No. 74659-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

LONNIE ROSENWALD, Respondent

v.

DAVID ROWE, Appellant

CORRECTED REPLY BRIEF OF APPELLANT

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I. Statement of the Case:

A. The Parties Were Not Similarly Situated When This CIR Began And When They Signed The Agreement

The response brief, hereafter referred to as "the brief" or "the response brief" represents that the parties were similarly situated financially when the CIR began and the agreement was signed citing CP 178 and 576-580 at page 19. CP 178 is the first page of a declaration signed by Ms. Rosenwald. The only comment bearing on their relative financial circumstances as of when they began living together in early 2009. (CP 440) is that in 2008 she earned $370,000 and he approximately $100,000. CP 578-580 is Mr. Rowe's deposition testimony. Those pages contained nothing of their relative financial circumstances in 2009, nor at any other time. The record, undisputed, shows they were not similarly situated financially neither when their committed intimate relationship began nor when the agreement was signed. When they signed the agreement she had about $3 million in property and at the time of the summary judgment hearing she had $7 million or $15 million in assets net of debt depending upon whose recitation of evidence would be believed (CP 228). At the time of the signing of the agreement he had a car with a $13,000 equity net of debt, $2,000 in a checking account, $27,500 in

credit card debt and an interest in some unencumbered land in South Africa the value unknown (CP 279). At the time of hearing he had no assets except for an interest in the South African land which was valued at $50,000 to $300,000. (CP 394).

B. Mr. Rowe Was Not Employed Briefly Nor Was He A Working Professional When He Signed The Agreement.

The brief represents at page 9, as a statement of the case, that Mr. Rowe was briefly unemployed with no citation to the record. (see RAP 10.3(a)(5). That representation is repeated at page 19 as well as the representation that both parties were working professionals when the agreement was signed. The record, undisputed, shows otherwise.

Mr. Rowe was unemployed over two months before he was presented with an initial draft in May 2009. (CP 227). His unemployment compensation ran out, his credit was exhausted and he had no job prospects when he signed in November 2009. (CP 228-229) Contrary to the insinuations in the brief that Ms. Rosenwald paid more than he toward living expenses (their brief page 10) their contributions were equal as far as overall living expenses were concerned (CP 597). It was not denied that he had to borrow from her while unemployed to repay her after he found employment to meet his obligation to pay equally. (CP 229).

C. There Is No Evidence That Mr. Rowe Was A Well Established Professional With A Significant Earning Capacity.

The brief represents that Mr. Rowe was also a well-established professional with a significant earning capacity with no citation to the record. The undisputed facts are that when the hearing occurred in December 2015, he was age 62, had been unemployed continuously for over 20 months, was in poor health, on public welfare, and with no prospect of employment. (CP 73, 228 and 501). Ms. Rosenwald even submitted evidence that his age was a bar to unemployment in her reply declaration of December 14, 2015. (CP 509).

D. He Did Not Give $20,000 - $25,000 To His Children.

The brief represents that he gave $20,000 to $25,000 to his children while the parties lived together citing CP 583. CP 583 merely demonstrates that he gave some amounts that were not specified beyond his child support obligations. He managed to save between $20,000 - $25,000. (CP 583).

E. Mr. Rowe Did Not Have Free Use Of The Whidbey Summer Vacation Home.

While the $730 per month that he paid was a "rental-type" payment, he did not have free use of the Whidbey Island rental home. Ms.

Rosenwald would not allow him to store modest swimming equipment there, nor could he use the home as a site for his son's wedding. (CP 233 and 234).

F. There Was No Evidence Of Extensive, Ongoing Negotiations.

The brief also represents that the couple negotiated the agreement for months over numerous provisions. (The brief at page 27). There is no evidence that negotiations were ongoing or that they involved numerous provisions. There were three drafts between the time the initial draft was presented to Mr. Rowe in May 2009 and the time he was presented with the final draft in October 2009. The third was merely a clean version of the red-lined second draft. (RP 17).

The only changes made to the initial draft were section 9 dealing with termination of the relationship, section 10, an estate planning clause if she should pre decease him, not at issue in the case, and a section 11 entitled dispute resolution which added a requirement of mediation and 10 joint counseling sessions before the relationship is terminated, related to section 9. Other those additions, there were no other changes to the agreement as originally drafted and rejected by Mr. Rowe. (CP 202). Those were the only changes from the original May draft. (RP 18).

G. The Agreement Did Not Provide For The Creation Of A Community Estate.

Thus the initial proposal, rejected by Mr. Rowe through his attorney on June 9, 2009 that precluded the creation of a community estate or any interest in the separate property of the other remained unchanged.

Mr. Rowe stated that Ms. Rosenwald would not relent from her refusal to allow for the creation of community property provision which was insisted upon in his attorney's letter of June 9, 2009. (CP 109-110). Thus the suggestion in the response brief at page 20, that the agreement provided for the creation of community property is not supported by any evidence. The contrary is true. The text of the agreement speaks for itself.

II. Argument

1. The Agreement Was Unfair In Substance

The brief argues that *Dewberry v. George*, 115 Wa.App 351, 365, 62 P.3d 25 (2003) and *G W-F*, 170 Wa.App 631 at 645, 285 P.3d 208 (2012), hold that there is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their individual labor (The Brief page 18). That proposition was not the holding in either of those cases.

In *Dewberry* supra, at 365 (2003) that statement is qualified by the following observation: "Under the agreement, each party was able to and did accumulate substantial separate property. Citations omitted." The citations omitted distinguish *Matter of Marriage of Matson* 107 Wash.2d 479, 730 P.2d 668 (1986) and *Matter of Marriage of Foran,* 67 Wash.App 242, 834 P.2d 1081 (1992) in which disadvantaged parties were not able and did not accumulate significant separate property as did the advantaged partner, which is the case here.

The focus instead was upon whether the agreements made inadequate provision for a disadvantaged party who seeks to prevent its enforcement. In fact, in *In re Marriage of Bernard*, 165 Wash.2d 895, 204 P.3d 907(2009) the agreement was deemed both substantively and procedurally unfair, even though the wife had a master's degree in business. *Bernard* supra at 898 (2009). After noting the observation that two working professionals have the right to preserve the fruits of their labor, ergo, that it prevented the creation of a community estate (RCW 26.16.040) our Supreme Court articulated a key qualification:

"However, an agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's

separately property is substantively unfair." *Bernard* supra at 912 (2009). That is precisely the case here, as well, as it was in *Matson* supra, and *Foran* supra.

In *G W-F* supra that qualification was the key distinguishing factor that resulted in the agreement being upheld: "Here, unlike Bernard, the oral agreement was not disproportionate to one partner, as both had the same education, and the same earning potential." *G W-F* supra at 647 (2012). In upholding the trial court this court noted: "Dr. Finch established her own savings account and her own investments as did Dr. Wieder." *G W-F* supra at 645 (2012). It noted that unlike in Bernard, there was no significant disparity in their pre-marriage wealth. *G W-F* supra at 647 (2012). Thus she was able to accumulate her own separate property and did so with no significant disparity between the parties resulting from the agreement. That is the opposite of the case here.

The brief at pages 19 and 20 attempts to analogize this case to *G.W.F.* supra, and *Dewberry* supra, by representing what is blatantly inaccurate: that Ms. Rosenwald and Mr. Rowe were working professionals with successful careers when the agreement was signed and that both had significant earning potential by the time of the summary

judgment. This was true of her. It was absolutely untrue of him, which is one of the key points of distinction in the case law cited.

Another key point of distinction is that the agreement is disproportionate to their respective means, with Rosenwald earning over $370,000 per year as an established lawyer with an estate net of debt approaching $3,000,000 and he unemployed with no prospect of employment with an estate net of debt of less than $25,000 (CP 277-278 and 279) when she insisted the agreement be signed or that he have to leave. At the time it was executed his prior earnings were less than a third of hers when he had been employed in 2008. (CP 178).

The brief argues at page 22 that Mr. Rowe's position is that the question of substantive fairness should only be on the circumstances at the time of the hearing, to determine substantive fairness citing an inaccurate spin on the argument his counsel made at the hearing (RP 22) and on this appeal. It argues this was the theory of Mr. Bernard, *Bernard* supra, rejected by our Supreme Court. That was not Mr. Bernard's position and it is not Mr. Rowe's position.

Mr. Bernard's position was that the test of the substantive fairness should be the outcome in the absence of an agreement, given the shortness of the marriage, as it would be no different than the position resulting from

enforcement of the agreement. That position was rejected by our State Supreme Court. (see *Bernard* supra at 904 (2009). That was not and is not Mr. Rowe's position. Nor is it that substantive fairness should be limited to the relative financial circumstances of the parties at the time of trial. Mr. Rowe's position, instead, has always been that the court must consider the effect of the agreement on the relative financial circumstances of the parties when trial occurs.

Mr. Rowe's brief at page 22 relied upon *Matson* supra at 481 (1986) in which our supreme court compared the economic disparities of the parties when the agreement was consummated with the economic effect of the agreement at the time of trial: "At the time of the agreement, James owned one-half of the shares of stock in the Matson Fruit Company and real estate in Yakima County ... The property was worth... about $330,000. Petitioner's net worth, as of the trial date was approximately $830,000. Judith, on the other hand, owned her personal effects." *Matson* supra at 481 (1986). Whether to uphold the agreement as fair in substance, as in *Dewberry* supra and *G W-F* supra, or to deem it unfair as in *Matson* supra and *Bernard* supra, the relative economic effects of it on each party, as of the time of trial, must be known.

Indeed, a court cannot determine whether there is a financially disadvantaged party perpetrated by the agreement (to wit): whether the agreement precludes the acquisition of significant separate property unless it knows the relative financial circumstance of both parties as of the time of trial.

2. That The Agreement Was Consummated In A Procedurally Unfair Manner.

The brief does not dispute the facts that constitute the duress and coercion exerted by Ms. Rosenwald on Mr. Rowe. Instead it challenges the legal sufficiency of those facts, appearing to argue that they do not rise to the level of the coercion or duress contemplated by case law. It also contends inaccurately, at page 26, that the brief filed on behalf of Mr. Rowe cited no authority except summary judgment cases as to duress.

Mr. Rowe's brief in chief, at page 24, cited *In re Marriage of Matson* supra, that there be no overreaching by the party seeking enforcement of the agreement. It also cited at page 25, *In re Marriage of Foran* supra.

The response brief argues that duress in entering a contract requires more than proof of recalcitrance, but rather "wrongful or oppressive conduct." *Retail Clerks v. Shopland* Inc, 96 Wa.2d 939 at 944,

640 P 2d 1051 (1982). *Retail Clerks* supra involved a contract between parties dealing at arms-length.

Contracts between prospective spouses and committed intimate partners, involve a special view as to the wrongfulness of a party's conduct towards the other party. In relying upon *Whitney v. Sea 1st Natn'l Bank*, 90 Wa2d 105, 579 P.2d 937 (1978), as it relates to procedural fairness, our state Supreme Court emphasized: "Parties to a prenuptial agreement do not deal at arm's length with each other. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor and sincerity in all matter bearing on the proposed agreement." *In re Marriage of Matson*, supra at 484-485 (1986). The burden to prove good faith was that of Ms. Rosenwald (RCW 26.16.210) and (*Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208 (1972), as was pointed out in Mr. Rowe's brief in chief at page 25.

Contrary to the argument in the brief, the only cases pertaining to summary judgments on this issue cited in Mr. Rowe's brief in chief was the proposition that trial court was required to construe the evidence in a light most favorable to Mr. Rowe, as the non-moving party. (*Maki v. Alunminum Building Products*, 73 Wa 2d 23, 436 P.2d 186 (1968)).

Looked at in a light most favorable to Mr. Rowe, and considering Ms. Rosenwald's burden to prove good faith, the following wrongful conduct should have resulted in a denial of the summary judgment. That he had been unemployed and ran out of unemployment compensation while the negotiations occurred; that they'd been engaged to be married for over nine months, with him financially dependent upon her; that she removed her wedding engagement ring and threatened to kick him out unless he would refuse sign the agreement without further advice from his lawyer and only use his lawyer to merely sign the agreement, and unless Mr. Rowe would sign after the second draft was submitted. That she only put the engagement ring back on immediately after he signed, none of which did she deny in her deposition (CP 440-441).

3. That The Agreement Was Unconscionable In Substance In The Event of The Termination Of The Relationship.

Mr. Rowe does not seek to turn *Matson* supra on its head, nor its progeny. None of those cases reach the question of whether a provision of an agreement, namely, the property division in the event of termination of a relationship, is so unfair as to rise to the level of being unconscionable in substance, precluding consideration of procedural fairness. For this court to determine that an agreement in which there is a gross disparity of

resources, earnings and precludes the creation of a community estate or a share of the advantaged party's separate estate is unconscionable in substance does not overrule nor turn *Matson* supra on its head.

4. Striking The Trial Date Was An Abuse of Discretion Spousal Maintenance and Attorney Fees.

a. The Agreement Does Not Preclude An Award Of Spousal Maintenance Or Attorney Fees If The Parties Are Married.

The brief argues at page 29 that validity of the agreement precluded the need to determine whether the parties' relationship can be considered a marriage since the agreement governs regardless. It further argues at page 30 that the provision of the agreement that both parties are bound by its terms and are to seek no other recourse, precludes Mr. Rowe from seeking maintenance or attorney fees should the court treat the parties as being married. This argument is invalid.

The terms of the agreement relate to characterization of property, financial obligations to each other while living together, what termination of the relationship means, and an obligation to pay transitional costs to Mr. Rowe upon its termination, and entitlements to him upon her pre-deceasing him. Since the agreement contains no provision as to a waiver of spousal maintenance nor of the right to request an award of attorney

fees under RCW 26.09.140, in the event of a legal separation or dissolution of a marriage, a trial determination that the parties are married, would entitle Mr. Rowe to seek spousal maintenance and attorney fees, if the agreement were to be deemed valid.

Mr. Rowe's testimony that he realized they were not "legally married" was a mere reference to the fact that they had not obtained a marriage license. However, the response brief does not deny that the trial court was aware at the summary judgment hearing that the question of whether a marriage exists, and if it does, spousal maintenance, and attorney fees would be sought at trial (RP 25 and 26). The brief does not deny that the marital status hearing was stricken and reserved for trial before the court struck the trial date. (CP 753-782).

The response brief at page 30 argues that Mr. Rowe's brief in chief cited no authority that the trial court was aware that Washington case law has recognized couples as being married even though they have no license. But then acknowledges "...the cases Rowe cited to the trial court..." (see Response brief page 30) as it argues those cases to be "...inapposite and inconsistent with modern law." (Response brief page 30). Proof that the trial court was aware of Washington case law on relationships deemed marriages in the absence of a marriage license was provided in the

memorandum filed on behalf of Mr. Rowe CP 499-501. The email correspondence to and from third parties and Ms. Rosenwald, pictures of the ceremony with the sign directing them to "the wedding" and each changing their Facebook pages from single to married were all in the record. (CP 440-498).

Counsel for Ms. Rosenwald and the court acknowledged that whether they are legally married or not was before the court in the summary judgment hearing. (RP 27). Nor was it raised as an issue on this appeal by Mr. Rowe. Nevertheless Ms. Rosenwald appears to argue two inaccurate propositions, necessitating a response here.

One is that the body of law establishing a relationship as a marriage without a marriage license has been overruled by the case law defining committed intimate or quasi marital relationships. The other is the facts here do not constitute such a marriage. Both of those propositions are inaccurate.

The body of case law that establishes recognition of such marriages in this state have not been overruled by the cases involving committed intimate relationships. None of those committed intimate relationship cases involved the parties participating in a marriage ceremony. In none of them did the parties hold themselves out as being

husband and wife to each other or publicly all of which occurred in this case.

As to the prerequisites for establishing a marriage without a license in this state, the response brief relies on *In re McLaughlin's Estate*, 4 Wa 570 at 586, 30 P. 651 (1892) (response brief page 31). The quote at 586 was from another state, not part of the decision. The holding in *McLaughlin* supra at 585 has been followed in all other cases on the subject.

"In all cases, whether common-law marriages are recognized or not, evidence of cohabitation and repute are admissible as tending to show a valid marriage. Holding each other out as husband and wife to the public, and continued living together in that relationship, has ordinarily, if not universally, held sufficient proof, unless contradicted, to establish it, even within those states where common-law marriages are not recognized." *McLaughlin* supra at 585 (1892). That was the case here.

Following that decision, subsequent cases in Washington have held: "if a ceremony of marriage appears in evidence, it is presumed to have been rightly performed, and to have been proceeded by all needful preliminaries ...A valid marriage may be presumed to exist from general reputation among the acquaintances of parties that such is the fact, when

that reputation is accompanied by cohabitation, and arises from their holding themselves out to the worked as occupying that relation to which the law refers when marriage is mentioned: *Summerville v. Summerville*, 31 Wa 411 at 416, 72 P. 84 (1903). This principle was followed in *McDonald v White* , 46 Wa 334, 89 P.891 (1907) and *Weatherall v. Weatherall* 56 Wa 344 at 349 – 350, 105 P.822 (1909). (CP 499-501).

RCW 26.04.010 and the notes thereunder (1998) defines a marriage as a union between two people. Since the legislature has not registered its disapproval of the foregoing cases which have never been overruled, its silence is evidence of its approval of those holdings. *1000 Friends of Wash v. McFarland*, 159 Wa.2d 165 at 181, 149 P.3d 616 (2006); see also, *In re Custody of AFJ*, 179 Wa.2d 179 at 186, 314 P.3d 373 (2013). The doctrine has not been overruled by statute or case law.

b. Whether Ms. Rosenwald Owes $15,000 or $30,000 Is An Issue Not Resolved By The Agreement, Necessitating A Trial.

The agreement under section 11 requires 10 joint counseling sessions before the relationship is terminated. (CP 271). Section 9 provides that upon termination, in the event the relationship has not terminated and more, then 5 years have passed, she owes him $30,000; if five years or less, then $15,000. By refusing to participate in more than

one counseling session, her claim that the relationship terminated in 2013 and therefore she only owes him $15,000 is a claim for relief precluded by the provision that neither party shall seek recourse contrary to the provisions of the agreement. By urging the validity of the agreement she is bound by that provision as much as he is. If the agreement is valid for one purpose it is valid for all purposes. *In re Marriage of Campbell*, 22 Wa App 560 at 563, 589 P.2d 1244 (1978). The disagreement over the agreement's definition of when the relationship is deemed terminated warranted a trial.

III. The Attorney Fee Award.

This should have been denied since the summary judgment motion should have been denied.

Although the agreement was deemed valid, there was insufficient evidence that a rate of over $500 per hour was warranted under the standards governing the reasonableness of attorney fees. Her attorney's professional credentials were not part of the record. Mr. Rowe's attorney has been a fellow in the American Academy of Lawyers since 1998. He served on the National Board of Governors. He has practiced family law exclusively in Washington State for over 41 years. He charges $280 per hour. The trial court did analyze or show any cognizance of the factors

required to determine the reasonableness of the fees requested. (*Absher Const.Co v. Ken School Dist No. 415*, 79 Wash.App 841, 917 P.2d 1086 (1995)

DATED this 23rd day of September, 2016.

Respectfully submitted,

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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVID ROWE,	)	
	)	
Appellant,	)	DECLARATION OF SERVICE
	)	
v.	)	
	)	
LONNIE ROSENWALD,	)	
	)	
Respondent,	)	
	)	

I, Amy Spring, state and declare as follows:

I am a Licensed Legal Intern in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 23th day of September, 2016, I placed true and correct copies of Corrected Reply Brief via legal messenger to:

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I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on this 23rd day of September, 2016.

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