regard to any procedural corrections under the second prong of the *Matson/Foran* test.¹⁶ *See, e.g.*, Brief of Respondent at 45-46.¹⁷

Gloria, like the Trial Court, seeks to apply “new law” because the established law does not grant her relief.

G. The Parties’ Agreements Are Subject To Arbitration

For the reasons set out in Appellant’s Opening Brief at 44-47, the issues in this case must be arbitrated. This is what both parties agreed to

¹⁶ Gloria argues the self-evident fact “To date . . . no substantively or procedurally unfair marital agreement . . . has ever been enforced in . . . this state.” Brief of Respondent at 28. Of course, this is true. Under the *Matson/Foran* test, if an agreement is substantively unfair, the procedure leading up to it is then measured by the second prong of the test. If it fails the second prong, it cannot be enforced. Thus, no agreement that is both substantively and procedurally unfair can be enforced.

¹⁷ Citing to RCW 26.09.070(1) and (3) respondent argues that “The Dissolution Act thus provides no ‘out’ justifying enforcement of a substantively unfair agreement on the grounds of procedural fairness.” *Id.*, at 45. “But, either substantive or procedural unfairness should prevent enforcement of a marital agreement.” (Emphasis added.) Respondent even has to cite inapplicable Wisconsin law, at Brief of Appellant at 45, n.3, in her effort to now create “new law” governing marriage agreements. What respondent

in their Prenuptial Agreement¹⁸ and in its ratification by the First Amendment.¹⁹

In opposition, respondent cites *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004) and *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.2d 753 (2004).

In *Adler*, the plaintiff alleged a violation of the Washington Law Against Discrimination (WLAD). Among other things, our Supreme Court held the facts on appeal were insufficient to determine if an arbitration agreement affecting plaintiff's employment was procedurally unconscionable, though parts of it were substantively unconscionable and severable. In *Adler*, unlike here, there was no explicit severance clause in the agreement.²⁰ Nonetheless, the Court held a court could refuse to enforce the contract, or enforce it after severing its substantively unconscionable provisions. *Adler*, 153 Wn.2d at 358-59.

In the companion *Zuver* case, another WLAD case, the Court held that when the parties have agreed to a severability clause in an arbitration agreement, the courts "often" will strike the offending unconscionable provision to preserve the contract's requirement for arbitration. *Zuver*,

ignores in this argument is our state's established utilization of the two prong *Matson/Foran* test. *Id.*, at 46.

¹⁸ At CP 62; Exhibit 101.

¹⁹ At CP 104; Exhibit 104.

²⁰ The severance clause in the parties' agreement is at CP 77, paragraph 23.

153 Wn.2d at 319-21. Accordingly, the Court severed the confidentiality and remedies provisions and sent the remaining issues to arbitration.

Zuver does not require any arbitration in this case to be bound by the Trial Court's rulings of unfairness by "severing" the unfair matters from any arbitration. All claims arising out of, or relating to, the Prenuptial Agreement are required to be arbitrated. CP 78. This leave no room for a "severing" of the Trial Court's substantive rulings when the arbitration, and not a trial court, is assigned that responsibility by the parties.

H. Respondent Is Not Entitled To Her Attorney Fees

The agreements preclude respondent's request for attorney fees, except in arbitration.²¹ The attorney fee orders in this case are contrary to the terms of the marriage agreements. *See*, Appellant's Opening Brief at 11.

V. CONCLUSION

Tom Bernard reasonably tried to negotiate in good faith with Gloria the financial terms of their marriage. Gloria frustrated Tom's effort by her unreasonable delay in retaining independent counsel to help her in the negotiation process. The resulting Prenuptial Agreement was

²¹ At CP 73, 76-7, 79.

inadequate; everyone agreed it needed amending in order to address fairness concerns raised by Gloria and her attorney. Then, Gloria again frustrated Tom's effort to negotiate a fair agreement by doing nothing to address the amendment issue for months after the wedding and then by being unreasonably passive in the negotiation process that led up to the First Amendment, which Gloria signed and acknowledged and which her attorney certified.

Gloria, once again seeks to frustrate her agreement because, despite Gloria's acknowledgment and her attorney's contrary certification, they apparently had secret reservations about the side letter agreement, the scope of that agreement, what could and could not be negotiated as any Amendment to the Prenuptial Agreement and the fairness of the Amendment itself. None of this was communicated to Tom or his attorney who were, therefore, prevented from trying to address all of these reservations before the First Amendment was signed. If Tom had any bargaining power in the negotiations leading up to the First Amendment, he lost it when the First Amendment was signed without any knowledge of Gloria's secret reservations.

After the First Amendment was signed, Tom acted in good faith and in reasonable reliance on the fact that he and his wife had agreed

upon an enforceable resolution of the problems inherent in the formation and content of the Prenuptial Agreement.

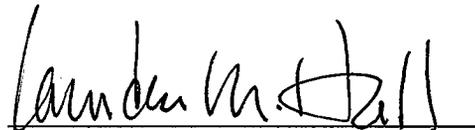
Whether intentional or not, Gloria and her attorney materially misled Tom about the viability of the First Amendment. Therefore, Gloria should not now be permitted to challenge that which she signed under-oath as her "free and voluntary act."

The Trial Court's rulings in this case should be reversed. This entire matter should be referred to arbitration, as the parties agreed.

DATED: November 7, 2006.

Respectfully submitted,

CAMDEN HALL, PLLC

A handwritten signature in black ink, appearing to read "Camden M. Hall", written over a horizontal line.

Camden M. Hall, WSBA No. 146
Attorneys for Appellant

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington, that by the end of the day on November 7, 2006, I will have served, or had served, this Appellant's Reply Brief and Declaration of Service upon the following individuals in the manner indicated below:

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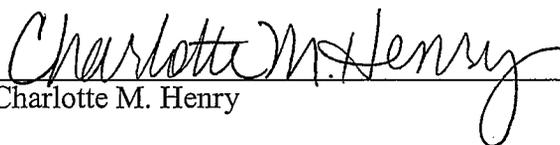
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